WORK-RELATED TAX DEDUCTIONS IN A CHANGING INDUSTRIAL ENVIRONMENT: RAMIFICATIONS FOR UNIVERSITY ACADEMICS

Slides for presentation to the *10th Queensland Tax Researchers Symposium* at the St Lucia Campus of The University of Queensland on Wednesday, 3 July 2019[1]

In the Theme 3 Business Session[2]

By Dr Steven Stern, Adjunct Professor, College of Law and Justice, Victoria University and Committee Member, Tax Bar Association, Victorian Bar[3]

Slide 1: Casualization of academic work force

- It is estimated to be running at 50 per cent of staff at some universities.
- In the university sector, one-half of employees in a university can be on casual or sessional employment contracts at any one time.
- Unlike a previous "era of soaring enrolments and salaries, universities are being financially squeezed".
- As contrasted with a previous era of dominant permanent staff, in the new era casual academics have to bear their own costs for work-related expenses.

Reference: Robert Bolton, "NTEU chief McGowan ready to enforce enterprise agreements, resist casualisation" (Monday, 18 February 2019) *Australian Financial Review* 12.

[1] These slides are provided on the basis that they represent very preliminary work as presently I am applying to the academic panel for the 32nd Annual Conference of the Australasian Tax Teachers' Association to be hosted by the Tasmanian School of Business and Economics from 22 to 24 January 2020, for me to be selected for inclusion in the faculty which is to make presentations to the Conference on the theme "Small Business and Innovation: Does the Taxation Law support or hinder growth?". It is intended that, if my application in this regard were to be successful, material in these slides is to be available for adaptation or other use in any such presentation; and for any such inclusion in a subsequent publication in the *Journal of the Australasian Tax Teachers' Association* of refereed papers from the Conference.

[2] It is intended that the interaction between academic "employment" and "business", and its specific taxation ramifications and broader impact on the overall economy, will be explored further in the more comprehensive paper intended to be adapted from this relatively rudimentary presentation, whose adaption and development for presentation to the 32nd Annual Conference of the Australasian Tax Teachers' Association on the theme "Small Business and Innovation: Does the Taxation Law support or hinder growth?", is the subject of an application to the academic panel for that Conference.

[3] BEc LLB (Mon); LLM PhD (Melb); CTA; Barrister-at-Law, List S Svenson Barristers, Victorian Bar; Registered Tax Agent; Member, Victorian Technical Committee, Taxation Institute of Australia; Member, National SME & Tax Practitioner Technical Committee, Taxation Institute of Australia; Member, Australian Academy of Forensic Science; Registered Trade Mark Attorney; Senior Fellow, Economic Society of Australia.

Slide 2: Features of new era of dominant casualisation of academic workforce

- Casual employees in university sector expected to be “work ready”.
- They therefore must commonly bear their own work-related expenses.
- Casual employees tend to be paid only for the actual hours prescribed.
- Prescribed in each sessional contract for the successive semesters.
- Where they are to deliver lectures, provide tutorials, develop curricula or mentor or supervise research students.
- Paid at the rates specified in the applicable Enterprise Agreement for each such task.

Reference: Robert Bolton, “NTEU chief McGowan ready to enforce enterprise agreements, resist casualisation” (Monday, 18 February 2019) *Australian Financial Review* 12.

Slide 3: Universities and Commonwealth funding bodies take academic labour for free

> “There is a significant level of underpayment of casual staff. They are insecure. They won't question things and often when they're new into the labour force they'll accept almost anything. There is an awful lot of abuse in my view where people are doing work they are not being paid for. In other words the universities are happy to take that labour for free," Mr McGowan said.”

Reference: Robert Bolton, “NTEU chief McGowan ready to enforce enterprise agreements, resist casualisation” (Monday, 18 February 2019) *Australian Financial Review* 12.

