

Interpreting the Australian income tax definition of ‘ordinary income’: ritual incantation or analysis, when examined through the lens of early twentieth century linguistic philosophy?

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Abstract

This article examines the interpretation of subsection 6-5(1) of the *Income Tax Assessment Act 1997* (Cth). The High Court of Australia has concluded that subsection 6-5(1) should be understood upon the basis that it adopts some or all of the elements of the oft-quoted dictum of Sir Frederick Jordan in *Scott v Commissioner of Taxation*. The article shows that different decisions of the High Court of Australia have adopted different statements of the elements of the dictum that ought to be referred to, and some decisions of the High Court have ignored the dictum altogether. Moreover, no High Court decision has analysed the statement of Jordan CJ. This article addresses this absence of analysis by offering an analysis of that dictum having regard to the vibrant, contemporaneous linguistic philosophy of the early twentieth century. This analysis suggests that Sir Frederick Jordan’s dictum is vague and appears to incorporate unresolved contradictions.

Key words: income tax law, ordinary income, statutory interpretation, linguistic philosophy

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1. INTRODUCTION

At the heart of the Australian income tax one of the core assessing provisions – subsection 6-5(1) of the *Income Tax Assessment Act 1997* (Cth) – states that 'your assessable income includes income according to ordinary concepts, which is called ordinary income'. This 'plain language' definition was adopted in the context of common public acknowledgement that a clearer definition of 'income' was needed.¹ However, statutory guidance regarding the meaning of ordinary income is extremely limited.² Likewise, the extrinsic materials provide no clear guidance upon the meaning of the statutory terms.³

In the course of considering subsection 6-5(1), the High Court of Australia has emphasised the significance of the statement of Jordan CJ in *Scott*⁴ and has indicated that several elements of his Honour's statement 'are no mere matters of ritual incantation; they identify the essential nature of the inquiry'.⁵ Somewhat confusingly, different majority decisions in the High Court have adopted different statements of the elements to be extracted from Sir Frederick Jordan's statement⁶ or have even ignored this 'essential nature of the inquiry' altogether.⁷ This confusion is also manifest in the specification of the test in the lower courts,⁸ in extrajudicial discussion⁹ and in extrajudicial scepticism as to the basis upon which amounts are characterised for income

¹ Joint Committee of Public Accounts, Commonwealth Parliament, *An Assessment of Tax*, Report No 326 (1993) 76. Prior to the enactment of the *Income Tax Assessment Act 1997* (Cth), Australian income tax legislation at both federal and state levels referred to the general concept of 'income' without comprehensively defining that term for the purposes of the income tax legislation. The *Income Tax Assessment Act 1915* (Cth) referred to income, providing an inclusive definition in section 3 which stated that "'Income" includes interest upon money secured by mortgage of any property in Australia'. Section 3 of the *Income Tax Assessment Act 1922* (Cth) expanded this inclusive definition by including within the concept of 'income' some payments to members of cooperatives while excluding rebates paid to members of cooperatives as well as the component of a purchased annuity that is attributable to the purchase price of that annuity. Section 25 of the *Income Tax Assessment Act 1936* (Cth) referred to 'income'. For the purpose of differentiating between different classes of income, all of these earlier Acts regarding income tax defined 'income from personal exertion' and 'income from property'. However, as noted in many case decisions, these definitions included 'income' on both sides of the definition and therefore did not define income itself.

² Note the definitions of 'income from personal exertion' and 'income from property', which generally have been regarded as providing little guidance regarding the concept of income because they refer to income on both sides of the definition: per Windeyer J in *Scott v Federal Commissioner of Taxation* (1966) 117 CLR 514, 524 (citing Jordan CJ in *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219); note, however, the apparent reliance upon the definition of income from personal exertion in *Stone*, without reference to the earlier case law and without close analysis of the limitations of the statutory definition: *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 296-297 [17].

³ Chief Justice Robert French, 'Law – Complexity and Moral Clarity' (2013) 40(6) *Brief* 25, 25; the limited usefulness of the Explanatory Memorandum is critically assessed in a second article under preparation by this author.

⁴ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 220.

⁵ *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639, 661 [64].

⁶ Discussed in section 2 of this article.

⁷ *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656.

⁸ *Federal Commissioner of Taxation v McNeil* [2005] FCAFC 147, 144 FCR 514, per French J, [40]; cf the fuller statement of Sir Frederick's approach by Dowsett J in *McNeil*, [2005] FCAFC 147 [207].

⁹ G T Pagone, 'Income and Capital Distinction', paper delivered at the South Australian Convention of the Taxation Institution of Australia, 9 May 2009, 2, citing *Scott* as authority for the process for determining income specified by Dixon J in *The Commissioner of Taxes (South Australia) v The Executor Trustee and Agency Company of South Australia Limited (Carden's Case)* (1938) 63 CLR 108, 152.

tax purposes.¹⁰ Writing extrajudicially, Chief Justice French opined that judicial formulations of the income concept were 'broad, but almost content-free, generalisations'.¹¹ Referring to the High Court decision in *McNeil*,¹² his Honour observed that the decision illustrates how '[a] simple broadly expressed provision on the one hand attracts a plethora of judicial exposition such that some would say the true meaning of the statute, if it has one, is buried in the cases'.¹³

This confusion regarding the terms that subsection 6-5(1) is taken to incorporate, and also the meaning of those terms, is difficult to dispel because of the absence of close analysis of the elements of Sir Frederick Jordan's statement in the High Court decisions that apparently adopt that statement.¹⁴ The absence of such analysis is cause for questioning the High Court's observation that reference to the Jordan CJ definition is not a matter of ritual incantation.¹⁵ If Sir Frederick Jordan's statement were to be analysed, what would this analysis reveal? Would it reveal what might hitherto have been the hidden elements of the concept of income according to ordinary concepts? Or would such analysis expose irresolvable tensions between the elements of that statement?

This article takes the High Court's rejection of ritual incantation seriously by critically analysing the elements of Sir Frederick Jordan's statement. The purpose of this analysis is to determine whether that statement provides secure foundations for the concept of income according to ordinary concepts. The reference to 'the essential nature of the inquiry'¹⁶ in *Montgomery* implies that firm intellectual footings can be found in Sir Frederick Jordan's statement. The narrative here is of an objectively specified inquiry that constitutes the foundation for identification of the 'ordinary income' component of the Australian income tax base.¹⁷ This narrative simultaneously draws upon and reinforces the 'orthodox' narratives of the rule of law and judicial constraint, which

¹⁰ 'I suspect, but can not verify, that most judges decide first the outcome they wish to reach and then use the appropriate maxim of interpretation to justify it, rather than first applying the maxim of interpretation to reach the outcome': Justice D Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72(9) *Australian Law Journal* 685, 686.

¹¹ French, above n 3, 25.

¹² *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656.

¹³ French, above n 3, 28.

¹⁴ In another paper my review of relevant High Court decisions indicates that no such analysis is to be found in the respective majority judgments in those case decisions.

¹⁵ See, for example, *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 73 [55]: 'British Gold Fields is a case whose authority stems more from repetition than from analysis', per Gleeson CJ, Gummow, Hayne and Crennan JJ. It is possible that this close analysis has been undertaken but not written into the relevant High Court judgments, in which case those case decisions do not transparently reflect all of the significant logical steps in reasoning to the conclusions reached. See, for example: Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787; Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494; Stephen Gageler, 'Why Write Judgments?' (2014) 36(2) *Sydney Law Review* 189.

¹⁶ *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639, 661 [64].

¹⁷ See, for example, Matthew Kramer, *Objectivity and the Rule of Law* (Cambridge University Press, 2009) ch 2; Larry Alexander, 'The Objectivity of Morality, Rules, and Law: A Conceptual Map' (2013) 65(2) *Alabama Law Review* 501; Nicos Stavropoulos, *Objectivity in Law* (Oxford University Press, 1996). For the view that 'legislative intention' is the relevant 'object', see Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39.

depict judges applying more or less determinate law in a manner consistent with the rule of law.¹⁸

My argument in this article is that judicial analysis of Sir Frederick Jordan's judgment is necessary if the High Court is to move beyond ritual incantation of the statement that apparently specifies the essential nature of the inquiry into the meaning of income. Further, I suggest that such analysis is best undertaken through the lens of the vibrant debate regarding linguistic philosophy which emerged as Western philosophy worked itself through its 'linguistic turn' from the late nineteenth century.¹⁹ That debate included close consideration of different accounts of linguistic meaning. On one view advanced in the course of this debate, any linguistic element (a word, phrase, sentence, etc) embodied the formal specification of its meaning. Another view was that the meaning of any linguistic element was to be found in the conventional usage of that element. To be clear, this article is not presenting the argument that the dictum of Jordan CJ in *Scott* is directly or indirectly referring to this philosophical literature. The judgments of Jordan CJ do not expressly refer to this philosophical literature, and nor does biographical material expressly state that Jordan CJ was aware of this literature notwithstanding his keen interest in literature.²⁰ However, the reason for referring to this philosophical literature is that it expresses most clearly the different views regarding sources of linguistic meaning that are commonly referred to by us all when we examine the nature of linguistic meaning. When we discuss linguistic meaning we commonly refer to these different sources of meaning. We might say 'we use "income" to mean ...' and we might also say 'the semantic meaning is ...'. The semantic and pragmatic strands of linguistic philosophy are not distinctly 'philosophical' – they echo common understandings of competing foundations of linguistic meaning.

When viewed through this lens, it can be seen that Sir Frederick Jordan's statement gains rhetorical force from the apparent synthesis of the intellectual foundations that underpinned different strands of early twentieth century linguistic philosophy and also common understandings of the foundations of linguistic meaning. I argue that this rhetorical force should be tested by critically assessing whether Sir Frederick successfully threaded disparate strands into a durable fabric that underpins a stable and determinate meaning of 'income' or 'ordinary income'.²¹ In undertaking this analysis, I argue that the elements of Sir Frederick's statement are ill-defined and quite possibly reflect fundamentally irreconcilable approaches to specifying the nature of the inquiry into income and also the nature of income itself. The significant practical and theoretical

¹⁸ French, above n 3, 30. See also Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20(1) *Public Law Review* 26, 27.

¹⁹ For a useful critical overview of the development of linguistic philosophy over the latter part of the nineteenth century and the first half of the twentieth century see P M S Hacker, 'The Linguistic Turn in Analytic Philosophy' in Michael Beaney (ed), *The Oxford Handbook of the History of Analytic Philosophy* (Oxford University Press, 2013) 926.

²⁰ See J M Bennett, *Portraits of the Chief Justices of New South Wales 1824-1977* (John Ferguson, 1977); J M Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, 1974); Maurice Byers, 'Recollections of Sir Frederick Jordan' (1991)(Winter) *Bar News* 13. This material notes that Sir Frederick Jordan had a keen interest in literature, but does not directly refer to any awareness of the philosophy of language.

²¹ Hacker, above n 19, noting that analytical school may still have several decades of life. With respect to tax jurisprudence, there is ongoing interest in Wittgenstein's work, which was a key legacy of the linguistic turn: Bret N Bogenschneider, 'Wittgenstein on Why Tax Law is Comprehensible' [2015] 2 *British Tax Review* 252.

consequences of these conclusions are noted briefly in the conclusion of this article and chart a future research program.

2. SIR FREDERICK JORDAN'S STATEMENT IN *SCOTT*

Sir Frederick Jordan's statement was made in relation to the former New South Wales income tax legislation.²² That legislation imposed tax upon 'taxable income'²³ which was defined to be the amount of assessable income left after taking away allowable deductions.²⁴ Assessable income was defined to be the gross income after excluding amounts of income specifically exempted.²⁵ In effect, the concept of income was left undefined because 'income' was defined to mean 'income derived ... directly or indirectly ...'.²⁶ In *Scott* the taxpayer was appointed to a statutory Board and that Board was subsequently dissolved by the *Meat Industry (Amendment) Act 1932*. That Act also stated that members of the Board should be compensated in the amount that they would have received had their services been terminated otherwise than according to law. The taxpayer received a lump sum of £7,000 as compensation. By way of case stated, the New South Wales Court of Appeal was asked to determine whether the compensation received by Mr Scott was 'income'.

In this context, and in deciding that the lump sum was not 'income', Jordan CJ²⁷ observed that the assessment of 'income' appeared in the context of income tax legislation, and continued:

The word 'Income' is not a term of art and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to [be applied].²⁸

This dictum addresses two fundamental matters: the subject of the inquiry into the ordinary meaning of a statutory term and also the process by which the ordinary meaning is extracted from examination of that subject matter. Different interpretations of the dictum identify differing specifications of the subject matter and the process.

On its face, the first part of the dictum describes a four-stage inquiry, the logical order²⁹ of which is:

1. determine whether the statutory language is a 'term of art';

²² *Income Tax (Management) Act 1928* (NSW).

