

# THE BOTTOM LINE FOR REVIEW OF AN ASSESSMENT — A CASE NOTE ON COMMISSIONER OF TAXATION v FUTURIS CORPORATION LTD

SUE MILNE\*

*Decisions of the Taxation Commissioner are prima facie reviewable, pursuant to s 75(v) of the Constitution and s 39B of the Judiciary Act 1903 (Cth), for jurisdictional error. However, the Income Tax Assessment Act 1936 (Cth) (ITAA 1936) provides significant buffers to the ability of a court to review the Taxation Commissioner's decisions. The tension between the general principle of the reviewability of the decisions of Commonwealth officers on the one hand, and the intention of Parliament to protect the Taxation Commissioner's decisions from judicial review on the other hand, was addressed by the High Court in Commissioner of Taxation v Futuris Corporation Ltd ('Futuris'). The context, scope and purposive approach to statutory construction, as refined by the Gleeson Court, is subtly underscored in Futuris by the policy consideration of protecting the public revenue. This is manifest in the Court's construction of ss 175 and 177(1) of the ITAA 1936 which limits challenges to notices of assessment made under the Act. Despite refuting a privative clause construction on these provisions, the Court did not limit the protections that these provisions afford to assessments. Instead, the Court upheld the effectiveness of the provisions in both limiting and conditioning the exercise of a court's jurisdiction to review taxation assessments. Challenging a court's jurisdiction through the operation of a privative clause is fraught with difficulties; it is more effective to limit or condition the grounds of review.*

## I INTRODUCTION

The case of *Commissioner of Taxation v Futuris Corporation Ltd* ('Futuris')<sup>1</sup> concerned an application for judicial review by the taxpayer against the validity of an assessment made under the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936'). At the time of issue of the notice of assessment, the Taxation Commissioner

\* Lecturer, University of South Australia Law School. The author would like to sincerely thank her colleagues Jane Knowler, Vicki Waye, Wendy Lacey and Steven Churches for their comments on earlier drafts. Grateful thanks also to the constructive advice and comments of the Reviewer.

1 (2008) 237 CLR 146 ('Futuris').

(‘the Commissioner’) knew that the assessment was excessive in respect of both the taxable income and the tax assessed as payable.<sup>2</sup>

Judicial review of a taxation assessment is not available under the *Administrative Decisions (Judicial Review) Act 1975* (Cth),<sup>3</sup> but actions for mandamus, prohibition and injunction are available under s 39B of the *Judiciary Act 1903* (Cth) (‘*Judiciary Act*’) with ancillary remedies, including certiorari and declaratory orders, available under the *Federal Court of Australia Act 1976* (Cth).<sup>4</sup> The s 39B remedies mirror the original supervisory jurisdiction of the High Court to review decisions of Commonwealth officers, secured under s 75(v) of the *Constitution*.<sup>5</sup>

The taxpayer argued that the Commissioner’s assessment represented an unauthorised exercise of the power to assess. The knowledge of the Commissioner that the taxation assessment was excessive demonstrated a lack of good faith or lack of bona fides in the assessment process. Thus, prima facie, the Commissioner fell into jurisdictional error. Jurisdictional error concerns the purported exercise of jurisdiction in excess of that which has been conferred upon a decision making body, or the failure to exercise proper jurisdiction,<sup>6</sup> and is a potent trigger for the right to have an administrative decision reviewed by the courts. The writs of prohibition and mandamus are only available for jurisdictional error,<sup>7</sup> whereas injunctive relief is generally believed to be available on wider grounds.<sup>8</sup> However this right to judicial review of an assessment is discretionary and does not amount to a ‘constitutional right’.<sup>9</sup>

The taxpayer sought an order to quash the assessment, in addition to a declaratory order that the assessment was invalid. The declaratory order, being a remedy conditioned by s 39B of the *Judiciary Act*, required that this relief be underpinned by a finding of jurisdictional error.<sup>10</sup> Significantly, there are historically only two recognised grounds for jurisdictional error in respect of the Commissioner’s assessment.<sup>11</sup> These are a conscious maladministration of the assessment process,<sup>12</sup> and assessments which do not meet the definition of ‘assessment’

2 ITAA 1936 (Cth) s 166 provides in part, that ‘the Commissioner shall make an assessment of the amount of the taxable income (or that there is no taxable income) of any taxpayer, and of the tax payable thereon (or that no tax is payable)’. Also of relevance is s 169 of the ITAA 1936, which states that ‘[w]here, under the Act, any person is liable to pay tax, then the Commissioner may make an assessment of the amount of this tax’.

3 *Administrative Decisions (Judicial Review) Act 1975* (Cth) sch 1.

4 *Federal Court of Australia Act 1976* (Cth) ss 21–3.

5 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

6 The author notes that the question of jurisdiction in this context is multifaceted: see, eg, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 569–73.

7 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

8 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508.

9 *Glennan v Federal Commissioner of Taxation* (2003) 77 ALJR 115.

10 *Futuris* (2008) 237 CLR 146, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ).

11 As reiterated in *Futuris*, *ibid* 157 [25] (Gummow, Hayne, Heydon and Crennan JJ), although Kirby J believed that other disqualifying forms of ‘assessment’ existed: at 183 [124]–[126].

12 *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39; *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 91 ATC 4315; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 (‘*Richard Walter*’).

within the Act. ‘Tentative’ or ‘provisional’ assessments are held not to constitute an assessment,<sup>13</sup> failing, as they do not create a definitive liability.<sup>14</sup> These two ‘strands of invalidity’<sup>15</sup> — that of tentative or provisional assessments, and a lack of bona fides — are familiar claims in appeals against taxation assessments.

## **A Review and Appeal under the ITAA 1936**

Under s 166 of the ITAA 1936, the Commissioner has the power to make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon. Section 173 provides that every amended assessment shall be an assessment for the purposes of the Act. Section 177F(1) confers a discretion on the Commissioner to make a determination to cancel a tax benefit and s 177F(3) empowers the Commissioner to make compensating adjustments to the taxpayer’s assessable income following a s 177F(1) determination.

Sections 175, 175A and 177(1) are significant interlocking provisions and are set out in full, below.

### 175. Validity of assessment

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

### 175A. Objections against assessments

A taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

### 177(1)

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.

A s 39B application against an excessive assessment lies outside the normal review and appeal mechanism available under pt IVC of the *Taxation Administration*

13 *FJ Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360 (‘Bloemen’); *Richard Walter* (1995) 183 CLR 168.

14 It is understood that the assessment itself must constitute a definitive liability: *Federal Commissioner of Taxation v S Hoffmung & Co Ltd* (1928) 42 CLR 39, 55–6 (Isaacs J).

15 The term coined by the Full Court of the Federal Court of Australia in *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257, 267.

*Act 1953* (Cth) ('pt IVC proceedings'),<sup>16</sup> invoked by s 175A of the ITAA 1936. Under pt IVC proceedings it is the actual assessment — the substantive liability raised against the taxpayer — that is reviewable, not the *process* by which that assessment is made, per se.

To the extent that the taxpayer is dissatisfied with the manner in which the Commissioner went about making the assessment, he or she is constrained by s 175 of the ITAA 1936. Further, pursuant to s 177(1) of the ITAA 1936, evidentiary conditions are placed on notices of assessment. Yet there is an inherent ambiguity in the text of this provision.<sup>17</sup> Does production of a notice of assessment provide conclusive evidence that an assessment was actually made, or does it merely provide conclusive evidence that an assessment, if made, was duly made? It has been held that a notice of assessment provides both conclusive evidence that an assessment has been made, and that in making the assessment, the Commissioner has complied with the statutory formalities.<sup>18</sup>

What then constitutes the process or due making of the assessment, as distinct from the assessment itself? Generally speaking, the procedure or mechanism by which the taxable income and tax is ascertained or assessed constitutes the process of assessment.<sup>19</sup> However, matters which go to the substantive liability of the taxpayer, including the exercise of relevant discretions by the Commissioner,<sup>20</sup> and determinations of the Commissioner,<sup>21</sup> go to the issue of the assessment itself. It is arguable that there exists a 'bright line' to delineate between the process of assessment and the assessment itself.

