HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

COMMISSIONER OF TAXATION APPELLANT

AND

FUTURIS CORPORATION LIMITED RESPONDENT

Commissioner of Taxation v Futuris Corporation Limited
[2008] HCA 32
31 July 2008
A47/2007

ORDER

1. Appeal allowed with costs.

2. Set aside the orders and declaration of the Full Court of the Federal Court of Australia entered on 26 June 2007 and, in their place, order that the appeal to that Court be dismissed with costs.

On appeal from the Federal Court of Australia

Representation

N J Williams SC with A J Payne and L B Price for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with B J Sullivan SC and T M Thawley for the respondent (instructed by Cosoff Cudmore Knox)

CATCHWORDS

Commissioner of Taxation v Futuris Corporation Limited

Income Tax – Review and appeals – Judicial review – *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), s 39B – Appellant Commissioner issued amended assessments of income tax to respondent taxpayer – Taxpayer alleged Commissioner deliberately "double counted" amounts of assessable income – Taxpayer sought judicial review in Federal Court under s 39B of the Judiciary Act while "appeal" pending under Pt IVC of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act") – Relationship between Constitution and proceedings under Pt IVC of the Administration Act and s 39B of the Judiciary Act – Scope of issues for determination in s 39B proceeding – Relevance of availability of remedy in Pt IVC proceeding to discretion to grant relief in s 39B proceeding.

Income Tax – Validity of assessment – Judicial review – Finding of Full Court that Commissioner failed to exercise *bona fide* the power of assessment –*Income Tax Assessment Act* 1936 (Cth) ("the Act"), s 175 provided that failure to comply with provisions of the Act did not affect validity of assessment – Whether deliberate maladministration manifests jurisdictional error – Whether "double counting" manifested jurisdictional error where amended assessment issued on footing that compensatory adjustment could be made under s 177F(3) – Whether amended assessment "tentative" or "provisional" – Meaning of "*bona fide*" – Whether other grounds for judicial review of amended assessment relied on by the taxpayer and available in the proceedings.

Income Tax – Validity of assessment – Judicial review – Section 177(1) of the Act provided for production of notices of assessment to be conclusive evidence of certain matters except in Pt IVC proceedings – Application of s 177(1) to proceedings under s 39B of the Judiciary Act – Whether s 177(1) a privative clause subject to "*Hickman* principle" – Relevance of *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

Constitutional law (Cth) – Income tax – Criteria for valid law with respect to taxation – Absence of arbitrariness and susceptibility to judicial scrutiny – Role of judicial remedies under s 75(v) of the Constitution and s 39B of the Judiciary Act in upholding constitutional design – Discretionary character of such remedies derived from the Constitution.

Income Tax – Review and appeals – Judicial review in Federal Court under the Judiciary Act, s 39B – Discretionary character of such review – Availability of proceedings under Pt IVC of the Administration Act – Institution of proceedings under Pt IVC of the Administration Act – Relevance of that step to exercise of discretion to decide proceedings under the Judiciary Act, s 39B – Whether proceedings under s 39B should be dismissed in exercise of discretion – Whether necessary and appropriate to consider application of ss 175 and 177 of the Act.

Words and phrases – "assessment", "*bona fide*", "double counting", "good faith", "*Hickman* principle", "jurisdictional error", "privative clause", "provisional", "tentative".

Judiciary Act 1903 (Cth), s 39B.
Income Tax Assessment Act 1936 (Cth), ss 175 and 177(1).
Taxation Administration Act 1953 (Cth), Pt IVC.

1 GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The Full Court of the Federal Court of Australia (Heerey, Stone and Edmonds JJ)[1] declared that the amended assessment of income tax for the year ended 30 June 1998 which was served upon the respondent ("Futuris") by notice dated 12 November 2004 (identified in litigation as "the Second Amended Assessment") is not a valid assessment for the purposes of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). Their Honours also ordered that the Second Amended Assessment be quashed.

2 The Act provides in s 6(1) that an "assessment" relevantly means "the ascertainment of ... the amount of taxable income ... and of the tax payable on that taxable income". The term "assessment" thus identifies what Kitto J said[2] was:

> "the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case".

The Second Amended Assessment fixed the taxable income of Futuris at $188,988,223 and the tax payable at $68,035,760.28.

3 The Full Court allowed the appeal by Futuris against the dismissal by the primary judge (Finn J)[3] of its application for the relief now granted by the Full Court. The Full Court based its orders upon the holding that the Second Amended Assessment "was not a *bona fide* exercise of the power to assess"[4] by the appellant ("the Commissioner").

4 The jurisdiction of the Federal Court invoked by Futuris was that conferred by s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Section 39B relevantly replicates the terms in which jurisdiction is conferred

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

2 *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 252; [1963] HCA 51.

3 *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2006) 63 ATR 562; [2006] ATC 4579.

