

Citation

Fullarton, A. and Pinto, D. 2024. A Synopsis of Tax Accounting and Livestock in Australia: Insights from the Wade Case. In: 35th Australasian Tax Teachers' Association Annual Conference, 18th Jan 2024, Melbourne, Victoria, Australia.

---

## ***A Synopsis of Tax Accounting and Livestock in Australia: Insights from the Wade Case***<sup>¶</sup>

ALEXANDER ROBERT FULLARTON\* AND DALE ANTHONY MARK PINTO<sup>†</sup>

---

*This paper is a synopsis of the book Tax Accounting and Livestock in Australia: Insights from the Wade Case. The book is a detailed examination of the taxation implications of the disposal of animals held in a business of primary production in conjunction with the sale of a farm or pastoral lease.*

*In the pastoral and farming industries, valuable stud animals are not normally sold as trading stock but, as a consequence of a natural or family disaster, they may need to be disposed of against the will of the owners. In Australia, the Australian Taxation Office (ATO)'s view is that the revenue from the sale of all animals held as part of a primary production business is income according to ordinary concepts, regardless of the function of those animals in the business or the reasons for sale, and the receipts are taxed as ordinary income. That view deprives owners of a raft of tax concessions granted to other business owners on the sale of their businesses. The authors consider this situation to be grossly unfair to pastoralists, farmers and graziers if they are forced to sell their breeding stock as a result of a natural disaster or along with the sale of their business on their retirement from the industry.*

*The book looks at how the ATO's view was established and why it came into being. It looks at the basis on which the ATO formed its view and examines the litigation which the ATO uses to support its opinion – Federal Commissioner of Taxation v Wade ('Wade Case'). It then examines the background of the Wade Case in detail, and the court documents presented in the preceding trial and administrative reviews.*

---

---

¶ Alexander R Fullarton and Dale A M Pinto, *Tax Accounting and Livestock in Australia: Insights from the Wade Case* (Ibidem Verlag, 2024).

\* PhD (UNSW), M Com (Curtin), Adjunct Professor, Curtin Law School, Curtin University, Lex.Fullarton@curtin.edu.au. Lex Fullarton is also a solar farmer and a former provincial tax practitioner.

† PhD (Law) (Melb), MTax (Hons) (Syd), John Curtin Distinguished Professor of Taxation Law, Curtin Law School, Curtin University, Dale.Pinto@cbs.curtin.edu.au.

## I INTRODUCTION

This paper is a synopsis of the book *Tax Accounting and Livestock in Australia: Insights from the Wade Case*.<sup>1</sup> The book contains a detailed examination of the taxation implications of the disposal of animals held in a business of primary production in conjunction with the sale of a farm or pastoral lease. This synopsis is intended to be an overview of the concepts researched in the book. Where detail has been omitted, readers should refer to the parts of the book outlined here for further detail and explanation.

The book considers the disposal of animals held in a business of primary production in conjunction with the sale of a farm or pastoral lease. In normal trading circumstances, these animals would not be sold as trading stock. However, the Australian Taxation Office (ATO) considers that *all* revenue from the sale of animals held in a business of primary production is income according to ordinary concepts and that the receipts are taxed as ordinary income. That view is held regardless of the role that the animals play in the operation of the business – whether they are beasts of burden, breeding stock or animals held for their produce such as milk or wool.

The authors consider that, at times, the sale of a pastoral property may be against the will of the owner for a number of reasons, and that the ATO view deprives the owner of a raft of tax concessions granted to other business owners on the sale of their businesses. They consider this situation to be grossly unfair.

The book looks at how the ATO formed its view, and examines the litigation which the ATO uses to support its opinion – *Federal Commissioner of Taxation v Wade* ('*Wade Case*').<sup>2</sup> It also examines legislative amendments made to the Australian tax legislation in 1936 that prevent livestock from being considered as capital in a business of primary production in Australia. The book suggests that those amendments were made because of a mistake by the Australian Parliament in its reaction to recommendations contained in the Ferguson Royal Commission on Taxation 1934.<sup>3</sup>

To support that suggestion, the authors refer to a previous case, which was very similar to the *Wade Case* of 1951. This is *Robinson v Federal Commissioner of Taxation* ('*Robinson Case*'), a 1927 case<sup>4</sup> in which the decision was contrary to the decision handed down in *Wade*. The book therefore investigates matters beyond the *Wade Case* to find out why the income tax legislation was amended in 1936 to change the outcome between the *Robinson Case* and the *Wade Case*.

The book discovers that section 17 of the *Income Tax Assessment Act 1922* (ITAA 1922) provided for an election to be made as to whether animals in a business of primary production were to be treated as capital assets or as revenue assets. However, s 17 was removed from the succeeding act, the *Income Tax Assessment Act 1936* (ITAA 1936), and thereafter taxpayers

---

1 Alexander R Fullarton and Dale A M Pinto *Tax Accounting and Livestock in Australia: Insights from the Wade Case* (Ibidem Verlag, 2024).

2 *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105 ('*Wade Case*').

3 Commonwealth, *Royal Commission on Taxation* (1932-34) (Ferguson Royal Commission Report).

4 *Robinson v Federal Commissioner of Taxation* [1927] HCA 8; (1927) 39 CLR 297 ('*Robinson Case*').

have been compelled to consider *all* animals held in a business of primary production to be revenue assets regardless of the role they play in the business.

The book concludes that the repeal of s 17 was based on a mistake, in that Parliament amended the legislation based on a mistaken interpretation of the recommendations made in the Ferguson Royal Commission on Taxation report of 1934.<sup>5</sup> It recommends that Parliament be made aware of the mistake and that s 17 be re-enacted to correct an anomaly in Australia's current tax legislation which prevents retiring pastoralists, farmers and graziers from benefitting from the tax concessions that are available to other business owners on their retirement.

## II STRUCTURE

The book moves from the broad to the specific in four parts. Each part has been published in a peer-reviewed academic journal to provide rigour and reader confidence in the conclusions and recommendations of the book. The parts move from the broad topic of tax accounting for livestock in Australia to a detailed examination of the litigation supporting the ATO view and finally to a caveat to tax professionals' practice of accepting ATO opinions without challenge.

PART I	Tax Accounting for Livestock: Mother or Meat/Capital or Revenue;
PART II	The <i>Wade Case</i> : An Analysis;
PART III	The Foundations of the <i>Wade Case</i> : Concrete or Clay; and
PART IV	Australian Taxation Office Pronouncements: Why Tax Advisers Need to Exercise Caution

**Part I** Tax Accounting for Livestock: Mother or Meat/Capital or Revenue looks at the sale of rural properties in Australia and considers the value of animals included in the sale of those properties. It argues that the provisions of the *Income Tax Assessment Act 1997* are being misinterpreted by tax administrators and tax professionals. By considering the sale of *all* animals traded during the sale of a pastoral lease or farm as revenue, vendors are denied tax concessions which are permitted under the capital gains tax provisions of the Australian *Income Tax Assessment Act*.

The research reveals that the ATO's view that all animals held in a primary production business are trading stock regardless of the function they perform and the duration for which they are held relies entirely on the decision in the *Wade Case* of 1951. That conclusion led the authors to further research into the decision handed down in that case, and Part I presents the findings of that research.