Essentially then, s 177(1) reinforces s 175 in that it determines that the due making or the process of assessment cannot be litigated in any court or tribunal. The question whether this restriction also applies in applications for judicial review has not attracted a uniform response,<sup>22</sup> with the determinative issue going to the question of the grounds for seeking judicial review. In contrast, a pt IVC proceeding is restricted from addressing the validity of an assessment on the grounds of statutory non-compliance, but does not suffer the evidentiary hurdles posed by s 177(1) as to the conclusiveness of the amount and particulars of the assessment. It lies exempt. The conclusiveness of the due making of the

16 Part IVC of the *Taxation Administration Act 1953* (Cth) facilitates the process for review by the Administrative Appeals Tribunal ('AAT') of assessments made by the Commissioner under the ITAA 1936, and for appeals to the Federal Court against certain taxation decisions. This right of appeal from the AAT to the Federal Court is also granted under the *Administrative Appeals Tribunal Act 1975* (Cth) s 44, on questions of law from a decision of the AAT, and the Federal Court is now empowered, in certain circumstances, to make findings of fact: *Administrative Appeals Tribunal Act 1975* (Cth) s 44(7).

17 See generally *Bloemen* (1981) 147 CLR 360, 373 (Mason and Wilson JJ).

18 *Ibid.*

19 The 'due making of the assessment' has been held to cover all procedural steps other than those going to substantive liability: *George v Federal Commissioner of Taxation* (1952) 86 CLR 83, 206–7 (Dixon CJ, McTiernan, Williams, Webb, Fullagar JJ).

20 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, 621–2 (Brennan J).

21 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 272 (Kitto J); *Bloemen* (1981) 147 CLR 360, 373–4 (Mason, Wilson JJ); *Richard Walter* (1995) 183 CLR 168, 178, 185 (Mason CJ).

22 *Bloemen* (1981) 147 CLR 360; *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 91 ATC 4315; *Richard Walter* (1995) 183 CLR 168.

assessment, is however, thought to apply to review and appeal proceedings, thereby reinforcing the substantive intent of s 175 to insulate the process of assessment from review or appeal.

These protections against appeal and review of an assessment upon production of a notice of an assessment, mean that the word ‘assessment’ has become the rubicon to cross. If there is no assessment, then the protections of ss 175 and 177(1) are not enlivened. These protections also expose a tension between the supposedly limited power of the Commissioner to make an assessment, and the ss 175 and 177(1) provisions which, prima facie, appear to mean that the Commissioner’s actions in excess of power or authority with respect to that assessment are not prohibited. Conflict often arises with respect to legislative provisions characteristic of ss 175 and 177(1),<sup>23</sup> which seek to oust or limit a court’s jurisdiction to review an administrative decision. They create, prima facie, an ‘inconsistency between a provision in a statute, or an instrument, conferring a limited power or authority, and a provision which appears to mean that excess of power or authority may not be prohibited’.<sup>24</sup> The High Court in *Plaintiff S157/2002 v Commonwealth* (*‘Plaintiff S157/2002’*)<sup>25</sup> has provided a far reaching analysis to the approach to the construction and application of this form of legislative provision, within the context of the Act itself.

The arguments in *Futuris* raised the question of judicial review in the light of ss 175 and 177(1), however the majority of the High Court in *Futuris* determined that there was no conflict between s 175 and the requirements of the Act governing assessment. Instead, the majority view held that the critical matter for determination was the proper construction of s 175 and its application to the facts.<sup>26</sup> That is, did the Commissioner act bona fide in his process of assessment so as to attract the protections of s 175? The facts were not in dispute. Further, the evidential conditions of s 177(1) were only briefly addressed in *Futuris* as, having declared the assessment valid, the High Court had no need to examine the ss 175 and 177(1) nexus. The deceptively simple decision of *Futuris* does not however, reflect the historical context of taxation decisions which have faced the difficult question of judicial review of an assessment in the light of a privative clause construction upon ss 175 and 177(1) of the ITAA 1936.<sup>27</sup> Post *Plaintiff S157/2002*, this analysis is still found wanting.

## II STATUTORY CONFLICT AND PRIVATIVE CLAUSES

One of the most common forms of statutory device which is often, erroneously, perceived to have the effect of widening the possible scope of power and authority

23 Sometimes, in earlier decisions, referred to as privative clause provisions.

24 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 486–7 (Gleeson CJ), echoing Mason CJ and Brennan J in *R v Coldham; Ex parte The Australian Workers Union* (1983) 153 CLR 415, 418.

25 (2003) 211 CLR 476.

26 *Futuris* (2008) 237 CLR 146, 166 [62] (Gummow, Hayne, Heydon and Crennan JJ).

27 See, eg, *Bloemen* (1981) 147 CLR 360; *Richard Walter* (1995) 183 CLR 168.

of an administrative decision maker, is the privative or ouster clause.<sup>28</sup> The privative clause seeks to oust or limit a court's jurisdiction to review a decision made under the power or authority of an Act.<sup>29</sup> This question of jurisdiction once lay at the heart of the very nature of the privative clause. It was part of a debate which sought to classify the privative clause as one which went to the question of a court's jurisdiction or worked within a court's jurisdiction, and has been subsumed into a contextual construction of the clause relative to the Act as a whole.<sup>30</sup> The privative clause is a creature of legislation and the meaning and effect of any legislative provision, including a privative clause provision, can only be determined from its context. This contextual construction on privative clauses means 'there can be no general rule as to the meaning or effect of a privative clause'.<sup>31</sup>

The dominance of the question of jurisdictional and non-jurisdictional error in the application and interpretation of privative clauses is still of central significance, and resonates with this reflection upon privative clauses and questions of jurisdiction.<sup>32</sup> A finding of jurisdictional error will surmount the protections of a privative clause, by rendering a decision void.<sup>33</sup> Therefore, for example, if there exists no assessment within the meaning of the ITAA 1936 due to a finding of one of the 'strands of invalidity', ss 175 and 177(1) are not enlivened, focussed as they are upon the consequences attendant upon the creation of a 'notice of assessment'. 'As kryptonite is to Superman, so is the "jurisdictional error" fatal to the effectiveness'<sup>34</sup> of many privative clauses in ousting review by the courts:

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong

28 But see, eg, *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 630 (Gaudron and Gummow JJ): 'In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded'.

29 For an analysis of the application and interpretation of privative clauses in their various guises, see Administrative Review Council (Australia), 'Scope of Judicial Review' (Report No 47, 20 April 2006) ch 3; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) ch 17; Enid Campbell and Matthew Groves, 'Privative Clauses and the Australian Constitution' (2004) 4 *Oxford University Commonwealth Law Journal* 51.

30 Compare the tortuous analysis and differing opinions upon the construction of ss 175 and 177(1) in *Richard Walter* (1995) 183 CLR 168, to the approach of the High Court in *Plaintiff S157/2002* (2003) 211 CLR 476, to privative clause provisions in the *Migration Act 1958* (Cth).

31 *Plaintiff S157/2002* (2003) 211 CLR 476, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

32 The definition of jurisdictional error is fluid and as yet not exhaustive, as is the debate on distinguishing between jurisdictional error and error within jurisdiction: see *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. Very recently, in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 573 [71], the High Court stated that it is neither necessary nor possible to 'attempt to mark the metes and bounds of jurisdictional error'.

33 *Plaintiff S157/2002* (2003) 211 CLR 476, 506.

34 Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 345, 347.

question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.<sup>35</sup>

Privative clauses manifest in a variety of ways,<sup>36</sup> and are more commonly found in legislation concerning industrial relations, conciliation and arbitration, taxation, and more recently and controversially, migration and the criminal law.<sup>37</sup> Crucially however, the effectiveness of privative clauses in ousting the supervisory jurisdiction of the courts is similarly variable, with the issue going to a determination of the grounds for judicial review and the classification of the error found as being jurisdictional or non-jurisdictional.<sup>38</sup>

Traditionally, such clauses are drafted so as to limit a court's ability to review certain classes of administrative decisions.<sup>39</sup> Such provisions might be drafted as finality clauses; for example, a clause might describe a decision under an Act as 'final and conclusive'. Yet these words have been held to be of not sufficiently clear intent to remove the supervisory jurisdiction of the courts, interpreted instead as removing a statutory right of appeal.<sup>40</sup> A provision may state that certain decisions provide 'conclusive evidence' on a particular question, yet this 'conclusive evidence' provision has been held to be insufficient on its own, to exclude judicial review.<sup>41</sup> Another form may state that an administrative decision applies 'as if enacted' by statute after a given period of time, thus giving legislative force to the decision. Or, a section might provide that non-compliance with aspects of a statutory requirement does not affect the validity of a decision, as exemplified by s 175 of the ITAA 1936. Such validating provisions are often held to be effective, although strictly construed.<sup>42</sup>

35 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 (McHugh, Gummow and Hayne JJ), citing *Craig v South Australia* (1995) 184 CLR 163. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

36 Or are drafted to encompass every conceivable manifestation of such clauses in order to pre-empt any perceived gap in the interpretation by the court of the ousting of the right to review. See, eg, *Serious and Organised Crime Control Act 2006* (SA) s 41.