4 (2007) 159 FCR 257 at 273.

upon this Court by s 75(v) of the Constitution in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The central issue presented by reliance upon s 39B for an order quashing the Second Amended Assessment thus was not merely whether there had been an error of fact or law by the Commissioner, but whether there had been error in the exercise by the Commissioner of powers conferred by the Act which amounted to jurisdictional error[5].

5 In *Parisienne Basket Shoes Pty Ltd v Whyte*[6] Dixon J referred to the maintenance of "the clear distinction … between want of jurisdiction and the manner of its exercise". His Honour in this context also used the phrase "excess of jurisdiction"[7] and, with respect to relief under s 75(v) of the Constitution, the same idea had been conveyed as early as 1914 in *The Tramways Case [No 1]*[8], by such expressions as "usurp jurisdiction", "wrongful assumption of jurisdiction" and "proceeding without or in excess of jurisdiction". Thereafter, in his submissions in *R v Kirby and Ors; Ex parte The Transport Workers' Union of Australia*[9], Dr Coppel QC is reported as using the term "jurisdictional error".

6 Part IVC of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act") contains provisions for the making of taxation objections and their disposition by the Commissioner, for review by the Administrative Appeals Tribunal ("the AAT") and for "appeals" to the Federal Court against decisions by the Commissioner upon certain taxation objections. Further, s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act") provides an

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5 *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at 1198 [17]; 198 ALR 250 at 254; [2003] HCA 31; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [73]; [2003] HCA 2.

6 (1938) 59 CLR 369 at 389; [1938] HCA 7. See, further, *Craig v South Australia* (1995) 184 CLR 163 at 176-180; [1995] HCA 58.

7 (1938) 59 CLR 369 at 389. Writing in the first edition of his work, published in 1959, Professor de Smith traced the development of judicial review in terms of jurisdiction to the 17th century: de Smith, *Judicial Review of Administrative Action* (1959) at 65-66.

8 (1914) 18 CLR 54 at 62, 65, 72; [1914] HCA 15.

9 (1954) 91 CLR 159 at 168; [1954] HCA 19.

"appeal" to the Federal Court, on a question of law, from a decision of the AAT[10].

7 With respect to a decision of the AAT, the Commissioner is obliged by the Administration Act to take such action, including amendment of any assessment concerned, as is necessary to give effect to the decision (s 14ZZL). The Commissioner is required also to implement orders of the Federal Court by steps which may include the amendment of assessments (s 14ZZQ). Neither the AAT nor the Federal Court itself is empowered by Pt IVC to vary assessments.

8 After the disallowance by the Commissioner of the objection by Futuris to the Second Amended Assessment, Futuris had on 1 June 2005 appealed to the Federal Court pursuant to Pt IVC of the Administration Act. The application based upon s 39B of the Judiciary Act was made thereafter on 10 October 2005, but was heard and disposed of in advance of any hearing of the Pt IVC proceeding. That proceeding remains pending in the Federal Court.

9 The recourse to the Federal Court (and thereafter by special leave, to this Court) which is provided by Pt IVC of the Administration Act meets the requirement of the Constitution that a tax may not be made incontestable because to do so would place beyond examination the limits upon legislative power[11].

10 This state of affairs has two pertinent consequences. The first is that under the system provided by Pt IVC being, as to the Federal Court, a law supported by s 77(i) of the Constitution, the contestability of assessments made by the Commissioner is not confined to that measure of judicial review for jurisdictional error which is provided by s 75(v) of the Constitution and by s 39B of the Judiciary Act. The second consequence is that, as a matter of discretion, relief under s 75(v) and s 39B may be (and often will be) withheld where there is another remedy provided by Pt IVC[12].

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10 With respect to "appeals" instituted after 16 May 2005, s 44(7) of the AAT Act empowers the Federal Court, in certain circumstances, itself to make findings of fact.

11 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640; [1984] HCA 20; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 221-222; [1995] HCA 23.

12 *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at 1198-1199 [15]-[18]; 198 ALR 250 at 254-255. See also the authorities collected in *Re*

(Footnote continues on next page)

The holding by the Full Court

11 What is conveyed by the holding by the Full Court that the Second Amended Assessment did not represent an exercise by the Commissioner of the power to assess which was *bona fide*? That phrase is used in several senses in public law. With cognate expressions, it also appears in formulations of the tort of misfeasance in public office. This Court has accepted that in that context it is sufficient that the public officer concerned acted knowingly in excess of his or her power[13]. The House of Lords has since indicated that in English law recklessness may be a sufficient state of mind to found the tort[14]. The affinity between tort law and public law has been remarked upon in this Court[15]; that affinity reflects the precept that in a legal system such as that maintained by the Constitution executive or administrative power is not to be exercised for ulterior or improper purposes[16].

12 However, Aickin J observed in *The Queen v Toohey; Ex parte Northern Land Council*[17] that sometimes it was impossible to be certain of the meaning intended to be conveyed by the expressions "good faith" and "bad faith". His Honour went on to discern three distinct grounds upon which an exercise of an administrative power might be attacked[18]. One was the existence of a corrupt

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McBain; Ex parte Australian Catholic Bishops Conference (2002) 209 CLR 372 at 471 [279]; [2002] HCA 16.

