Tax – Where Laws Intersect

Rise2018 National Conference

Australian Bar Association and New South Wales Bar Association

The Hon Robert French AC
16 November 2018, Sydney

Introduction

This paper broadly concerns the intersection between tax law and the general law, particularly in the context of judicial review. It directs attention to the question — are tax laws special to the extent that they should attract particular approaches to their interpretation and their interaction with the general law. That question is the focus of this paper. That question and the more general issue of oversight of the administration of taxation laws is posed in the context of the effects of taxation laws on the lives and wellbeing of millions of Australians and their governments. Tax laws are not just about raising revenue. They are used to influence important economic priorities and societal behaviours through incentives for some activities and disincentives for others. For the success of their objectives they require public trust founded on the belief that the executive authorities administering them are accountable for the ways in which they discharge their duties and do so within the law.

Tax exceptionalism

The primary question — are tax laws special — has been agitated in more than one jurisdiction, but particularly in the United States. It has centred on the term 'tax exceptionalism'. That term describes the belief that 'tax law is somehow deeply different from other law with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.'[1] Professor Kristin Hickman, in a paper published in 2006, spoke critically of it:

---

[1] Laurence Zelenak, 'Maybe Just a Little Bit Special, After All?' (2014) 63 *Duke Law Journal* 1897, 1901. See also James M Pucket, 'Structural Tax Exceptionalism' (2015) *Georgia Law Review* 1067, 1069.

> The view that tax is different or special creates, among other problems, a cloistering effect that too often leads practitioners, scholars, and courts considering tax issues to misconstrue or disregard otherwise interesting and relevant developments in non-tax areas, even when the questions involved are not particularly unique to tax.[2]

Former Justice Michael Kirby, speaking to the Institute of Chartered Accountants on this theme in 2011 began his address with what he described as 'the most upsetting, objectionable and insulting thing' he could say to the audience. He found it in his dissenting judgment in *Federal Commissioner of Taxation v Ryan*[3] in which he had written:

> It is hubris on the part of special[ists] … to consider that 'their Act' is special and distinct from general movements in statutory construction which have been such a marked feature of our legal system in recent decades.[4]

He softened the blow by conceding the high intelligence of his audience, acknowledging that:

> Tax is hard because it is detailed, complicated and imports precise notions of commercial and property law, in part ancient and, in part, constantly evolving. Because tax law is hard, it needs, and attracts, fine minds and precise ways of thinking.[5]

The perception of tax law as special is not unique. There are many areas of the law which are regarded by one constituency or another, including specialist legal practitioners, as exceptional by virtue of their perceived complexity or the need for them to be administered in a way that is sympathetic to some societal goal. In Australia there have been a number of examples of stakeholder constituencies asserting the need, in particular subject areas, for

---

2 Kristin E Hickman, 'The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference' (2006) 90 *Minnesota Law Review* 1537, 1541.

3 (2001) 201 CLR 109.

4 The Hon M Kirby, 'Down With *Hubris*! A Message on Tax Reform for Australian Tax Specialists', Speech delivered to The Institute of Chartered Accountants in Australia, National Tax Conference 2011, Melbourne, 7 April 2011, 1 citing *Federal Commissioner of Taxation v Ryan* (2001) 201 CLR 109, 146 [84].

5 Ibid 2.

specialist or accredited practitioners, specialist judges, and specialist courts and tribunals.[6] Those areas have included, from time to time, workplace relations law, family law, human rights, native title, intellectual property, competition law, drug crime, environmental law, town planning law, veterans' affairs[7] and the sentencing of indigenous offenders.[8]

The idea of a specialist taxation court has been floated. Justice Tony Pagone raised it in a paper which he delivered in 2010[9] and which was quoted by Justice Kirby in his paper. Such courts offer obvious efficiencies. However, they also attract the obvious risks of becoming jurisprudential silos, accessible only to a narrow band of narrowly focussed cognoscenti. A further difficulty common to all specialist courts in Australia is that the final appeal on important questions of the laws they administer lies to a generalist court, the High Court of Australia which, from the perspective of the specialist, gets things wrong on occasion. An institutional compromise which avoids the establishment of special courts is the creation of special lists, streams, or national practice areas within generalist courts. It can allow for the deployment of appropriate expertise within a generalist court and with appropriate rotations can help protect against the growth of subject matter exceptionalism.