37 See, eg, *Criminal Code Act 1995* (Cth) ss 268, 122(1); *Serious and Organised Crime Control Act 2006* (SA) s 41.

38 For example, in *Plaintiff S157/2002*, the High Court upheld the validity of s 474(1) of the *Migration Act 1958* (Cth), but found that the clause did not purport to oust the jurisdiction conferred by s 75(v) of the *Constitution*. Yet it was effective in precluding a grant of certiorari by the High Court for non-jurisdictional error of law.

39 For example, determinations of a Medical Board regarding matters alleged to constitute an injury recognised under the *Workers' Compensation Act 1916* (Qld), in *Hockey v Yelland* (1984) 157 CLR 124.

40 In *Hockey v Yelland*, the 'final and conclusive' determinations of the Medical Board were held not to remove the supervisory jurisdiction of the courts, as the words were not of clear enough intent and went more to the question of appeal than judicial review: (1984) 157 CLR 124, 130–1 (Gibbs CJ), 142 (Wilson J).

41 *Shergold v Tanner* (2002) 209 CLR 126.

42 Further, they have been considered to be 'probably the most effective privative clause of all': Aronson, Dyer and Groves, above n 29, 979.

A privative clause might purport to prevent access to traditional remedies for judicial review. The operation of certain prerogative writs of prohibition and certiorari<sup>43</sup> might be denied, however the original jurisdiction of the High Court with respect to the decisions of Commonwealth officers comprehensively restricts the effect of privative clauses ousting the writs of prohibition, mandamus or injunction in the federal sphere.<sup>44</sup> The writs themselves may not be specifically stated, for example, ‘No award of the Court shall be challenged, appealed against, reviewed, quashed or called into question in any other Court on any account whatsoever’.<sup>45</sup> However, a provision which states that a decision may not ‘quashed or called into question’ has been successful to oust the right to certiorari for non-jurisdictional error on the face of the record, with the term ‘quashed’ equated to ousting the writ of certiorari.<sup>46</sup>

A privative clause may manifest in such a manner as to restrict the grounds upon which judicial review might be invoked.<sup>47</sup> The *Administrative Decisions (Judicial Review) Act 1975* (Cth) codifies some of these grounds,<sup>48</sup> however this Act does not apply to judicial review of taxation assessments.<sup>49</sup> A privative clause may appear to restrict the time within which judicial review might be invoked.<sup>50</sup> Other, less obvious forms which have the effect of restricting judicial review by the courts include legislative clauses which allow a subjective element in decision making, for example, ‘in the officer’s opinion’. However, the opinion is not without its limits and must be properly formed in respect of the material before the decision maker.<sup>51</sup> Those provisions which delegate decision making to private bodies where the right of appeal or review is less certain, might also be found effective in ousting judicial review by the courts.<sup>52</sup>

The modern approach to privative clauses as enacted by our legislators is to enact general privative clause provisions which identify a class of decisions, sometimes

43 *Industrial Relations Act 1940* (NSW) s 84(1)(b): ‘No writ of prohibition or certiorari shall lie in respect of any award, order, proceeding, direction or contract determination relating to any industrial matter or matter in respect of which a tribunal has jurisdiction or any other matter which, on the face of the proceedings, appears to be or to relate to an industrial matter or matter in respect of which a tribunal has jurisdiction’. In *Houssein v Under Secretary, Department of Industrial Relations and Technology NSW* (1982) 148 CLR 88, this provision was held to be effective in ousting the jurisdiction of the Supreme Court to grant certiorari in respect of an error of law appearing on the record.

44 Privative clauses cannot oust the entrenched jurisdiction conferred by s 75 of the *Constitution* on the High Court: *Plaintiff S157/2002* (2003) 211 CLR 476, 505.

45 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow* (1910) 11 CLR 1, where as early as 1910, the High Court determined that decisions of specialist tribunals were not immune from review under s 75(v) of the *Constitution*, despite such a conclusive privative clause.

46 *South East Asia Firebricks Sdn Bhd v Non-Metallic Products Manufacturing Employees Union* [1981] AC 363; *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88. Similarly, the ‘nor called into question’ clause was also equated to the ousting of certiorari in *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

47 *Abebe v Commonwealth* (1999) 197 CLR 510.

48 *Administrative Decisions (Judicial Review) Act 1975* (Cth) s 5.

49 *Ibid* sch 1.

50 *Ibid* s 11(3); *Migration Act 1958* (Cth) s 486A.

51 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ).

52 See *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

referred to as a ‘privative clause decision’, not to be challenged in any court. This classic proviso might read:

A privative clause decision:

- (a) is final and conclusive;
- (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.<sup>53</sup>

The interpretation and application of privative clauses by the courts is one of narrow compass due to the common law presumption of access to the courts. Privative clauses which seek to oust a court’s jurisdiction challenge fundamental legal doctrines relating to questions of justiciability.<sup>54</sup> At the federal level, constitutional doctrine — specifically the separation of powers and the rule of law<sup>55</sup> — reinforces the role of courts in the interpretation and application of the law, particularly regarding questions going to jurisdiction,<sup>56</sup> and the review of government actions in applying the law. Yet in doing so, courts must also recognise parliamentary supremacy and the right of legislatures to enact laws, even those laws limiting rights of review. On a state level, the absence of a separation of powers doctrine introduces an element of uncertainty in the scope and effectiveness of a narrow application of privative clause provisions.<sup>57</sup> However, it has been suggested that the need to maintain a single common law system in Australia is a guarantee against incompatibility in the recognition of judicial power between the states and the Commonwealth.<sup>58</sup> More recently, in *Kirk v Industrial Court of New South Wales*,<sup>59</sup> the High Court has held that the federal *Constitution* curtails the ability of state legislatures to interfere with the supervisory jurisdiction of a Supreme Court of a state, through the operation of a privative clause.<sup>60</sup>

53 *Conciliation and Arbitration Act 1903* (Cth) s 601(1); *Migration Act 1958* (Cth) s 474(1); *Serious and Organised Crime Control Act 2006* (SA) s 41.

54 ‘One of the reasons why privative clauses engender great controversy is that they often stand at the boundary — and even seek to define the boundary — of matters that are within the province of the courts and matters that are not’: Crock and Santow, above n 34, 346.

55 See, eg, *Plaintiff S157/2002* (2003) 211 CLR 476, 513–14.

56 In as much as the privative clause is perceived to allow a decision maker to determine the limits of their own powers and responsibilities, the High Court has specifically held that ‘the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction’: *ibid* 512.

57 *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 229 (Spigelman CJ); *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ).

58 *Kable v DPP (NSW)* (1996) 189 CLR 51. An overview of the subsequent interpretation of *Kable v DPP (NSW)* in High Court jurisprudence is provided in the judgment of Bleby J in *Totani v State of South Australia* (2009) 105 SASR 244; decision upheld, in part, on appeal to the High Court: *South Australia v Totani* (2010) 85 ALJR 19.

59 (2010) 239 CLR 531.

60 *Ibid*, in a development of *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

Yet privative clauses are recognised and given force by the courts, particularly when there lies within the Act other legislative pointers to the intention of Parliament to restrict review by the courts.<sup>61</sup> So for example, on its own, the ‘conclusive evidence’ provision has been held to be insufficient to exclude judicial review.<sup>62</sup> However, when such a provision is allied to another provision with similar intent, this may provide the courts with little opportunity to deny the ousting of jurisdiction, or at the very least, provide some persuasive force as to the focus of Parliament. Hence the popularity of the more widely constructed privative clause, first made evident in industrial relations legislation.

Similarly too, a privative clause provision which resides in an Act which still allows for full appeal within the framework of the statute also mitigates against a denial of the effectiveness of the privative clause provision.<sup>63</sup> This makes a focus upon the interpretation and application of the nexus between ss 175 and 177(1) of the ITAA 1936 more acute. These provisions reside together with s 175A, a clause which invokes the repeal and review mechanism on assessments. It is s 175A which limits the effect of s 175 and thus satisfies the constitutional requirement that ‘a tax may not be made incontestable because to do so would place beyond examination the limits upon legislative power’.<sup>64</sup> As explained by Kirby J in *Futuris*, a law with respect to taxation must not be arbitrary, must be based on ascertainable criteria, and must be susceptible to judicial scrutiny.<sup>65</sup>

Yet s 175A does more than that. It provides a judicial process of a specialised nature and High Court interpretation of ss 175 and 177(1) reflects the recognition of this speciality. Mason CJ reasoned in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*<sup>66</sup> (*Richard Walter*) that the paramount purpose of the ITAA 1936 was to ascertain the tax liability of a taxpayer and the concomitant review and appeal regime lies to allow the taxpayer to show that the assessment is excessive; ‘In that context, the existence of an inadmissible purpose on the part of the Commissioner plays no part’.<sup>67</sup> It is up to the pt IV process to inquire into and investigate matters relating to the assessment of the substantial liability of the taxpayer.