Slide 4: CPA Australia on Importance of work-related expenses continuing to be deductible

- Keynote address to the 2018 Annual Conference of the Australasian Tax Teachers' Association on Friday, 19 January 2018 at Monash University by Paul Drum, Head of Policy at CPA Australia.
- Mr Drum raised the importance of employees continuing to be able to deduct work-related expenses from their assessable income for income tax purposes.
- Mr Drum expressed surprise and disappointment that the Australian Council of Trade Unions has not supported CPA Australia on the issue.
- As discussed at the Conference, the Federal Commissioner of Taxation, Chris Jordan, is being reported as claiming that "worker rorts" supposedly are costing the economy more than multi-national tax avoidance.
- However, employers increasingly as part of an ongoing cost-cutting exercise:

- Are requiring employees to bear expenses that hitherto were paid for regularly as part of the employment relationship.

Slide 5: Shift of ATO focus from large corporates to alleged "dodgy" workers

- Report that under Mr Jordan the Australian Taxation Office was shifting its focus:
- Away from the larger corporate and multinational sectors;
- To "dodgy" work-related expense claims.
- Mr Jordan reported as alleging these "dodgy" work-related expense claims:
- To be worth at least – and probably substantially more than –
- What some commentators claimed:
- Was the gap between:
- The tax that should have been paid by the corporates and multinationals; and
- The tax that actually was paid by this sector of corporates and multinationals.
- According to Mr Jordan:
- The significant potential gap involving individuals "swamps the large market".

Reference: Joanna Maher, "ATO's Chris Jordan vows crackdown on work expenses, negative gearing" (Wednesday, 3 July 2017) *Australian Financial Review* 1.

Slide 6: Contrast Reserve Bank of Australia's concerns of economic impact on ATO crackdown

- Reserve Bank of Australia is reported as advising that Mr Jordan's crackdown on work-related tax deductions is having a bad effect on the Australian economy:
- "A crackdown on tax deductions and better technology from the Australian Tax Office is contributing to slower income growth and slower consumption, the Reserve Bank of Australia says. … Tax a big hit to disposable income."
- A consistent theme of the Reserve Bank in recent times has been the negative impact on the economy of lower wages and salaries.
- It therefore seems of pivotal importance to the Australian economy that any "crackdown" on work-related tax deductions actually is lawful under Australia's taxation legislation.

Reference: Matthew Cranston, "ATO crackdown gobbling up income growth" (Wednesday, 27 March 2019) *Australian Financial Review* 4.

Slide 7: Economic impact makes it crucial that any "crackdown" on workers is lawful

- "With only a few weeks to write the new Budget and a fragile majority in the House, Curtin and Chifley did not have time or inclination for major changes to the Fadden Budget they had rejected. They wanted higher pay for the armed forces, higher taxes on the wealthy and lower taxes on the poor."

Reference: John Edwards, *John Curtin's War: Volume 1: The coming of war in the Pacific and the reinventing of Australia* (2017) 291 Penguin, Random House, Australia.

- The GST is regressive because the tax amount represents a greater proportion of the income of lower income earners than high income earners. The tax reverses the principle of progressive taxation under which the tax rate rises according to the taxpayer's income. When a GST is introduced people like pensioners who previously paid no tax at all are suddenly forced to pay tax.

Reference: Peter Mac, "Government tax agenda: A GST on everything" (5 June 2019) *The Guardian* 1.

- It therefore seems of pivotal importance to the Australian economy that any "crackdown" on work-related tax deductions actually is lawful under Australia's taxation legislation.

Slide 8: High Court of Australia has clearly enunciated what is allowable and what is *NOT*

- What is ***NOT*** a private or capital expense!
- An employee's pursuit of information concerning the modernisation of, or improvements, in his or her art or professional occupation:
- Is part of the constant process of him or her keeping up to date.
- These are activities of a kind which skilled professions call upon those who practise any such skilled profession to pursue.
- It is simply a false analogy to treat incurring expenses of this nature by a professional as equivalent to the acquisition of something of an enduring nature and therefore capital.

Reference: *Commissioner of Taxation v Finn* (1961) 106 CLR 60.