On a comparative note, tax exceptionalism had a considerable history in the United States including different approaches to the same taxation laws being taken by the specialist Article I Tax Court and the Article III Federal District Circuit Courts. It suffered a reverse with the decision of the Supreme Court in 2010 in *Mayo Foundation for Medical Education and Research v United States*[10] although not for the benefit of taxpayers. The Court rejected an argument that a less deferential standard of review should be applied to Treasury Department tax regulations than that applied to the rules of other agencies under the principle enunciated in *Chevron USA, Inc v Natural Resources Defense Council, Inc*.[11] In *Chevron*, the Supreme Court had held that where there is ambiguity in a statute, courts, in reviewing

---

6 For a general discussion of the issues raised by the creation of specialist courts with an emphasis on workplace relations see Justice Michael Moore, 'The Role of Specialist Courts – An Australian Perspective' (2000–2001) *Law Asia Journal* 139–54; (2001) *FedJSchol* 11. See also The Hon TF Bathurst, 'Specialist Courts/Court Tracks – The Way to Go?', Paper delivered at the Pacific Judicial Conference, Papua New Guinea, 14 September 2016.

7 See eg Melissa Davey, 'Australia should consider specialist war veterans' courts, says law researcher', *The Guardian* (online), 24 April 2015 <http://www.theguardian.com/australia.../2015/apr/24/australia-should-consider-specialist-war-veterans-courts-says-law-researcher.

8 Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders* (Federation Press, 2015).

9 T Pagone, 'Some Problems in Legislative Economic Concepts – A Judicial Perspective', Unpublished paper delivered to the Federal Treasury, 2 December 2010 in a Revenue Group Seminar Series.

10 562 US 44 (2010).

11 467 US 837 (1984).

regulations made under it, should apply the interpretation adopted by the regulatory agency if it were reasonably open. In *Mayo*, the Court said:

> In the absence of … justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action'.[12]

In the United Kingdom there do not appear to be any special principles of public law that apply to the administration of the taxation laws. In a paper published in the *Journal of Tax Administration* in 2017, Stephen Daly of Kings College, London cited Lord Woolf's statement in 2001 in *R v North & East Devon Health Authority, Ex parte Coughlan* that '[i]t cannot be suggested that special principles of public law apply to the Inland Revenue or to taxpayers.' [13] Of course, the application of general principles of public law in a particular area of the law may generate a class of outcomes which have distinctive characteristics simply because of the subject matter upon which the general law operates.

As Daly pointed out an historical inclination to literal interpretation of taxation laws in the United Kingdom was for a long time a kind of tax exceptionalism. That literalism coupled with a degree of hostility to the revenue, was encapsulated in Lord Cairn's observation in *Partington v Attorney-General* in 1869 that if the Crown 'cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.'[14] The spirit of literalism endured well into the 20th century. Lord Tomlin said in 1936 in *Inland Revenue Commissioners v Duke of Westminster* that:

> [e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.[15]

---

12 562 US 44, 51 (2010) citing *Dickinson v Zurko* 527 US 150, 154 (1999).

13 Stephen Daly, 'Tax Exceptionalism: A UK Perspective' (2017) 3(1) *Journal of Tax Administration* 95 citing [2001] QB 213, 243 [61].

14 (1869) LR 4 HL 100, 122.

15 [1936] AC 1, 19.

Literalism yielded only to the need to avoid the absurdities that its application sometimes produced.[16]

Exceptionalist literalism along similar lines informed the Australian approach to the interpretation of tax laws for many years. The late Justice Graham Hill once observed:

> In the good old days, some think, judges interpreted the law having regard to the language used by Parliament and gave the benefit of the doubt to the taxpayer. If Parliament wanted to tax, it was up to Parliament to make its intentions clear; if Parliament wanted to hit the target, it had to do so cleanly.[17]

Literalism was adopted early in the life of the High Court as an appropriate approach to statutory interpretation generally and that of taxation statutes in particular. Barton J in 1917 quoted Viscount Haldane LC for the proposition that:

> The duty of Judges in construing Statutes is to adhere to the literal construction unless the context renders it plain that such a construction *cannot* be put on the words. This rule is especially important in cases of Statutes which impose taxation.[18]

Australia followed the Westminster line in *Anderson v Commissioner of Taxes (Vic)*.[19] The Court held that accrual by survivorship of a beneficial interest in land held jointly was not chargeable with probate duty under a Victorian statute.[20] Latham CJ quoted Lord Cairns from *Partington*.[21] Rich and Dixon JJ found in the English cases something like an interpretive principle of legality against the imposition of tax absent clear language. They quoted Lord Buckmaster in *Ormond Investment Co Ltd v Betts* where he referred to 'a

---

16 See generally N Preston, 'The Interpretation of Taxing Statutes: The English Perspectives' (1990) 7 *Akron Tax Journal* Art 2.