13 *Sanders v Snell* (1998) 196 CLR 329 at 346-347 [42]; [1998] HCA 64.

14 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at 192, 228, 231.

15 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558; [1997] HCA 3; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 106-107 [53]; [2000] HCA 57.

16 cf *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at 190-191.

17 (1981) 151 CLR 170 at 232; [1981] HCA 74.

18 *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 232-233. See also *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 67 [93], 95 [181]; [2004] HCA 63; *SZFDE v*

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purpose, with which Aickin J identified the doing of an act for personal gain including a gain for the associates of the person doing the act. Absence of good faith also was used to indicate the presence of an improper purpose outside the scope of the power but without any endeavour to obtain personal gain.

13 Finally, Aickin J indicated that in a narrow and technical sense a power might be said to have been exercised improperly where the act done was beyond the power conferred irrespective of the motive or intention of the party exercising the power. In this third sense "good faith" means merely exercising an administrative power "for legitimate reasons" and its absence suggests no degree of moral obliquity[19]. However, it is apparent from the terms in which the Full Court expressed its reasons that the failure attributed to the Commissioner to exercise *bona fide* the power of assessment was not designed to identify "good faith" in any such softer sense.

14 The Full Court said in the penultimate paragraph of its reasons[20] that the Commissioner had applied provisions of the Act "to facts which he knew to be untrue" and it was that circumstance which brought the case "squarely" within the description of a failure to exercise *bona fide* the power of assessment.

15 For the reasons which follow, the Commissioner did not apply the Act to facts which were known to be untrue, there was no absence of *bona fides* attending the Second Amended Assessment, there was no jurisdictional error vitiating that amended assessment, and the appeal to this Court should be allowed and the order of the primary judge reinstated.

The legislative provisions

16 It is convenient to begin with some examination of the central provisions of the legislation dealing with returns and assessments, and the collection and recovery of tax and with objections against assessments, reviews and "appeals". References to provisions of the Act in these reasons are to the form in which they

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Minister for Immigration and Citizenship (2007) 81 ALJR 1401 at 1405-1406 [13]; 237 ALR 64 at 67-68; [2007] HCA 35.

19 *SZFDE v Minister for Immigration and Citizenship* (2007) 81 ALJR 1401 at 1405-1406 [13]; 237 ALR 64 at 67-68.

20 (2007) 159 FCR 257 at 273.

appeared in the relevant year of income, with an indication of material changes since 1998.

17 The Commissioner has the general administration of the Act (s 8). The staff necessary to assist the Commissioner are engaged under the *Public Service Act* 1999 (Cth) ("the Public Service Act"), and, with the Commissioner they constitute a Statutory Agency for the purposes of that law[21].

Section 166 of the Act states[22]:

> "From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon."

Section 169 provides:

> "Where under this Act any person is liable to pay tax, the Commissioner may make an assessment of the amount of such tax."

18 Pursuant to s 166A(1), the Commissioner is deemed to have made an assessment of taxable income and of the tax payable on that taxable income where a tax return is furnished in the circumstances there described.

19 Section 170 makes detailed provision for the amendment by the Commissioner of assessments. There is a general provision for a four year period within which assessments may be amended where there has been an avoidance of tax (s 170(2)(b))[23], and s 173 states that:

> "Except as otherwise provided every amended assessment shall be an assessment for all the purposes of this Act."

20 As soon as conveniently may be after any assessment is made, the Commissioner is obliged by s 174 to serve notice thereof in writing by post or otherwise upon the person liable to pay the tax. Any income tax assessed shall

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21 The Administration Act, s 4A.

22 Sections 166 and 169 were amended by the *Tax Laws Amendment (Improvements to Self Assessment) Act (No 2)* 2005 (Cth).

23 See now Item 4 of s 170(1) of the Act.

be due and payable by the person liable to pay it on the date specified in the notice as the date upon which the tax is due and payable, not being less than 30 days after service of the notice (s 204)[24]. In the event of a deemed assessment pursuant to s 166A(1), service of a notice of assessment is deemed to have occurred on the day specified by s 166A(1)(c). When it becomes due and payable, income tax shall be a debt due to the Commonwealth and payable to the Commissioner in the manner and at the place prescribed (s 208). Any tax unpaid may be sued for and recovered in any court of competent jurisdiction by the Commissioner or a Deputy Commissioner (s 209)[25].

21 As already indicated, provision is made in Pt IVC of the Administration Act (ss 14ZL-14ZZS) for objections to assessments, and for reviews by the AAT and appeals to the Federal Court. Both in the AAT (s 14ZZK) and the Federal Court (s 14ZZO) the taxpayer bears the burden of proving that the assessment is excessive. The tax (and any additional tax or other amount) may be recovered notwithstanding the pendency of a review or appeal (ss 14ZZM, 14ZZR).