**Part II** The *Wade Case*: An Analysis finds that the judges in the case accepted the concept that *all* animals held in a business of primary production were to be considered trading stock, regardless of the function that they performed in the business, as a matter of the operation of the law. No further investigation was made by them as to why that was so. However, Part II concludes that the *Wade Case* was primarily a decision as to whether monies paid to a taxpayer as insurance recoveries for loss and replacement of assets were assessable income for taxation purposes. The class of asset was immaterial. Therefore, the concept of livestock being capital

---

5 Commonwealth, *Royal Commission on Taxation* (Third Report, 12 April 1934) (Ferguson Third Report).

or revenue assets had no real impact on the final decision of the court, and should not be used by the ATO to support its view.

Part II further investigates why the decisions in the *Robinson Case* and the *Wade Case* were different, given that they were based on almost identical material facts. The animals in *Robinson* were sheep and in *Wade* were dairy cattle, but both types of livestock were held for their produce and not for trade, with the sheep being for wool and the cattle for milk.

Part II also considers a similar New Zealand case, *Land Projects Limited v Commissioner of Inland Revenue*,<sup>6</sup> and notes that the judge in that case pointed to the accounting difficulties that may be encountered in segregating ‘what portions of the sheep and cattle at Happy Valley were held only for breeding purposes and what portions were held merely until such time as they should be ready for sale’.<sup>7</sup>

The book argues that, 60 years later and with the advent of electronic data processing which did not exist in 1964, those difficulties are no longer the obstacles they once were. To investigate the background to the *Wade Case* from source documents not reported in the decision of the case and to seek insight into the events leading to Wade’s tax assessment and the subsequent appeals, the book moves on to Part III, which reveals facts that were not considered by the High Court.

**Part III** The foundations of the *Wade Case*: Concrete or Clay? looks at why the decision in the *Robinson Case* of 1927 was different from that in the *Wade Case* of 1951. It finds that the repeal of s 17 of the *ITAA 1922* by means of the *ITAA 1936* was based on a recommendation of the Ferguson Royal Commission of 1934.

The Ferguson Royal Commission reported that pastoralists and graziers had been classifying their sheep as capital assets and thereby avoiding income tax on the sale of their flocks. It reported that there was difficulty in segregating the value of the fleece carried by the animal at sale from the value of the sheep itself. The entire receipt on the sale was applied to the animal, and no value was given to the wool that it carried. Thus, tax was avoided on the ‘income’. Therefore, it recommended that, for ‘simplicity’, the animal (the sheep) be classified as trading stock, and that the simplest legislative solution was to repeal s 17 and thereby remove the option to consider the sheep as a capital asset. The book suggests that s 17, or an equivalent provision, should now be re-enacted to restore equity to the tax legislation and address the perceived tax avoidance method.

Part III also finds that the ATO view can be proved to be correct, but argues that it is formed on a ‘clay foundation’. It is the repeal of s 17 that removed the option, not necessarily the decision in the *Wade Case*. Part III suggests that the findings of the *Wade Case* could be challenged and thus render the ATO advice unreliable. Part IV looks at the dangers of tax professionals accepting ATO pronouncements at face value without conducting prudent independent investigations when interpreting taxation legislation and advising clients.

The final part, **Part IV**, Australian Taxation Office Pronouncements: Why Tax Advisers Need to Exercise Caution, considers the modern ATO practice of issuing pronouncements as to the

---

6 *Land Projects Limited v Commissioner of Inland Revenue* [1964] NZLR 723 (*‘Land Projects Case’*).

7 *Ibid* 723.

treatment of transactions for taxation purposes. It suggests that in the modern environment of complex taxation law, there is ever-evolving legislation and interpretation. To maintain the high professional standards that are ethically and legally required of them, tax practitioners are obliged to engage in close scrutiny of the law to obtain a clear understanding.

The book makes it clear that tax practitioners find it increasingly difficult to keep themselves informed while dealing with the pressures of their workloads. It notes that, to assist practitioners, professional bodies are constantly providing information and commentary about changes to statutory and case law. Further, the ATO issues its own interpretations, rulings and other such proclamations to guide taxpayers and practitioners and assist in compliance.

The book suggests that the sometimes confusing and apparently convoluted legislative changes and evolving case law are leading practitioners to become increasingly reliant on ATO rulings and advice rather than conducting their own legislative research and making their own interpretations of statutes. It argues that the practice of accepting ATO opinions without challenge can have extremely significant fiscal impacts on taxpayers and tax collections, and warns that tax practitioners should not always consider that the rulings, determinations and advice provided by the ATO give the greater clarity and certainty in the preparation and lodgement of taxation returns and the payment of tax that they are seeking.

### III RESEARCH DESIGN AND CONDUCT

#### A *The Aim*

The book aims to investigate whether the ATO's view remains valid for the tax accounting treatment for livestock in Australia in the modern age.

The premises are that:

- Some animals held in a primary production business may be considered as beasts of burden or aids to manufacture, and should not be considered as trading stock;
- It is the ATO view<sup>8</sup> that *all* livestock held in a business of primary production are trading stock, irrespective of their function in the business and the number of accounting periods for which they are held;
- However, the word *all* is not contained in the *Income Tax Assessment Act 1997 (ITAA 1997)*;<sup>9</sup>
- Therefore, the ATO view relies entirely on the decision in the 1951 *Wade Case*;<sup>10</sup>
- However, the ATO's advice, rulings, determinations and pronouncements normally include a caveat that they may not be correct, which limits the protection that can be gained from relying on the advice; and

---

8 Letter from Alison Lendon, Deputy Commissioner of Taxation, to Alexander Robert Fullarton, 6 November 2019 (held by the author). The context is the ATO's view that all animals in a primary production business are considered as livestock within the definition of s 995-1 of the *ITAA 1997*. In this letter regarding the ATO's view of the classification of livestock in a primary production business, Lendon states, 'The Commissioner [of Taxation] considers that the definition of livestock in section 995-1 of the Income Tax Assessment Act 1997 includes all animals in a primary production business'.

9 s 995-1 *ITAA 1997*.

10 *Wade Case* (n 2).

- It might therefore be the case that the ATO’s view should not be relied on as a valid interpretation of tax law.

## B *The Research Methods Used to Support the Findings*

### 1 *Research Proposition*

The proposal of the book is that some animals held in a primary production business are held for the production of goods for sale such as milk and wool or for breeding purposes and should be considered as aids to manufacture rather than trading stock for sale. They should be classified as capital assets and treated accordingly for accounting and taxation purposes.

To illustrate the distinction between livestock as an aid to manufacture and livestock as trading stock, the mustering crew at De Grey Station in Western Australia is shown in Figure 1.



Figure 1: ‘Meet the Crew’ – the Mustering Team from De Grey Station.<sup>11</sup>

It is fair to assume that the inclusion of the horse-mounted stockmen and women indicates that the horses are part of the station plant and are not livestock for trading purposes.

Further, a pastoral station manager, interviewed in the research, stated that his horses and dogs were very expensive and highly trained. He said they had a key role in his mustering operations and could not be regarded as livestock in any way. ‘To regard them as livestock is a lack of understanding of the pastoral industry’.<sup>12</sup> Therefore, the book argues that the ATO’s view is no longer valid and should be challenged.