Slide 9: *Commissioner of Taxation v Finn* (1961) 106 CLR 60 – the facts and the issue

- A deduction was claimed by a professional officer in the service of the Government of Western Australia.
- The Government of Western Australia employed him on a salary.
- His claim was that he incurred the expense of travelling in order to better fit himself to perform the work which the Western Australian Government required of him.
- It was overseas travel during leave for purpose of bringing him up to date with trends in architecture and for bettering prospects of future promotion -
- His claim was to deduct the travel expenses
- It was important that officers and employees engaged at a salary in the exercise of a skilled profession should not be in a worse position in respect of the costs of better equipping or qualifying themselves in point of knowledge and skill than are those exercising the same profession as a calling remunerated in fees paid by clients or by the members of the public who, under whatever style, enlist their services.
- The issue must be whether the expenditure was incurred in gaining or producing the assessable income.

Slide 10: Per Dixon CJ at pages 68 and 69

- The pursuit of information concerning the modernisation or improvements in an art or professional occupation or employment is part of the constant process of keeping up to date which skilled professions call upon those who practise them to pursue.
- It is simply a false analogy to treat such a professional taxpayer incurring expenses of this nature as engaged in the equivalent of the acquisition of something of an enduring nature and therefore capital.
- You cannot treat an improvement in the knowledge of a professional man as the equivalent of the extension of plant in a factory.
- Unfortunately, skill and knowledge of most arts, sciences and professions are not permanent possessions: they fade and become useless unless the art, science or profession is constantly pursued, nourished and revived.
- They do not endure like bricks and mortars.
- Nor is there any requirement in either limb that assessable income has to be gained or produced in the current year when expenses have been incurred.

Slide 11: Per Kitto J at pages 69 and 70

- Employment in an academic or professional occupation means holding an office of a kind which by its nature makes it incumbent upon the officeholder or other academic or professional employee much more than the performance of set duties at set times.
- Its professional status implies an obligation of progressive acquaintance with a living and developing art or profession.
- These persons therefore must avail themselves of such opportunities as might arise to add, in the interests of those seeking their skilled services from time to time, even if also in their own interests, to their knowledge and understanding of the kind of matters on which they are employed or otherwise engaged.
- In making investigations and studies which they pursue, they are acting within the scope of their office and profession, and therefore in the gaining of their salary or fees.

Slide 12: Per Windeyer J at page 70

- A taxpayer who gains income by the exercise of his skill in some profession or calling and who incurs expenses in maintaining or increasing his or her learning, knowledge or experience and ability in that profession or calling necessarily incurs those expenses in carrying on his or her profession or calling.
- Whether he or she be paid fees by different persons seeking his or her skilled services from time to time, or be paid a regular salary by one person to exercise his or her skill, matters not.
- Moreover, it would simply be wrong to assume that an employer or services acquirer is so indifferent to its rights and prospects in its service of such a taxpayer as not to be affected by the true measure of those attainments.
- Outgoings incurred for the genuine purpose of acquiring or maintaining knowledge and skills in a vocation do not become an outgoing "of a private nature" simply because the taxpayer got pleasure and satisfaction in increasing his or her knowledge and attainments.

Slide 13: Enterprise Agreements pertinent to application of High Court decision in *Finn*

- Enterprise agreements are in force throughout the university sector in Australia.
- Enterprise agreements commonly provide that:
- Academics who aspire to retain, or be promoted to, any higher-level appointment:

- Must demonstrate that they: "typically have achieved international recognition through original, innovative and distinguished contributions to their field of research, which are recognised as outstanding".

Slide 14: Research: core to University status

- "The objects of the University include: to undertake scholarship, pure and applied research, invention, innovation, education and consultancy of international standing and to apply those matters to the advancement of knowledge and to the benefit of the wellbeing of the Victorian, Australian and international communities."

Reference: *University of Melbourne Act 2009* (Vic), section 5(c).

Slide 15: Global dimensions of research

- Australia has reclaimed its place in the top 10 countries for high-quality science research, according to the latest Nature Index due for global release tomorrow.
- Nature Index named Queensland University of Technology as the biggest improver among Australian universities from 2015 to 2018.
- Nature Index measured the number of scientific papers published in 82 leading journals in the areas of life science, physical sciences, earth and environmental sciences, and chemistry. The journals are chosen by committees of experts, aided by a global survey of leading science researchers.
- The index measured the number of papers published in the 82 journals by author or institution.
- Because researchers usually work in teams, each author on a paper is credited with an equal fraction of the whole paper. Institutional scores are calculated from the fractional counts of their affiliated researchers.
- Among Australian universities, the top improvers in volume of quality research were the University of Queensland in life sciences, Griffith University in physical sciences, Curtin University in earth and environmental sciences, and the University of New South Wales in chemistry.