²³ *Income Tax (Management) Act 1928* s 8(1).

²⁴ *Income Tax (Management) Act 1928* s 4.

²⁵ *Income Tax (Management) Act 1928* s 4.

²⁶ In relation to the definitions of 'income from personal exertion' and 'income from property', see comments at n 2, above.

²⁷ Stephen and Street JJ agreeing on this point. Stephen J decided that the amount was assessable as a 'retiring allowance'.

²⁸ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219.

²⁹ As opposed to the order in which the stages of the inquiry are identified in the dictum of Jordan CJ.

2. if the statutory language is not a 'term of art', such as the statutory reference to 'income', identify the set comprising 'ordinary concepts and usages';
3. review this broad set in order to identify receipts of a form that are comprehended as income under ordinary concepts and usages; and
4. consider the principles that are applied for determining how much of a receipt that fits a requisite form 'ought to be treated as income'.

Thus, for statutory terms that are not 'terms of art', the subject matter comprising 'ordinary concepts and usages' is analysed for the purpose of identifying the forms and principles governing inclusion in the relevant set. These forms and principles are then applied to identify members of the set identified by the statute (such as 'income'). This approach examines what might be described as the logical fabric of our language that may lie 'beneath' or be seen to underpin the meaning of terms according to ordinary concepts and usages.

However, on a different interpretation, the proviso in the latter part of Sir Frederick Jordan's statement suggests that different subject matter and a different process should be adopted. This proviso refers to identifying amounts that are income 'in ordinary parlance'. On one interpretation of this approach, a judge would examine 'ordinary parlance' to produce a list of receipts that have come to be labelled as 'income' 'in ordinary parlance'. On this interpretation, and in contrast to the analytical approach identified in the first part of the dictum, the second part of the statement focuses upon the 'surface meaning' that is presumably obvious to any observer of ordinary parlance prepared to compile a list of things referred to by each linguistic 'label'.³⁰ This interpretation appears to be supported by Sir Frederick Jordan's subsequent observations, arrived at without any preceding express analysis of 'income', that Mr Scott's compensation sum was not 'income' according to its 'ordinary'³¹ and/or according to its 'natural'³² meaning. An observer could reasonably interpret these observations to imply that 'income' is a label that need not be analysed in order to identify the set of rules governing inclusion in the set 'income' because the term 'income' may have come to be applied to all sorts of things by convention. On this reading of the judgment, we do not need to analyse the meaning of 'income' to arrive at the conclusion that 'income' does not refer to a compensation sum such as Mr Scott's, because we intuitively know that the label would never be applied to such a sum 'in ordinary parlance'.

A third interpretation of Sir Frederick's reference to 'ordinary parlance' could be that this is no more than a shorthand reference to the analytical extraction of forms/principles described in the first part of the statement. This approach would overcome the possibility of any inconsistency between the first and second parts of the statement, but only by adopting an interpretation of 'ordinary parlance' that appears to contradict the majority's decision in *Montgomery*, in which the majority appeared to treat the two elements as though they were not substitutable.

These tensions within Sir Frederick's statement will be examined more closely in section 5 of this article. However, for present purposes suffice it to say that Jordan CJ

³⁰ See the discussion of the naming theory of meaning in section 4.2.

³¹ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219.

³² *Ibid.*

might be taken to have contemplated two quite different approaches to identifying the meaning of 'income'. Before turning to further analysis of this statement, it is appropriate to review the adoption of the statement of Jordan CJ by the High Court of Australia in some decisions upon the meaning of 'ordinary income' over the past two decades.³³

3. THE HIGH COURT'S ADOPTION OF THE JORDAN CJ DEFINITION OF 'INCOME' WHEN INTERPRETING SUBSECTION 6-5(1)

In the course of considering the definition of ordinary income in subsection 6-5(1), in some decisions the High Court has emphasised the significance of the statement of Jordan CJ. The purpose of this section of the article is to establish two propositions with respect to the adoption of Sir Frederick's statement in various High Court decisions. The first proposition is that the elements of Sir Frederick's statement have not been analysed by the High Court. Following from this first proposition, the second proposition is that this absence of analysis has allowed different judicial paraphrases of Sir Frederick's statement to be adopted without criticism. This confusion about the substantive content of Sir Frederick's statement is only compounded by the fact that some High Court decisions dealing with the meaning of ordinary income have not referred to Sir Frederick's statement at all, leaving open the possibility that Sir Frederick's statement may not be as significant as other High Court decisions suggest.³⁴

In dealing with the application of the former section 25(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), the majority's joint judgment in *Montgomery* observed that counsels' submissions had been framed upon analogies to decided cases, and continued:

That approach is often helpful, but resort to analogy should not be permitted to obscure the essential nature of the inquiry which is to determine whether 'in ordinary parlance' the receipt in question is to be treated as income. As Jordan CJ made plain, the references to 'ordinary parlance' and to the 'ordinary concepts and usages of mankind' are no mere matters of ritual incantation; they identify the essential nature of the inquiry.³⁵

³³ For a review of Australian decisions in which the dictum of Jordan CJ was directly referred to, see Mark Burton, 'A review of judicial references to the dictum of Jordan CJ, expressed in *Scott v Commissioner of Taxation*, in elaborating the meaning of "income" for the purposes of the Australian income tax' (2017) 9 *Journal of Australian Taxation* 297.

³⁴ This article clearly proceeds upon the basis that judicial words within a judgment have a meaning and that this meaning is important to the legitimacy of judgments. The legitimacy of judgments, according to the widely accepted understanding of law framed in terms of 'legal objectivity', exists because a judgment explains how the outcome of the case was arrived at 'according to law'. The law is an object which pre-exists any judgment and so the judge discovers the relevant law and applies that law to the facts of the particular case. Taking judicial words in judgments seriously, by analysing those words in pursuit of an understanding of the judicial discovery of the statutory meaning, is routine in legal analysis. Acknowledging this significance of judicial words in judgments is consistent with the principle that judicial words in a judgment do not supplant the meaning of statutory terms, but rather reveal how the meaning of statutory terms was discovered and how that meaning was applied in a particular case. In this section of the article, I discuss the different judicial descriptions of the meaning of the dictum of Jordan CJ that have been adopted in judgments of the High Court. In doing so, I identify differing verbal formulations that appear to describe the meaning of that dictum. I finish this section by noting that this proliferation of judicial formulations of the meaning of Sir Frederick Jordan's dictum is problematic if we accept the proposition that the statutory text in subsection 6-5(1) only has one meaning which, according to the widely accepted account of legal objectivity, pre-exists any case decision.

³⁵ *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639, 661 [64].

This statement of the majority in *Montgomery* indicates that Sir Frederick's statement should be the starting point for any consideration of whether a particular amount is 'income'. However, according to its terms, this statement differs from that of Jordan CJ in several important respects.

First, *Montgomery* does not expressly refer to the forms/principles analysis described by Jordan CJ.

Second, *Montgomery* appears to identify several quite different and incomparable 'essential natures of the inquiry' in the statement of Jordan CJ. The first such specification of the relevant inquiry is expressly identified as the identification of whether 'in ordinary parlance' a receipt is '*to be treated as income*'. However, this statement could be interpreted in different ways. This could be a reference to the forms/principles analysis of Jordan CJ outlined above. Alternatively, the statement could be a reference to the 'surface meaning' approach described by Jordan CJ in the second part of his Honour's statement, also outlined above. As a further possible alternative, could 'is to be treated as income' be taken to mean that the courts will determine whether a particular amount 'is to be treated as income' and that this *stipulation* of meaning thereafter will be adopted in ordinary parlance?

The second essential nature of the relevant inquiry identified in *Montgomery* requires reference to 'ordinary parlance' and to 'the ordinary concepts and usages of mankind'. However, although the majority in *Montgomery* stated that these phrases describe the nature of the inquiry, these phrases do not describe a process of inquiry but do potentially identify subjects of an inquiry. The phrases identify what is to be examined without specifying the process of examination. Moreover, the two phrases are not synonymous. 'Ordinary concepts and usages' could include written usages, for example, and 'parlance' generally would not refer to written usage.³⁶ Given this potential conflict, the relationship of these two elements should have been made clear in *Scott* and/or in *Montgomery*. In the absence of any judicial elaboration of these potentially inconsistent elements, the application of Sir Frederick's statement remains problematic after *Montgomery*.

In *Federal Commissioner of Taxation v Stone*³⁷ the High Court was called upon to determine whether receipts of a sportsperson were 'ordinary income' for the purposes of section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997). The 'plain language' definition of 'ordinary income' in subsection 6-5(1) was quoted at the beginning of this article. One question that arose was whether this definition incorporated a change to the law. The former legislation merely referred to 'income' while the new legislation defined the new statutory concept of 'ordinary income' to be 'income according to ordinary concepts'. There was no comparable 'old law' definition of income and the definition of 'ordinary income' clearly did not duplicate all of Sir Frederick's statement.

In the course of deciding that Stone's receipts were ordinary income, the joint judgment referred to ITAA 1997, section 1-3³⁸ and immediately concluded that subsection 6-5(1)

³⁶ See the discussion of this matter in section 4.8 below.

³⁷ (2005) 222 CLR 289.

³⁸ The High Court did not analyse the text of section 1-3.

was an 'evident reference'³⁹ to the decision of Jordan CJ in *Scott*. Sir Frederick's statement in *Scott* was then extracted in full.

Later in the joint judgment in *Stone*, the plurality noted that the existence of a business activity 'perhaps very often' will carry with it the conclusion that the proceeds of that business activity are ordinary income.⁴⁰ However, the joint judgment appears to have adopted a definition of ordinary income that is not necessarily supported by the text of subsection 6-5(1) and nor by the statement of Sir Frederick Jordan:

Asking whether a person was carrying on a business may therefore be useful and necessary. But the inquiry about "business" must not be permitted to distract attention from the question presented by both the 1936 Act and the 1997 Act. That question seeks to identify whether a receipt is, or receipts are, "income". As s 6-5 of the 1997 Act makes plain, that requires consideration of whether the receipt in question is income *in accordance with "the ordinary concepts and usages of mankind"* (emphasis added).⁴¹

With respect, the adoption of Sir Frederick's statement in *Stone* is open to criticism. One cause for criticism is that the text of subsection 6-5(1) is substantially different to the text of Sir Frederick's statement. Given this difference, the conclusion that subsection 6-5(1) adopted all of Sir Frederick's statement does not necessarily follow from the premise that subsection 6-5(1) incorporates one phrase from Sir Frederick's statement. If anything, there is a good case for concluding that the more narrowly framed statutory text should prevail over the inquiry more fully expressed by Sir Frederick,⁴² rather than taking the statutory text to have adopted the entire dictum of Jordan CJ.

Moreover, the joint judgment in *Stone* did not undertake any express textual analysis of ITAA 1997, section 1-3, but stated that '[b]ecause the 1997 Act contains provisions of the 1936 Act in a rewritten form, construing the word "income" in the 1997 Act requires reference to the definition in s 6(1) of the 1936 Act of "income from personal exertion"'.⁴³ This statement indicates that the majority accepted that the provisions of the ITAA 1997 necessarily had the same meaning as the comparable provisions found in the ITAA 1936. However, this conclusion is inconsistent with section 1-3 itself,⁴⁴ the statutory framework of the ITAA 1997⁴⁵ and the relevant statement in the Explanatory

³⁹ *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 294 [8].

⁴⁰ *Ibid* 296 [16].

⁴¹ *Ibid*.

⁴² See, for example, *FCT v Slater Holdings Limited* (1954) 15 CLR 447; Gageler J in *Baini v The Queen* [2012] HCA 59; 24 CLR 469 [43].

⁴³ *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 296-297 [17]. This statement appears to be a reference to the earlier statement that 'section 1-3(1) of the 1997 Act provides that the 1997 Act contains provisions of the 1936 Act 'in a rewritten form': *ibid* [9].

⁴⁴ Beginning with the conditional conjunction 'if', subsection 1-3(2) requires consideration of whether it is true that the ITAA 1997 appears to have expressed the same idea as that which was expressed in the ITAA 1936. On the reading of subsection 1-3(1) adopted in *Stone*, the test set out in subsection 1-3(2) would necessarily be answered in the affirmative. In this case, why would the legislature have used the conditional 'if'?

⁴⁵ Section 15-2, for example, clearly recognises that it is subordinate to the general income rule in section 6-5(1). By contrast, the former comparable rule (ITAA 1936 s 26(e)) took priority over the former general assessing rule in ITAA 1936 s 25(1).