17 Justice Graham Hill, 'How is Tax to be Understood by the Courts?', Paper presented at the Taxation Institute of Australia SA State Convention, 4 May 2001, 1 cited in J Tretola, 'The Interpretation of Taxation Legislation by the Courts — A Reflection on the Views of Justice Graham Hill' (2006) 16 *Revenue Law Journal* 74–5.

18 *Lumsden v Internal Revenue Commissioners* [1914] AC 877, 896 cited by Barton J in *Commissioner of Stamp Duties (NSW) v Simpson* (1917) 24 CLR 209, 216 (emphasis in original).

19 (1937) 57 CLR 233.

20 *Administration and Probate Act 1928* (Vic).

21 Ibid 239 quoting *Partington v Attorney-General* (1869) LR 4 HL 100, 122.

cardinal principle … well known to the common law [which] has not been and ought not to be weakened—namely, that the imposition of tax must be in plain terms.'[22]

Literalism continued into the 1980s. Chief Justice Sir Garfield Barwick was characterised as its judicial flag bearer. In *Commissioner of Taxation v Westraders Property Pty Ltd*,[23] decided in 1981, he said:

> It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax.[24]

The tide was beginning to ebb. Mason J did not echo the Chief Justice's sentiments but adopted a purposive approach by reference to the legislative history of the relevant provisions. Murphy J dissented having regard to the character of the relevant transaction as 'a major tax avoidance scheme'[25] and observed presciently:

> It is an error to think that the only acceptable method of interpretation is strict literalism. On the contrary, legal history suggests that strict literal interpretation is an extreme, which has generally been rejected as unworkable and a less than ideal performance of the judicial function.[26]

He lamented that in tax cases the prevailing trend in Australia had become so absolutely literalistic that it had become a disquieting phenomenon. He said, in words informed by a consciousness of the importance of our tax laws, albeit *against* an exceptionalist approach to their interpretation:

---

22 Ibid 243 quoting *Ormond Investment Co Ltd v Betts* [1928] AC 143, 151.
23 (1981) 144 CLR 55.
24 Ibid 59.
25 Ibid 79.
26 Ibid.

> If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.[27]

A purposive approach applicable to statutory interpretation generally overtook UK tax jurisprudence as evidenced in such cases as *Ramsay v Internal Revenue Commissioner*[28] and *Internal Revenue Commissioners v McGuckian*.[29] The High Court's move away from literalism was evidenced in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*.[30] Mason CJ and Wilson J said in their joint judgment '[t]he fact that the Act is a taxing statute does not make it immune to the general principle governing the interpretation of statutes.'[31] The approach to interpretation of taxing statutes began to be assimilated with the interpretation of statutes generally. Moreover, exceptionalist or not, the tax laws of the Commonwealth, like all Commonwealth statutes, were always subject to the rules set out in the *Acts Interpretation Act 1901* (Cth). One of those related to purpose, that is s 15AA which required that:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act), is to be preferred to each other interpretation.

A relevant purpose or object may be discerned by reference to extrinsic material as authorised by s 15AB.

The discernment of purpose is not necessarily congruent with the discovery of the elusive phantom known as legislative intention. A joint judgment of six Justices of the High Court in *Lacey v Attorney-General (Qld)* in 2011[32] observed, in relation to the general principles governing statutory interpretation, that:

---

27 Ibid 80.
28 [1982] AC 300, 323 (Lord Wilberforce).
29 [1997] 1 WLR 991, 999 (Lord Steyn).
30 (1981) 147 CLR 297.
31 Ibid 323.
32 (2011) 242 CLR 573.

> The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.[33]

That said, ascertainment of purpose can be a challenge. This is particularly so in statutory provisions which are reflective of underlying political compromises. In some cases purpose can only be identified at a level of generality which is not of any assistance in making the constructional choices which are in contest and which are open on the text of the provision. As McHugh J observed in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*[34] much modern legislation regulating industry reflects compromises reached between or forced upon competing groups whose interests may be enhanced or impaired by legislation. He said:

> In such cases, what emerges from the legislative process … reflects wholly or partly a compromise that is the product of intensive lobbying, directly or indirectly, of Ministers and parliamentarians by groups in the industry seeking to achieve the maximum protection or advancement of their respective interests. The only purpose of the legislation or its particular provisions is to give effect to the compromise. To attempt to construe the meaning of particular provisions of such legislation not solely by reference to its text but by reference to some supposed purpose of the legislation invites error.[35]

That observation is readily capable of application to taxation laws.