61 Or, conversely, the presence of a privative clause in an Act may serve to reinforce the invalidity of a provision which seeks to impose executive control on judicial power: *Totani v State of South Australia* (2009) 105 SASR 244.

62 *Shergold v Tanner* (2002) 209 CLR 126.

63 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 270 (Kitto J); *Richard Walter* (1995) 183 CLR 168.

64 *Futuris* (2008) 237 CLR 146, 153 [9] (Gummow, Hayne, Heydon and Crennan JJ), affirming *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639–40.

65 *Futuris* (2008) 237 CLR 146, 170 [80] (Kirby J).

66 (1995) 183 CLR 168.

67 *Ibid* 187 (Mason CJ) affirming Mason and Wilson JJ in *Bloemen* (1981) 147 CLR 360 that, ‘[i]ts [the notice of assessment] production will put beyond contention the due making of the assessment so that the Court cannot find that no assessment was made, or that, if made, it was made for an inadmissible purpose’.

### III CONSTRUCTION OF PRIVATIVE CLAUSES

#### A The Hickman Principle

*R v Hickman; Ex parte Fox and Clinton*<sup>68</sup> ('Hickman') is a seminal decision of the High Court in privative clause jurisprudence. The decision concerned the interpretation of a provision in the *National Security (Coal Mining Industry) Employment Regulations 1941* (Cth) ('the Regulations'). The Regulations empowered the Local Reference Board to settle disputes with regard to any local matter likely to affect amicable relations between employers and employees in the coal mining industry. Regulation 17 provided that decisions of the Board, 'shall not be challenged, appealed against, quashed or called into question, or to be subject to prohibition, mandamus or injunction, in any court on any account whatsoever'. The High Court held that despite Regulation 17, prohibition under s 75(v) of the *Constitution* was available as members of the Board appointed under the Regulations were officers of the Commonwealth.<sup>69</sup>

The judgment of Dixon J provided an alternative approach to the interpretation of the privative clause, in obiter, that has now become a classic principle of construction.<sup>70</sup> Dixon J posited the privative clause provision as the first hurdle to be crossed before a court will even consider whether there has been a transgression of the limits of power or authority by a decision maker.<sup>71</sup>

Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, *provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.*<sup>72</sup>

In *Hickman*, the High Court held that a privative clause which appeared, on its face, to remove the right to judicial review of an administrative decision, was effective provided certain conditions (the three *Hickman* provisos) were met. These provisos — known as the *Hickman* principle — require that the decision be a bona fide attempt to exercise the power in question, that it relate to the subject matter of the legislation, and that it be reasonably capable of reference to the relevant power to make the decision. As a statement on the limits placed upon the

68 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

69 *Ibid* 606 (Latham CJ).

70 Menzies J in *Coal Miners' Industrial Union of Workers of WA v Amalgamated Collieries* (1960) 104 CLR 437, 455 is frequently cited for his reference to the 'classical' approach of Dixon J to the construction of privative clauses as set out in *Hickman* (1945) 70 CLR 598.

71 Cf Aronson, Dyer and Groves, who interpret this as a fourth step in the application of the three *Hickman* provisos, stating it as '[p]roviding the impugned decision does not display jurisdictional error on its face': Aronson, Dyer and Groves, above n 29, 970.

72 *Hickman* (1945) 70 CLR 598, 615 (emphasis added).

power or authority of the decision maker, to be established at first instance, the *Hickman* principle might be thought to operate, de facto, as a test for jurisdictional error. Yet it would be a mistake to assume the three provisos comprise the sole test for jurisdictional error.<sup>73</sup>

The provisos suffer from a lack of clarity and detail,<sup>74</sup> lack substantial theoretical underpinnings, and yet are acknowledged to be founded upon early precedent.<sup>75</sup> The *Hickman* principle has become known as a compromise solution to the issue of legislative supremacy in conflict with the rule of law, so characteristic of traditional ouster clause interpretation.<sup>76</sup> The *Hickman* principle has been interpreted to mean that if the provisos are not met, then the privative clause provisions are not operative. Yet subsequent constructions on this statement by the courts have been complex and conflicting. At one stage, the principle was thought to expand the powers of the decision maker,<sup>77</sup> however other decisions relied upon an interpretation which held that the privative clause validated decisions that may otherwise have been invalidated by the substantive law governing the decision maker's powers and jurisdiction.<sup>78</sup>

Yet Dixon J drafted the *Hickman* principle in the context of statutory construction. He reasoned that when Parliament confers authority subject to limitations and at the same time enacts a privative clause to prevent review of actions made under that authority, it becomes a question of interpretation of the whole of the legislative instrument, in the way of reconciliation.<sup>79</sup> The inconsistency between the competing provisions is resolved by reading the two provisions together and giving effect to each.

The first step in this process of statutory construction is to look to the question of the activation of the privative clause. Thus, the *Hickman* principle has become accepted to mean that the protection which a privative clause purports to provide will be *inapplicable* unless at first instance, the three *Hickman* provisos are satisfied.<sup>80</sup> If this is a preliminary test for jurisdictional error as suggested earlier,

73 There is High Court obiter to suggest that the concept of jurisdictional error is not limited to the *Hickman* provisos: see, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, 1003 (Kirby J); *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294. More recently, and in recognition of policy considerations, the High Court has avoided any discussion on the question of the limits of jurisdictional error: see above n 32.

74 See, eg, *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 249 (Mason CJ), 275 (Brennan J).

75 See especially *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

76 In *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 251, Mason CJ asserts: 'the Hickman interpretation has its origins in the supremacy of the Constitution and judicial power'. See also Caron Beaton-Wells, 'Restoring the Rule of Law — Plaintiff S157/2002 v Commonwealth of Australia' (2003) 10 *Australian Journal of Administrative Law* 125; Aronson, Dyer and Groves, above n 29, 984–5.

77 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298.

78 *Ibid* 313–14 (Black CJ). The majority found that the privative clause validated decisions of the Refugee Review Tribunal by making lawful those decisions which would otherwise constitute jurisdictional error, including a failure to comply with procedural fairness. This validating application of the *Hickman* principle is also referred to in *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415, 418–19.

79 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398–9 (Dixon J).

80 *Plaintiff S157/2002* (2003) 211 CLR 476, 501, applying Dixon J's reasoning in *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399–400.

in a sense, it widens the possible scope of decisions which may fail to satisfy the provisos, fall into jurisdictional error and thus be amenable to judicial review. Conversely, the decision has also been interpreted as widening the possible scope of valid decisions made by the administrative decision maker, although this interpretation was subsequently quashed in *Plaintiff S157/2002*.<sup>81</sup>

A second step is to then consider the express statutory limitations or duties imposed on a decision maker.<sup>82</sup> A privative clause cannot affect the operation of a statutory provision which imposes inviolable limitations or restraints upon the jurisdiction or powers of the decision maker, or imperative duties.<sup>83</sup> The privative clause provisions cannot conflict with, and must be reconciled with these inviolable restraints and imperative duties imposed on the decision maker.

In *Plaintiff S157/2002*, the High Court addressed the question of conflicting statutory provisions manifest in the privative clause provisions of the *Migration Act 1958* (Cth).<sup>84</sup> The Court held that privative clauses are to be strictly construed, to be consistent with the *Constitution* and with the presumption that they are not intended to oust the jurisdiction of the courts.<sup>85</sup> Further, the majority determined that the *Hickman* principle was simply a rule of statutory construction to reconcile conflicting statutory provisions, and that the process of reconciliation will require the court to identify the leading provisions from the subordinate provisions, in order to determine which provision should give way to the other. The High Court subsequently held that a privative clause is to be read in conjunction with other provisions of the Act in question, in order to determine the force and effect of the privative clause.<sup>86</sup> It is a process of reconciliation of conflicting statutory provisions so as to give force and effect to the whole of the statute.<sup>87</sup>

*Plaintiff S157/2002* affirmed that the decision maker's decision must conform to the imperative duties and inviolable restraints<sup>88</sup> placed upon the power and authority of the decision maker under the Act. The failure to observe these restraints and duties results in the decision falling into jurisdictional error, thus becoming no decision at all. The privative clause would not then be enlivened. The *Hickman* principle, in providing the first step in the approach to construction of a privative

81 (2003) 211 CLR 476.

82 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J): 'for a clearly expressed specific intention of [that] kind can hardly give way to the general intention indicated by ... a [privative clause]'.