<sup>11</sup> Photograph entitled ‘Meet the Crew’, De Grey Station – Central Station, Central Station at <[www.centralstation.net.au/](http://www.centralstation.net.au/)>. (Reproduced by permission of Mark Bettini of De Grey Station).

<sup>12</sup> Telephone Conversation with Sean D’Arcy, owner and manager of Lyndon Station, Western Australia (Alexander Robert Fullarton, Curtin Law School, Curtin University, 24 December 2019).

## 2 *Hypothetical Case Study and Research Question*

### (a) *Hypothetical Case Study*

To focus the scope of the research, the following hypothetical case study was considered by the participants in the research:

A pastoral property is sold. The property is sold, and her estate distributed. In preparation for the sale, she had mustered the property and every beast of commercial value was stripped from the property and sold. Only the breeding stock and animals too light to cover the costs of sale are turned back onto the grazing land. The executor argues that the small animals turned off are below commercial trade weight. While they will become valuable in the future, at the point of sale they were of no commercial value. He further argues that the breeding stock kept back for breeding purposes are capital items as they are used to manufacture products for sale in the same way that a lathe is used to make machine parts for sale.

The key to the case is the matter of capital gains tax exemptions applicable to an individual taxpayer on the sale of a business forced by medical factors. The executor argues that as the owner was under 55 years of age, quite clearly ill and subsequently died, the revenue from the disposal of the property, including the animals, thereupon is a capital gains tax event and permitted to claim the applicable capital gains tax exemptions.’

### (b) *Research Question*

The book contains further discussion of the establishment of the research question, which is: ‘On the sale of a rural business (farm or pastoral lease) involving livestock, are all animals (cattle, sheep, goats and the like) considered as trading stock and therefore revenue items? Alternatively, are some, or all, of the animals breeding stock and therefore subject to capital gains tax provisions and exemptions?’

## 3 *Research Procedures*

A mixed methods research procedure was adopted to test the hypothesis and develop the research findings. This consisted of:

- A quantitative survey of 110 rural Australian tax practitioners, using a Likert scale which ranged from 1, ‘all animals are breeding stock (Capital – CGT provisions apply)’, to 5, ‘all animals are trading stock (Revenue – Income tax provisions apply)’, with combinations of these two in between;
- A qualitative study by way of a series of interviews conducted with stakeholders engaged in the operation and sale of pastoral properties in Western Australia who were asked to consider the hypothetical case study;
- A review of the published literature, parliamentary reports and the Explanatory Memorandum accompanying a *Bill for an Act to Consolidate and Amend the Income Tax Assessment Act 1922-1934, 1935*;
- An examination of the administrative tribunal and court documents concerning matters which preceded the appeal case (*Federal Commissioner of Taxation v Wade* (1951))<sup>13</sup> as well as the court reports of the *Wade Case* itself; and

---

13 *Wade Case* (n 2).

- An overview of the changes in accounting standards relevant to accounting for biological assets that were introduced in 2019.<sup>14</sup>

## IV RESEARCH OUTCOMES AND ANALYSIS

### A Case Study Analysis – Tax Practitioner Survey

Only one of the respondents to the survey considered all of the animals in the proposed hypothetical scenario (despite only some of those animals being held for breeding purposes and others, such as calves, being of no commercial value) as capital. However, fewer than half of the respondents determined that they were all trade stock, with 52.6 per cent favouring the concept that at least some of the animals should be classified as breeding stock to varying degrees.

### B Case Study Analysis – Stakeholder Interviews

The study covered seven people who contributed to the stakeholder interviews. They included a vendor and a purchaser of a pastoral property in Western Australia, and their respective selling agents. Other interviewees were long-term pastoralists who were descendants of three generations of a family engaged in the pastoral industry and had no intention of selling in the foreseeable future but rather were planning to pass the ownership on to the following family generations. Their opinion was sought as independent support for how transactions relating to herds were managed and classified on modern pastoral properties, at least in Western Australia.

The study indicated that those involved in the ownership, transfer, administration and record keeping of animals on pastoral properties were aware of a distinction between stud or breeding stock and livestock for sale as trading stock, but ultimately did not account for them in this way. Rather, it appeared that they relied on the advice of professional accounting advisers. The interviews also indicated that those advisers were not consulted prior to the transfer of properties, but were instead faced with a *fait accompli*, as the contracts of sale allocating purchase prices to various categories were executed before the relevant accountants were consulted. It also appeared that all stakeholders adopted the view that ultimately *all* livestock are sold and therefore *all* are trading stock. However, most participants considered that breeding stock should be considered as capital assets, even though the contract of sale documentation did not treat them in this way.

The study suggests it is the complexity of recording and accounting separately for the two classifications that may be an obstacle to regarding some livestock as capital assets. It is simply more convenient for stakeholders to treat *all* animals as livestock for trading purposes, even when they do not believe that to be true.

---

14 Australian Accounting Standards Board Accounting Standards AASB 116, as amended in 2019, and AASB 141. These standards apply to annual periods beginning on or after 1 January 2019 but before 1 January 2021. Earlier application is permitted for annual periods beginning on or after 1 January 2014 but before 1 January 2019. These standards incorporate relevant amendments made up to and including 9 December 2016. <[www.aasb.gov.au/](http://www.aasb.gov.au/)>.



## C *Review of the Published Literature*

A brief review of the published literature is conducted in the book to provide a working definition of stock-in-trade. It considers Yorston, Smyth and Brown's definition of stock-in-trade to be the most acceptable for the study; these authors defined stock-in-trade to be:

the aggregate of those items of tangible property which are:

1. held for sale in the ordinary course of business, or
2. in the process of production for such sale, or
3. to be currently consumed in the production of goods or services to be available for sale.<sup>15</sup>

The review also notes the 1975 Asprey Report suggestion that changes in the closing value of livestock would have an impact on income for taxation purposes.<sup>16</sup> The Asprey Report noted:

All livestock in a business of primary production are treated by the Act as trading stock even though some animals are not acquired for the purpose of sale.<sup>17</sup>

However, the report considered that some livestock, such as stud stock, could form part of the assets of a business along with the plant. It stated:

Although animals not acquired for the purpose of sale (for example, stud stock) could be regarded as more akin to plant than trading stock, there is no provision in the Act for writing off annual amounts of depreciation from their cost.<sup>18</sup>

The Asprey Report inferred that if stud stock were to be depreciated, then they may well be considered as plant. The report also pointed to the influence of accounting treatment for distributing the capital cost over several accounting periods in helping to determine whether livestock kept for stud purposes should be revenue or capital items.

Further, the review concludes that the finding that the compensation paid to Wade in 1951 was of a capital nature may have exempted those monies from taxation entirely, and that the total exemption may have influenced the judges' decisions. However, capital gains tax was introduced in 1985, and div 108 of the *ITAA 1997* now applies to the imposition of capital gains tax on capital gains and losses from the acquisition and disposal of capital assets, so this may be a basis for challenging the decision in the *Wade Case*.