The contemporary approach to statutory interpretation directs attention to text, context and purpose. Legislative intention which can be distinguished from purpose is imputed to the preferred construction of the statutory text rather than determined as an anterior fact which informs construction. So much appears from the oft quoted passage in *Project Blue Sky Inc v Australian Broadcasting Authority*:

---

33 Ibid 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
34 (2005) 224 CLR 193.
35 Ibid 231 [126].

> The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.[36]

The 'text, context, purpose' troika was restated in the judgment of the High Court delivered on 14 November 2018 in *SAS Trustee Corporation v Miller*[37] where reference was also made to the relative coherence of each constructional choice with the scheme of the statute and its objects and policies.

The application of the general rules of interpretation to taxing statutes was restated in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.[38] Four Justices of the High Court in a joint judgment made two important points:

1. Tax statutes do not form a class of their own to which different rules of construction apply.

2. The fact that a statute is a taxing Act or contains penal provisions is part of the context and is therefore relevant to the task of construing the Act in accordance with those settled principles.[39]

Pearce and Geddes in the 8th edition of their work *Statutory Interpretation in Australia* commented on general statements that appear to minimise the distinction between taxation and other laws and said nevertheless 'it seems likely that the courts will maintain the view that "it is for the Crown to show that a taxing statute imposes a charge on the person sought to be taxed".'[40] If that observation suggests a tax specific approach to interpretation it should be treated with some caution. It may be, however, that it does no more than reflect a particular case of a more general proposition about statutes imposing duties or creating liabilities.

A generalist's legal landscape

The application of the general rules of interpretation to tax laws requires legal skills but it is questionable whether it requires skills particular to those laws. Indeed generalist

---

36 (1998) 194 CLR 355, 384 [78].
37 [2018] HCA 55.
38 (2009) 239 CLR 27.
39 Ibid 49 [57] (Hayne, Heydon, Crennan and Kiefel JJ).
40 Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [9.36] quoting *C & J Clark Ltd v Inland Revenue Commissioners* [1975] 1 WLR 413, 419 (Scarman LJ).

skills are often called for. Taxation law does not occupy an island entire unto itself. It embraces much of the general law. The liabilities, duties and powers to which tax laws give rise more often than not result from their interaction with the law relating to contracts, torts, property, equity and trusts, corporations and partnerships, and the law as set out in the array of Acts and Regulations, Commonwealth, State and Territory, which create, regulate, modify and destroy rights, powers, privileges and obligations including those which arise at common law.

There are many examples of such interactions. I will mention two from my time on the High Court. In 2010 in *Aid/Watch Inc v Federal Commissioner of Taxation*[41] the Court was concerned with the question whether the provisions of income tax, fringe benefits tax and goods and services tax legislation exempting charitable institutions from taxation extended to Aid/Watch which promoted the more efficient use of Australian and multi-national foreign aid directed to the relief of poverty. The answer depended upon the understanding of that term in the law of trusts and, in particular, the classification of charitable trusts derived from Lord Macnaghten's speech in *Commissioners for Special Purposes of the Income Tax v Pemsel*,[42] classifying charitable trusts into their four principal divisions. The exempting provisions each picked up as a criterion for its operation the general law relating to equitable principles with respect to charitable trusts. The Court observed that in the absence of a contrary indication in the statute, the statute speaks continuously to the present and picks up the case law as it stands from time to time. Importantly, the development of the general law doctrine through case law was not to be directed or controlled 'by a curial perception of the scope and purpose of any particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.'[43] That is to say, the development of the general law was not to be informed by the statutory context in which it was applied. Thus the term 'charitable institution' in s 50–5, Item 1.1 of the *Income Tax Assessment Act 1997* (Cth) and the corresponding provisions of the *Fringe Benefits Tax Assessment Act 1986* (Cth) and the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) was to be understood by reference to its force in the general law as developed in Australia from time to time.[44]

---

41 (2010) 241 CLR 539.
42 [1891] AC 531, 583.
43 (2010) 241 CLR 539, 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
44 Ibid 550 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

The second case was *Federal Commissioner of Taxation v Bamford*.[45] The relevant section of the *Income Tax Assessment Act 1936* (Cth) (ITAA) provided for a beneficiary of a trust estate presently entitled to a share of its income to be taxed on its share. The Court held that a capital gain, treated by a trustee as income available for distribution, was assessable. The concept of the 'income of a trust estate' in the Act was to be understood according to the general law of trusts. Those cases are fairly straight forward examples of the way in which taxation law ranges across the landscape of the general law, both judge-made and statutory.