83 *R v Coldham; Ex parte The Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J) citing *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361, 369 (Latham CJ and Dixon J); *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J).

84 *Migration Act 1958* (Cth) s 474(1).

85 *Plaintiff S157/2002* (2003) 211 CLR 476, 504–5 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

86 *Ibid* 501.

87 *Ibid* 488, as defined by Gleeson CJ: '[g]iving effect to the whole of the statute which confers powers or jurisdiction, or imposes duties, or regulates conduct, and which also contains a privative provision, involves a process of statutory construction described as reconciliation'.

88 *Ibid*.

clause, has lost both position and prominence.<sup>89</sup> Yet it is still perceived as a tool of construction as the courts have not wholly discarded the *Hickman* approach.<sup>90</sup>

#### IV PRIVATIVE CLAUSES AND TAX LEGISLATION

Historically, s 175 of the ITAA 1936 has been variously, but not consistently, characterised as a privative clause.<sup>91</sup> It operates as a validating provision in that it upholds the validity of a taxation assessment, despite non-compliance with the ITAA 1936. Similarly, s 177(1) of the Act has also been characterised as a privative clause.<sup>92</sup> More accurately perhaps, it has been characterised as a ‘conclusive evidence’ provision which asserts that the administrative decision maker’s decision represents in itself, conclusive evidence that the necessary statutory requirements have been fulfilled and that an assessment has been made. As we have seen earlier, courts are reluctant to recognise the ‘conclusive evidence’ provision as solely having the power to oust a court’s jurisdiction.

*FJ Bloemen Pty Ltd v Federal Commissioner of Taxation* (*Bloemen*)<sup>93</sup> concerned the application of the supervisory jurisdiction of the Supreme Court of New South Wales in relation to an appeal or review of whether an assessment under s 166 of the ITAA 1936 was invalid.<sup>94</sup> In the course of its reasoning the High Court looked at the conclusive evidence provision of s 177 (1) of the ITAA 1936. The Court held that the provision provided both conclusive evidence that an assessment was duly made, and that the assessment existed.<sup>95</sup> Thus challenges to the validity of an assessment outside pt IVC proceedings would be unsuccessful. It was held that this conclusive evidence provision applies in both statutory proceedings<sup>96</sup> and in the general jurisdiction of the Court,<sup>97</sup> thus ‘foreclosing ... the issue’ of appeal or review of the due process of the assessment, or that an assessment was actually made.<sup>98</sup> Rather than seeking to oust or limit jurisdiction, the provision imposes evidential rules for the court. In essence, it evinces an intention against a ‘curial

89 The concept of jurisdictional error is not limited to the *Hickman* provisos. See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, 1003 (Gummow and Hayne JJ); *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

90 See, eg, *Totani v State of South Australia* (2009) 105 SASR 244. In *Kirk v Industrial Court of New South Wales* the High Court states that to understand the law relating to privative clauses, one must begin with *Hickman*: (2010) 239 CLR 531, 579.

91 See, eg, *Richard Walter* (1995) 183 CLR 168.

92 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263; *Bloemen* (1981) 147 CLR 360; *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484.

93 (1981) 147 CLR 360.

94 Although this decision dealt with a challenge brought in the original jurisdiction of the New South Wales Supreme Court, not a s 39B application in the Federal Court, it was generally believed that the decision would be applicable under such a proceeding.

95 *Bloemen* (1981) 147 CLR 360, 378 (Mason, Wilson JJ, Stephen J agreeing).

96 For example, in proceedings for recovery of the tax debt.

97 *Bloemen* (1981) 147 CLR 360, 378 (Mason and Wilson JJ, Stephen J agreeing).

98 *Ibid* 376.

diving into the many official and confidential channels of information to which the Commissioner may have recourse to protect the Treasury'.<sup>99</sup>

*Richard Walter*<sup>100</sup> concerned the validity of two assessments issued by the Commissioner to different taxpayers in respect of the same income. It brought into review ss 175 and 177(1) of the ITAA 1936 where the High Court determined that ss 175 and 177(1) were privative clause provisions and, to the extent that they were in conflict, required reconciliation through the application of the *Hickman* principle as a tool of statutory construction. However, although the *Hickman* principle was discussed in all six reasons for the decision in *Richard Walter*, only three of the justices found the principle applicable.<sup>101</sup> Even then, their Honours differed in that Brennan J labelled s 175 as a privative clause, whereas the joint decision of Deane and Gaudron JJ viewed s 177(1) as jurisdictional in effect, and thus required 'reading down' in the light of s 75(v) of the *Constitution*. The other justices found no need to apply the *Hickman* principle as they saw no conflict or inconsistency which required reconciliation.<sup>102</sup> Nor did they characterise the provisions as ones which went to the question of the Court's jurisdiction. *Hickman* would only be applicable if the privative clause went to jurisdiction and sought to quash or qualify that jurisdiction. Instead, the provisions were read as being operative within the jurisdiction of the Court, so that in recovery proceedings the court was bound to accept that the liability of the taxpayer was conclusively established.

The judgments of Dawson, Toohey and McHugh JJ focussed on an evidentiary rather than a jurisdictional approach to a construction of s 177(1) and found no application for the *Hickman* principle.<sup>103</sup> Mason CJ also regarded s 177 as a 'conclusive evidence provision' — provisions which do not ordinarily oust jurisdiction or interfere with the exercise of judicial power. Such provisions usually do no more than attach definitive legal consequences to an act, and in this case, it gives effect to the substantive expression of intention in s 175. Thus s 177 operates in the exercise of its jurisdiction and does not seek to withhold jurisdiction.

The analysis of s 177(1) given by McHugh J in *Richard Walter* provided that the purpose of s 177(1) was to enact substantive rules of law which gave effect to two policies manifest in the Act. Firstly, that the provisions of the Act involved in the 'due making'<sup>104</sup> of the assessment were not legally enforceable, as manifest in s 175. The first limb of s 177(1) then reinforced this policy by ensuring that the 'due making' of the assessment could not be litigated in any court or tribunal.

99 *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246, 276 (Isaacs ACJ).

100 *Richard Walter* (1995) 183 CLR 168.

101 *Ibid* 188 (Brennan J), 204 (Deane and Gaudron JJ).

102 *Ibid* 177 (Mason CJ), 215 (Dawson J), 223 (Toohey J), 234 (McHugh J).

103 *Ibid* 184–6 (Mason CJ), 222 (Dawson J), 233 (Toohey J), 240 (McHugh J), upholding *Bloemen* (1981) 147 CLR 360.

104 The 'due making of the assessment' has been held to cover all procedural steps other than those going to substantive liability. *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, 207.

## V JUDICIAL REVIEW UNDER THE ITAA 1936

But what does this mean in terms of what may be judicially reviewed by a court? Does this mean that the procedural steps of the assessment process are not justiciable? Certainly McHugh J in *Richard Walter* came to that conclusion when he applied the reasoning of Isaacs ACJ in *Federal Commissioner of Taxation v Clarke* such that:

As a result of s 175 and the first limb of s 177, the procedural acts of the Commissioner in making an assessment do not give rise to any legally enforceable duty that can attract the operation of s75(v) of the Constitution or s 39B of the Judiciary Act. The procedural steps by which the Commissioner makes an assessment are not justiciable in courts invested with federal jurisdiction.<sup>105</sup>

The second limb of s 177(1) provides:

And, except in proceedings under Part IVC of [the *Taxation Administration Act 1953* (Cth)] on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

This exception limb suggests that assessments of tax are not challengeable in ordinary legal proceedings, and that matters affecting the substantive liability of the taxpayer are only open to challenge in pt IVC proceedings.<sup>106</sup> Dawson J in *Richard Walter* poses the following interpretation:

To the extent that s 177(1) may be regarded as having a substantive operation extending beyond that of a mere evidentiary provision, it must be to change the nature of the tax imposed from that of an impost giving rise to a liability which is contestable generally to that of an impost the liability for which is contestable only upon a review or by way of an appeal. The unavailability of any remedy under s 75(v) to impede the recovery process arises from the nature of the tax rather than the restriction of jurisdiction to grant those remedies. And it is clear that it is within legislative power to define the nature of the liability imposed by a tax, provided that the liability is not arbitrary or incontestable.<sup>107</sup>

As an exercise in statutory interpretation, the two decisions of *Bloemen* and *Richard Walter* are illuminating in the approaches taken. In *Bloemen*, the Court did not define the provisions as being in conflict, nor was the *Hickman* principle referred to as a relevant principle of statutory construction. In *Richard Walter*, characterisation of the provisions as privative clauses, both of which were in conflict, and the application of the *Hickman* principle, raised difficult issues going to the question of jurisdiction. As a consequence, the application of constitutional

<sup>105</sup> *Richard Walter* (1995) 183 CLR 168, 242 (McHugh J).