## D *Analysis of the Wade Case*

The circumstances put to the High Court in 1951<sup>19</sup> were that Michael Wade was a dairy farmer carrying on business in the suburb of Osborne Park in the City of Perth, Western Australia. In the financial year 1947–48, 110 of his dairy cows were destroyed under the provisions of the

---

15 Keith Yorston, Eugene Bryan Smyth and Samuel Raymond Brown, *Advanced Accounting* (Law Book, 1978) 12. This definition is based on the definition of 'Inventory' in Chapter 4, *Accounting Research Bulletin*, No 43, 1953 of the American Institute of Accountants.

16 Taxation Review Committee, *Full Report* (Parliamentary Paper No 136, January 1975) (Asprey Report) 105–106.

17 *Ibid* 99.

18 *Ibid* 283.

19 John Angus Lancaster Gunn and Richard Esmond O'Neill (eds), *Commonwealth Taxation Board of Review Decisions (New Series)* (Butterworth and Co, 1952) 1; (1 CTBR (NS)).

*Milk Act 1946–1947 (WA)*. Wade received a sum of A£2,016 (A\$4,032)<sup>20</sup> as compensation for the animals that were destroyed. In the same year, he purchased 116 replacement dairy cattle for the sum of A£1,986 (A\$3,972).<sup>21</sup>

In his return of income for the year of income in which this took place [1948] he treated the extra six dairy cattle as a purchase of stock and showed the amount in his livestock account; but he excluded from his revenue account the receipt of £2,016 compensation for the 110 cattle condemned. Correspondingly he excluded the cost of the 110 cattle by which he replaced them, an amount of £1,886, placing a note on his return that this was a purely capital transaction.<sup>22</sup>

The Commissioner of Taxation took a different view to the transactions and amended Wade's 1948 income tax assessment accordingly.

In making his assessment for that year of income the Commissioner of Taxation **added** the £2,016 to the amount shown in Wade's return under sales and the £1,866 to the amount shown under purchases, thus increasing the assessable income derived from the livestock account by the amount of £584.<sup>23</sup>

Wade appealed the amendment and relied on the following legislation and cases as precedents to support his appeal:

(i) Legislation

The following legislation was referred to in the *Wade Case*:

Section 25(c) *Income Tax Assessment Act* (1922) (Cth) and sections 6(1), 26(j), 28(2), 32, 36(1) and (8) *Income Tax Assessment Act* 1936 (Cth).<sup>24</sup>

A detailed analysis of the application of the provisions is presented in the book. However, one significant point is made here, namely that in *Farnsworth v Federal Commissioner of Taxation*<sup>25</sup> Latham CJ stated, 'It is provided in s. 6 [ITAA 1936] that "trading stock" includes anything produced, manufactured, acquired or purchased for purposes of manufacture, sale or exchange, and also includes livestock'.<sup>26</sup> This statement does not include the word **all**, but Dixon and Fullagar JJ **inferred** that it did.<sup>27</sup> Further, Dixon and Fullagar JJ stated that *Farnsworth v Federal Commissioner of Taxation*<sup>28</sup> dealt with the disposal of assets within a business and not the disposal of the entire business, and therefore s 36 did not apply.<sup>29</sup>

In the case study that is the subject of this research, the matter related to the disposal of the entire business, and therefore the *Wade Case* should be relied on to support the view that *all*

---

20 Australia changed its monetary system on 14 February 1966 from Pounds Sterling to the decimalised Australian Dollar. One pound of 20 shillings or 240 pence became two dollars of 100 cents

21 The figure £1,986 is a misprint. The published Commonwealth Law Report refers throughout to the correct figure of £1,886 (*Wade Case* (n 2) 108).

22 *Wade Case* (n 2) 108–9.

23 *Ibid* 106.

24 Fullarton and Pinto (n 1) Pt II.

25 *Farnsworth v Federal Commissioner of Taxation* [1949] HCA 27; (1949) 78 CLR 504, 510.

26 *Ibid*.

27 *Wade Case* (n 2) 110.

28 *Farnsworth v Federal Commissioner of Taxation* (n 25).

29 *Wade Case* (n 2) 111.

livestock are trading stock, as the disposal of the entire business involves the disposal of animals held for breeding purposes and not only those held for trading purposes.

(ii) Cases

The following cases were referred to in the *Wade Case*:

*Commissioners of Inland Revenue v Brooks*;<sup>30</sup> *Commissioners of Inland Revenue v Newcastle Breweries Ltd*;<sup>31</sup> *Commissioners of Inland Revenue v Northfleet Coal & Ballast Co*;<sup>32</sup> *Commissioners of Inland Revenue v Executors of Williams*;<sup>33</sup> *Danmark Pty Ltd v Federal Commissioner of Taxation*;<sup>34</sup> *Farnsworth v Federal Commissioner of Taxation*;<sup>35</sup> *Maritime Electric Co Ltd v General Dairies Ltd*;<sup>36</sup> *The Minister for Lands v Ricketson and the Australian Mortgage, Land & Finance Co*;<sup>37</sup> *Short Bros Ltd v Commissioners of Inland Revenue*.<sup>38</sup>

A detailed review of the above cases and their relevance to the *Wade Case* can be found in Part II of the book.<sup>39</sup>

However, two additional cases to the list above were referred to in the *Wade Case* and are significant.

*The Commissioners of Inland Revenue v J Gliksten & Son, Ltd*,<sup>40</sup> which focused on insurance recoveries for loss of trading stock, supports the result of the *Wade Case* if a dairy herd is considered as trading stock:

the normal commercial method of dealing with moneys recovered by a trader under a policy of insurance, in respect of stock destroyed by fire, was to include the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock.<sup>41</sup>

Further, the decision in *Stebbing v Metropolitan Board of Works*,<sup>42</sup> which also focused on compensation, suggests that the value of compensation was paid through the operations of the Dairy Cattle Compensation Fund and that the money paid to Wade was to compensate him for the slaughter of his dairy cattle and was marginally higher than the actual replacement of the dairy cattle. That Wade's income tax assessment might not have been amended if the cattle had been replaced for precisely the same amount as the compensation monies received is a matter of speculation.

The following cases were not referred to in the *Wade Case* but are related to it. They are *Kelsall*

---

30 (1915) AC 478.

31 (1927) 12 TC 927. Reported in K.BD, 42 TLR 185, CA, 42 TLR 609, and HL, \*43 TLR 476.

32 (1927) 12 TC 1102.

33 (1943) 1 All ER 318.

34 (1944) 7 ATD 333.

35 *Farnsworth v Federal Commissioner of Taxation* (n 25).

36 (1937) AC 610.

37 (1898) 19 LR NSW 281.

38 (1927) 12 TC 955.

39 Fullarton and Pinto (n 1) Pt II.

40 Referred to in the reporters of the *Wade Case* as *J. Gliksten and Son v Green*. H J Green was the Inspector of Taxes [1929] UKHL TC 14 364 (22 February 1929).

41 *Ibid*, 385.

42 (1870) LR 6 QB 37.