Reference: Tim Dodd, Higher Education Editor, "Research surge lifts the nation back into top ten" (Wednesday, 19 June 2019) *The Australian* 26.

Slide 16: ARC on what required high-level research outcomes now entail in today's university

- Professor Therese Jefferson, Executive Director, Social, Behavioural and Economic Sciences, Australian Research Council.
- Keynote address to the 2019 Annual Conference of the Australasian Tax Teachers' Association Annual Conference on Thursday, 17 January 2019 at Curtin University in Perth, Western Australia.
- Professor Jefferson emphasized the importance of academics in the modern university undertaking:
- "Interdisciplinary research";
- A term the ARC uses:
- "To describe research approaches that do not fit within a traditional single disciplinary structure".
- Consequently, an academic's work-related expenses continue to be deductible whenever an expense pertains to anything outside the academic's core discipline where it does pertain to multi-disciplinary research of a kind required by the Australian Research Council.

Slide 17: Illustration of multi-disciplinary research of a kind required by ARC

- Bioarcheologist Ronika Power subjects ancient bones and tissue to X-rays and CT scans, DNA and isotopic analysis, 3D geometric morphometrics and paleopathological analyses, then adds knowledge of architecture, philosophy, artworks, texts and environmental evidence to build a picture of prehistoric societies that might inform modern ones.
- "Bioculturual archeology, a subset of bioarcheology, interprets scientific data from human remains in conjunction with every other aspect of the archeological record, bringing it all together to form a new holistic understanding of the experiences of individuals and groups from past populations," Associate Professor Power in Macquarie University's Department of Ancient History said of her combination of skills.
- The interleaving of humanities with science interested the Australian Academy of the Humanities, which last week awarded Associate Professor Power the Max Crawford Medal for 2019.
- The Academy says: Her research focuses on cultural responses to human health and disease, climate change, mass migrations and violence, particularly pertaining to prehistoric periods across Africa and the Mediterranean."

- Associate Professor Power: "We're challenging the notion that science and culture are subjects that should be studied independently of each other. When combined, they have even greater power and potential for positive social change."
- The Australian Academy of the Humanities says the Crawford Medal is Australia's most prestigious award for achievement and promise in the humanities.
- It is named for Max Crawford, professor of history at the University of Melbourne from 1937 to 1970.

Reference: Jill Rowbotham, Higher Education Writer, "Arts, science mix to open doors to the past" (Wednesday, 19 June 2019) *The Australian* 26.

Slide 18: Complex mix of requirements for modern Australian university

- The Australian National University still leads the country in the annual QS World University Rankings but has fallen by five rankings to 29th overall, while 24 of the nation's 35 universities measured in the 2020 rankings recorded an improvement.
- A survey of 44,000 employers rated the University of Melbourne as the most desirable Australian hiring destination and it was 21st overall in the world.
- The list produced by global higher education consultancy QS Quacquarelli Symonds ranks 1000 universities on academic reputation, graduate employability, staff-student ratio, research performance, employer reputation and internationalization.

Reference: Jill Rowbotham, "More ups than downs in our QS rankings" (Wednesday, 19 June 2019) *The Australian* 27.

Slide 19. Employers expect universities to have their graduates job-ready globally

- On reputation for employable graduates, Melbourne University is No 21 in the world, based on comments from 44,000 companies that were asked about the job-readiness of graduates.
- Sydney University, the University of New South Wales and Monash University are in the top 50 global universities for employability.

Reference: Robert Bolton, Education Editor, "Melbourne Uni still leads in jobs rankings" (Wednesday, 19 June 2019) *Australian Financial Review* 10.