An intersection of particular importance to taxation law is with the general principles underpinning what can be described as 'the rule of law' in Australia. Here the legislative scheme providing for challenges to taxation assessments coupled with the statutory validity accorded to assessments outside review under Part IVC of the *Taxation Administration Act* might seem to place tax laws in a special light. If it does so however, it is, in a formal sense, a consequence of the substantive law being interpreted according to general rules.

Taxation law and the rule of law

Decisions made under taxing statutes are made in a constitutional and legislative framework which gives content to the rule of law. In Australia, that concept includes some specific propositions relevant to the exercise of official powers:

1. All official power derives from rules of law found in the Commonwealth and State Constitutions or in laws made under those Constitutions.

2. There is no such thing as unlimited official power, be it legislative, executive or judicial.

3. The powers conferred by law must be exercised lawfully, rationally, consistently, fairly and in good faith.

4. The courts have the ultimate responsibility of resolving disputes about the limits of official power.

Section 75(v) of the *Commonwealth Constitution*, described by Gleeson CJ as 'a basic guarantee of the rule of law' confers jurisdiction on the High Court:

---

[45] (2010) 240 CLR 481.

> In all matters:
>
> …
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The provision confers authority on the Court to judicially review decisions of Commonwealth Ministers and officers for jurisdictional error which, broadly speaking, covers conduct in excess of power. The jurisdiction cannot be removed by anything other than a constitutional amendment. It is thus proof against attempts to place Commonwealth executive action beyond legal scrutiny and challenge where jurisdictional error is asserted. A statutory equivalent of that jurisdiction is conferred on the Federal Court by s 39B(1) of the *Judiciary Act 1903* (Cth).

In *Plaintiff S157/2002 v Commonwealth*,[46] decided in 2003, Gleeson CJ observed in relation to s 75(v) that:

> The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.[47]

Importantly for present purposes however, the Chief Justice pointed out that the legislative powers given to the Parliament by the *Commonwealth Constitution* enable Parliament to determine the content of the law to be enforced by the Court.[48] It is in that area that particular provisions of the ITAA confining challenges to assessments, for the most part to processes under Pt IVC of the *Taxation Administration Act*, operate.

The importance of judicial review to the rule of law was emphasised in a statement by Denning LJ dating back to 1957 and quoted by Gleeson CJ in *Plaintiff S157* that '[i]f tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.'[49] Similar concerns have no doubt informed occasional

---

46 (2003) 211 CLR 476.
47 Ibid 483 [6].
48 Ibid.
49 Ibid 483 [8] citing *R v Medical Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 586.

observations in the United Kingdom about the possibility of common law limitations on the legislative powers of the Parliament. In 2006, in *R (Jackson) v Attorney General*[50] Baroness Hale, now the President of the Supreme Court of the United Kingdom, said:

> The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny … In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.[51]

Observations to like effect were made by Lord Steyn[52] and by Lord Hope.[53] Lord Hope revisited the general proposition in 2012 in *Axa General Insurance Ltd v HM Advocate*[54] when speaking of legislation to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. He said '[t]he rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'[55]

Resort to the elusive principles of common law constitutionalism is not necessary in the Australian federal context because, as Gleeson CJ said in *Plaintiff S157*:

> In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, … It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power.[56]

Plaintiff S157 concerned the validity and application of s 474 of the *Migration Act 1958* (Cth) which provided 'that a privative clause decision' was final and conclusive and that it must not be challenged, appealed against, reviewed, quashed or called in question in

---

50 [2006] 1 AC 202.
51 Ibid 318 [159].
52 Ibid 302–3 [102].
53 Ibid 308 [120].
54 [2012] 1 AC 868.
55 Ibid 913 [51].
56 (2003) 211 CLR 476, 484 [9].

any court and that it was not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. The term 'privative clause decision' referred to a decision of an administrative character made, proposed to be made, or required to be made under the *Migration Act,* save for certain exclusions. The Court in *Plaintiff S157* held that s 474 properly construed did not prevent the judicial review of decisions that involve jurisdictional error because they were not decisions made 'under' the Act. Taxation law had its moment on the stage in that case. The Chief Justice referred to *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*,[57] which concerned the interaction of s 39B(1) of the *Judiciary Act* with ss 175 and 177 of the ITAA. Section 175 provides:

> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Section 177(1) provides:

> The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

The provisions have a considerable ancestry in earlier Commonwealth tax legislation and precursor legislation in the States and colonies.