*Parsons & Co v Inland Revenue*,<sup>43</sup> and the *Robinson Case*.<sup>44</sup>

In *Kelsall Parsons & Co v Inland Revenue*,<sup>45</sup> Lord Normand stated:

Then it was urged that the whole structure of the appellants' business was affected by the cancellation, and that, on the authority of *Van den Berghs, Limited v Clark*, the payment should therefore be treated as a capital payment.<sup>46</sup>

However, Lord Normand found, in that case,<sup>47</sup> that the business had not ceased and that the payment should be treated as a revenue payment, and hence that it was assessable income for income tax purposes. Likewise, Wade's business did not cease and the decision is likely to be correct that the excess compensation monies should be considered as revenue.

The 1927 *Robinson Case*<sup>48</sup> of 1927 relates to a matter wherein

The owner of a sheep station in carrying on his business never sold or exchanged any ewes or ewe weaners off the station, but they were bred and held exclusively for breeding purposes and for their wool. The owner sold the station on a 'walk-in-walk-out' basis. Included in the sale were a number of ewe weaners.

*Held*, that the ewe weaners were not 'trading stock' within the definition of that term in sec. 4 of the *Income Tax Assessment Act 1922-1925*, and therefore that the proceeds of the sale of such ewe weaners were not assessable income of the owner under sec. 17 (1) of that Act.<sup>49</sup>

Part II also looks at the landmark New Zealand case of 1964, *Land Projects Limited v Commissioner of Inland Revenue* ('*Land Projects Case*')<sup>50</sup> for guidance. Prebble considered the concept of carrying on business in New Zealand<sup>51</sup> and looked at the definition of livestock in the business of primary production. He referred to the Appellant's argument in the *Land Projects Case*:

that it would be ridiculous to require of a taxpayer that he should make a return of a domestic cat, a pet lamb or a favourite hunter [assume hunting dog] and therefore it could not have been intended by the Legislature in New Zealand that *all* animals should be regarded as trading stock.<sup>52</sup>

However, the judge in that case countered:

I see nothing absurd in taking into account the value of a pet lamb which has grown up and turned out into the sheep farmer's regular flock so as to become an asset of the sheep farming business. A cat which is used to destroy mice in a store stacked with bags of flour may also be an asset of a business, perhaps a capital asset in ordinary bookkeeping, but it is permissible for the Legislature to declare that such an animal and many others shall for income tax purposes be deemed to be trading

---

43 [1938] SC 238.

44 *Robinson Case* (n 4).

45 *Kelsall Parsons & Co v Inland Revenue* (n 42).

46 *Van den Berghs, Limited v Clark* (1935) AC 431, 19 TC 390.

47 *Kelsall Parsons & Co v Inland Revenue* (n 42).

48 *Robinson Case* (n 4).

49 *Ibid*.

50 *Land Projects Case* (n 6).

51 John Prebble, 'Intention to Make a Profit and "Business" in Section 65(2)(A) of the Income Tax Act 1976' (1978) 4 *Otago Law Review* 165.

52 *Land Projects Case* (n 6) 727.

stock and the language of subs. (1) [of s. 98] is clear. It declares that the expression ‘trading stock’, for the purposes of s. 98 and only for those purposes, includes livestock.<sup>53</sup>

Of significance to this examination is that his Honour continued:

With respect, I adopt the language of Dixon and Fullagar JJ in *Wade’s case (supra)* and say that our New Zealand Act places all animals in the category of trading stock but only of course for the purposes of s. 98.<sup>54</sup>

Therefore, the *Land Projects Case* may settle the argument for New Zealand, but it raises speculation as to what his Honour’s findings might have been had the *Wade Case* found otherwise. Ultimately however, it is noted that the New Zealand Inland Revenue legislation now considers *all* livestock as trading stock,<sup>55</sup> and the New Zealand Inland Revenue Department has issued a public ruling under s 91D of the *Tax Administration Act 1994* (NZ).<sup>56</sup>

Part II argues that 60 years later, with the advent of electronic data processing which did not exist in 1964 so that the record keeping difficulties considered in the *Land Projects Case* are no longer the obstacles they once were, reliance on the decision of the 1951 *Wade Case* is no longer relevant and is unsafe.

## 5 *The Introduction of Biological Accounting Standards to Australia*

The findings of Fischer and Marsh<sup>57</sup> are examined in detail in Part I of the book. They looked at the generally accepted accounting principles (GAAP) existing in the United States to explore the impact of the adoption of the international accounting guidance for agricultural activities.

The review in Part II also looks at changes in accounting standards since 1951, and in particular at Australian accounting standard AASB 116, which defines plant and equipment as tangible items for use for more than one [accounting] period (year)<sup>58</sup> and AASB 141, which gives examples to illustrate the definition of ‘consumable biological assets’, namely agricultural assets which:

are those that are to be harvested as agricultural produce or sold as biological assets. Examples of consumable biological assets are livestock intended for the production of meat, livestock held for sale, fish in farms, crops such as maize and wheat, produce on a bearer plant and trees being grown for lumber.<sup>59</sup>

When the authors reached the end of Part II their research was taken to be complete, and the reasons why a case in 1927 was decided in the opposite way to one in 1951 were left to speculation. However subsequently, legal research into the events and cases leading to the *Wade Case* was carried out to seek answers to some of the speculation raised above. To provide

---

53 Ibid.

54 Ibid.

55 *Income Tax Act 2007* (NZ) s YA 1; (definition of ‘trading stock’).

56 New Zealand Inland Revenue Department, Tax Technical, ‘Income Tax – Timing of Disposal and Derivation of Income from Trading Stock’ BR PUB 14/08 (30 September 2014) <https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/rulings/public/pu14008.pdf?la=en>.

57 Mary Fischer and Treba Marsh, ‘Biological Assets: Financial Recognition and Reporting Using US and International Accounting Guidance’ (2013) 13(2) *Journal of Accounting and Finance* 57.

58 AASB 116 (n 14).

59 AASB 116 (n 14).

further insight into the *Wade Case*, Part III examines its foundations and how the matter came before the High Court.

## V THE FOUNDATIONS OF THE *WADE CASE*: CONCRETE OR CLAY?

Part III looks at the events leading up to the 1951 *Wade Case*. It goes beyond the decision of the Full Bench of the High Court and conducts further research into the background to the *Wade Case*. It does that by examining the initial decision in Wade's earlier appeal to the Commonwealth Taxation Board of Review (CTBR)<sup>60</sup> and the documents put before the tribunal, as well as the Commissioner's initial appeal to the High Court.<sup>61</sup> It also examines commentary in other reports on the CTBR matter such as Butterworth's *Commonwealth Taxation Board of Review Decisions*<sup>62</sup> and Wolters Kluwer's *CCH Taxation Board of Review Decisions*.<sup>63</sup>

### A *Timeline of Events*

To provide context to the story of Wade's 1948 income tax return and the ultimate decision of the High Court in 1951, the book contains a detailed timeline of events leading up to the final appeal. For the reader's convenience, a brief summary is provided here.

**13 May 1949** Michael Wade lodged his return of income for the financial year ended 30 June 1948. This included a note, pinned to the document by Wade's accountant, disclosing the destruction and replacement of his dairy herd but stating that those transactions were of a capital nature and did not form part of Wade's assessable income.<sup>64</sup>

**26 August 1949** The Commissioner of Taxation issued his assessment of taxation, which was adjusted to include the transactions relating to the disposal and replacement of the 110 cattle.<sup>65</sup>

**13 September 1949** Wade objected to the assessment.

**18 October 1949** The Deputy Commissioner of Taxation for Western Australia notified Wade that his objection was disallowed.