Memorandum accompanying the Bill for the ITAA 1997.⁴⁶ Deciding that section 1-3 applies without analysing its terms first is contrary to the description of orthodox interpretative practice set out in various High Court decisions.⁴⁷ This is particularly significant given the rebuttable presumptive rule of statutory interpretation that different statutory words are presumed to be intended to have a different meaning.⁴⁸

The joint judgment in *Stone* refers to the decision in *Montgomery* in support of other propositions regarding the concept of ordinary income.⁴⁹ However, the joint judgment in *Stone* does not directly refer to the consideration of *Scott* in *Montgomery*. This oversight is extraordinary, given the observation in *Montgomery* that the decision in *Scott* specifies the essential nature of the relevant inquiry into the nature of income.

Finally, at different points the joint judgment appears to adopt different elements of Sir Frederick's statement. At paragraph 8 the joint judgment extracted Sir Frederick's statement in full, which suggests that the entire statement ought to be adopted for the purpose of identifying 'income'. At paragraph 16, extracted above, the joint judgment appears to adopt just one part of Sir Frederick's statement: 'income in accordance with "the ordinary concepts and usages of mankind"'.⁵⁰

In *FCT v Anstis*⁵¹ the joint judgment in the High Court also appears to have adopted an ambiguous position with respect to Sir Frederick Jordan's statement by referring to the decision in *Stone* with approval, by adopting the limited reference to elements of Sir Frederick's statement in *Montgomery*⁵¹ and by paraphrasing that statement with full reference to the forms/principles inquiry:

As has been said [citing *Stone*], that is an evident reference to the statement by Jordan CJ that the forms of receipt falling within the term 'income', and the principles to be applied to ascertain how much of those receipts ought to be treated as income, 'must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income' [citing *Scott*]. The reference to 'ordinary parlance' and to the 'ordinary usages of mankind' are 'no mere matters of ritual incantation; they identify the essential nature of the inquiry' [citing *Montgomery*].⁵²

In *Commissioner of Taxation v McNeil*⁵³ the joint judgment made no direct reference to Sir Frederick Jordan's statement or to the High Court decisions adopting that statement for the purposes of subsection 6-5(1). Rather, the decision in *McNeil* was grounded upon

⁴⁶ The Explanatory Memorandum noted that 'most provisions are being rewritten without any intention of changing their effect': Explanatory Memorandum accompanying the Income Tax Assessment Bill 1996, 34.

⁴⁷ *Project Blue Sky Inc v Australia Broadcasting Authority* (1998) 194 CLR 355, 381-382 [69].

⁴⁸ D C Pearce and R A Geddes, *Statutory Interpretation in Australia* (LexisNexis Australia, 8th ed, 2014) 150-154 [4.6]-[4.7].

⁴⁹ See *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 297 [18] and 306 [60].

⁵⁰ (2010) 241 CLR 443.

⁵¹ *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639, 661 [64].

⁵² *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443, 450 [13].

⁵³ *Commissioner of Taxation v McNeil* (2007) 229 CLR 656.

acceptance of Justice Pitney's statement of principle in *Eisner v Macomber*,⁵⁴ as adopted by the High Court in *Montgomery*.⁵⁵

In *Spriggs* the unanimous Full High Court decision observed:

It was not disputed that these payments were income according to the concept of 'ordinary income' under s 6-5 of the ITAA, that is, within 'the ordinary concepts and usages of mankind' [citing *Scott*].⁵⁶

The endnote to this text referred to the decision of Jordan CJ in *Scott*, the decision in *Stone* and also to the Explanatory Memorandum accompanying the Income Tax Assessment Bill 1996.

In section 2 of this article I suggested that Sir Frederick Jordan's statement in *Scott* incorporated two apparently different approaches to identifying 'income' and, moreover, that his Honour did not elaborate upon the elements of these approaches in the course of his judgment. The review of High Court judgments dealing with Sir Frederick Jordan's statement in this section of the article demonstrates that those decisions have not incorporated express, close analysis of that statement. This absence of close analysis of Sir Frederick Jordan's definition is striking, given the reasons for the preparation of written judgments in the appellate courts.⁵⁷ Arguably, express analysis of Sir Frederick's judgment would have shone light upon the meaning and application of the elements of Sir Frederick's statement. This critical appraisal of *Scott* would have avoided the omissions and inconsistencies regarding this matter that can be seen in the decisions in *Montgomery*, *Stone*, *Anstis*, *McNeil* and *Spriggs*. Upon the basis of those decisions, there are at least five, and potentially six, different approaches to the relevance of Sir Frederick's statement for the purpose of identifying 'ordinary income':

1. the full statement of Jordan CJ in *Scott* (*Stone*, *Anstis*);
2. 'income according to the ordinary concepts and usages of mankind' (*Stone*, *Spriggs*);
3. 'ordinary parlance' (*Montgomery*);
4. 'ordinary concepts and usages of mankind' and 'ordinary parlance' (*Montgomery*);
5. the statement may not be relevant to the determination of some 'income' cases, given the adoption of a different approach in *McNeil* with respect to income from property without any reconciliation to Sir Frederick's statement; and
6. apply the terms of the statutory text – 'income according to ordinary concepts' – given that the general rules of statutory interpretation place considerable emphasis upon the statutory text, particularly in the absence of any clear

⁵⁴ 252 US 189, 206-207 (1920).

⁵⁵ (1999) 198 CLR 639, 660-663. See critical discussion of these judgments in Neil Young QC, 'The Historical Significance of the High Court's Decision in *Federal Commissioner of Taxation v The Myer Emporium Ltd*' (2007) 31(1) *Melbourne University Law Review* 266, 285ff.

⁵⁶ *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1, 17.

⁵⁷ See the material referred to at n 15 above.

rationale for displacing the statutory text of subsection 6-5(1) with some other judicial words more or less drawn from the statement of Sir Frederick in *Scott*.

This proliferation of general statements of principle regarding the process for identifying the meaning of 'ordinary income', apparent within particular case decisions (eg, *Stone*) as well as across different decisions, should be of concern to any observer who considers that the law 'works itself pure' by progressively identifying the respective determinate meanings of statutory terms. These general statements are not tailored to the facts of particular cases because they describe the *process* for identifying the meaning of ordinary income, rather than the outcome of the process, the meaning of income. The process for identifying the meaning of ordinary income should be the same in any case, and this is reflected in the singular reference to 'the essential nature of the inquiry' in *Montgomery*.

4. IDEAS OF 'MEANING' AROUND THE TIME OF SIR FREDERICK JORDAN'S STATEMENT

In the absence of judicial analysis of Sir Frederick's statement, different commentators could adopt different approaches to elaborating the meaning and significance of that statement. I have decided to examine the statement by locating it within its historical context, and in particular by critically analysing that statement through the lens of linguistic philosophy that so preoccupied early twentieth century Western philosophers. By doing so I am not implying that judges are or should be philosophers.⁵⁸ However, as will become apparent, analysis of the meaning of the elements of Sir Frederick Jordan's statement in *Scott* is enhanced by examining those elements in the context of the themes within the contemporaneous linguistic philosophy.

Two matters are central to identifying the meaning of legislation:

1. In general terms, how does language 'latch onto' ideas and things in our world so that we can use language to communicate about those ideas and things?

For example, when we use the word 'income' to describe a particular amount, what is it that we are referring to? Does the 'incomeness' of the amount inhere in the essential nature of the particular amount, in its DNA if you like? Or is the incomeness of the amount determined irrespective of the essential nature of the amount itself, and found rather in the semantic or conventional rules governing our use of the label 'income' when we perceive and understand our world? Or is 'income' whatever the legislature intended should be treated as income?

Our answers to these questions determine what we examine when identifying the meaning of statutory terms – the intrinsic nature of the things in the world to which we attach our linguistic labels, our linguistic conventions regarding the semantic meaning of linguistic symbols or the rules of usage regarding those symbols or the intention of the 'speaker' who uttered the linguistic symbols.

⁵⁸ This matter has attracted opposition from legal positivists such as Joseph Raz, apparently upon the basis that philosopher judges would import metaphysics into the law - a proposition anathema to legal positivism: Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009) 53, 79ff. By contrast, Ronald Dworkin's natural law theory accommodated the concept of the philosopher judge who would grapple with metaphysical principles underpinning the law: Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 90.

This is the metaphysical aspect of statutory interpretation; and

2. Once the first question above is answered, what is the process by which we identify the meaning of the language unit and how do we specify the standard to be applied in determining that a claim to have found that meaning should be accepted as true?

This is the epistemological aspect of statutory interpretation.⁵⁹

This brief reference to the interrelated metaphysical and epistemological questions is sufficient to indicate that a *meaningful* definition of ordinary income will explicitly and/or implicitly answer both questions by telling us what makes something 'income' and also by telling us how to go about verifying the truthfulness of a statement that a particular amount is/is not income. Some or even all of these matters might be addressed by expressly or implicitly adopting social norms, such as the norms of logic.⁶⁰

4.1 What is statutory language referring to? The concept of income and the problem of universals

The concepts of 'ordinary', 'usage', 'parlance', 'concept' and 'income' are all instances of universals, in that they name general categories of particular instances.⁶¹ When we examine a particular monetary sum (say, 'the \$1,000 paid by Tom to Mary at 8:01am on 15 June 2016') to determine whether it falls within the set of monetary sums that we call 'income', we are confronting what philosophers refer to as the problem of universals. The problem of universals grapples with the basis upon which we determine that a particular instance is appropriately determined to fall within a universal category. Commentators have identified three broad categories of theories regarding the problem of universals: realism, conceptualism and nominalism.

4.1.1 Realism

Realist approaches to this metaphysical question share the idea that things that we know of or perceive *exist* and also exist independently of our thoughts or beliefs about those objects of our thought. Some commentators appear to have adopted some form of realism when considering the basis upon which particular amounts are identified as income. Prebble, for example, suggests that a particular receipt has a substantive essence or nature that legal characterisations can only imperfectly identify.⁶² Upon this basis, Prebble argues that the law of income taxation must always be incomprehensible because it can never hope to operate upon the 'real' natures of particular amounts.⁶³

One strand of realism, developed by Plato, holds that a universal is an ideal form of a property that exists independently of any particular instance of the universal *and* is also manifest in each particular instance of that universal. The ideal Form exists independently of thought, time and space, being received by humans prior to birth and 'remembered' afterwards by an intellectual elite (philosophers). Reference to a

⁵⁹ Michael Moore, 'A Natural Law Theory of Interpretation' (1985) 58(1-2) *Southern California Law Review* 277, 291.

⁶⁰ Raz, above n 58; Ekins and Goldsworthy, above n 17, 67.

⁶¹ Aristotle defined universals as being 'predicated of many': Aristotle, 'De Interpretatione', (17a38) in Aristotle, *Categories and De Interpretatione* (trans J L Ackrill, Clarendon, 1963) 37.

⁶² John Prebble, 'Income Taxation: A Structure Built on Sand' (2002) 24(3) *Sydney Law Review* 301, 306.

⁶³ John Prebble, 'Why is Tax Law Incomprehensible?' [1994] 4 *British Tax Review* 380, 388.

universal such as 'income' therefore entails reference to a thing that exists, the Form of income. In Plato's metaphor of the cave, universals (Forms) exist behind observers and the shadows of the Forms are seen on a cave wall. Unable to see the Forms directly, the observers are consigned to only ever seeing shadows of those Forms. One reading of the Cave metaphor is that ordinary people live their respective lives without ever seeing the purity of Forms, which have to be rediscovered by philosophers who reveal this *a priori* knowledge by rational thought, rather than discovering knowledge by empirical investigation of the world.

Another form of realism is attributed to Aristotle. In broad terms, one reading of Aristotle⁶⁴ is that he accepted that universals exist, but unlike Plato, Aristotle considered that universals exist only in the particular forms of matter⁶⁵ where a universal is manifest. According to this view, the substance of things is their respective primary essences and there is a difference between these primary essences and accidental characteristics.⁶⁶ Tom's payment to Mary may be made by way of 10 x \$100 currency notes rather than 20 x \$50 currency notes. The mode of payment is 'accidental' in that it does not affect the essential nature of the payment.

After ruling out various contenders for identifying the essence of something upon grounds that need not detain us here, Aristotle proposed that the essence of something is its 'form' that inheres in the thing rather than the matter of which it is composed. The essence of a bronze statue is the form of the statue rather than the bronze (ie, the 'matter') of which the statue is made. Likewise, the essence of Tom's payment to Mary is the form of the payment rather than the (possibly 'nonsubstantial') 'matter' of it. According to one reading of Aristotle, the form of something is a universal or a compound of universals. Universals are capable of definition and definitions may incorporate universals which can be defined.⁶⁷ This process of definition continues until the simple, logical atoms of the definition have been identified.