22 The operation of the Pt IVC system is triggered by s 175A of the Act which states[26]:

> "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 Administration Act]."

Section 175 is a short but important provision. It 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) states:

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24 The tax payable by taxpayers other than a "full self-assessment taxpayer" now becomes due and payable in accordance with the 21 day time periods prescribed by s 204(1). As to amended assessments see s 204(2). The tax payable by a "full self-assessment taxpayer" becomes due and payable in accordance with s 204(1A).

25 Sections 208 and 209 were repealed by the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act* 2006 (Cth). See now s 255-5 in Sched 1 to the Administration Act.

26 Section 175A was amended by the *Tax Laws Amendment (Improvements to Self Assessment) Act (No 2)* 2005 (Cth).

> "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 Administration Act] on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct."

23 The significance of s 175 for the operation of the Act and for the scope of judicial review outside Pt IVC is to be assessed in the manner indicated in *Project Blue Sky Inc v Australian Broadcasting Authority*[27]. That case decided that the description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance with a statutory criterion can be determined[28]. Rather, consistently with the reasons in *Project Blue Sky* of McHugh, Gummow, Kirby and Hayne JJ[29], the question for the present case is whether it is a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with provisions of the Act renders the assessment invalid; in determining that question of legislative purpose regard must be had to the language of the relevant provisions and the scope and purpose of the statute.

24 Section 175 must be read with s 175A and s 177(1). If that be done, the result is that the validity of an assessment is not affected by failure to comply with any provision of the Act, but a dissatisfied taxpayer may object to the assessment in the manner set out in Pt IVC of the Administration Act; in review or appeal proceedings under Pt IVC the amount and all the particulars of the assessment may be challenged by the taxpayer but with the burden of proof provided in s 14ZZK and s 14ZZO of the Administration Act. Where 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.

25 But what are the limits beyond which s 175 does not reach? The section operates only where there has been what answers the statutory description of an "assessment". Reference is made later in these reasons to so-called tentative or

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27 (1998) 194 CLR 355; [1998] HCA 28.

28 (1998) 194 CLR 355 at 373-374 [38].

29 (1998) 194 CLR 355 at 390-391 [93].

provisional assessments which for that reason do not answer the statutory description in s 175 and which may attract a remedy for jurisdictional error. Further, conscious maladministration of the assessment process may be said also not to produce an "assessment" to which s 175 applies. Whether this be so is an important issue for the present appeal.

The alleged error in assessment

26 It is convenient at this stage to identify the nature of the error in the assessment process which produced the Second Amended Assessment. Futuris submits that the assessment process was flawed because there was a "double counting" in a significant amount. It also submits that this "double counting" was deliberately done by the Commissioner, but a consideration of the further dimension this gives to the litigation may be put to one side for the moment.

27 The evidence before the primary judge was documentary and the basic facts are not in dispute.

28 Futuris is a publicly listed company which through shareholding in various subsidiaries owned assets which constituted collectively what was known as the "Building Products Division" of Futuris. Vockbay Pty Ltd ("Vockbay") and Walshville Holdings Pty Ltd ("Walshville") were directly owned subsidiaries. In turn, Bristile Ltd ("Bristile") was a subsidiary of Vockbay.

29 In 1997 Futuris decided to dispose of its Building Products Division. This was to be achieved by a public flotation of Walshville. The implementation of this proposal required the transfer to Walshville of the interests held by Vockbay (through Bristile) in the Building Products Division.

30 Vockbay transferred to Walshville its shares in Bristile. This involved transfers of assets between companies under common ownership and attracted the provisions of Div 19A of Pt IIIA of the Act for the working out of capital gains and capital losses. Part IIIA[30] is headed "Capital Gains and Capital Losses" and Div 19A[31] (ss 160ZZRAAA-160ZZRH) is headed "Transfers of

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30 Part IIIA of the Act (including Div 19A) was repealed by the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act* 2006 (Cth). See now Pts 3-1 and 3-3 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act").

31 See Div 138 of the 1997 Act. That division was, in turn, repealed by the *New Business Tax System (Consolidation, Value Shifting, Demergers and Other*

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Assets between Companies under Common Ownership". Division 19A was added to Pt IIIA by s 61 of the *Taxation Laws Amendment Act* 1991 (Cth). In the second reading speech in the House of Representatives on the Bill for that Act the Minister said that as the law stood asset transfers between 100 percent commonly owned company groups could result in the early realisation of capital losses or reduced capital gains on the disposal of shares in the transferor company and that advantages could also arise in respect of loans made to the transferor company[32]. The Minister continued:

> "The Government believes that no taxpayer should obtain tax advantages by reason of an internal reorganisation of a company group's affairs, as a result of which assets are transferred within the group. To prevent this, the Bill proposes a series of cost base adjustments to shares or loans held, directly and indirectly, in the respective companies, that is, the transferor and transferee of the asset. The adjustments are intended to reflect changes in the value of shares or loans held within the group following the transfer of assets from one group company to another."