**14 November 1949** Wade advised the Deputy Commissioner of Taxation (WA) of his request to have the matter referred to the Board of Review.

**19 May 1950** The Second Commissioner of Taxation referred Wade's request for a decision on the objection to his assessment to the Taxation Board of Review No 2 in Melbourne.<sup>66</sup>

---

60 *Wade v Commissioner of Taxation*, Commonwealth Taxation Board of Review No 2 (1950) No M37/1950. Note: The matter is also reported as (1950) 1 CTBR (NS) Case 77, 335 and (1950) 1TBRD Case 72, 273.

61 *Commissioner of Taxation v Wade* (High Court of Australia, Kitto J 4 September). It should be noted that the matter was initially heard by Kitto J alone on 4 September 1951. A decision was not made at that time, but rather it was ordered that the case be argued before the Full Bench of the High Court.

62 Gunn and O'Neill (n 19).

63 Wolters Kluwer, CCH Australia *CCH iKnow* (online at 2 April 2022).

64 *Commissioner of Taxation v Wade Appeal Book* High Court of Australia, 9 of 1950, 18.

65 *Ibid* 14.

66 *Ibid* 30.

**12 September 1950** Wade's evidence was put to the Taxation Board of Review.<sup>67</sup> Wade withdrew two of the three claims disallowed by the Commissioner, and the third was decided in Wade's favour.

**8 December 1950** The Commissioner of Taxation lodged a notice of appeal to the High Court to resolve the following questions of law:

1. Whether the condemnation and killing of the cattle and the receipt of £2,016 as compensation was a disposal of trading stock within the meaning of section 36 of the *Income Tax Assessment Act 1936–1948*;
2. Whether the said sum of £2,016 was an amount received by Wade by way of insurance or indemnity for or in respect of any loss of trading stock, which would have to be taken into account in computing assessable income within the meaning of section 26(j) of the *Income Tax Assessment Act 1936–1948*; and
3. Whether the Board of Review was right in holding that it was not open to it to find that the said amount of £2,016 could have been included under section 26(j) of the *Income Tax Assessment Act 1936–1948*.<sup>68</sup>

**4 September 1951** The Commissioner of Taxation appealed to the High Court before a single judge, Kitto J, to lodge an appeal to the Full Bench of the High Court.<sup>69</sup>

**10 September 1951** The Commissioner's appeal was referred by Kitto J in Perth, Western Australia, to the Full Bench of the High Court.<sup>70</sup>

**5 November 1951** The Commissioner's appeal was heard in Melbourne by the Full Bench of the High Court.<sup>71</sup>

Some salient points are the following:

- N A Lappin appeared for the Commissioner of Taxation, but there was no appearance of counsel for the respondent. Dixon and Fullagar JJ noted that 'there was no appearance upon the appeal for the respondent taxpayer',<sup>72</sup> and assumed that the taxpayer 'doubtless regarded the amount of the consequential reduction of tax as insubstantial'. However, the transcript of the proceedings before Kitto J on 4 September contains a discussion as to why neither Michael Wade nor his solicitors would be attending the appeal hearing, and an undertaking by N A Lappin 'to see that a copy of [the] notes will be available for the members of the Full Court'.<sup>73</sup> The transcript also

---

<sup>67</sup> *Commissioner of Taxation v Wade* (n 60) 33-8.

<sup>68</sup> Ibid 14. It should be noted that the Commissioner of Taxation might have appealed to the Western Australian Supreme Court in the order of the hierarchy of courts. Since 1977, the matter might have been appealed to the Federal Court, as it refers to Commonwealth legislation. However, this did not happen, and the case was referred initially to a single judge of the High Court. The decision to refer the matter to the Full Bench was made by Kitto J.

<sup>69</sup> Ibid 2-9.

<sup>70</sup> Judges Dixon, Fullagar and Kitto.

<sup>71</sup> *Wade Case* (n 2).

<sup>72</sup> Ibid 338.

<sup>73</sup> *Commissioner of Taxation v Wade* (n 60) 9.

contains a confirmation of an undertaking that the Commissioner would not apply for an order for costs against the taxpayer.<sup>74</sup>

- The Full Bench included Kitto J, who had heard the initial appeal and had had the benefit of hearing Wade's and the Commissioner's evidence in the Court.<sup>75</sup> The observations as to representation and costs are considered of some importance as they illustrate that some details were known to Kitto J but not necessarily to the other judges, and may have been overlooked in their reported decisions.
- Kitto J stated that he had difficulty in considering Wade's dairy cattle as trading stock,<sup>76</sup> and handed down a different decision to the other two judges. However, as he considered the case to focus on the assessability of the excess of the compensation paid to Wade over the cost of replacement cattle, he made the same finding as they did. The £2,016 was revenue and the £1,866 was a deductible expense.

The book argues that the *Wade Case* refers to the assessability of insurance recoveries or compensation, and not to the classification of animals as livestock, and therefore does not support the ATO view.

#### B *Taxation Review Board Evidence*

Evidence that was put to the CTBR but is not found in the authorised court reports proved useful in the examination of Wade's income tax records. Detail of the livestock trading account furnished by Wade in his 1948 income tax return was found in the certified copy of Kitto J's Appeal Book.<sup>77</sup>

---

74 Ibid 7.

75 Transcript of proceedings before his Honour Mr Justice Kitto 4 September 1951 *Commissioner of Taxation v Wade* (n 60) 2-9.

76 Wade Case (n 2) 114. Kitto J stated that he had 'some difficulty in accepting the view that the fact that dairy cattle, which are not trading stock according to ordinary concepts, are required [to be] by force of a definition to be taken into account under ss 28 and 32 of the *Income Tax Assessment Act 1936-1947* (Cth) as trading stock'.

77 Part of Wade's 1948 income tax return is contained in Kitto J's Appeal Book, but several pages, including the Live Stock Schedule, are missing.



This is reproduced in Table 1.

Live Stock Schedule  
for the year ended 30 June 1948

Dr				Cr			
Column A				Column B			
Date	Particulars	No.	Amount	Date	Particulars	No.	Amount
1 Jul 47	Opening stock:				Sales:		
	Cattle	94	£ 748		Cattle	24	£ 208
	Horses	9	68		Horses	3	8
	Purchases:				Deaths:		
	Cattle	24	£ 356		Horses	3	
	Horses	6	75				
	Natural Increase:			30 Jun 48	Closing stock:		
	Cattle	20			Cattle	114	£ 929
					Horses	10	95
		<b>153</b>	<b>£ 1247</b>			<b>153<sup>78</sup></b>	<b>£ 1240</b>

Table 1: Wade's 1948 Live Stock Schedule.

The structure of the Live Stock Schedule does not follow modern accounting standards for a Livestock Trading Account, but the net loss of £7 is contained in Part D of the 1948 income tax return under 'Income as Farmer, Pastoralist, Horticulturist etc.'<sup>79</sup>

The amended Live Stock Schedule, as shown in Table 2, changed the net loss of £7 to a net profit from livestock trading of £576. The impact of considering the proceeds arising from the destruction of the dairy cattle and their replacement as assessable income rather than capital had the effect of increasing Wade's taxable income by £583.