Four of the Justices in *Richard Walter* held that s 177 did not purport to deprive the Federal Court of the jurisdiction conferred by s 39B(1) of the *Judiciary Act*. Deane and Gaudron JJ were of the opinion that s 39B(1) overrode or amended s 177(1) to the extent that it would apply to certificates produced in proceedings in the Federal Court under s 39B(1) where the applicant's case was that an assessment was invalid on the ground that it was not bona fide.

---

[57] (1995) 183 CLR 168.

In *Plaintiff S157* Gleeson CJ referred to an observation by Mason CJ in *Richard Walter* that privative provisions were effective to protect an award or order from challenge on the ground of a mere defect or irregularity which did not deprive the tribunal of the power to make the award or order. That qualification protected review on the basis of jurisdictional error. But it begged the question — what would amount to jurisdictional error in relation to assessments made and issued by the Commissioner of Taxation?

That question was considered in 2008 in *Commissioner of Taxation (Cth) v Futuris Corporation Ltd*.[58] The case that came to the High Court concerned a *Judiciary Act* action in which Futuris argued that the assessment processes to which it had been subjected were flawed because, in the second of two amended assessments, the Commissioner had deliberately double-counted a significant amount of its taxable income. Futuris sought an order quashing the second amended assessment and a declaration of its invalidity. The Full Court of the Federal Court found in favour of Futuris that the second amended assessment was not a bona fide exercise of the Commissioner's power of assessment.

A majority of the High Court allowed the Commissioner's appeal and set aside the Full Court's orders. The central issue was whether the Commissioner had made a jurisdictional error in relation to the second amended assessment. The majority held that the Commissioner had double-counted but that the double-counting did not amount to jurisdictional error:

> In the process of the making of the second amended assessment errors by the Commissioner of this nature … fell within the scope of s 175 as explained earlier in these reasons. They could not found a complaint of jurisdictional error attracting the exercise of jurisdiction to issue constitutional writs … If there were errors they occurred within, not beyond, the exercise of the powers of assessment given by the [ITA Act 1936] to the Commissioner and would be for consideration in the Pt IVC proceedings.[59]

The majority identified two situations where a purported assessment would not be an assessment protected by s 175. First, tentative or provisional assessments were not assessments for the purposes of s 175. Second, conscious maladministration in the

---

58 (2008) 237 CLR 146.

59 Ibid 161–2 [45].

assessment process would deprive its product of the character of an assessment for the purposes of s 175. These have been described as historically 'the only two recognised grounds for jurisdictional error in respect of the Commissioner's assessment'.[60] The majority in their reasoning drew on s 13 of the *Public Service Act 1999* (Cth) which requires public servants to 'behave with honesty and integrity' and to 'act with care and diligence' in connection with their employment.[61] They held that this provision 'points decisively' against construing s 175 as protecting decision-makers who deliberately fail to act within the limits of their powers.[62]

On the facts, the second amended assessment was not tentative or provisional. The Commissioner had not engaged in conscious maladministration in making it. The majority attached weight to the Commissioner's intention to correct double-counting through the exercise of his discretion under s 177F(3).

This approach to judicial review of taxation assessment decisions might be thought to be confining and perhaps indicate that tax law is given special treatment. On the other hand, it might be thought simply to reflect the width of the legal powers conferred on the Commissioner by the operation of the no-invalidity provision, s 175. If non-compliance or misconstruction of a taxation law in making an assessment would vitiate that assessment absent s 175, then the addition of s 175 may be seen simply as going to the legal effect of the Commissioner's assessment notwithstanding error. That is a legal effect which is mitigated by Part IVC albeit not in relation to jurisdictional error.

The majority in *Futuris* also held that s 177 is not a privative clause.[63] In their joint judgment, Gummow, Hayne, Heydon and Crennan JJ, held that s 177(1) gave evidentiary effect to s 175 and that there was no conflict requiring any reconciliation between them and the requirements of the Act governing assessments. Significantly, towards the end of their judgment they spoke of the observation in *Richard Walter* that s 177(1) did not limit the jurisdiction conferred by s 39B of the *Judiciary Act*. That view had not been challenged in *Futuris*. However reference had been made in some of the judgments in *Richard Walter* to the distinction, extant in 1995, between mandatory and directory provisions and to what

---

60 Sue Milne, 'The Bottom Line for Review of an Assessment – A Case Note on *Commissioner of Taxation v Futuris Corporation Ltd*' (2010) 36(2) *Monash University Law Review* 181, 182.

61 *Commissioner of Taxation (Cth) v Futuris Corporation Ltd* (2008) 237 CLR 146, 164 [55] and see *Public Service Act 1999* (Cth) s 13(1)–(2).