Hence the statement by the primary judge that Div 19A has been characterised as an "anti-avoidance provision"[33].

31 Part IIIA had been introduced in 1986[34]. The general operation of Pt IIIA was outlined by Hill J in *Commissioner of Taxation v Cooling*[35]. His Honour explained that a "capital gain" accrues to a taxpayer where an asset has been "disposed of" during the year of income and the consideration for that disposal exceeds what the statute refers to as the "indexed cost base to the taxpayer in respect of the asset". That excess is treated as a capital gain which accrues to the taxpayer during the year of income. The provisions respecting indexation of the "cost base" implement the policy of the legislation that Pt IIIA will apply only to

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Measures) Act 2002 (Cth). A replacement regime, in different terms, is now in Div 727 of the 1997 Act.

32 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 6 December 1990 at 4651.

33 (2006) 63 ATR 562 at 564; [2006] ATC 4579 at 4581.

34 By the *Income Tax Assessment Amendment (Capital Gains) Act* 1986 (Cth).

35 (1990) 22 FCR 42 at 58-61.

"real gains" and avoid the taxation of the purely inflationary element of the gain[36].

32 In the present case the operation of Div 19A was twofold. It reduced the cost base of the interests of Futuris in Vockbay, which included both shares and loans. It increased the cost base of the shares of Futuris in Walshville. The amount of the cost base of Futuris which was so "transferred" from Vockbay to Walshville was calculated by Futuris to be $82,950,090. Of this approximately $63 million was attributed to shares and approximately $19 million to loans. The total sum was identified by the primary judge as "the transferred cost base calculation"[37].

33 In the course of the public float of Walshville, Futuris disposed of its shareholding in Walshville and by reason of that disposal it became necessary to determine the amount of any capital gain. In its return for the income tax year ended 30 June 1998 Futuris specified a taxable income of $86,088,045 and tax payable of $30,991,696.20. In a schedule to its return Futuris disclosed the transferred cost base calculation. Pursuant to s 166A(1) of the Act there arose a deemed assessment in relation to the taxable income as returned and the normal four year period for any amended assessment began to run, with an expiry date of 1 December 2002.

34 In November 2002 the Commissioner served on Futuris a notice of an amended assessment for the year ended 30 June 1998 ("the First Amended Assessment"). The accompanying adjustment sheet indicated that $19,950,088 was to be added to the taxable income returned. That addition was attributed to an increase in capital gain made on the disposal by Futuris of its shares.

35 The Commissioner disallowed an objection to the First Amended Assessment and indicated that the difference of $19,950,088 was to be attributed to a correction in the transferred cost base calculation from $82,950,090 to $63,000,002. On 17 July 2003 Futuris appealed to the Federal Court against the disallowance of its objection. This proceeding under Pt IVC of the Administration Act is still pending.

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36 (1990) 22 FCR 42 at 58.

37 (2006) 63 ATR 562 at 564; [2006] ATC 4579 at 4581.

36 The Second Amended Assessment was based upon an application of Pt IVA of the Act. Part IVA (ss 177A-177G) was introduced in 1981[38] and is headed "Schemes to Reduce Income Tax". The evidence includes a report dated 3 December 2003 from officers of the Australian Taxation Office ("the ATO") constituting "The Part IVA Panel". The Report dealt with an issue which was described as follows:

> "The issue deals with the avoidance of capital gains tax where the holding company of a company group disposes of one of its subsidiaries, where the cause of the avoidance is the increase in the cost base of the shares in the subsidiary that was disposed of. The increase resulted from two separate schemes, a capital gains tax reduction arrangement and the capitalisation of a loan from the holding company to the company that was disposed of."

37 The Report continued:

> "The Panel also considered if Part IVA was to apply to [Futuris], whether the company should be assessed on a tax benefit of $82,950,088 or, because [the ATO] had already issued an amended assessment including $19,950,088 of the otherwise possible $82,950,088 Part IVA adjustment to [Futuris] in respect to the First Scheme, the Part IVA adjustment should be for only $63,000,000 ($82,950,088 - $19,950,088). The Panel advised the assessment should be made on the full amount and, depending on the outcome of the Division 19A issue, a compensating adjustment can be made at a later stage if necessary."

38 There was also before the Commissioner a subsequent report by an officer which stated:

> "The Panel recommended that the assessment should be made on the full amount of $82,950,088 and, depending on the outcome of the Division 19A issue, a compensating adjustment can be made at a later stage if necessary. No doubt the Panel came to this view in order to 'protect the Revenue'.
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> I consider that a recent Federal Court case, *Australia & New Zealand Banking Group Ltd v Federal Commissioner of Taxation*[39] ... is

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38 By the *Income Tax Laws Amendment Act (No 2)* 1981 (Cth).

39 (2003) 137 FCR 1.