78 There is a mathematical error in that the total of the column is 154 not 153 as shown. It is noted that there are a number of mathematical errors throughout the income tax return and the Commissioner's amendments. The court decision noted the errors and adjusted them accordingly. Therefore, these did not influence the ultimate outcome of the case.

79 *Commissioner of Taxation v Wade* (n 60) 17.

Amended Live Stock Schedule  
for the year ended 30 June 1948

Dr				Cr			
Column A				Column B			
Date	Particulars	No.	Amount	Date	Particulars	No.	Amount
1 Jul 47	Opening stock: Cattle Horses	94 9	£ 748 72		Sales: Cattle Horses	134 3	£2,224 8
	Purchases: Cattle Horses	134 6	£2,242 75	30 Jun 48	Closing stock: Cattle Horses	114 10	£1,383 98
	Natural Increase: Cattle	20					
		<b>263</b>	<b>£3,137</b>			<b>261<sup>80</sup></b>	<b>£ 3,713</b>

Table 2: Wade's Amended Live Stock Schedule.

C      *Section 17 – The Forgotten Story*

The analysis of the *Wade Case* in Part II of the book refers to earlier cases that focused on the sale of livestock in Australia but held that breeding stock were not trading stock. This section investigates why the *Wade Case* might have been appealed to the High Court, given that the matter had already been resolved.

The book cites a number of other cases which it considers relevant to the *Wade Case* but which were not used in evidence by either party. Significantly, it examines the decision in the *Robinson Case*,<sup>81</sup> which focused on the sale of sheep in conjunction with the sale of a pastoral property. It was:

*Held*, that the ewe weaners were not 'trading stock' within the definition of that term in sec. 4 of the *Income Tax Assessment Act 1922-1925*, and therefore that the proceeds of the sale of such ewe weaners were not assessable income of the owner under sec. 17 (1) of that Act.<sup>82</sup>

As the *Robinson Case* of 1927 decided, contrary to the *Wade Case* of 1951, that there is a distinction between the animals held in a business of primary production and that some are not trading stock, the research examines amendments to the income tax legislation that occurred in the period between 1927 and 1951.

The research compares the *Income Tax Assessment Act 1922-34 (ITAA 1922)* to the following *ITAA 1936* and finds that s 17, which was central to the *Robinson Case*, was repealed in 1936.

Section 17 of the *ITAA 1922* contained the following provision:

<sup>80</sup> The Commissioner's assessment omitted the three horses shown as deaths in Wade's income tax return.

<sup>81</sup> *Robinson Case* (n 4).

<sup>82</sup> *Ibid* 297.

(4.) In this section— (a) the expression ‘trading stock’ does not include live stock which in the opinion of the Commissioner, Assistant Commissioner or Deputy Commissioner are ordinarily used as beasts of burden or as working beasts or for breeding purposes;<sup>83</sup>

Section 17 expressly identified that breeding stock was *not* trading stock. However, its repeal consequently brought *all* animals used in primary production into the livestock trading account, by inference, as Kitto J had noted.

The repeal of s 17 was in response to the recommendation of the Ferguson Royal Commission on Taxation of 1934.<sup>84</sup> The Royal Commission had considered arguments made by various graziers’ associations to continue the exemption from income tax for transactions relating to the purchase and sale of breeding stock, but found that:

The claim [by the associations that the sale of breeding stock should not be included in assessable income] is based upon the argument that live stock used for breeding purposes is equivalent to plant, and that when it is sold the proceeds should be regarded as a realization of capital. But the grazier does not take this view when he buys it, for the cost is debited to his working account, and he is allowed a deduction in full for the amount so expended. If breeding stock is sold otherwise than upon the realization of a business, the proceeds are brought to account as ordinary income, and the grazier is taxed on the profit or allowed for the loss on the transaction. If the argument that breeding stock is capital be sound, it should be treated consistently in all circumstances, and in that event its cost would not be allowed as a deduction, nor would any profit on its realization be taxable.

The truth is that live stock possesses some of the characteristics both of a fixed asset and a trading asset. Although an animal may be acquired primarily for breeding or wool-growing purposes, its ultimate sale is in many cases by no means a minor consideration. The life of any stock is limited to a few years, and must eventually be realized or replaced.<sup>85</sup>

Accordingly, the Royal Commission made the following recommendation:

We recommend that the proceeds of breeding stock sold upon the realization or discontinuance of a business from any cause whatever shall be included in the assessable income of the taxpayer.<sup>86</sup>

We recommend that Section 17 of the Commonwealth Income Tax Assessment Act, which permits the purchaser of sheep in the wool to treat the cost as a purchase of sheep and wool as distinct from each other, be deleted from the Act.<sup>87</sup>

Consequently, the amendment and the following explanatory memorandum were put to parliament:

(e) This definition continues the existing Commonwealth practice except in regard to live stock used as working beasts and beasts of burden by primary producers. In their case, the difficulty of identifying these animals and also the necessity of accounting for any sale of the possible natural increase, make it desirable in the interests of simplicity to bring working beasts and beasts of burden into the live stock schedule.<sup>88</sup>

---

83 *Income Tax Assessment Act 1922* (Cth) s 17.

84 Ferguson Royal Commission Report (n 3).

85 Ferguson Third Report (n 5) 135.

86 *Ibid.*

87 *Ibid* 136.

88 *Ibid* 9.

The book asserts that parliament mistook the recommendation of the Ferguson report that s 17 be repealed 'for simplicity'. The report referred to the difficulty is distinguishing the value of a sheep (a capital asset) from its fleece (a revenue asset). It was suggested that farmers and graziers were attributing the revenue from the sale of the sheep as the sale of capital, at that time a tax-exempt transaction, and considering the fleece it carried to have no commercial value. Hence farmers and graziers were engaged in a tax avoidance activity.

Parliament was simply recommended to repeal s 17 for simplicity but not the reason supporting the recommendation. The book suggests that a more equitable measure to ensure revenue from the sale of the fleece was classified as taxable income might have been to add to s 17 that for s 17 to apply the sheep must be sold 'off shears' (shorn). In modern times few parliamentarians might be familiar with the pastoral industry or shearing sheds, but in 1936 when 'Australia rode on the sheep's back' surely most of those in parliament might have been most familiar with shearing sheep.<sup>89</sup>

Nonetheless s 17 was duly omitted from the *ITAA 1936*, and therefore *all* animals used in a business of primary production became classified as trading stock regardless of the function of those animals. Therefore, this is the basis that the ATO should use in support of its view, and not the decision of the *Wade Case*.

The conclusion of this part is that, had the assessor and the accountant known of the repeal of s 17, the *Wade Case* would never have existed. The ATO could simply have pointed that out to the taxpayer, the Board of Review, the High Court and so on. The book also acknowledges that it would be unrealistic to expect tax preparers, legal practitioners and the courts to research every matter of precedent reported and used in the courts to the level conducted in this research, while highlighting the need to carry out independent research into the background of similar cases.