Slide 20: Requirement for casual employees to be engaged in pertinent trade or profession

- Emphasis in today's university on achieving successful employment outcomes for graduates.
- A condition of casual employment therefore usually is that the casual academic be engaged in the trade or profession in respect of which he or she is employed to train students.
- In this regard, the *University of Melbourne Act 2009* (Vic) provides that: "The objects of the University include … to provide vocational education and training" and "to equip graduates of the University to excel in their chosen careers".
- The word "business" is defined in the *Income Tax Assessment Act 1997* (Cth) so that: "***"business"*** includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee."
- Can you be "employed" and be in "business" at the same time in identical or similar trades or professions?
- E.g. can you be employed as a professor of surgery at Melbourne University and in practice as a surgeon in operating theatres throughout major Melbourne hospitals?
- E.g. can you be employed by a TAFE Institute to train students in carpentry and be working as a carpenter in your own business?

Slide 21: Illustration of need for non-commercial loss provisions

- In *Murtagh v Federal Commissioner of Taxation* (1984) 54 ALR 313, the taxpayer was employed by the Australian Wool Corporation as its Manager, Human Resources.
- The taxpayer also carried on horse breeding activities completely unrelated to this employment claiming a deduction against employment income for losses on trading in this business for the 1980 tax return.
- The Commissioner disallowed the deduction on the ground that the horse breeding activities were not sufficient genuinely to constitute the carrying on of a business.
- The taxpayer objected to the assessment and the objection was disallowed.
- Ultimately, the horses started to win and the parties' positions were reversed.

Slide 22: Does *Murtagh* apply to University employees?

- There is Mr Jordan's crackdown on work-related tax deductions!
- It seems to incorporate a claim that there are now since *Murtagh* non-commercial loss provisions!
- These non-commercial loss provisions supposedly have repealed the general deduction provisions.
- So that all expenses of an academic that otherwise would be deductible generally against his or her university salary must now be quarantined for deduction only against any non-employment "business" fees he or she has earned, wherever the academic has a "profession, trade, vocation or calling" of a kind that frequently has become a condition of his or her academic employment.

Slide 23: *Spriggs v Federal Commissioner of Taxation; Riddell v Federal Commissioner of Taxation* (2009) 239 CLR 1

- The Australian Government Solicitor was the solicitor on the record in these proceedings before the High Court of Australia for the respondent, the Federal Commissioner of Taxation. It was accepted by the parties that there was no significant distinguishing feature between the cases of each appellant.

Slide 24: Spriggs: The facts

- Spriggs was contracted to the Geelong Football Club ("Geelong") in the Australian Football League pursuant by successive AFL Standard Playing Contracts for each of the 2000 to 2004 competition seasons.
- The trial judge had found that each of these AFL Standard Playing Contracts was an employment contract between the football club as the employer and its players as employees. This finding by the trial judge was neither contested on appeal nor reversed by the appellate courts which proceeded accordingly.
- Connors Sports Management Pty Ltd "(Connors") negotiated each of these successive employment contracts for Spriggs after the conclusion of the first employment contract at the end of the 2000 season.
- Evidence was given at trial to the effect that players in the AFL Competition were increasingly being expected to conduct such a "business" as marketing and promoting their own individual sporting careers, images and personalities; and that the AFL Collective Bargaining Agreement and the AFL Player Rules were consistent with this.

- On the evidence, it was found that increasingly a player's prospects of successfully negotiating the continuation of rolling employment contracts depended upon the success of the player's "business" with, as intimated above, the applicable rules, including the employment contracts themselves, providing for the players to be in "business" while also employed.
- During the 2004 season, Connors and Spriggs considered that it might be appropriate for Spriggs to move to another club in the AFL competition. Connors became involved in various negotiations with representatives of a number of clubs towards that end.
- On 31 October 2004 Spriggs then current employment contract with Geelong came to an end. Spriggs therefore remained unemployed until, 9 December 2004, when Spriggs entered into a new employment contract with another club in the form of an AFL Standard Playing Contract with the Sydney Swans Ltd as negotiated by Connor with representatives of that club for the 2005 and 2006 competition seasons.
- Connors issued a tax invoice to Spriggs on 20 December 2004 for its management and promotional services in having successfully negotiated this subsequent employment contract for Spriggs.
- Connors invoiced Spriggs the equivalent of 3% of this base payment totalling **$2,310** including $210 GST. The Federal Commissioner of Taxation contended that this fee was not deductible by Spriggs against his employment income in the year commencing 1 July 2004 and ending 30 June 2005. During this year ended 30 June 2005, Spriggs earned **$641** in his "business" from licensing fees paid to him by the AFL for the use of his image on playing cards in his individual business capacity separate from his employment, as compared with the base payment for the 2005 AFL competition season of **$70,000** provided for in his employment contract with the Sydney Swans.