62 Ibid.

63 Ibid 166 [64].

'seems to have been some doctrinal status then afforded to *R v Hickman; Ex parte Fox*.'[64] Their Honours said:

> As to the first matter, *Project Blue Sky* has changed the landscape and as to the second, *Plaintiff S157/2002* has placed 'the *Hickman* principle' in perspective[65].

Futuris was to be decided on the basis of the path set out in the joint reasons and not by any course assumed to be mandated by what was said in any one or more of the several sets of reasons in *Richard Walter*. Although in recovery proceedings s 177 operated to change what otherwise would be the operation of the relevant laws of evidence, the presence of Part IVC meant that it did not operate to impose an incontestable tax or otherwise involve usurpation of the federal judicial power by the deeming of an ultimate fact.

The implications of no-invalidity clauses such as s 175 for judicial review, were described by Leighton McDonald and Peter Cane in their book on *Principles of Administrative Law* published in 2013.[66] The authors said:

> to the extent that, in general, judicial remedies are issued only on the basis of jurisdictional errors, no-invalidity clauses may be read as converting errors that would otherwise be jurisdictional in nature into errors which are made within the decision maker's power and will not justify a remedy. In this way, no-invalidity clauses expand the decision maker's powers to make legally valid decisions.

There are questions about the consequence of wide no-invalidity clauses coupled with privative clauses when it comes to the maintenance of the rule of law.

Post-*Futuris* it seems that in a formal sense, the rule of law in connection with the administration of the taxation laws, so far as they relate to assessments, is intact. There is no scope for unreviewable official action beyond statutory power, even though statutory power is widened by s 175. Judicial review is available for jurisdictional error which might deprive

---

64 (1945) 70 CLR 598.

65 (2008) 237 CLR 146, 168 [70].

66 Leighton McDonald and Peter Cane, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2013) 201.

a purported assessment of the character of an assessment because of its tentative or provisional nature or because of corruption or deliberate maladministration.

Lisa Burton Crawford of the University of New South Wales in a paper published last year[67] raises a question about the interaction between no-invalidity clauses and the implied separation of the judicial power. She argues that such clauses should not be treated as conclusively determining the validity of executive action and that it is wrong to say that such a clause puts the issue 'beyond argument'. A no-invalidity clause having such an effect might amount to a legislative usurpation of the judicial power of the Commonwealth. In this connection Kirby J in his judgment in *Futuris* said:

> it is questionable whether the Federal Parliament could lawfully provide that the 'validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.'
>
> The validity of an assessment (like any other legislative, executive or judicial act of a Commonwealth officer) can only be finally determined by a court, not by parliamentary *fiat* nor by administrative action. Moreover, the effect of non-compliance with a provision of the Act must surely depend upon the particular terms of that provision; the nature, extent and purpose of any non-compliance; and whether in law the non-compliance affects (or does not affect) the validity of what has been done or omitted.[68]

Burton Crawford offers a loosely analogical argument by reference to observations in recent judgments, which some might use to support the proposition that Parliament cannot statutorily declare that what is black in a statute is actually white. One example offered is the observation by Kiefel J in *CPCF v Minister for Immigration and Border Protection*, that statutory statements of parliamentary intention only have effect if the intention is one which the substantive provisions of the Act are capable of supporting.[69] And in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail*[70] a statutory assertion that an authority given a separate legal personality was 'not a body corporate' did not conclude the question whether the authority

---

67 Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No –invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81.

68 (2008) 237 CLR 146, [124]–[125].

69 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [281]–[284] (Kiefel J). See also *Monicilovic v The Queen* (2011) 245 CLR 1, [112], [208] and [316].

70 (2015) 256 CLR 171.

was nevertheless 'a corporation' within the meaning of s 51(xx) of the *Commonwealth Constitution.*

Burton Crawford also refers to the principle of legality as applicable to the construction of no-invalidity clauses to protect rights of judicial review on grounds such as breach of procedural fairness and rules against fraud and bad faith. She argues that the courts will not conclude that Parliament has authorised the executive action contrary to those principles unless it does so by express and unambiguous words.

Whether or not one agrees with those observations, they provide serious food for thought and indicate that more remains to be said about the operation of no-invalidity clauses and the extent to which they may be allowed to thin out the effective protection derived from the rule of law and the extent to which they legislatively undermine the judicial power.