> relevant here. In that case, pursuant to section 39B of [the Judiciary Act], the taxpayer contended that amended assessments that issued as a result of the application of Part IVA were invalid assessments because each of the amended assessments included an amount that had already been returned by the taxpayer as assessable income. The Court found against the taxpayer. I must point out that this decision is subject to appeal[40].
>
> Obviously, we will not pursue recovery for both amounts of tax, penalty and s 170AA interest/general interest charge involved with the two $19,950,088 adjustments."

39 Thereafter, on 9 November 2004 the Commissioner gave to Futuris notice that a determination had been made under s 177F of the Act, that the amount of $82,950,090 "being a tax benefit that is referable to an amount that has not been included in the assessable income of [Futuris] for the year of income ended 30 June 1998", shall be so included[41].

40 The Second Amended Assessment was issued. The First Amended Assessment was further amended by increasing the taxable income specified in that assessment by $82,950,090.

Conclusions with respect to jurisdictional error

41 Of Pt IVA the primary judge said[42]:

> "It is brought into operation upon the making of a determination by the Commissioner pursuant to [s 177F(1) of the Act]. That section provides the Commissioner with a discretion to cancel a tax benefit where such a benefit has been, or would but for the section be, obtained in connection with a scheme to which the Part applies. It is unnecessary for present purposes to describe the scheme that the Commissioner was satisfied existed relating to the Walshville float, although I would note that, in the Commissioner's view, it involved both declarations of dividends by

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40 It appears that this appeal did not proceed.

41 The difference between $82,950,090 and the figure of $82,950,088 referred to earlier by the Panel appears to be the $2 attributed to the indexed cost base of the original Vockbay shares.

42 (2006) 63 ATR 562 at 569; [2006] ATC 4579 at 4586.

> Bristile and Vockbay and the capitalisation of debts owed to Vockbay and Futuris respectively following those declarations of dividend."

42 The Commissioner relied upon s 177F(3) to overcome any risk of ultimate "double counting". This sub-section provides that, with respect to a determination by the Commissioner under s 177F(1) that the whole or part of the amount referable to a tax benefit shall be included in the assessable income, and in certain further circumstances, the Commissioner may determine that there should be an appropriate adjustment and shall then take action accordingly.

43 Finn J considered that s 177F(3) could operate with respect to the Second Amended Assessment and that the decision of Kenny J in *Australia and New Zealand Banking Group Ltd v Commissioner of Taxation* ("the *ANZ case*")[43], which was also a s 39B case, supported that view of s 177F(3). But his Honour, significantly, went on to hold[44] that even if the Commissioner in preparing the Second Amended Assessment had proceeded upon a mistaken view of the applicability of s 177F(3):

> "The effect of the mistake could, and should properly, be addressed in Part IVC proceedings."

44 In this Court, counsel for Futuris emphasised that the determination under Pt IVA to the effect that some $82.9 million be included in the assessable income of Futuris was not itself challenged in these proceedings. Rather, the case for Futuris had assumed the correctness of that step so that the whole of the $82.9 million was the relevant tax benefit. The essential point made by Futuris was that the Full Court had correctly differed from the primary judge when it determined that the assessment of taxable income in the Second Amended Assessment was flawed because there had been "double counting" of the amount of $19,950,088.

45 In the process of the making of the Second Amended Assessment errors by the Commissioner of this nature (if indeed there were errors) 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 which is conferred by s 75(v) of the Constitution on this Court and by s 39B of the Judiciary Act upon the Federal Court. If there were errors they occurred within, not beyond, the exercise of the powers of assessment

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43 (2003) 137 FCR 1.

44 (2006) 63 ATR 562 at 575; [2006] ATC 4579 at 4591.

given by the Act to the Commissioner and would be for consideration in the Pt IVC proceedings.

46 Several further points should be made here. The first is to contrast the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). That statute is so drawn as to define most of its grounds without direct reference to principles of jurisdictional error, and, in particular, allows review for non-jurisdictional error of law[45]. However, Sched 1 to the ADJR Act lists (par (e)) among classes of decisions to which that statute does not apply decisions in administration of assessment provisions of revenue laws, including the Act.

47 Secondly, principles of jurisdictional error control the constitutional writs but do not attend the remedy of injunction including that provided in s 75(v) (and thus in s 39B of the Judiciary Act)[46]. The same is true of the other equitable remedy, the declaratory order[47]. Nevertheless, the equitable remedies, which are available at the suit of a party with a sufficient interest, operate to declare invalidity and to restrain the implementation of invalid exercises of power. Where s 175 of the Act operates there will be no affectation of the validity of any assessment.

48 In the present litigation, in addition to an order quashing the Second Amended Assessment, Futuris sought (and obtained in the Full Court) a declaration of its invalidity. Section 21 of the *Federal Court of Australia Act* 1976 (Cth) empowered the Federal Court to make a declaratory order but only "in relation to a matter in which it has original jurisdiction", here that conferred by s 39B of the Judiciary Act with respect to the constitutional writs. Hence the need to underpin the relief by a finding of jurisdictional error. But, independently of that consideration, and as Gaudron J explained in *Enfield City Corporation v Development Assessment Commission*[48], the usual discretionary considerations attending the grant of equitable remedies apply to injunctions and declarations in public law cases. In the present case, it should be emphasised that

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45 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 167.