Slide 25: Spriggs: The issue

- Section 995.1 of the *Income Tax Assessment Act 1997* (Cth) provides that "***"business"*** includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee."
- Was Spriggs only able to deduct **$641** of the total amount of **$2,310** which Connors had invoiced him for, **$641** being the total amount of his "business" earnings in the year commencing 1 July 2004 and ending 30 June 2005?
- Or was Spriggs able to deduct the balance of the total amount of **$2,310** which Connors had invoiced him for, against his substantially higher employment income in the year commencing 1 July 2004 and ending 30 June 2005, where a base payment for the 2005

AFL competition season of **$70,000** was provided for in his employment contract with the Sydney Swans?

Slide 26: Riddell: The facts

- Riddell described his occupation in his tax return for the year ended 30 June 2005 as a "Professional Sportsperson".
- The National Rugby League Competition ("the NRL Competition") is the premier rugby league competition in Australia and New Zealand, conducted by National Rugby League Limited ("the NRL"), a public company limited by guarantee. Sixteen clubs participate in the NRL Competition.
- From 1998, Riddell played for three clubs in the Competition in succession. In each case, he was contracted to play rugby league on a full-time basis pursuant to an NRL Playing Contract between him and his club.
- There was a Collective Bargaining Agreement, between the Rugby League Professionals Association and NRL clubs, which dealt with industrial issues.
- The trial judge had found that each of these NRL Playing Contracts was an employment contract between the rugby club as the employer and its players as employees. This finding by the trial judge was neither contested on appeal nor reversed by the appellate courts which proceeded accordingly.
- The rules and regulations of the NRL Competition, including the "NRL Playing Contract and Remuneration Rules", are determined by the NRL. Under the NRL Playing Contract and Remuneration Rules, any club that participates in the NRL Competition must ensure that the club and its players have complied with those Rules.
- Under the Rules, any person who wishes to participate as a player in the NRL Competition must, among other things, be a party to a current NRL Playing Contract with a club. The NRL Playing Contract is a standard contract. As was agreed in each NRL Playing Contract entered into by Riddell, the NRL Playing Contract and Remuneration Rules were binding on him.
- On 6 June 2001, Riddell entered into an agreement with SFX Sports Group (Australia) Pty Ltd ("SFX"), which had acquired the agency which had negotiated his previous employment contracts. The term of the agreement was five years, and it was in place during the 2005 income year.
- The second recital stated: "The Player desires to exclusively engage the Manager to exclusively manage his affairs as hereinafter set out." Pursuant to clause 1, SFX agreed to provide such services to Riddell as advising the Player in respect of his sporting career and negotiating playing contracts on behalf of the Player.