So on this reading of Aristotle the substance of income is its essence, its essence consists of its form and its form consists of universals and there are definitions of universals in terms of necessary and sufficient conditions that must be found in any particular instance of 'income'. On this view, when our senses perceive an amount that is 'income', the image of income that we receive corresponds to the definition of 'income' because the form of the particular image of the amount corresponds to the definition of 'income'. For example, the manifestation of the form of a thing (comprising of universals) can be demonstrated by matching the necessary and sufficient criteria of the universal to the essence of the particular instance (where the essence will assume a particular form and a form will be or comprise definable universals).

It is important to note that 'form' typically differs from what lawyers refer to as the legal form of a transaction because the legal rules governing the nature of the legal form of a thing do not necessarily correspond to the universals that realist philosophers refer to.

⁶⁴ For the contrary argument, that each form of a kind is unique to each particular instance of that kind, see Edwin Hartman, 'Aristotle on the Identity of Substance and Essence' (1976) 85(4) *Philosophical Review* 545; Charlotte Witt, 'Aristotelian Essentialism Revisited' (1989) 27(2) *Journal of the History of Philosophy* 285.

⁶⁵ Here, matter can be perceived (ie, the wood in a tree) and intelligible (such as a geometric figure).

⁶⁶ See, for example, Aristotle, *Metaphysics*, Book 5 ch 6, observing that a person being musical is taken to be an accidental characteristic of that person rather than essential to that person's being.

⁶⁷ Aristotle, *Metaphysics*, Book Z8, 1034a6-8.

Thus, as I have already noted, Prebble argued that the legal forms of 'income' do not capture the real form of income.⁶⁸

4.1.2 *Conceptualism*

The second and third approaches to the problem of universals reject the suggestion that universals exist independently of human thoughts and beliefs.

The second approach, referred to as conceptualism, maintains that concepts identify characteristics that are common across a range of particular instances. Thus, according to conceptualists, there is a concept of 'income' that picks out the characteristics that make a particular instance, such as Tom's payment to Mary, 'income'. By assessing the extent to which a particular amount satisfies those characteristics, we are able to classify some monetary amounts as particular instances of income. Concepts therefore exist independently of the particular instances that they describe, but concepts are not things that exist in the particular instances of the concepts in the way that realists envisage universals to be. If concepts are things that exist independently of the things in the world that they categorise, we need to identify the concept of a concept that we are applying when identifying these metaphysical things called concepts. The problematic concept of a concept is discussed further in section 5.9 of this article below.

4.1.3 *Nominalism*

The third approach to the problem of universals, referred to as nominalism, rejects the existence of universals from particular instances and also rejects the idea that concepts mediate between the real world and our perception of the real world. A nominalist approach to words such as 'income' is that they merely describe characteristics that exist and that humans have identified as part of the reference of that linguistic unit – there is no need to incorporate metaphysical 'universals' or 'concepts' within a nominalist account. Nominalism therefore appears to resolve the problem of universals without reliance upon excess theoretical components (ie, Plato's forms, Aristotle's universals, or concepts). Rather than focusing upon things that are external to the linguistic unit, a nominalist can find the meaning of a linguistic unit within that linguistic unit itself by undertaking semantic analysis of that language unit and/or by considering the rules governing the use of the particular language unit and/or by finding the meaning intended by the 'speaker'.

4.2 **The philosophy of language – are ordinary usages sufficient to underpin propositions regarding truths about the world?**

At the time that Jordan CJ set out his definition of income, Western philosophy was working itself through 'the linguistic turn' – a reconsideration of the nature of philosophy which examined whether and how philosophical problems were linguistic problems.⁶⁹ In particular, the nature of any connection between the world and the truthfulness of statements made about that world was subjected to renewed scrutiny from the late nineteenth century.

⁶⁸ See text accompanying nn 62-63 above.

⁶⁹ For a history and analysis of the concept of the linguistic turn see Hacker, above n 19.

Prior to this renewed interest in language as a philosophical problem,⁷⁰ it was widely accepted that language meant what it referred to, and the use of language to refer to something was learned by associating language 'names' with particular objects/ideas and/or with particular sense perceptions of those objects or ideas.⁷¹

Several aspects of language usage suggested that this referential theory of language did not provide a comprehensive account of language meaning. For example, we have words for things that do not exist (eg, unicorn, ghost) and use those words to make meaningful statements. This non-referring aspect even extends to names for people that do not exist ('Santa Claus'). We also can say meaningful things about things that do not exist ('It is true that Santa Claus does not exist'). Further, Frege observed that different modes of referring expression could refer to the same thing but have different meanings.⁷² For example, 'The Morning Star' and 'The Evening Star' both refer to Venus but have a different meaning and therefore cannot necessarily be substituted. To illustrate this point, before hearing the statement I might not know that 'the morning star is Venus and that Venus is the evening star' and so that statement would add to my knowledge. Yet under a referential theory of language my knowledge should not be enhanced because the statement is merely saying 'Venus=Venus=Venus'. Frege also noted that this difference between sense and reference created circumstances in which the premises of a statement might be true but the conclusion is false. For example, what if Tom believes that the morning star is Venus but Tom does not know that the evening star is Venus? It would be true to state 'Tom believes that the morning star is Venus' and also true to state 'Venus is the evening star'. However, it would be false to state 'Tom believes that the morning star is the evening star'. All of this pointed to an important difference to our understanding of meaning – the difference between the 'sense' – the way that we convey information about a subject – and the subject itself (the 'reference').

This distinction between sense and reference therefore prompted a shift away from conceiving of language as a referential reflection of reality (a naming of reality) and precipitated various endeavours in search of a theory of linguistic meaning not grounded upon reference to objects in the world.⁷³ Two approaches emerged over the early decades of the twentieth century and were the subject of close discussion by the time Jordan CJ delivered his judgment in *Scott*. The first of these two approaches conceived of meaning in terms of truth claims derived by analysis of any particular statement. According to this account, to understand the logic of language would be to understand the logic of the world.⁷⁴ The second approach focused upon identifying the meaning of

⁷⁰ This was not a new problem. In his *Cratylus* Plato observed the apparent arbitrariness of words as signs for what they signified, and suggested that there must be a connection between the sign and the signified.

⁷¹ The proposition that language comprised mere names of ideas in the human mind can be seen in John Locke, *An Essay Concerning Human Understanding* (Oxford University Press, 1975 [1690]) 166; Jeremy Bentham, *Of Laws in General* (H L A Hart ed, Athlone Press, 1970 [1782]) 82.

⁷² Gottlob Frege, 'On Sense and Reference' (1892) in Peter Geach and Max Black (eds and trs), *Translations from the Philosophical Writings of Gottlob Frege* (Blackwell, 2nd ed, 1960) 57, 62.

⁷³ Writing in his later *Philosophical Investigations*, Wittgenstein captured the general perception of this picture theory of language as being one too primitive to capture our description of natural language: Ludwig Wittgenstein, *Philosophical Investigations* (tr. G E M Anscombe, P M S Hacker and J Schulte, Wiley Blackwell, 2009 [1953]) 6 [2].

⁷⁴ See discussion of this in P M S Hacker, 'Wittgenstein's Anthropological and Ethnological Approach' in Jesús Padilla Gálvez (ed), *Philosophical Anthropology: Wittgenstein's Perspective* (Ontos Verlag, 2010) 15, 15.

a statement by examining the social conventions governing the making of that statement in the particular circumstances in which it was made.

Over this period Bertrand Russell proposed his theory of descriptions, by which he hoped to reveal the hidden logic of the complex compositions within singular statements made in natural language.⁷⁵ Russell's study of the internal logic of statements promised a comprehensive and objective treatment of meaning that focused upon the truthfulness of the propositions that could be 'unpacked' by close analysis of the statements. In this way, the meaning of a statement was severed from any necessary reference to something in the world. Thus, on this view, the meaning comprised the truth claims made in the statement whether or not those truth claims were in fact true in the sense of correspondence to the real world. For example, Russell illustrated his argument by showing how reference to the (non-existent) king of France could be analysed into a number of truth claims.⁷⁶ Meaning existed, he claimed, without any need to refer to an object in the world.

In the 1930's the loosely affiliated members of the Vienna Circle of logical positivists interpreted this quest for improving the objectivity of the language of science in various ways. However, they shared the view that meaningful statements can only be made upon 'objective' foundations – comprising empirically verifiable propositions and analytic truths (such as the logical truths of mathematics).⁷⁷ According to this view, meaning was found in the truth value of statements, and truths could be 'analytic truths' (because the truth is contained within the proposition) or 'synthetic truths proven empirically (*a posteriori* truths)'.⁷⁸ The title of Rudolf Carnap's influential paper 'The Elimination of Metaphysics through Logical Analysis of Language' captured this theme – the meaning of language could be analysed by reducing words to their ultimate 'observation sentences' which were truth evaluable – they could be at least theoretically open to empirical confirmation.⁷⁹ Ayer's influential work disseminated this logico-empiricist approach in Great Britain,⁸⁰ arguing that the meaning of a statement is that which is capable of derivation by analysing the statement or as its truth conditions which are capable of empirical verification.⁸¹

While logical positivists were pursuing several approaches to eliminating metaphysics from the language of science, inspired by the earlier work of Wittgenstein, from the beginning of the 1930s Wittgenstein came to reject key elements of his earlier philosophy.⁸² In his later work, Wittgenstein maintained that the meaning of words was

⁷⁵ Bertrand Russell, 'On Denoting' (1905) 14 *Mind* 479.

⁷⁶ Ibid.

⁷⁷ The manifesto signed by some members of the Vienna Circle declared that '[c]larification of the traditional philosophical problems leads us partly to unmask them as pseudo-problems and partly to transform them into empirical problems and thereby to subject them to the judgment of empirical science. The task of philosophical work lies in this clarification of problems and assertions, not in the propounding of special "philosophical" pronouncements'. *The Scientific Conception of the World: the Vienna Circle* (Reidel, 1973 [1929]) 8.

⁷⁸ Immanuel Kant, *Critique of Pure Reason* (tr N Kemp Smith, St Martin's Press, 1965 [1781]) 48.

⁷⁹ Rudolph Carnap, 'Überwindung der Metaphysik durch der Logische Analyse der Sprache' ('The Elimination of Metaphysics through the Logical Analysis of Language') (1932) *Erkenntnis II* (reprinted in A J Ayer, *Logical Positivism* (The Free Press, 1959)).

⁸⁰ A J Ayer, *Language, Truth and Logic* (Victor Gollancz, 1956 [1936]).

⁸¹ Ayer, *Language, Truth and Logic*, above n 80, 35.

⁸² For careful comparison see P M S Hacker, 'Wittgenstein on Grammar, Theses and Dogmatism' (2012) 35(1) *Philosophical Investigations* 1.

conventionally determined and that language was an autonomous system, the words of which bore no necessary relation to the things that they depict or name.⁸³ However, this does not mean that language use is arbitrary – language is a tool used to meet our pragmatic ends⁸⁴ and so we might develop conventions regarding the use of language that are arbitrary in the sense that we might have developed different conventions in pursuit of those pragmatic ends. But this does not make the rules of grammar arbitrary in the strong sense of being incomprehensible because there is no way of knowing what any of us have determined those rules to stand for. Nor are the rules of grammar answerable to some correspondence with the real world or some ultimate pragmatic end for which language is created. Thus, the study of the meaning of words requires the study of the rules governing the proper use of components of natural languages.⁸⁵ Wittgenstein suggested that the philosophical task was one of description, not analytical discovery. By description, philosophical problems would be solved 'through an insight into the workings of our language ... not by coming up with new discoveries, but by assembling what we have long been familiar with'.⁸⁶ Careful scrutiny of natural language usage would reveal the nuances of the deeper layers of grammar beneath the surface grammar of a particular text.⁸⁷

4.3 The relevance of linguistic philosophy to analysis of Sir Frederick Jordan's statement

This brief overview of the philosophy of language over the first decades of the twentieth century indicates that different theories of meaning were being robustly assessed over the period leading up to the time when Jordan CJ set out his definition of income. A central theme of the literature of that period was the quest to refine the understanding of language so that language would not be a barrier to truthful communication about the world. This quest was grounded upon logical analysis or empirical verification of statements made in natural languages:

1. one strand approached this subject upon the basis that logical analysis of the semantic elements of truth claims would reveal the (possibly hidden) meaning of statements; and
2. an alternative strand considered that examination of the conventional use of language offered a therapeutic to philosophers who had turned their backs upon the rationality of human thought reflected in common language usage.

Both approaches encountered fundamental difficulties in specifying the foundations of truthful statements. A semantic theory of language confronted the challenge of identifying the threshold at which a description was sufficiently detailed so as to identify that which was signified. A conventional account of language meaning confronted the challenge of specifying the threshold at which a usage was a convention and the basis upon which that convention determined the statement's meaning. Moreover, a

⁸³ Wittgenstein, above n 73, [355].