46 See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [57]-[58]; [2000] HCA 5.

47 *Project Blue Sky* (1998) 194 CLR 355 at 393 [100].

48 (2000) 199 CLR 135 at 157-158 [58].

the pendency of a proceeding by Futuris under Pt IVC should have led the Full Court to refuse declaratory relief in any event.

49 The third point is one foreshadowed earlier in these reasons. It concerns the relief sought by Futuris on the footing that the Second Amended Assessment was not an "assessment" within the meaning of s 175 of the Act because it was "tentative" or "provisional". In *Batagol v Federal Commissioner of Taxation*[49], after describing "assessment" as a process with the consequence that a specified amount will become due and payable as the proper tax in the case in question, Kitto J added:

> "The idea coincides with that which Isaacs J expressed in *Federal Commissioner of Taxation v Hoffnung & Co Ltd*[50] in relation to war-time profits tax when he said: 'If an assessment definitive in character is made, it assumes that, so far as can there be seen, a fixed and certain sum is definitely due, neither more nor less. In short, it ascertains a precise indebtedness of the taxpayer to the Crown'[51]. On this construction of the Act nothing done in the Commissioner's office can amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by the service of a notice of assessment."

Further authorities to this effect were assembled by Kenny J in the *ANZ Case*[52]. The defect discerned in *Hoffnung* appeared in circumstances where the taxpayer had objected within time to the disallowance in a 1925 amended assessment of a deduction it claimed, but had failed earlier to object to the original "assessment" issued in 1919, which had been self-described as "tentative". The Commissioner took the position that any objection should have been made to the 1919 assessment and it was too late to do so in 1925. However, as Starke J put it[53] there had not been any assessment under the statute until 1925.

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49 (1963) 109 CLR 243 at 252.

50 (1928) 42 CLR 39; [1928] HCA 49.

51 (1928) 42 CLR 39 at 55.

52 (2003) 137 FCR 1 at 14-15.

53 (1928) 42 CLR 39 at 65.

50 The essential consideration here was explained as follows by Davies J in *Stokes v Federal Commissioner of Taxation*[54]:

> "Because the making of an assessment involves the determination and fixing of the taxpayer's liability to tax, subject to the taxpayer's right to object and to seek administrative review or to appeal to this court, a process which fails to specify what is the amount of the taxable income which has been assessed and what is the tax payable thereon is not an assessment for the purposes of s 166 or of s 170 of the Act."

51 The Full Court held[55] that it appeared neither on the face of the Second Amended Assessment nor from the letter written by the Deputy Commissioner to the public officer of Futuris on 20 September 2004 stating:

> "We also advise that we will not seek payment of any of the primary tax, tax shortfall penalty and interest and general interest charges payable under subsection 170AA(1) in respect of $19,950,088 of the Part IVA adjustment until the litigation relating to the Division 19A issue is finalised."

that the assessment was tentative or provisional "in the sense that it was not definitive of Futuris' liability".

52 Futuris challenges that outcome by Notice of Contention, but the Full Court on this issue was plainly correct. There remains, however, the question whether there was a conscious maladministration of the Act and, if so, whether s 175 had any operation in respect of a complaint of jurisdictional error.

The knowledge of the Commissioner

53 The Full Court found[56]:

> "it is our view that the Commissioner knew, during the relevant period, that if he included in Futuris' assessable, and therefore taxable, income an amount of $82,950,090 as a tax benefit obtained in connection with a

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54 (1996) 136 ALR 632 at 638; affd *Commissioner of Taxation v Stokes* (1996) 72 FCR 160.

55 (2007) 159 FCR 257 at 272-273.

56 (2007) 159 FCR 257 at 262.

> scheme to which Pt IVA applied *on top of* the taxable income assessed under the First Amended Assessment, he would be 'double counting' the amount of $19,950,088. That the Commissioner found comfort for this in his assumption that he could subsequently make a compensating adjustment in reliance on s 177F(3) does not mitigate against that conclusion as to his knowledge; on the contrary, it supports the conclusion that the Commissioner knew that his chosen course involved 'double counting'; and, with respect to, but contrary to, the finding of the primary judge, it also supports a conclusion that the 'double counting' was deliberate, albeit subject to the assumption that all could be made good by a subsequent compensating adjustment determination in reliance on s 177F(3)." (original emphasis)

54 If this finding as to mental element in the making of the assessment were to withstand the challenge in this Court by the Commissioner, would that, contrary to what has been concluded thus far in these reasons, enliven principles respecting jurisdictional error?