- Evidence was given at trial to the effect that players in the NRL competition were increasingly being expected to conduct such a “business” as marketing and promoting their own individual sporting careers, images and personalities; and that the NRL Collective Bargaining Agreement and NRL Playing Contract and Competition Rules were consistent with this.
- On the evidence, it was found that increasingly a player’s prospects of successfully negotiating the continuation of rolling employment contracts depended upon the success of the player’s “business” with, as intimated above, the applicable rules, including the employment contracts themselves, providing for the players to be in “business” while also employed.
- Each of the NRL Playing Contracts entered into by Riddell mentioned above was negotiated by SFX or the agency which it had acquired. During the 2004 NRL Competition season, SFX unsuccessfully attempted to negotiate a new NRL Playing Contract for Riddell with representatives of St George.
- Riddell was then granted permission, as required by his contract with St George and the NRL Playing Contract and Remuneration Rules, to negotiate with other clubs in the NRL Competition.
- ASX negotiated on Riddell's behalf with representatives of Parramatta National Rugby League Club Limited ("Parramatta") and another club, and, ultimately, agreed terms with the representatives of Parramatta.
- On 22 June 2004, Riddell entered into an NRL Playing Contract with Parramatta for the 2005 to 2007 NRL Competition seasons. Among other things, it provided for an annual playing fee of **$275,000** for each of those years.
- On 17 November 2004, SFX issued a tax invoice to Riddell. Against an amount of **$19,250**, the notation on the invoice read: "2005 Management Fees" for negotiating Riddell’s 2005 to 2007 NRL Playing Contract with Parramatta. This amount was equivalent to 7% of the annual playing fee under Riddell's 2005/2007 Contract. Including GST of **$1,925**, the total amount payable was **$21,175**.
- The Federal Commissioner of Taxation contended that this fee was not deductible by Riddell against his employment income in the year commencing 1 July 2004 and ending 30 June 2005.
- During the 2005 income year, Riddell earned **$11,394** in his “business” from various promotional activities negotiated by SFX on his behalf, including a television appearance and various sponsorships. By comparison, as intimated above, Riddell’s annual playing fee under his employment contract with Parramatta was **$275,000**.

Slide 27: Riddell: The issue

- Section 995.1 of the *Income Tax Assessment Act 1997* (Cth) provides that "***"business"*** includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee."
- Was Riddell only able to deduct **$11,394** representing the total amount he had earned in his "business" from various promotional activities during the income year, of the total amount of **$21,175** Riddell had to pay to SFX under its tax invoice?
- Or was Riddell able to deduct the balance of the total amount of **$21,175** payable by him to SFX under its tax invoice against his substantially higher employment income represented by an annual playing fee under his employment contract with Parramatta of **$275,000**?

Slide 28: The High Court decision in *Spriggs v Federal Commissioner of Taxation; Riddell v Federal Commissioner of Taxation* (2009) 239 CLR 1

- The High Court of Australia (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) were unanimous in deciding that a contract of employment can no longer be considered in isolation from a pre-existing or concurrent business undertaken by the employee taxpayer.
- The High Court recognized that an employer might require an employee to continue in business conducting certain activities relating to the employment concurrently but separately as part of an ongoing business (e.g. promotional activities, public relations work, television appearances, sponsorships, etc.,).
- Consequently, substantial "business" expenses in excess of "business" income were deductible against the more lucrative greater salary as "employees".
- The High Court held that in such circumstances "business" expenses are deductible against "employment" income, and "employment" expenses are deductible against "business" income, as the expenses had been incurred in respect of the same kind of activities germane both to the "business" and to the "employment".
- The High Court rejected the Commissioner's arguments to the contrary.
- The High Court held that a person can obtain and perform an employment contract as part of, and during the course of, running a business.
- The High Court observed that the definition of "business" in the taxation legislation does not state that a contract of employment cannot form part of a business. What the

definition provides, the High Court said, is that a person will not be taken to be conducting a business *merely because* [the High Court's emphasis] the person earns income under a contract of employment. Something more than that would be required for there to be a business.

- The High Court held that it would be artificial to separate the streams of income from business and employment activities, as argued by the Commissioner. The taxpayers' business activities were inextricably linked to their respective employments; and the taxpayers' respective employments were inextricably linked to their business activities. The employment contracts indeed provided for the continuation of these businesses. The businesses included repeatedly performing the employment contracts as the employment enhanced the businesses.

Slide 29: What the Australian Taxation Office promulgates on non-commercial loss provisions

- The ATO's public rulings on the non-commercial loss provisions of Division 35 of the *Income Tax Assessment Act 1997* (Cth) BEGIN:
- "**You can't claim a loss for a business that is little more than a hobby or lifestyle choice**."
- The ATO's public rulings on the non-commercial loss provisions of Division 35 of the *Income Tax Assessment Act 1997* (Cth) PROCEED:
- Where you have two or more business activities which are "**similar**", they "**may be grouped together when considering the non-commercial loss provisions**".