⁸⁴ Wittgenstein, above n 73, [5] 'clearly survey the purpose and functioning of the words'; see also [127], [132].

⁸⁵ Wittgenstein, above n 73, [28]-[33].

⁸⁶ Wittgenstein, above n 73, [109].

⁸⁷ Wittgenstein, above n 73, [664].

conventional account must accept that 'truth' can only ever be what is right for us, which is not consistent with the universality that we attribute to 'truth'.⁸⁸

This philosophical examination of the foundations of linguistic meaning is relevant to the present examination of the dictum of Jordan CJ in several ways. First, linguistic philosophy highlights the fact that the foundations of the meaning of linguistic elements cannot be taken for granted. Second, the first proposition is reflected in the echoes of the semantic and pragmatic threads, of both common understandings of the foundation of linguistic meaning and also of linguistic philosophy, to be found in the dictum of Jordan CJ, a matter taken up in section 5 of this article. Third, the examination of the foundations of linguistic meaning, characteristic of linguistic philosophy, highlights the matters that one might expect to be considered if reference to the dictum of Jordan CJ is to reach beyond ritual incantation with judicial analysis of the elements of the dictum.

5. UNDERSTANDING SIR FREDERICK JORDAN'S STATEMENT THROUGH THE LENS OF LINGUISTIC PHILOSOPHY

5.1 Science, and the science of language

In this intellectual context it would have been extremely difficult for lawyers to ignore the underlying 'scientific' examination of language and its use.⁸⁹ According to this formalist⁹⁰ approach to statutory construction, the meaning of legislation is an objective fact revealed by appropriate methods of 'statutory construction'. This objective statutory meaning is then applied to transactions 'objectively' characterised according to their respective legal forms. Indeed, in the taxation context, the proposition that taxation could only be imposed by clear language had come to be adopted for more than a century.⁹¹ If any reminder of this proposition were needed, decisions including *Scott v Cawsey*⁹² and *IRC v Duke of Westminster*⁹³ no doubt served to emphasise this narrative of legal objectivism.

At the same time it would have been extremely difficult to ignore the fact that there was no universal methodology that could be applied in discovering the objective linguistic meaning in a manner that would sustain the legitimation of law upon the basis that law comprised objective, determinate rules that could be applied with certainty. Judges had accepted that the ordinary usage of words recorded in dictionaries did not comprehensively capture the 'natural or ordinary' meaning of words.⁹⁴ Further, by the time of Sir Frederick's decision in *Scott*, it had already come to be accepted that

⁸⁸ Moore, above n 59, 297.

⁸⁹ See, for example, Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45(1) *University of Pittsburgh Law Review* 1.

⁹⁰ For discussion of the concept of legal formalism, see Frederick Schauer, 'Formalism' (1988) 97(4) *Yale Law Journal* 509; Judith Shklar, *Legalism: Law, Morals and Political Trials* (Harvard University Press, 2nd ed, 1986). For critical discussion of Shklar's work, see Robin West, 'Reconsidering Legalism' (2003) 88(1) *Minnesota Law Review* 119.

⁹¹ For early expressions of the strict construction of penal legislation, including taxation law, see *Ramsden v Gibbs* (1823) 1 B & C 319; 107 ER 119; *Denn v Diamond* (1825) 4 B & C 243, 245; 107 ER 1049, 1050. ⁹² (1907) 5 CLR 132, 154 per Isaacs J.

⁹³ *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1, 24-25 per Lord Russell.

⁹⁴ *Girls' Day Public School Trust v Ereaux* [1931] AC 12, 34 per Lord MacMillan, observing that the editors of the *New Dictionary* stated that the varieties of the sense of 'public' are such that there are many meanings of the term. Also, it was accepted that the meaning of composite expressions could not be established by merely compiling dictionary definitions of each part: *Perpetual Trustee v FCT* (1931) 45 CLR 224, 240 per McTiernan J.

'income' had been ascribed different meanings in different contexts.⁹⁵ In the early twentieth century the 'trust' concept of income had been identified as a possible theory of income for the purposes of Australian income taxation.⁹⁶ Meanwhile, a commercial or business understanding of income, influenced by the developing discipline of accountancy, had been acknowledged to be an alternative theory of income that could be applied in the context of income taxation.⁹⁷ Just three years after the decision in *Scott*, and during the era when logical positivists pursued their anti-metaphysical agenda, Henry Simons contributed to stripping the economic concept of income of metaphysical elements by focusing upon the apparent objectivity of 'market value' for the purpose of identifying income as a tax base.⁹⁸ Awash with these conflicting currents of thought upon the nature of income, Greene MR captured the view of many with his suggestion that the income/capital distinction seemed to turn on the spin of a coin.⁹⁹

By the time of the decision in *Scott* the general statutory references to 'income' presented a considerable challenge to judges because of the tension between the 'no taxation without clear words' maxim and the fact that 'income' did not clearly refer to one finite meaning comprising necessary and sufficient criteria for its application to particular circumstances.

In contexts other than the income tax this balancing of linguistic imprecision and, at least the appearance of, legal certainty could be resolved by reliance upon principles of interpretation that allowed reference to the statutory context¹⁰⁰ or to the legislative purpose.¹⁰¹ These principles allowed judges to construct, and quite possibly genuinely believe in the truth of, a narrative of discovering the 'right' meaning out of a range of possible meanings, while claiming that this right meaning had been the purpose of the legislature all along (that only lawyers with superior skills, such as judges, could discover). However, the purpose of taxing income was not considered by judges to offer secure footing upon which to elaborate the meaning of income¹⁰² and, as Jordan CJ noted,¹⁰³ the statutory context of the reference to 'income' offered little guidance in elaborating the meaning of income.

⁹⁵ See the discussion of the different meanings of income in its general sense and for income taxation purposes in *Harding v Federal Commissioner of Taxation* (1917) 23 CLR 119, 130 per Isaacs J (Gavan Duffy and Rich JJ agreeing).

⁹⁶ W Strachan, 'The Differentiation of Capital and Income' (1902) 18 *Law Quarterly Review* 274; W Strachan, 'Economic and Legal Differentiation of Capital and Income' (1910) 26 *Law Quarterly Review* 40; W Strachan, 'Capital and Income (Lifeowner and Remainderman)' (1912) 28 *Law Quarterly Review* 175; W Strachan, 'Capital and Income under the Income Tax Acts' (1913) 29 *Law Quarterly Review* 163.

⁹⁷ *The Commissioner of Taxes (South Australia) v The Executor Trustee and Agency Company of South Australia Limited (Carden's Case)* (1938) 63 CLR 108, 152 per Dixon J.

⁹⁸ Henry Simons, *Personal Income Taxation* (University of Chicago Press, 1938) 42 and, more generally, ch 2.

⁹⁹ *Inland Revenue Commissioners v British Salomon Aero Engines Ltd* (1938) 22 TC 29, 43.

¹⁰⁰ *The Metropolitan Gas Co v The Federated Gas Employees' Industrial Union* (1924) 35 CLR 449, 452 (per Isaacs and Rich JJ).

¹⁰¹ *Attorney General v Carlton Bank* [1899] 2 QB 158, 164 (Lord Russell).

¹⁰² See, for example, the decision of Dixon J in *Carden's Case, The Commissioner of Taxes (South Australia) v The Executor Trustee and Agency Company of South Australia Limited (Carden's Case)* (1938) 63 CLR 108, 152.

¹⁰³ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 220.

5.2 Analytical approaches to 'income' reflected in Sir Frederick Jordan's statement compared to orthodox interpretation of non-technical statutory language

In this context we can begin to understand Sir Frederick Jordan's reasoning behind adoption of his forms/principles framework. This framework for interpreting the definition of ordinary income is unusual when compared to the 'ordinary grammatical meaning',¹⁰⁴ 'literal meaning',¹⁰⁵ or 'grammatical meaning',¹⁰⁶ of the text commonly referred to by judges when considering the general principles of statutory construction.¹⁰⁷ When these textual formulae are adopted it seems to be implicitly assumed that the ordinary, natural or literal meaning is immediately apparent or readily accessed, for example by reference to dictionaries.¹⁰⁸

The first part of Sir Frederick Jordan's statement appears to depart from this process of identifying the meaning of non-technical language. In the same way that linguistic philosophy accepted that rules governing the linguistic meaning could be revealed by analysis, Sir Frederick indicated that language usage and concepts need to be *analysed* in order to arrive at the meaning of natural language terms. Forms of receipt are 'comprehended within'¹⁰⁹ the word 'income', suggesting that forms of receipt will be revealed by examining the inner logic of 'income'. However, this inner logic can only be revealed by examining 'ordinary concepts and usages'. Sir Frederick seems to be stating that identification of the forms of receipt comprehended within 'income' entails both semantic analysis of the word and conventional analysis of the use of the word. The preceding overview of linguistic philosophy indicates that this part of Sir Frederick's statement embodies a potentially irresolvable conflict between competing semantic and pragmatic accounts of the foundation of linguistic meaning.

Sir Frederick's reference to identifying 'principles' also presents challenges. It is not clear whether the principles also are 'comprehended within' 'income' or whether they are to be found by examining the social practice of using 'income'. The phrase 'ought to be treated as income' does not assist in clarifying the nature of the process contemplated by Sir Frederick Jordan's statement, because it could be referring to norms evident on the surface of ordinary language usage or it could be referring to norms that lie hidden beneath surface usage in circumstances where the usage does not necessarily reflect those norms.¹¹⁰

Notwithstanding these difficulties, the first part of Sir Frederick's statement has been understood to offer a rigorous foundation for the elaboration of income by focusing attention upon extracting forms and principles from 'ordinary concepts and usages'.

¹⁰⁴ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [45].

¹⁰⁵ *Project Blue Sky Inc v Australia Broadcasting Authority* (1998) 194 CLR 355, 384 [78]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [45].

¹⁰⁶ *Project Blue Sky Inc v Australia Broadcasting Authority* (1998) 194 CLR 355, 382 [72], 384 [78].

¹⁰⁷ While this 'ordinary or natural' etc meaning may not be adopted as the meaning of the legislative text in the context of resolving a matter by adjudication, decisions such as *Project Blue Sky* proceed upon the basis that such 'ordinary or natural' etc meaning should be adopted unless the context or purpose indicates that a 'legal' meaning ought to be adopted.

¹⁰⁸ This approach had long been adopted in Australia before the decision in *Scott: Sydney Municipal Council v Commonwealth* (1904) 1 CLR 208, 241 per O'Connor J. Around the time of *Scott*, see *Federal Commissioner of Taxation v Riley* (1935) 53 CLR 69, 80 per Starke J.

¹⁰⁹ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219 per Jordan CJ.

¹¹⁰ Because, for example, the general population may misunderstand the proper meaning of a term, by reference to the 'deep' meaning of the term, and so misuse the term.

This interpretation appears to emphasise the analytical aspects of the statement while downplaying the unresolved tension between semantic/conventional analysis and also ignoring the vagueness of the source of the principles to be identified. By revealing the hidden logic of 'income', Jordan CJ appeared to accept that the rules governing classification as 'income' would be determinate at any particular point in time and that these rules could underpin the classification of an amount as 'income' in circumstances not previously encountered. Thus, the application of the concept 'income' could adjust to changing social circumstances while remaining constant in its internal logic. This balance between change and continuity therefore appeared to resolve the tension between the ideal of legal certainty embodied in immutable law, reflected in the maxim that taxation can only be imposed with certain words, and the apparent confusion of competing concepts of income reflected in the contemporaneous literature.

The second part of Sir Frederick Jordan's statement appears to be consistent with the ordinary principle of adopting dictionary definitions of non-technical statutory language. In the second sentence of the extract from *Scott* his Honour appears to paraphrase his forms/principles approach by suggesting that we can determine whether an amount is income simply by determining whether it is income 'in ordinary parlance'. Indeed, in the next paragraph in his judgment Sir Frederick observed that 'according to the ordinary meaning of "income," as an English word, there can be no doubt that such a receipt as that now in question is not income'.¹¹¹ His Honour did not expressly apply his forms/principles approach for the purpose of identifying what he took to be the ordinary meaning of 'income', although this may be because Sir Frederick considered such express analysis superfluous given his immediately preceding statement. However, references to 'ordinary parlance' and to 'the ordinary meaning of "income"' could be interpreted to contradict the analytical discovery of the deep meaning of income hidden beneath the superficial veneer of ordinary usage. After all, 'ordinary parlance' is not synonymous with 'ordinary concepts and usages' as, unlike the former, the latter is broad enough to include written usages as well as parlance.