<sup>106</sup> *Ibid* 240 (McHugh J).

<sup>107</sup> *Ibid* 221–2 (Dawson J).

writes to circumvent the so-called privative clause provisions resulted in a complex set of decisions.<sup>108</sup>

## VI FUTURIS

### A Background

Futuris was a publicly listed company. In September 1997, Futuris disposed of company assets by means of the transfer of shares and loans between three subsidiary companies and the subsequent public float of one of these companies. The 1998 tax return lodged by Futuris was subject to two amended assessments by the Commissioner in respect of the 1997 distribution of assets. The first amended assessment, issued in 2002, increased Futuris' taxable income by \$19.95 million. The Commissioner determined that the transfer of assets between companies under common ownership attracted provisions of div 19A of pt IIIA of the ITAA 1936, for the purposes of determining capital gains and capital losses (the value shifting provisions).

The second amended assessment, issued in 2004, increased Futuris' taxable income by a further \$82.95 million which included a 'double counting' of the previously assessed \$19.95 million. The rationale for this assessment was a determination by the Commissioner that the 1997 transfer of assets constituted a scheme within pt IVA of the ITAA 1936 (the anti-avoidance provisions). The pt IVA provisions provide the Commissioner with the discretion to cancel a tax benefit obtained in connection with a scheme to which pt IVA applies, raise assessments when considered appropriate and impose additional tax.<sup>109</sup>

Futuris served a notice of objection against each of the two amended assessments. The Commissioner disallowed each objection. Futuris appealed to the Federal Court against the disallowance of the first amended assessment (the div 19A proceedings) and this appeal was not resolved in 2004 when the second amended assessment was issued. In 2005, Futuris appealed against the disallowance to the second amended assessment in the Federal Court in two separate actions: one under pt IVC div 5 of the *Taxation Administration Act 1953* (Cth), invoked by the pt IVA ITAA 1936 proceedings; the second being an application under s 39B of the *Judiciary Act* seeking to have the second amended assessment quashed.

The s 39B application to the Federal Court in regard to the second amended assessment concerned the question of the double counting by the Commissioner of the amount of \$19.95 million in calculating Futuris' taxable income for the 1997/1998 financial year. Futuris contended that in the second amended

<sup>108</sup> A criticism of this development in the law is seen in a published speech by Sir Anthony Mason, 'Administrative Law Reform: The Vision and the Reality' (2001) 8 *Australian Journal of Administrative Law* 135, 142.

<sup>109</sup> ITAA 1936 pt IVA s 177F. A succinct description of the operation of pt IVA is provided by Mason CJ in *Richard Walter* (1995) 183 CLR 168, 177–8.

assessment the Commissioner purported to ascertain figures for taxable income and tax payable which he knew to be incorrect and he did so on the erroneous assumption that, under the provisions of s 177F(3) of pt IVA of the ITAA 1936, he could later make a compensatory adjustment of the double counting of the \$19.95 million. The application of the s 177F(3) discretion to make a compensatory adjustment to the assessable income of the taxpayer was a significant issue in the Federal Court.

## **B Findings of the Court in *Futuris***

The judge at first instance, Finn J, found that the Commissioner had acted within his power when making the second amended assessment, and that the amended assessment attracted the privative clause protections of ss 175 and 177(1) of the ITAA 1936.<sup>110</sup> The Commissioner was entitled to do so because, inter alia: the div 19A proceedings had yet to be determined; there was uncertainty as to how the \$19.95 million was calculated; there was a need to protect the public revenue; and a later compensating adjustment of the assessment could be made if required.<sup>111</sup> On appeal, the Full Court of the Federal Court of Australia upheld the appeal in part, holding that the Commissioner had deliberately double counted the \$19.95 million and further, that it was not open to the Commissioner to make a compensating adjustment under s 177F(3) as:

s 177F(3) was only ever intended to operate to provide a compensating adjustment against taxable income (and tax) *properly* assessed, where income *properly* included in the taxpayer's assessable income would not have been included in that assessable income if the scheme had not been entered into or carried out and it is fair and reasonable that the amount or part of that amount should not be so included.<sup>112</sup>

Consequently the Full Court found there was not a bona fide exercise of the power to assess, thus taking the invalid assessment outside the protection of the privative clause provisions of ss 175 and 177(1). Jurisdictional error, established through the lack of bona fides in relation to the exercise of the power to assess, served to surmount the privative clause protections of s 175 and 177(1) and allowed s 39B of the *Judiciary Act* to operate.

The appeal to the High Court upheld the original decision of the judge at first instance and found that the Commissioner had acted within his power and that

<sup>110</sup> In his decision, Finn J relied on the reasoning of Kenny J in *Australian and New Zealand Banking Group Ltd v Federal Commissioner of Taxation* (2003) 137 FCR 1. This decision found that the Commissioner was not obliged to make an adjustment at the time of issuing a pt IVA amended assessment under s 177F(1), especially in circumstances where it is more appropriate to await the outcome of an appeal against the assessment: *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2006) 63 ATR 562, 572–3 [52] (Finn J).

<sup>111</sup> The source of power to make a compensating adjustment was found to be in s 177F(3) of the ITAA 1936: *Australian and New Zealand Banking Group v Commissioner of Taxation* (2003) 137 FCR 1.

<sup>112</sup> *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257, 264–5 (emphasis added).

the proper course for an appeal against an assessment was under the pt IVC proceedings. The High Court acknowledged that a parallel pt IVC proceeding was pending and found that the Full Court, in addition to the order quashing the second amended assessment, was wrong to make a declaration of its invalidity, as the pending proceeding by Futuris under pt IVC of the *Taxation Administration Act 1953* (Cth), should have led the Full Court to refuse declaratory relief.<sup>113</sup> The actions of Futuris in initiating a pt IVC proceeding would militate against the discretion to award a constitutional writ or equitable remedy.<sup>114</sup>

## C High Court approach in *Futuris*

The question posed by the High Court was whether it was a purpose of the Act (the ITAA 1936) that the Commissioner's failure to comply with the provisions of the Act during the process of assessment rendered the assessment invalid.<sup>115</sup> This question applied the test formulated by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*')<sup>116</sup> to replace the problematic distinctions between mandatory and directory statutory provisions and issues as to substantive compliance with regard to the latter, when determining the validity of an act done in breach of a statutory provision. The majority in *Project Blue Sky* said, '[a] better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid'.<sup>117</sup>

### 1 Legislative Purpose

In determining the legislative purpose of the Act, the Court had regard to matters of statutory construction, specifically that of the language of the relevant provisions and the scope and purpose of the statute.<sup>118</sup> The most relevant provisions of the Act were ss 175, 175A and 177(1) of the ITAA 1936. Although the joint decision of Gummow, Hayne, Heydon and Crennan JJ stated that s '175 must be read

113 *Futuris* (2008) 237 CLR 146, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ). Section 39B of the *Judiciary Act* does allow the Federal Court to make a declaratory order, but the usual discretionary considerations still apply to the grant of equitable remedies such as injunctions and declarations: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, affirmed in *Futuris*.

114 Constitutional writs may be withheld where there is another remedy provided by pt IVC: *Glennan v Federal Commissioner of Taxation* (2003) 198 ALR 250, 254–5.

115 *Futuris* (2008) 237 CLR 146, 156–7 [22]–[25]. The High Court turned on its head the approach of the judge of first instance, Finn J, who posed the question at issue as 'whether the Commissioner of Taxation (the Commissioner) is entitled to the privative clause protections of ss 175 and 177 of the ... ITAA 1936 ... in respect of the second amended assessment': *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2006) 63 ATR 562, 564.

116 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*').

117 *Ibid* 390 (McHugh, Gummow, Kirby and Hayne JJ).

118 This approach was first enunciated in this way in *Tasker v Fullwood* [1978] 1 NSWLR 20, 24 where the New South Wales Court of Appeal, in referring to a determination of the statutory intention of the Act, stated that regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'. Affirmed in *Project Blue Sky* (1998) 194 CLR 355, 390.

with ss 175A and 177(1),<sup>119</sup> their Honours ultimately resolved the question with a construction of s 175 alone.