Slide 30: Mr Jordan continues to treat "employment" and "business" as exclusive of each other

- Surely, when someone, say, who is conducting a carpentry "business" also is "employed" by a TAFE Institute as a carpentry instructor, these are "similar" activities.
- However, Mr Jordan's staff make such claims orally in such a scenario as that, whenever they can identify an expense as relating at all to carpentry, such as a TAFE carpentry instruction manual, it cannot be deducted against "employment" income as a carpentry instructor, but can only be deducted against "business" income earned providing carpentry services to customers and clients.
- Notwithstanding this High Court authority in *Spriggs v Federal Commissioner of Taxation; Riddell v Federal Commissioner of Taxation* (2009) 239 CLR 1, to which he did not refer, in an address delivered to the 34th National Convention of the Taxation Institute of Australia in Hobart on Thursday, 14 March 2019, Mr Jordan repeated that the work-related expense claims of the "individuals' not-in-business" sector (Mr Jordan's words - as if being

an employee and having a related business are incompatible) are the main source of the tax gap.

Slide 31: Very grave ramifications of Mr Jordan's position

- Potentially, there are very substantial ramifications for every university academic who has to be in some form of a "business" as part of his or her employment to make students "job ready".
- E.g., do you want to be operated on by someone who was not trained by a practising surgeon?

Slide 32: Analogy to alleged ATO overriding elected government disallowing research grants

- Robert Gottliebsen, "Just don't say unlosable: Three issues could yet allow Morrison to retain office" (Friday, 7 December 2018) *The Australian* 33:
- And just to remind readers of how entrenched is the ATO's bad behaviour, this week *The Australian Financial Review* used a front-page headline to repeat *The Australian*'s allegations that the ATO was rejecting the small business research grants that have been given by the federal government after careful study.
- My readers will remember that way back in June last year, under the heading "Research and development tax incentives – a dangerous hazard for small enterprise", I warned the small business community to be wary of accepting these government grants to boost Australian innovation because they were against ATO cultural thinking. I urged our elected government to warn anyone accepting these grants that they were in danger of the ATO hitting them hard as part of its anti-small business culture.
- Subsequently, I wrote further articles to reinforce the warning but clearly the ATO, with its total power, can override elected governments in small business issues.

Slide 33: Legal status of personnel employed by Australian Government to work at the ATO

- The Australian Taxation Office is "a non-corporate Commonwealth entity within the Treasury portfolio and serves three Ministers" "led by Chris Jordan AO, Commissioner of Taxation": https://www.ato.gov.au/About-ATO/About-us/Who-we-are/
- The Australian Taxation Office is not a separate body corporate.

- The Commonwealth of Australia is the legal entity which employs or otherwise engages the individual personnel who work in the Australian Government's Australian Taxation Office.
- There is the metaphor used by Justice Fullagar in *Australian Communist Party v The Commonwealth of Australia* (1951) 85 CLR 1, at258 that "a stream cannot rise higher than its source" which is applicable here.
- Section 51 of the Constitution of the Commonwealth of Australia pertains to the powers of the Parliament of the Commonwealth:
- "The Parliament shall, subject to this Constitution, have powers to make laws for the peace, order and good government of the Commonwealth with respect to … Taxation, but so as not to discriminate between States or parts of States".
- Individuals engaged by the Commonwealth of Australia to work in the Australian Government's Australian Taxation Office do not have any licence to make claims for payments in respect of "taxes" which conflict with the law, including which conflict with the express terms of public rulings which the Commonwealth of Australia has promulgated under the Australian Government's Australian Taxation Office name.

Slide 34: Conclusion

- University research is being financially squeezed:
- First, by constantly reducing Government funding; and
- Second, by requiring University academics increasingly to bear the applicable costs.
- The changing industrial environment in the university sector can impact on whether work-related tax deductions will continue to be available at all for academics employed in the sector; and,
- If continuing to be somewhat available, the extent of any such availability,
- Some important ramifications of which are detailed above; and
- Which therefore must be explored.
- This exercise should Include the lawfulness or unlawfulness of arbitrarily denying work-related tax deductions;
- The negative effects of any such illegality on the Australian economy; and
- The negative effects more broadly on the Australian economy of the financial squeeze on University funding,
- Which financial squeeze includes requiring University academics to bear the cost burdens, including in respect of "tax" from arbitrary denial of work-related deductions.