There is, then, a tension between the first and second parts of Sir Frederick's statement. If that statement were interpreted so that 'income' meant its meaning in ordinary parlance as reflected in dictionary meanings, we would justifiably question why Sir Frederick would have expressed such an orthodox proposition in such a convoluted manner. Why refer to the forms/principles analysis at all? Likewise, the High Court decisions that have adopted Sir Frederick's statement might have more economically adopted the orthodox principle regarding reference to dictionaries. At least in a formal context such as a statute or a judicial decision, there is a conventional assumption that all words are intended to have some effect, unless nonsense would arise by doing so. Applying this interpretative assumption, *all* of the elements of Sir Frederick Jordan's statement should be recognised. However, in this case, it seems that a choice must be made between incomparable approaches to identifying the meaning of income.

5.3 Does the forms/principles framework apply to other expressions that are not terms of art?

The forms/principles analysis is expressed in the first part of Sir Frederick's statement in such a manner as to suggest that this analysis ought to apply to all statutory terms that are not terms of art and also to judicial terms that are not terms of art. Thus, 'income' is not a term of art and its meaning is determined according to the forms/principles analysis

¹¹¹ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219 per Jordan CJ.

of ordinary concepts and usages and perhaps 'ordinary parlance'. Is it also the case that these expressions are not 'terms of art'? If so, should the same forms/principles analysis be undertaken in elaborating the meaning of these terms/phrases? Further, should the same analysis be applied to those meanings, and so on in infinite regress *unless* at some point this process will reveal ultimate, 'atomic' foundations that are true in virtue of themselves? If there is an infinite regression, the foundation of meaning cannot be found.¹¹² However, Sir Frederick Jordan's statement leaves this matter unresolved.

If it is possible for the meanings of components of Sir Frederick's statement to be identified without undertaking the same forms/principles analysis, upon what basis is this determination made?

5.4 Why the forms *and* principles approach?

Elaboration and application of the two-stage forms/principles framework depends upon the meanings attributed to 'forms' and 'principles' and also upon specification of the source(s) from which those forms and principles are derived.

Sir Frederick's statement clearly accepts that 'income' describes receipts that meet particular formal descriptions. A lawyer reading the dictum, recorded in a legal judgment, could reasonably be expected to read this reference to 'forms of receipt' to be a reference to forms of receipt classified according to legal rules rather than amounts being classified according to rules derived from non-legal sources. However, this legal interpretation of 'forms' is undermined by two elements of the dictum of Jordan CJ. As the forms of receipt are derived by analysis of ordinary concepts and usages, in this context it would be reasonable to infer that his Honour did not have in mind the legal form of a receipt. Moreover, this 'non-legal' interpretation of the reference to 'forms' is also supported by Sir Frederick's observation that income is not a 'term of art'. If 'income' were a term of art then it is more likely that legal forms would be considered in characterising amounts, as distinct from applying non-legal rules when identifying forms of receipt that are 'income'.

In section 4.1 above it was noted that philosophers have refined different approaches to classifying things such as income and that legal classifications of things such as income are not necessarily consistent with these approaches. The reference to 'forms' might be a passing acknowledgment of philosophical realism which, as we have seen, would identify the essence of a particular amount by comparing it to the essence of a Platonic Form or by comparing the amount against the formal Aristotelian essence or even by assessing the amount against what Wittgenstein called a 'logico-pictorial' form.¹¹³ On this view, 'income' might be equated to a genus that groups different species of receipt according to their respective forms. Each form would have its own essence and hence its own necessary and sufficient criteria. However, all forms would share the essence of income.

However, his Honour's reference to the secondary role of principles, also extracted from ordinary concepts and usages, complicates this realist interpretation because it is

¹¹² The prospect of a parallel infinite regression was raised by Quine in his critique of logical positivism: W V O Quine, 'Truth by Convention' (1935) in W V O Quine, *The Ways of Paradox, and Other Essays* (Harvard University Press, 1976) 77 and W V O Quine, 'Two Dogmas of Empiricism' (1951) 60(1) *Philosophical Review* 20.

¹¹³ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (Kegan Paul, 1922) 2.2.

difficult to see how 'principles' can be accommodated within a realist framework in which things have an essence that is defined in terms of necessary and sufficient criteria. If a receipt has a form of a kind that warrants its inclusion under the category 'income' because its essence corresponds with the essence of income, a realist would reject the proposition that the particular amount cannot be income because 'principles' operate to override the essential nature of the receipt. This suggests that Sir Frederick cannot have meant to adopt some version of philosophical realism when referring to forms of receipt.

If Sir Frederick's reference to 'forms of receipt' does not refer to legal formalism and also does not refer to philosophical realism, what are the rules governing identification of the relevant forms? And how do 'principles' interact with those rules? For example, could principles affect the types of form comprehended within the concept of income? These aspects of Sir Frederick's statement remain unresolved.

Moreover, his Honour did not elaborate upon the reasons for adopting this dual forms/principles inquiry. However, adopting the convention of interpreting statements in their best possible light, it is reasonable to speculate that his Honour had in mind the benefit of undertaking a preliminary cull of forms of receipt that could never satisfy the concept of income described by the principles considered in the second stage of the inquiry. For example, the relatively blunt instrument of assessing forms of receipts could enable a judge to quickly dispose of many cases without recourse to the second stage identification and application of principles. If a gains concept of income were to be extracted from ordinary concepts and usages, benefiting from the public provision of infrastructure could be considered to be a gain.¹¹⁴ However, exclusion of such benefits upon the basis of their form (such as 'absence of an 'earning activity'¹¹⁵ or the absence of a 'receipt'¹¹⁶) could avoid the need for close consideration and application of the second stage principles.

This forms/principles approach therefore has intuitive cognitive appeal because it accords with two cognitive approaches that humans routinely adopt when categorising things – application of necessary and sufficient criteria and also consideration of concept theories when classifying more problematic cases.¹¹⁷ However, the cognitive power of this two-stage analysis depends upon the specification of the forms and principles and also the specification of the rules that prevent conflict between those forms and principles. The absence of these definitional and operative rules in Sir Frederick's judgment and/or in judgments that have adopted Sir Frederick's statement means that it is not possible to take this analysis further here.

5.5 'Ordinary'

The references to 'ordinary parlance' and 'ordinary concepts and usages' maintain some degree of continuity with established principles of interpretation that recognised the 'ordinary or natural' meaning of words.¹¹⁸ However, I have already noted that Jordan

¹¹⁴ See discussion of this point in Boris Bittker, 'A "Comprehensive Tax Base" as a Goal of Income Tax Reform' (1967) 80(5) *Harvard Law Review* 925, 935.

¹¹⁵ *Hayes v FCT* (1956) 96 CLR 47, 54 per Fullagar J.

¹¹⁶ *Payne v FCT* (1996) 56 FCR 299.

¹¹⁷ These cognitive processes are discussed further below when dealing with concepts: see section 5.9 below.

¹¹⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-162 per Higgins J.

CJ departed from that simplistic account of natural language meaning by suggesting that analysis of ordinary concepts and usages and ordinary parlance would reveal the forms of income receipt and principles to be applied in characterising receipts as income.

Although 'income' was to be elaborated by analysis and judgment, according to Jordan CJ, the ordinariness of the language elements subjected to judicial analysis promoted a narrative that depicted one concept of income that was routinely adopted in the community and therefore was of the community and hence unremarkable. This narrative promotes the view that judicial decisions regarding the income concept reflect the univocal community's understanding of the term rather than being imposed from above by unrepresentative appointees to judicial office.¹¹⁹

The narrative of analysis of ordinary language usage also serves to explain why the characterisation of amounts as income is not necessarily a straightforward application of ordinary meaning and may require legal expertise to correctly characterise such amounts. The narrative of analysis therefore promotes the legitimacy of 'law as scientific analysis of observable phenomena' and also of the professional judgment necessary to the operation of law.¹²⁰ Judges, rather than ordinary folk, must be at the centre of pronouncements upon the meaning of an ordinary term such as 'income'.

Superficially, then, this narrative of linguistic analysis of ordinary language usage answered several imperatives by portraying judicial practice as objective examination of the community's 'ordinary' meaning of language. However, given the central importance of the concept of 'ordinary' to this narrative, surprisingly little attention has been devoted to what is 'ordinary'. Dictionary definitions reflect an ambivalence regarding what is ordinary. One sense of the word is that it refers to the unexceptional nature of the thing. Something may be rare but unexceptional – the last example of a particular model of utilitarian passenger car, for example. 'Ordinary' might also refer to the commonality of the occurrence and perhaps the distribution of the thing. William Shakespeare's poetry may be extraordinary by nature but so commonly available as to be ordinary in the sense of availability/usage.

Turning to 'ordinary concepts', an extraordinary (by nature) concept might be so frequently used that it is ordinary. Conversely, a concept that is unexceptional in terms of the structure of the concept could be extraordinary because it is rarely used. Jordan CJ did not elaborate upon the conditions governing what counts as 'ordinary', and the dictionary definitions leave considerable leeways of choice.

In the absence of any judicial analysis of the concept of ordinariness itself for the purposes of applying Sir Frederick's statement, it is impossible to assess the truthfulness of claims that a particular usage, concept or parlance is 'ordinary'. Parsons alluded to this epistemic problem when he suggested that members of the community might not accept the concept of income attributed to them,¹²¹ as did Hill J in his first instance

¹¹⁹ See *Harding v Federal Commissioner of Taxation* (1917) 23 CLR 119, 130 per Isaacs J (Gavan Duffy and Rich JJ agreeing), noting that the relevant sense of 'income' was one with which the community had been familiar for over 100 years.

¹²⁰ Eliot Friedson, *Professionalism* (University of Chicago Press, 2001) ch 1; noting Friedson's caveats about 'ideal types': 8-10.

¹²¹ Ross Parsons, 'Income Tax - An Institution in Decay' (1986) 3(3) *Australian Tax Forum* 233, 239.

decision in *Stone*.¹²² This absence of precision appears to have allowed some judges to adopt a range of approaches to the concept of ordinariness which have underpinned different approaches to the meaning of 'income'. For example, a 'business' or 'commercial' concept of income could be adopted in characterising the nature of a particular receipt¹²³ while a gains concept of income can also be considered to be 'ordinary'.¹²⁴

5.6 Ordinary concepts and usages: a composite expression or a single object?

It is not clear whether 'ordinary concepts and usages' is one composite expression or whether it refers to two sets of social phenomena: 'ordinary concepts' and 'ordinary usages'. An ordinary concept of 'income' could differ from an (ordinary?) usage of 'income', depending upon the meanings of 'concepts', 'usages', and 'ordinary'. Is there a difference between ordinary concepts and ordinary usage? If so, which one prevails in arriving at the proper meaning of income? If ordinary concepts and ordinary usage are different but lead us to the same meaning of income, why refer to them both?

5.7 Rules governing the identification of relevant 'ordinary concepts and usages'

With respect to the epistemological aspect of Sir Frederick Jordan's statement, his Honour did not set out the basis upon which we ought to derive the relevant forms/principles from the entire set of 'ordinary concepts and usages'.

Confronted with the entire set of ordinary concepts and usages (ie, 'star', 'fairy', 'apple' are all concepts), how do we go about extracting the forms/principles specific to 'income'? Without close specification of this inquiry, there is a risk that the forms/principles which I identify will merely reflect personal predispositions regarding the nature of income rather than having an objective logical or empirical foundation. To illustrate this point, it is fair to suppose that there are ordinary concepts and usages with respect to 'apples'. It is also fair to suppose that most would accept that ordinary concepts and usages with respect to apples have very little or nothing to do with ordinary concepts and usages regarding the forms/principles of 'income'. But upon what basis can I be sure that concepts and usages regarding apples have little or nothing to do with income other than because I have already formulated a concept of income that incorporates an element that allows me to exclude apples, or, a concept of apples that excludes income?

¹²² *Stone v FCT* [2002] FCA 1492, 2002 ATC 5085, 5094 [57], noting that some observers may be surprised that ordinary concepts are so complex, but continuing by noting the ambiguity commonly encountered in natural languages.

¹²³ *The Commissioner of Taxes (South Australia) v The Executor Trustee and Agency Company of South Australia Limited (Carden's Case)* (1938) 63 CLR 108, 152. The recognition of the ordinariness of the commercial and accounting concept of 'profits' in the context of the United Kingdom income tax legislation had been accepted in *Gresham Life Assurance Society v Styles* [1892] AC 309; 3 TC 185, 189 per Halsbury LC ('in a sense which no commercial man would misunderstand'); 3 TC 185, 191 per Lord Herschell ('as a matter of business').

¹²⁴ See, for example, *Commercial and General Acceptance Ltd v FCT* (1977) 137 CLR 373, 382 per Mason J. Note also the adoption as 'ordinary' of a gain concept of income by Pitney J in *Eisner v Macomber* 252 US 189, 206-207 (1920); see nn 54-55 above. For discussion of this aspect of the decision in *Montgomery* see Domenic Carbone, 'An Extraordinary Concept of Ordinary Income? The Significance of *FCT v Montgomery* on What is Income According to Ordinary Concepts' (2010) 20 *Revenue Law Journal* 1, 21-24.