Section 175 of the ITAA 1936 might appear to directly answer the *Project Blue Sky* question by proclaiming the validity of taxation assessments under the Act, notwithstanding non-compliance with the statute's provisions.<sup>120</sup> The High Court in *Project Blue Sky* addressed the construction of conflicting statutory provisions and held that such provisions were to be construed so as to give best effect to the purpose and language of those provisions while retaining the unity of the Act as a whole. Conflicting provisions might require reconciliation by determining the hierarchy of the provisions to find which provision gave way to the other.<sup>121</sup>

Through the prism of *Project Blue Sky*, the majority held that there was no conflict between s 175 and the requirements of the Act governing assessment, so no process of reconciliation was required. Instead, the majority view held that the critical matter for determination was the proper construction of s 175 and its application to the facts.<sup>122</sup> The facts were not in dispute. The principal focus was upon the question of whether the Commissioner acted bona fide in the exercise of his powers to issue the amended assessment. The question of a valid assessment under the Act was addressed outside of a privative clause construction of s 175: '[t]he notion of bona fides ... did not enter the case by the tortuous path of statutory construction and reconciliation with which Dixon J was concerned'.<sup>123</sup>

Applying the reasoning of *Project Blue Sky* and *Plaintiff S157/2002*, the High Court in *Futuris* found no conflict between the relevant provisions of the ITAA 1936, nor did they construe ss 175 and 177(1) as privative clause provisions. Instead, the High Court upheld the effectiveness of these provisions in limiting the matters which would fall outside the scope of these provisions, into jurisdictional error.

119 *Futuris* (2008) 237 CLR 146, 157 [24].

120 Section 175 is an original provision of the ITAA 1936 as enacted, so it is not a legislative response to *Project Blue Sky*.

121 In *Project Blue Sky*, this application was given effect with regard to ss 160(d) and 122(2)(d) of the *Broadcasting Services Act 1992* (Cth). Section 160 directed that the Australian Broadcasting Authority ('ABA') perform its functions in a manner consistent with, inter alia, the objects of the Act, and with Australia's international obligations, including any agreements between Australia and a foreign country. Section 122(2)(d) imposed an obligation on the ABA to determine standards to be observed by commercial television broadcasting licensees that related to the Australian content of programs. It was held by the Court that these provisions were interlocking and that s 160, in providing the conceptual framework in which the ABA operated, was necessarily the dominant provision. Section 122 must then be read within the regulatory framework imposed by s 160, but s 160 did not impose essential preliminaries to the exercise of power. It was subsequently held that the Australian Content Standard, authorised by s 122, was not consistent with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement 1983, in respect of New Zealand's access rights to the Australian market. To the extent of the inconsistency, the Standard was not invalid but constituted an unlawful breach of the Act.

122 *Futuris* (2008) 237 CLR 146, 166 [62] (Gummow, Hayne, Heydon and Crennan JJ).

123 *Ibid* 167 [68] (Gummow, Hayne, Heydon and Crennan JJ).

## 2 The Hickman Principle

Consistent with *Plaintiff S157/2002*,<sup>124</sup> the majority in *Futuris* rejected the application of the *Hickman* principle entirely, and directed that the decisions given in *Richard Walter*, which were seen to have applied a *Hickman*-like approach to the interpretation of the effect of ss 175 and 177(1), should not be considered ‘mandated’. ‘*Project Blue Sky* had changed the landscape’ and *Plaintiff S157/2002* had placed the *Hickman* principle, with respect to the construction of a privative clause, in perspective.<sup>125</sup> To the extent that the *Hickman* principle offered a possible path upon which to challenge the due making of an assessment under s 39B, this avenue is possibly now closed, or at the very least, questionable. For the *Hickman* principle, when appropriately applied, is of secondary importance to the broader statutory construction of what the privative clause purports to protect, where it is ‘necessary to have regard to the terms of the particular clause in question’.<sup>126</sup>

## 3 Assessment

A taxation assessment constitutes the taxable income and tax payable which amounts to the substantive liability of the taxpayer under the Act. As stated by the High Court in *Futuris*, s 175 ‘operates only where there has been what answers the statutory description of an assessment’.<sup>127</sup> The judge at first instance, the Full Court of the Federal Court, and the High Court dealt peremptorily with and rejected the tentative or provisional argument. What became the issue for discussion was the lack of good faith strand, explored principally by the High Court through the question of the knowledge of the Commissioner. The Full Court had reasoned that the Commissioner knew, at the time he issued the second amended assessment, that he applied the ITAA 1936 to facts which he knew to be untrue. Following the decision of that court in *Darrell Lea Chocolate Shops Pty Ltd v Federal Commissioner of Taxation*,<sup>128</sup> the Full Court held that the assessment failed as a ‘bona fide exercise of the assessing power to assess that person in respect of that income’.<sup>129</sup> In the High Court, the majority found that a deliberate failure to comply with provisions of the Act would not be protected by s 175. The ethos of the public service was founded upon the concept of an apolitical entity, acting in the national interest with care and diligence, behaving with honesty and integrity, as enshrined in the *Public Service Act 1999* (Cth). Such statutory exhortations and the common law writ of the tort of misfeasance in public office serve to underlie *against* ‘a construction of s 175 which would encompass deliberate failures to administer the law according to its terms’.<sup>130</sup> These policy considerations underlie a construction of the provision such that,

124 From the vantage point of *Project Blue Sky*, the majority in *Plaintiff S157/2002* determined that the *Hickman* principle was simply a rule of statutory construction to reconcile conflicting provisions.

125 *Futuris* (2008) 237 CLR 146, 168 [70] (Gummow, Hayne, Heydon and Crennan JJ).

126 *Plaintiff S157/2002* (2003) 211 CLR 476, 502 [64].

127 *Futuris* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

128 (1996) 72 FCR 175.

129 *Darrell Lea Chocolate Shops Pty Ltd v Federal Commissioner of Taxation* (1996) 72 FCR 175, 186.

130 *Futuris* (2008) 237 CLR 146, 164–5 [55] (Gummow, Hayne, Heydon and Crennan JJ).

a failure to act bona fides in the making of an assessment amounts to an invalid assessment under the Act. The High Court in *Futuris* revealed a reluctance to recognise other grounds for review.

The High Court found that a deliberate failure to comply with legislative provisions would amount to invalidating the assessment. What of reckless indifference? In *R v Commissioner of Taxation (WA); Ex parte Briggs*,<sup>131</sup> the Federal Court found that a failure by the Commissioner to investigate and ascertain the taxable income of a taxpayer would not amount to a valid assessment. In its judgment, the Court said that the notices of assessment were issued ‘knowing that they did not reflect any rational assessment of a liability of the prosecutor or with reckless indifference to whether they did or did not reflect any such assessment’.<sup>132</sup> This decision was not referred to by the High Court in *Futuris*, and it is arguable that reckless indifference sits upon the same spectrum as a deliberate failure to comply with legislative provisions. Where the tipping point on the spectrum allows the assessment to fall into jurisdictional error is not clear, but it is useful to recall the reasoning of Gleeson CJ in *Plaintiff S157/2002* regarding degrees of manifest jurisdictional error.<sup>133</sup>

Allegations of power exercised corruptly or with deliberate disregard to the scope of the power are however, not to be made lightly.<sup>134</sup> The High Court also found the Full Court had erred in its construction of the process of assessment and the due regard to be had to the compensating adjustment process available through s 177F(3) of the ITAA 1936.<sup>135</sup> This was a significant issue before the Full Court,<sup>136</sup> however, the High Court gave it only a brief address, holding that the power to make good an assessment by a subsequent compensating adjustment under s 177F(3) was more than just an ‘assumption’.<sup>137</sup> This then goes to the question of the knowledge of the Commissioner with respect to the bona fide nature of his actions in making the assessment.

What the majority of the High Court failed to address was the substance of other questions as to the validity of the assessment raised by the plaintiff, including the nature of the tax burden. Once a notice of assessment is issued and served, the tax becomes due and payable,<sup>138</sup> a burden levied upon the plaintiff, despite qualifying

131 (1986) 12 FCR 301.

132 *Ibid* 308.

133 *Plaintiff S157/2002* (2003) 211 CLR 476, 487. Courts have traditionally refused to recognise that privative clauses protect manifest jurisdictional error: *Church of Scientology v Woodward* (1982) 154 CLR 25, 55–6 (Mason CJ).

134 *Futuris* (2008) 237 CLR 146, 165–6 [60] (Gummow, Hayne, Heydon and Crennan JJ).

135 ‘The key to the error in the reasoning of the Full Court may be seen in the concluding words in the passage from its reasons set out above that what was held to be the “deliberate” conduct of the commissioner was “albeit subject to the assumption that all could be made good by a subsequent compensating adjustment determination in reliance on s 177F(3)”’: *ibid* 165 [58].

136 *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257, 264–6.

137 *Futuris* (2008) 237 CLR 146, 165 [59] (Gummow, Hayne, Heydon and Crennan JJ). This interpretation on the application of the provision has been subject to subsequent criticism by at least one Federal Court judge: *Kocic v Commissioner of Taxation* (2008) 73 ATR 794, [13] (Edmonds J).