There is a kind of 'tax is special' argument about the implications of *Futuris* advanced by Professors McDonald and Cane in their book *Principles of Administrative Law*. They consider that *Futuris* is unlikely to have the consequence that all no-invalidity clauses will be read according to their terms. They consider that it may be confined to the tax context because Pt IVC of the *Tax Administration Act* is an alternative to judicial review which can satisfy an entrenched minimum requirement of legal accountability. On that basis, it is suggested, courts might be more willing in the tax context than in other contexts to hold that judicial review is limited. They argue that although the joint judgment in *Futuris* did not make this explicit, the Justices referenced Part IVC procedures a number of times in ways which might suggest that they considered them as a 'fall back accountability' mechanism. They suggest that courts may limit the effect of no-invalidity clauses in other cases where there is no alternative accountability mechanism by pointing to the 'internal contradiction' between such clauses and the limits on the decision-maker's powers.

In reflecting upon these observations I am drawn back to a joint judgment I wrote in 1991 with Justice Trevor Morling in a case called *David Jones Finance and Investments Pty Ltd v Commissioner of Taxation*,[71] which concerned the interaction between s 39B(1) of the *Judiciary Act*, s 175 and s 177. In that judgment we held that s 177 operated upon jurisdiction but did not displace the jurisdiction subsequently conferred on the Federal Court by s 39B of the *Judiciary Act*. The purpose of s 39B was to confer on the Federal Court the

---

[71] (1991) 28 FCR 484.

full amplitude of the like jurisdiction conferred on the High Court by s 75(v) of the *Constitution*, albeit not a constitutionally entrenched jurisdiction. Section 177 did not protect the Commissioner from inquiry into the bona fides of the exercise of his statutory powers. The decision, however, was disapproved by the majority judgment in the High Court in *Richard Walter* and is now lost in the mists of history.

This paper has focussed upon judicial review of taxation decisions particularly in the area of operation of the no-invalidity provision in connection with assessments, which is central to the enforcement of the law. There are of course other aspects of taxation administration outside the assessment powers which attract general judicial review jurisdictions including those created by s 39B(1) of the *Judiciary Act* and by the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). A number of these were usefully set out in the 2016 Review by the Inspector General of Taxation into the Taxpayers Charter and Taxpayer Protections.

Non-judicial accountability

It would be a mistake to leave this topic without referring to the administrative mechanisms in place which provide for scrutiny and accountability in relation to the administration of taxation laws in ways which are indicative of their national significance.

There are the generic mechanisms of parliamentary scrutiny particularly through the work of parliamentary committees. However, given the complexity of the law the ability of such committees to give finely detailed consideration to its administration may be limited. The Australian Taxation Office (ATO) is also subject to scrutiny by the Australian National Audit Office in the same way as other government agencies. Indeed, the Australian National Audit Office undertook performance audits of the Taxpayers Charter in 2004-05, 2005-06 and 2007.

A tax specific mechanism for complaints about the administration of the ATO was created in 1995 with the establishment of a Tax Ombudsman. This was a recommendation of the Joint Committee of Public Accounts, which had also recommended the establishment of the Taxpayers Charter. An important development was the subsequent establishment of the Office of the Inspector General of Taxation. The Inspector General of Taxation (IGT) is an independent statutory officer whose function is to review systemic tax administration issues and to report to Government with recommendations for improving tax administration. From

1 May 2015, the IGT took over the handling of tax complaints from the Ombudsman. Its scrutinising function was extended to include the Tax Practitioners' Board. The IGT describes his functions as follows:

> In the context of taxpayer rights and protection, the IGT, as an independent agency, assists taxpayers in several ways. First, the IGT facilitates discussion between taxpayers and the ATO or TPB to address or resolve mattes in dispute. Secondly the IGT makes determinations which are persuasive but not binding on the ATO or TPB. It should be noted that the IGT is not empowered to consider the merits of ATO decisions as this is the jurisdiction of the Administrative Appeals Tribunal and the courts.[72]

The expectations by taxpayers of fair and reasonable treatment by the Commissioner of Taxation and his office, the availability of judicial and non-judicial appeal and review processes and complaint mechanisms, are of particular importance to the field of taxation law. As the IGT has stated, and the ATO has acknowledged, the way in which the ATO treats taxpayers is a major factor in influencing their compliance. In one sense there is nothing special about that aspect of tax administration. Public trust is indispensable to the effectiveness of all our institutions, public and private. Taxation administration however, is special in the sense that its effectiveness is central to the functioning of government generally and the wellbeing of our society and its members.

---

[72] Inspector General of Taxation, 'Review into the Taxpayers' Charter and Taxpayer Protections, December 2016, par 2.12.