5.8 'Parlance'

I have already noted that the reference to 'ordinary parlance' could restrict the scope of the survey of ordinary concepts and usages to those concepts and usages found in 'ordinary conversation'. This privileging of the spoken word, upon the basis that oral utterances offered an immediate reflection of the speaker's meaning that is lost when words are committed to writing, was subjected to critical analysis by Derrida.¹²⁵ Without revisiting that critique, for present purposes it is sufficient to note that the reference to 'parlance' indicates that the analytical narrative embodied in Sir Frederick's statement could be taken to suggest that judges focus upon analysing the one true meaning of income revealed in ordinary parlance, by contrast to analysis of 'degenerate' usages of 'income' such as those found in written form. If this interpretation is correct, there would be a contradiction in reflecting ordinary parlance in written judgments and also in analysing written usages of 'income' in documents such as written case decisions.

5.9 Theories of Concepts

Subsection 6-5(1) specifically refers to 'ordinary concepts' and therefore could be taken to adopt the same phrase from Sir Frederick Jordan's statement in *Scott*. Given the importance of the concept of a concept to identifying the statutory meaning of 'ordinary income', it is surprising that the concept of a concept has not been subjected to close analysis in the case law regarding the meaning of income.

The purpose of this section is to provide an overview of different concepts of concepts in order to take Australian tax jurisprudence some way down the path of addressing that lacuna. In elaborating upon different theories of concepts, I am not attempting to develop an argument for a preferred concept of a concept. Rather, the first purpose of this section is to establish the proposition that there is a multitude of concepts of concepts available and that these concepts are 'ordinary' in terms of their general recognition and/or in terms of their use.¹²⁶ If there are different ordinary concepts of concepts, and different ordinary concepts of concepts such as 'income' and 'capital', the difficulty of applying the statutory definition in subsection 6-5(1) is compounded. This difficulty is only exacerbated by the fact that the choice between concepts of concepts is not guided by statutory, judicial or non-legal rule.¹²⁷ If these premises are accepted, then the meaning of 'ordinary income' is inherently unstable. Therefore legal pluralism or legal scepticism could more accurately describe the operation of the statutory definition of 'ordinary income' than legal formalism.¹²⁸

¹²⁵ Jacques Derrida, 'Signature Event Context' in *Limited Inc* (Northwestern University Press, 1988) ch 1.

¹²⁶ I hope that the accompanying references are useful for those wishing to engage with the literature upon concepts of concepts.

¹²⁷ Typically, judges accept that any statutory term has an ordinary, natural, literal or grammatical meaning. The basis upon which such a meaning is identified is not specified. It seems that it is simply assumed that one such meaning exists. One anonymous reviewer suggested that my approach to 'concepts' was misconceived, upon the basis that the statutory and judicial references to 'concepts' was to the ordinary or natural meaning of the word:

The author makes some interesting points in part 9, 'Theories of Concepts', but, if I interpret her correctly, in doing so seems to assume that Jordan CJ intended to use the term 'concepts' with one of a number of technical meanings, when, as explained, he appears more probably to have intended simply to expound the ordinary meaning rule of standard statutory interpretation.

The point of this section, as I say in this paragraph, is that there is no one ordinary meaning of 'concept'.

¹²⁸ Compare Evans' suggestion that a 'theory theory' of concepts can both recognise competing theories of constitutional meanings while simultaneously providing a stable foundation for constitutional

5.9.1 Dictionary definitions

The *Shorter Oxford English Dictionary* states that a 'concept' is an idea of a class. The *Shorter Oxford English Dictionary* also indicates two relevant senses in which 'ordinary' is commonly used: 'ordinary' according to the common usage of the thing and 'ordinary' according to the intrinsic nature of the thing. Putting these elements together, it is plausible that an 'ordinary concept' is any idea of a class of objects that is widely found or widely attested in language usage (rather than being a specialised, or what might be called an 'artificial' language, such as that of symbolic logic). I have also noted that the ITAA 1997 has not stipulated the meaning of the phrase 'ordinary concepts' and nor have relevant case decisions analysed the meaning of the phrase.

5.9.2 Concepts of concepts in the literature of philosophy and psychology

For those with even limited knowledge of the literature upon the subject of concepts, the propositions that there are multiple theories of concepts, and that to date there is no one 'universally right' concept of a concept has been identified, will be uncontroversial. However, the apparent judicial reluctance to undertake an analysis of concepts of concepts makes it necessary for me to sketch some of the main concepts of concepts. Laurence and Margolis¹²⁹ identify five broad categories of concepts of concepts, conceding that this taxonomy does not do justice to the many nuances identified in the literature upon this subject. Those categories are:

1. classical;
2. prototype;
3. exemplar;
4. 'theory theories'; and
5. various combinations of the preceding categories.

In the following paragraphs I will sketch these concepts and illustrate their respective relevance to inquiries into the meaning of 'income'.

5.9.3 Classical theories of concepts

Classical theories of concepts characterise concepts as definitions that denote the necessary and sufficient criteria for a concept to apply in a particular case. According to this view, an individual possesses a concept when they grasp the rules by which a member of a set is identified – when they know the necessary and sufficient conditions for membership of the relevant class.¹³⁰ This definitional account of concepts is not only

interpretation. Evans does not explain how this stability can arise, given his apparent acceptance that there is no basis upon which the merits of competing theories can be assessed and the one stable meaning identified: Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29(3) *University of New South Wales Law Journal* 207.

¹²⁹ Stephen Laurence and Eric Margolis, 'Concepts and Cognitive Science' in Stephen Laurence and Eric Margolis (eds), *Concepts*, (MIT Press, 1999) ch 1.

¹³⁰ Joseph Raz adopts different definitions of concepts at different points in his work. However, at one point he appears to adopt a classical definition of concepts, stating that 'I will follow them in equating complete mastery of a concept with knowledge and understanding of all the necessary features of the objects to which it applies. Thus, complete mastery of the concept of a table consists in knowledge and understanding of all the essential properties of tables, and so on'. *Between Authority and Interpretation*, above n 58, 21.

applicable for those who subscribe to philosophical realism,¹³¹ because the definition may identify the necessary and sufficient criteria that must exist in reality (the real essence of the thing) or they may identify the necessary and sufficient criteria that must be satisfied by convention.¹³²

The classical theory of concepts resonates with legal rule formalism.¹³³ According to rule formalism, the meaning of a legal concept (such as income) is identified having regard to its set of definitional rules and this set of definitional rules is then 'laid on top' of the 'fact pattern' comprising our sensory perceptions of the particular instance under examination. One can then mechanically determine whether or not the 'fact pattern' corresponds to the definitional rules of the concept.

Although classical theories of concepts were the predominant paradigm for concepts until the latter half of the twentieth century,¹³⁴ they have been subjected to considerable criticism in contemporary philosophy and cognitive psychology upon several grounds.¹³⁵ One limitation is that it is extremely difficult to identify a concept that satisfies the classical focus upon definitional rules that comprehensively specify necessary and sufficient conditions for their application.¹³⁶ A second difficulty is that the classical theory implies that all members of a class would be identified with more or less equivalent speed because of the binary nature of determining whether each of the necessary and sufficient conditions were respectively satisfied. However, experimental data indicates that this is not the case because individuals exhibit 'typicality effects' in processing the application of a concept – 'simple' cases are more readily identified to fall within a concept than 'difficult' cases.¹³⁷

One explanation for these typicality effects is that the definitional rules comprising concepts may be fuzzy. With respect to the concept of income, the High Court appears to have accepted that this is the case. In *Anstis*, the majority's joint judgment appeared to acknowledge that a criterial approach to identifying the concept of income was not discernible in the income tax case law:

There is a difficulty in making good absolute propositions in this field. In *Federal Commissioner of Taxation v Montgomery*, Gaudron, Gummow, Kirby and Hayne JJ recognised that 'income is often (but not always) a product of

¹³¹ See the discussion in section 4.1.1 above.

¹³² A point noted, for example, by Edouard Machery, *Doing Without Concepts* (Oxford University Press, 2009) 78. Thus, the classical theory of concepts is not describing a universal thing of the kind of a Platonic Form.

¹³³ See, for example, the discussion of 'serious rules' in Larry Alexander, "'With me it's all er nuthin'": Formalism in Law and Morality' (1999) 66(3) *University of Chicago Law Review* 530, 539; Schauer, 'Legal Formality', above n 90.

¹³⁴ Chris Swoyer, 'Conceptualism' in P F Strawson and Arindam Chakrabarti (eds), *Universals, Concepts and Qualities: New Essays on the Meaning of Predicates* (Routledge, 2017) 127, 141; Machery, above n 132, 77-78.

¹³⁵ R Mark Sainsbury, 'Concepts without Boundaries' in Rosanna Keefe and Peter Smith (eds), *Vagueness: A Reader* (MIT Press, 1996) 186; J Fodor, M Garrett, E Walker and C Parkes, 'Against Definitions' (1980) 8(3) *Cognition* 263.

¹³⁶ Wittgenstein, for example, argued that the concept 'game' could not be defined in a manner that satisfied the classical idea of concepts: Wittgenstein, above n 73, [65]-[78].

¹³⁷ Laurence and Margolis, above n 129, 24-26. Margolis and Laurence critically assess the limitations of the classical account of concepts that have been identified in the literature.

exploitation of capital; income is often (but not always) recurrent or periodical; receipts from carrying on a business are mostly (but not always) income'.¹³⁸

By contrast, the High Court in *Montgomery* appeared to adopt a criterial approach in identifying the concept of the class of all inquiries into the meaning of income by specifying the essential nature of such inquiries.¹³⁹ However, the vagaries of Sir Frederick's statement, already noted earlier in this article, indicate that the elements identified in his Honour's statement are insufficient to constitute necessary and sufficient conditions for identifying inquiries into the income concept which would satisfy the requirements of *Montgomery*.

5.9.4 Prototype theories

Prototype theories of concepts emerged in the 1970s as research was undertaken indicating that individuals did not necessarily apply the classical theory of concepts in practice.¹⁴⁰ Prototype theories relax the strictness of necessary and sufficient conditions by suggesting that concepts include a body of knowledge regarding the statistical ordering of properties most likely to be found in members of a class.¹⁴¹ This probabilistic understanding of concepts does not necessarily, and typically does not, maintain that concepts exclusively comprise this statistical information.¹⁴² However, a prototype concept allows for quick classification of many cases which exhibit properties typically found in the relevant concept and therefore the prototype theory offers an explanation of cognitive studies which suggest that the classical concept of concepts is not always applied in practice.¹⁴³

Machery notes that prototypical properties can be featural or dimensional.¹⁴⁴ A featural property is one that a member of a class either has or does not have. Income is not capital, for example. A dimensional property is one that a member of a class can have to varying degree. Parsons' seminal identification of indicia of income implicitly recognised a prototype concept of income by identifying the features of income commonly found in the set of income amounts without specifying that these indicia were necessary.¹⁴⁵ Regularity of receipt, for example, often exists when an amount is income but regularity of receipt is neither determinative¹⁴⁶ of the 'characterisation as income' question nor is it essential.¹⁴⁷

¹³⁸ *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443, 452 [19].

¹³⁹ *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639, 661 [64].

¹⁴⁰ Prototype theory grew out of Wittgenstein's reservations regarding the usefulness of a classical theory of concepts: Wittgenstein, above n 73, [65]-[78].

¹⁴¹ This approach arose because of the difficulties encountered in framing comprehensive descriptions of the objects of language. To overcome this difficulty with respect to Russell's theory of descriptions, Searle anticipated the prototype model by suggesting that a proper name (ie, 'Aristotle') did not necessarily require a comprehensive description of all necessary elements that make up 'Aristotle': John Searle, 'Proper Names' (1958) 67 *Mind* 166.

¹⁴² Machery, above n 132, 85.

¹⁴³ Laurence and Margolis, above n 129, 29-30.

¹⁴⁴ Machery, above n 132, 84.

¹⁴⁵ Ross Parsons, *Income Taxation in Australia* (Law Book Co, 1985) ch 2.

¹⁴⁶ *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443, although query whether the import of this decision is that regularity may support an inference of dependence or reliance and that the two factors combined will be sufficient to characterise an amount as income.

¹⁴⁷ *Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199, 210.

One source of difficulty with concept prototypes is that they might include statistical information about dimensional features, such as the mean and standard deviation from the mean. But such information is fuzzy, as atypical members of a class exist. The extract from *Anstis* in the preceding section of this article¹⁴⁸ illustrates why this statistical ordering of dimensional features of the concept 'income' could be applied for Australian income tax purposes. However, such a statistical ordering of dimensional features is problematic, because no one property can have a high indexical rating owing to the fact that there are cases in which each property, respectively, did not exist. A one-off receipt was income,¹⁴⁹ a non-receipt was income because there was a profit¹⁵⁰ and an amount that did not fall within one of the three generally recognised categories of receipt was income,¹⁵¹ and so on.