138 ITAA 1936 s 204.

the assessment as one which might be subject to an adjustment at a later date.<sup>139</sup> *Futuris* had argued that the second amended assessment imposed an immediate liability to pay the taxation, irrespective of the remedial provisions to correct the amount owed. Kirby J suggested that this practical and financial burden on the taxpayer had more merit as a ground of judicial review for jurisdictional error, being ‘alien to the scheme and provisions of the Act’,<sup>140</sup> than did either of the two strands of invalidity argued. Adding weight to this argument is the fact that there is no time limit imposed on the Commissioner within which to make a s 177F(3) adjustment to the assessment. Presumably this allows the objection and appeal process to be finalised, so as to then enable the Commissioner to amend the assessment if a party has suffered a disadvantage as a result of the pt IVA scheme.

The majority of the High Court, with Kirby J in agreement, found no evidence of *mala fides* or wrongful intent in the making of the second amended assessment, although the assessment might have been mistaken in law. But this goes to the question of the process of assessment which is outside the scope of judicial review leading to invalidity because of s 175. Consequently, the majority held that the errors in the process of assessment did not amount to a lack of *bona fides* in the assessment process. The High Court held that ‘[w]here s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the *Constitution* or under s 39B of the *Judiciary Act*’.<sup>141</sup>

#### 4 Jurisdictional Error

Taken together in *Futuris*, the Court simply states that the validity of an assessment is not affected by failure to comply with any provision of the Act, as the dissatisfied taxpayer has other avenues of redress through the appeal and review provisions of the *Taxation Administration Act 1953* (Cth). This, however, poses a question for our understanding of the nature of jurisdictional error. If the mechanism for correcting the error of law did not reside in the taxation legislative framework, would the Commissioner’s error of law then amount to jurisdictional error on the grounds of lack of *bona fides*? The question is particularly acute when it is understood that the interpretation of the application of s 177F(3) is not yet fixed, and that the High Court found that the pt IVC proceeding might determine otherwise<sup>142</sup> than that the Commissioner could rely on correcting any error in assessment by a ‘subsequent compensating adjustment determination in reliance on s 177F(3)’.<sup>143</sup> However, the High Court answers this question in the negative,

139 ‘The review processes built into the tax legislation guarantee the rule of law and the right of people to challenge unlawful decisions, but they do not remove the obligation to pay tax in the meantime.’ Administrative Review Council, above n 29, 43.

140 *Futuris* (2008) 237 CLR 146, 190 [149] (Kirby J).

141 *Ibid* 157 [24] (Gummow, Hayne, Heydon and Crennan JJ).

142 *Ibid* 165 [59] (Gummow, Hayne, Heydon and Crennan JJ).

143 *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257, 262.

and states that it would still not support the conclusion that the Commissioner knowingly acted in defiance of the statutory provisions.<sup>144</sup>

It is suggested in *Futuris* that the scope for founding jurisdictional error in the making of a taxation assessment is necessarily restricted due to the nature of taxation as a revenue law. The majority looked to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) as a means of determining the scope of judicial review (without direct reference to jurisdictional error itself) to illustrate how the Act did not apply to decisions made in administration of assessment provisions of revenue laws.<sup>145</sup> Kirby J, although critical of the taxonomy surrounding jurisdictional error, was anxious to point out that *Futuris* had argued broader grounds to establish jurisdictional error, but these had failed to be properly addressed by the Court.<sup>146</sup>

## 5 Jurisdictional Error and s 177(1)

In *Futuris*, the joint decision of the High Court affirmed Dawson J in *Richard Walter*, where his Honour held that s 177(1) merely evidences the making of the assessment and therefore does not pose any statutory conflict.<sup>147</sup> The approach of the Court reflects previous decisions which have held that in proceedings for the recovery of tax, the taxpayer will be precluded from going behind the assessment for any purpose.<sup>148</sup> But does s 177(1) act, in turn, to restrict the evidence received in a judicial review hearing? The majority answered this question only to the extent that it related to the matter currently before it. As ‘allegations of corruption or other deliberate maladministration’ would be in issue, they held that s 177(1) ‘did not conclude against *Futuris* curial consideration of alleged maladministration of the Act’.<sup>149</sup> Presumably this is because the lack of bona fides would serve to invalidate the assessment and consequently s 177(1) would not be enlivened.

The majority in *Futuris* briefly distinguished the operation of s 177(1) in recovery proceedings (one where a notice of assessment has been produced and served) for recovery of a tax debt that has become due and payable, as one which changes the normal rules of evidence.

But the discussion is still equivocal. The real debate on the issue of judicial review in light of s 177(1) has yet to be heard and it requires a focus upon the

144 *Futuris* (2008) 237 CLR 146, 165 [59] (Gummow, Hayne, Heydon and Crennan JJ).

145 *Ibid* 162 [46] (Gummow, Hayne, Heydon and Crennan JJ).

146 This included that the assessment was not an assessment within the meaning of the Act because it was known to overstate the taxpayer’s taxable income and tax payable; and that there was no intention that the full amount of tax payable stated in it be payable by the taxpayer: *ibid* 188–9 [144] (Kirby J).

147 *Ibid* 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

148 See, eg, *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 270; *Bloemen* (1981) 147 CLR 360.

149 *Futuris* (2008) 237 CLR 146, 166–7 [66] (Gummow, Hayne, Heydon and Crennan JJ). This reflects the approach of Deane and Gaudron JJ in *Richard Walter* who said that s 39B overrode s 177(1) to the extent that it would make the issue of a notice of assessment conclusive evidence of the due making of the assessment in the Federal Court, where the assessment was not valid for lack of bona fides: *Richard Walter* (1995) 183 CLR 168, 213.

effect of jurisdictional error upon an assessment. Yet it may be a simple task once the far more difficult question of the issue of jurisdictional error has been decided. Jurisdictional error recognises that something about the Commissioner's assessment of taxation is so alien to the character of the decision so as to take it outside the power of the Commissioner to make the assessment. This then invalidates the assessment so as to render it no assessment at all. If there is no assessment within the meaning of the Act, s 175 and s 177(1) are not enlivened so there is no restriction on the evidence to be placed before the court in a judicial review proceeding.<sup>150</sup>

Yet, the nature of the ITAA 1936 and the general powers for review and appeal of an assessment under a pt IVC proceeding means that it is this mechanism which provides the gateway to possible enlargement or contraction for the scope of jurisdictional error. For

[t]he 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.<sup>151</sup>

## 6 What Errors Will Attract the ss 39B and 75(v) Remedies?

Despite the wording of s 175, we know that there are two instances which take an assessment outside the protection of this validating clause.<sup>152</sup> First, assessments which do not meet the definition of assessment, as understood under the Act, including tentative or provisional assessments; secondly, assessments, failing 'at the threshold of legal validity' due to lack of a bona fide exercise of the Commissioner's power to assess.<sup>153</sup> Yet the High Court in *Futuris* did not explore the question of what might amount to jurisdictional error any further, as they found that the issues in hand did not constitute the appropriate vehicle in which to explore such questions. The nature of the ITAA 1936 with its broad ranging review and appeal mechanism, available through the pt IV process, militates against the requirement for judicial review. The discretionary nature of s 39B also presents a barrier to the success of a judicial review application. Further, there is a reluctance to recognise broader measures of judicial review with regard to taxation matters, at the expense perhaps of 'a serious misunderstanding of the ambit of s 39B(1) of the *Judiciary Act*'.<sup>154</sup> Perhaps I should leave Toohey J in *Richard Walter* with almost the last word:

150 This is suggested by Mason CJ in *Richard Walter* (1995) 183 CLR 168, when he held that s 177 does not limit the evidence that may be received in an application for judicial review under s 39B or 75(v).

151 *Futuris* (2008) 237 CLR 146, 183 [125] (Kirby J).

152 Outside too, of the review and appeal mechanism available through s 175A.

153 *Futuris* (2008) 237 CLR 146, 169 [75] (Kirby J).

154 *Ibid* 191 [152] (Kirby J).

the weight of authority is clearly against any general proposition that a court may inquire into the making of an assessment with a view to determining whether there has been an abuse of power ... clearly the circumstances, if they exist at all, are most exceptional.<sup>155</sup>

*Futuris* clearly upholds the effectiveness of the validating and conclusive evidence provisions found in ss 175 and 177(1) respectively, in limiting the scope of judicial review. The text of the statute reflects the intention of Parliament to limit challenges to taxation assessments and a narrow approach to statutory construction plays its part in reinforcing this intent.

155 *Richard Walter* (1995) 183 CLR 168, 227–8 (Toohey J).