## VI AUSTRALIAN TAXATION OFFICE PRONOUNCEMENTS: WHY TAX ADVISERS NEED TO EXERCISE CAUTION

The final part of the book (Part IV) argues that the ATO practice of issuing opinions and taxation rulings for the guidance of taxation practitioners compiling and submitting taxation returns does not always result in greater clarity or certainty in the application of taxation laws. It argues that the *Wade Case* focused on the assessable nature of monies received as compensation for loss of assets. That Wade's loss was dairy cattle is somewhat irrelevant to the findings of the case. Part IV argues that tax practitioners should not consider rulings, determinations and advice provided by the ATO as always providing greater clarity and certainty in the preparation and lodgement of taxation returns and the payment of tax. The practice of accepting ATO opinions without challenge can have extremely significant fiscal impacts on taxpayers and tax collections.

It must be noted that the ATO is not directly responsible. While it provides guidance for taxpayers, the ATO clearly states that its opinions may not be correct, and its written opinions include a specific disclaimer that states:

---

<sup>89</sup> Sir John McEwan the 18th Prime Minister was such a farmer. He was elected in 1934 to the House of Representatives.

If this advice turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the advice in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax.<sup>90</sup>

Tax agents are duty bound to take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which they are providing advice to a client,<sup>91</sup> and in that context this book asserts that agents should not simply accept that the ATO's view on a matter necessarily represents the correct view of that issue. Therefore, the book suggests that tax practitioners should use such ATO rulings and determinations as a guide but not as a rigid matter of law. Each case should be considered on its merits and assessed accordingly.

## VII CONCLUSION

The book concludes that, despite the complexities of recording the transactions for accounting purposes and for compliance with requirements for lodgement of taxation returns, the matter of the distinction between animals held for the long term for their produce rather than held in the short term for trading purposes should be reconsidered by the ATO, stakeholders and the accounting/tax professions. The associated accounting standards are beyond the scope of this book. However, it is suggested that the adoption of AASB 141 will ultimately make that review essential.

The book suggests that the repeal of s 17 should be investigated and researched, such that the situation argued by Wade, and addressed by statute prior to 1934, be reinstated. Modern electronic data processing systems and accounting procedures permit the distinctions to be effectively returned to farmers, pastoralists and graziers for taxation purposes. What may have been complex in 1934 may be simpler in the twenty-first century. Therefore, if the proper accounting and stock identification and recording systems are used, and despite the repeal of s 17, stud or breeding stock can be considered capital assets. The proceeds of the sale of such animals would then be subject to capital gains tax rather than income tax and therefore eligible for the appropriate capital gains tax concessions.

Finally, the book points to a flaw in the ATO's published view that *all* livestock held in a business of primary production are revenue rather than capital assets, and draws the attention of tax professionals and academics to the need to conduct diligent research when giving advice to taxpayers. It suggests that in the case examined in the book it might be said that the ATO 'got lucky', and warns that ATO advice usually contains a clear caveat that it is not to be relied on as formal legal advice. The advice only acts to indemnify taxpayers against penalties and interest if the advice is incorrect and the taxpayer proves the advice was relied upon in good faith. Therefore, liability for any loss or damage arising from the use of the advice lies entirely on the giver of the advice and not the ATO.

---

90 Lendon (n 8).

91 Code of Professional Conduct *Tax Agent Services Act 2009* (Cth) s 30-10.

## BIBLIOGRAPHY

### *A Articles/Books/Reports*

Fullarton, Alexander R and Dale A M Pinto *Tax Accounting and Livestock in Australia: Insights from the Wade Case* (Ibidem Verlag, 2024).

Gunn, John Angus Lancaster, and Richard Esmond O'Neill (eds), *Commonwealth Taxation Board of Review Decisions (New Series)* (Butterworth and Co, 1952) 1; (1 CTBR (NS))

Prebble, John, 'Intention to Make a Profit and "Business" in Section 65(2)(A) of the Income Tax Act 1976' (1978) 4 *Otago Law Review* 165.

Wolters Kluwer, CCH Australia *CCH iKnow* (online at 2 April 2022)

### *B Cases*

*Commissioners of Inland Revenue v Brooks* (1915) AC 478

*Commissioners of Inland Revenue v Executors of Williams* (1943) 1 All ER 318

*Commissioners of Inland Revenue v Newcastle Breweries Ltd* (1927) 12 TC 927. Reported in KBD, 42 TLR 185, CA, 42 TLR 609, and HL, \*43 TLR 476

*Commissioners of Inland Revenue v Northfleet Coal & Ballast Co* (1927) 12 TC 1102

*Commissioner of Taxation v Wade* (High Court of Australia, Kitto J 4 September)

*Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 7 ATD 333

*Farnsworth v Federal Commissioner of Taxation* [1949] HCA 27; (1949) 78 CLR 504

*Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105

*Kelsall Parsons & Co v Inland Revenue* [1938] SC 238

*Maritime Electric Co Ltd v General Dairies Ltd* (1937) AC 610

*Robinson v Federal Commissioner of Taxation* [1927] HCA 8; (1927) 39 CLR 297

*Short Bros, Ltd v Commissioners of Inland Revenue* (1927) 12 TC 955

*Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37

*The Commissioners of Inland Revenue v J Gliksten & Son, Ltd* [1929] UKHL TC 14 364 (22 February 1929)

*The Minister for Lands v Ricketson and the Australian Mortgage, Land & Finance Co* (1898)

19 LR NSW 281

*Van Den Berghs, Ltd v Clark* (1935) AC 431, 19 TC 390

*Wade v Commissioner of Taxation*, Commonwealth Taxation Board of Review No 2 (1950) No M37/1950.

#### C Legislation

*Income Tax Assessment Act 1922* (Cth)

*Income Tax Assessment Act 1936* (Cth)

*Income Tax Assessment Act 1997* (Cth)

*Income Tax Act 2007* (NZ)

*Tax Agent Services Act 2009* (Cth)

#### D Other

Australian Accounting Standards Board *Accounting Standards AASB 116* (2019)

Australian Accounting Standards Board *Accounting Standards AASB 141* (2019)

Code of Professional Conduct *Tax Agent Services Act 2009* (Cth)

*Commissioner of Taxation v Wade* Appeal Book High Court of Australia, 9 of 1950

Commonwealth, *Royal Commission on Taxation* (1932-34) (Ferguson Royal Commission Report)

Commonwealth, *Royal Commission on Taxation* (Third Report, 12 April 1934) (Ferguson Third Report)

Explanatory Memorandum, Bill for an Act to Consolidate and Amend the Income Tax Assessment Act 1922-1934, 1935

Letter from Alison Lendon, Deputy Commissioner of Taxation, to Alexander Fullarton, 6 November 2019

New Zealand Inland Revenue Department, Tax Technical, 'Income Tax – Timing of Disposal and Derivation of Income from Trading Stock' BR PUB 14/08 (30 September 2014)  
<<https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/rulings/public/pu14008.pdf?la=en>>

Photograph of 'Meet the Crew' – the Mustering Team from De Grey Station

Taxation Review Committee, The Parliament of the Commonwealth of Australia, *Full Report*

(Parliamentary Paper No 136, January 1975) (Asprey Report)

Transcript of Proceedings Before His Honour Mr Justice Kitto 4 September 1951  
*Commissioner of Taxation v Wade*