A second source of difficulty with concept prototypes is that the rules governing specification of the featural and dimensional properties are ill-defined. While there is evidence to suggest that individuals use a prototypical approach to concepts in day-to-day living,¹⁵² as it seems the High Court did in *Anstis*,¹⁵³ a key difficulty confronting prototype theories is specifying the rules by which we identify the statistically relevant features.¹⁵⁴ Birds, for example, have many features that are either ignored or downplayed when applying the concept 'bird' (ie, digestive system, circulatory system, possession of a brain, eyes). Upon what basis do we focus upon just some of these features in specifying the prototypical properties?

5.9.5 Exemplar theories

Exemplar theories conceive of concepts as a body of information regarding examples of a concept encountered in the past. Reasoning by analogy, this information regarding the properties of prior examples is compared to the thing under scrutiny and a classification decision is made. Exemplar theories of concepts account for the categorisation of a thing as being a member of a concept class upon the basis that the thing closely resembles a known member of the class. When crossing difficult epistemological terrain, reasoning by (dis)analogy to past cases makes sense and is commonly found in case law dealing with the meaning of income.

Consider the case of a thing that closely matches a known member of a class but is only 'moderately similar'¹⁵⁵ to other members of the class. This thing is more likely to be classified as a member of the class by comparison to another thing that is only moderately similar to most known members of the class. This aspect of exemplar theories derives from the fact that they typically recognise that the properties taken into account are dependent, in that application of a concept is a non-linear function of the properties of the subject that match the exemplar. Machery observes that the non-linearity of the exemplar function distinguishes exemplars from prototypes because prototypes typically apply a linear function.¹⁵⁶

¹⁴⁸ See text accompanying n 138 above.

¹⁴⁹ For example, *Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199.

¹⁵⁰ *Warner Music Pty Ltd v FCT* (1996) 70 FCR 197.

¹⁵¹ *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443.

¹⁵² Laurence and Margolis, above n 129, 84.

¹⁵³ *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443.

¹⁵⁴ Machery, above n 132.

¹⁵⁵ For discussion of this aspect of exemplar theories, see Machery, above n 132, 98.

¹⁵⁶ Machery, above n 132, 98.

So when considering whether an amount is 'ordinary income', an exemplar theory suggests that if the receipt matches my exemplars of income in several respects (beneficially received, etc) but does not match other properties of my exemplars (ie, the receipt is irregular) then I apply a function (multiplicative, for example) in weighing whether the receipt is income. In the absence of express consideration of this function, it is possible for different judges and others to apply different functions in resolving a particular case, a process loosely described as determining the weight to be given to particular facts.

The unspecified application of this function underpinned the reservations regarding analogical reasoning – application of an exemplar concept of concepts – expressed by the majority in *Montgomery*. There the majority observed that counsel in their submissions had argued upon the basis of what they considered to be analogous cases, an approach that the majority justices stated missed the import of the definition of income.¹⁵⁷

5.9.6 'Theory theories'

One of the key difficulties with both prototype theories and exemplar theories is that they do not currently specify the basis upon which prototypes or exemplars are identified. 'Theory theories' of concepts seek to address this shortcoming by suggesting that concepts are theories or else are part of a broader theoretical/conceptual framework. Reflecting this 'theory theory' of concepts, both Parsons¹⁵⁸ and Prebble¹⁵⁹ have criticised the concept of income adopted for income tax purposes upon the basis that it does not reflect any theory of the nature of income.

In broad terms, the proposition that concepts are theories is taken to mean that each concept comprises information that explains the membership of a category. Margolis and Laurence suggest that this idea of theories as explanations is tied to the idea that scientific theories explain phenomena and that this idea of theories is supported by the many instances of essentialist thinking that psychologists observe.¹⁶⁰ Essentialist conceptualisation entails identification of the essence of a thing – a three-legged dog may have lost its tail, no longer bark and suffer from a condition that means that it has lost its fur, but it will still be a dog because it satisfies the hidden essence that causes it to be a dog.¹⁶¹ Thus, a 'theory theory' of concepts does not countenance the checklist of observable properties envisaged by classical theories. One key benefit of 'theory theory' is that it appears to explain the development of concepts as children mature into adulthood,¹⁶² and so it is understandable that developmental psychologists have been most attracted to the 'theory theory' of concepts.

Under the second type of 'theory theory', concepts are parts of a broad theoretical framework within which the mind organises concepts into domains. Machery suggests that 'domains are sets of entities, including categories, properties, and processes, that

¹⁵⁷ See extract accompanying n 35 above.

¹⁵⁸ Parsons, 'Income Tax - An Institution in Decay', above n 121.

¹⁵⁹ Prebble, above n 62 and Prebble, above n 63.

¹⁶⁰ Laurence and Margolis, above n 129, 45-6.

¹⁶¹ S Gelman and H Wellman, 'Insides and essences: Early understandings of the non-obvious' (1991) 38 *Cognition* 213, cited by Machery, above n 132, 103.

¹⁶² Laurence and Margolis, above n 129, 46-47.

are treated similarly by the mind'.¹⁶³ Thus, for example, artificial and natural domains may be separated upon the principle of differentiating those things that have been created intentionally from those that arose without deliberate action. Accidental inventions may pose a challenge for this neat categorisation, but the point is that the 'theory theory' envisages a metatheoretical structure within which concepts (possibly comprising mini-theories) will be organised.

In the context of the income tax, a 'theory theory' of income could be grounded upon some concept of justice. Benefit theory¹⁶⁴ and gains theory¹⁶⁵ are alternate options that might shape our thinking about what falls within the class of 'income', either generally or more specifically in the context of taxation. Alternatively, the subjective intention of the taxpayer (or objective/subjective intention) might offer a similar foundation for explaining categorisation of particular amounts as income.¹⁶⁶ If there is a change to a part of the underlying metatheoretical structure, it is reasonable to expect that this flapping of a butterfly's wings might generate ripples throughout the entire conceptual structure as theories of different concepts are adjusted to take account of the changes as they occur. Thus, if the class of things in the world that is grouped under a particular concept changes, then this could affect the scope of other concepts. For example, the concept of 'capital' might change, prompting a reconsideration of the concept of income. Likewise, the concept of 'business activity' might change, once again prompting a reconsideration of 'income' and 'capital'.¹⁶⁷ This approach clearly has implications for the durability of particular concept definitions, as they are liable to change at any moment as a result of change to any other conceptual definition.

5.9.7 Combinations of conceptual theories

So far we have been examining individual theories of concepts upon the basis that a person applies the one theory of concepts with respect to all concepts and with respect to all aspects of those concepts. We have noted that depicting broad concepts of concepts in this way is undertaken with crude brushstrokes that obscure the nuances of individual theories and that individual theories may contemplate that concepts are a complex assemblage of different concepts of concepts. Some theories of concepts take this heterogeneity further in accepting that individuals apply combinations of concepts of concepts in higher level thought.

These hybrid theories suggest that individuals use different conceptual theories with respect to different aspects of a concept, but nevertheless arrive at a fixed concept comprising different conceptual approaches.¹⁶⁸ These heterogeneous theories also accept that individuals apply different concepts of concepts, but argue that individuals may have different concepts for the same thing and that the application of the most appropriate concept will be determined having regard to the context in which the conceptual thinking occurs.

¹⁶³ Machery, above n 132, 103.

¹⁶⁴ Graeme Cooper, 'The Benefit Theory of Taxation' (1994) 11(4) *Australian Tax Forum* 397.

¹⁶⁵ Simons, above n 98.

¹⁶⁶ For discussion of intention of the artefact maker, see Paul Bloom, 'Intention, history, and artefact concepts' (1996) 60(1) *Cognition* 1, cited in Machery, above n 132, 103.

¹⁶⁷ See discussion of this point in *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 295-297.

¹⁶⁸ Machery, above n 132, ch 3.

5.9.8 *Is there an ordinary concept of a concept?*

The preceding overview of different concepts of concepts indicates that there is considerable difficulty in identifying those concepts which are ordinary, in the sense of widely used or attested.

If 'widely used or attested' is understood to imply that something is preferred, then it is possible that the set identified by the label 'ordinary concept' is an empty set because no concept of a concept is preferred. Rather, it is possible that different ideas of concepts are applied by different people and in different contexts. However, I suggest that it is appropriate to adopt the interpretative presumption against meaningless statutory words by proceeding upon the basis that 'widely used' does not require that a particular concept of a concept is preferred. Rather, widely used can be understood to mean 'commonly found in usage'. Thus, given that at least some of the different concepts of concepts described here are commonly accepted to be found in common usage, the legislative reference to 'ordinary concepts' is not an empty set.

However, proceeding on this basis does not resolve the difficulty of identifying ordinary concepts because the ordinary concept of a concept could include all manner of theories of concepts. If so, a judge must extract a concept of income after considering a multitude of possibly incomparable, ordinary concepts of income, and that choice is not guided by any principle expressed in the legislation or the case law.

6. CONCLUSION

In *Montgomery* a majority of the High Court stated that at least some elements of the statement of Sir Frederick Jordan in *Scott* identified the essential nature of the inquiry into the meaning of income and that this statement was not a matter of ritual incantation. In doing so, the High Court juxtaposed ritual incantation with analysis, implying that statutory meaning is an object that can be discovered by analysis of the relevant statutory text in accordance with orthodox principles of statutory interpretation.

Despite this legalist depiction of the objective discovery of law, the meaning of the subsection 6-5(1) definition of 'ordinary income' remains shrouded in a Dickensian fog¹⁶⁹ that several authoritative High Court decisions upon the subject have not dispersed. Indeed, with respect, those High Court decisions appear to have thickened the fog by adopting various inconsistent statements of the elements of Sir Frederick Jordan's statement. Moreover, those decisions have not analysed the elements of that statement. Given this significant lacuna in the High Court's elaboration of the concept of ordinary income, this article analysed Sir Frederick Jordan's statement by locating it in the context of the vibrant linguistic philosophy of the early twentieth century. Viewed through the lens of this contemporaneous linguistic philosophy, analysis of Sir Frederick's statement suggests that the meaning and interaction of the elements of that statement are ill-defined. Further, it was noted that some of those elements may be contradictory, giving rise to the possibility that Sir Frederick Jordan's statement incorporates irresolvable contradictions.

These conclusions regarding the absence of analysis undertaken by the High Court and the difficulties that would arise were such analysis were to be undertaken, are significant for several reasons. They are significant for the doctrinal approach to the concept of

¹⁶⁹ Charles Dickens, *Bleak House* (Penguin, 1971 [1853]) ch 1.

ordinary income, for our self-understanding as we reflect upon the nature of 'law'¹⁷⁰ and also to the sociology of law.

From the perspective of doctrinal elaboration of the concept of income, the analysis of Sir Frederick Jordan's statement indicates that the statement does not offer a secure foundation for identifying 'income'. This indicates that a different approach to the statutory definition of 'ordinary income' must be found. However, the plurality of concepts of concepts poses considerable challenges if the statutory definition of ordinary income is to be interpreted in line with orthodox principles of statutory construction.

If there is no uniformly adopted foundation upon which amounts are characterised under the income/capital dichotomy, there is the possibility that law is inherently pluralist as Davies suggests.¹⁷¹ Taking this inherent heterogeneity of law to an extreme, it is possible that this instance of what is commonly described as 'black letter law' in fact is one in which philosophical scepticism might offer a more appropriate account¹⁷² than theories of law framed upon determinate legal meaning¹⁷³ or limited 'judicial discretion'.¹⁷⁴ Moreover, as 'judicial activism'¹⁷⁵ is necessarily part of the practice of Australian taxation law because of the absence of analysis described in this article, and also because of the intrinsic pluralism that would be exposed if analysis were undertaken, sociological examination of law's legitimacy in this domain should be re-examined. If the legitimacy of judicial practice in this domain cannot plausibly be grounded upon the objective discovery of statutory meaning, then the existence and foundations of that legitimacy need to be reassessed.

¹⁷⁰ Raz, *Between Authority and Interpretation*, above n 58, 31.

¹⁷¹ Margaret Davies, 'The Ethos of Pluralism' (2005) 27(1) *Sydney Law Review* 87.

¹⁷² Prebble, 'Why is Tax Law Incomprehensible?', above n 63.

¹⁷³ For example, Ronald Dworkin, above, n 58.

¹⁷⁴ H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) ch 7.

¹⁷⁵ Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) *Quadrant*, January-February, 9; for critical review of this article, see Allan C Hutchinson, 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29(1) *Monash University Law Review* 85.