55 The issue here is whether, upon its proper construction, s 175 of the Act brings within the jurisdiction of the Commissioner when making assessments a deliberate failure to comply with the provisions of the Act. A public officer who knowingly acts in excess of that officer's power may commit the tort of misfeasance in public office in accordance with the principles outlined earlier in these reasons. Members of the Australian Public Service are enjoined by the Public Service Act (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest. These considerations point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms.

56 Such failures manifest jurisdictional error and attract the jurisdiction to issue the constitutional writs. To the extent that there is any indication to the contrary in what was said by Mason and Wilson JJ in *F J Bloemen Pty Ltd v Federal Commissioner of Taxation*[57] that should not be followed.

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57 (1981) 147 CLR 360 at 378; [1981] HCA 27.

57 It should be added that, with respect to the remedy of injunction, what was said in the joint reasons in *Plaintiff S157/2002 v The Commonwealth*[58] indicates that injunctive relief clearly is "available for fraud, bribery, dishonesty or other improper purpose".

58 However, there was no such failure of due administration with respect to the Second Amended Assessment. The Court was taken through the internal documents of the ATO and the correspondence which was in evidence. 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[59] 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)".

59 This was more than an "assumption"; the reasoning in the *ANZ Case*[60] was fairly open to the construction that it supported the course taken in making the Second Amended Assessment and the assessment was made on that footing. That s 177F(3) might be differently construed in a subsequent Pt IVC proceeding (and the allowing of this appeal leaves open that possibility in the pending Pt IVC litigation in the Federal Court) does not support any conclusion that the Commissioner engaged in "double counting" with any knowledge or belief that there was a failure in compliance with the provisions of the Act.

60 Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld. Remarks by Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Federal Commissioner of Taxation*[61] are in point. Their Honours said:

> "The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and

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58 (2003) 211 CLR 476 at 508 [82].

59 (2007) 159 FCR 257 at 262.

60 (2003) 137 FCR 1.

61 (2000) 46 ATR 191 at 193; [2000] ATC 4812 at 4815.

would continue to be the case. As Hill J said in *San Remo Macaroni Company Pty Ltd v FCT*[62] it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside."

61 The outcome on the present appeal bears out the quoted observation by Hill J.

Conclusions

62 The primary judge was correct to dismiss the s 39B application and the Full Court erred in displacing that outcome. The appeal to this Court should be allowed. It should be noted that the process of reasoning which has led to that conclusion does not depend upon giving determinative effect to s 177(1). Rather, the critical matter for the determination by this Court of the appeal has been the proper construction of s 175 and its application to the facts as correctly found by the primary judge.

63 However, given the attention devoted to s 177(1) in the submissions of both parties something more should be said respecting that provision.

The relationship between s 175 and s 177(1)

64 The evident policy reflected in the terms of s 177(1) is the facilitation of proceedings for the recovery of tax which are instituted by the Commissioner under s 209 of the Act in a court of competent jurisdiction[63]. Corresponding provision is made elsewhere in the Act for the recovery of other amounts[64]. The action for recovery is facilitated by the "conclusive evidence" provision in s 177(1). That sub-section, as the Commissioner correctly submitted, is not a privative clause in the ordinary use of that term. It does not purport to oust the (necessarily federal) jurisdiction conferred upon any other court in matters arising under the Act. To the contrary, it recognises that there may be Pt IVC

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62 (1999) 43 ATR 53 at 71; [1999] ATC 5138 at 5154.

63 Section 209 attracts the conferral of federal jurisdiction upon State courts by the ambulatory operation of s 39(2) of the Judiciary Act: *Forsyth v Deputy Commissioner of Taxation* (2007) 81 ALJR 662 at 665 [1]-[2]; 233 ALR 254 at 255; [2007] HCA 8.

64 See, as to the PAYE system, *Forsyth v Deputy Commissioner of Taxation* (2007) 81 ALJR 662; 233 ALR 254.

proceedings and in those proceedings the "conclusive evidence" provision does not apply.

65 In recovery proceedings s 177(1) operates to change what otherwise would be the operation of the relevant laws of evidence. But, given the presence of Pt IVC, s 177(1) does not operate to impose an incontestable tax or otherwise fall foul of the principles which were considered in *Nicholas v The Queen*[65] and which respect usurpation of the federal judicial power by deeming to exist an ultimate fact.

66 What of the operation of s 177(1) as a limitation upon the evidence which may be received in an application for judicial review under s 75(v) of the Constitution or s 39B of the Judiciary Act? What will be in issue there, as explained earlier in these reasons, are allegations of corruption and other deliberate maladministration. The attribution "correct" given by the concluding word of s 177(1) is inapt to describe the situation which would arise were such allegations (properly pleaded) made good in the judicial review proceeding. Considerations applied above in the construction of s 175 apply here also. The result is that, on its proper construction and its application to the present s 39B case, s 177(1) did not conclude against Futuris curial consideration of alleged deliberate maladministration of the Act with respect to the Second Amended Assessment.

67 It follows from what has been said respecting s 177(1) that not only is it not a privative clause, but there is not the conflict or inconsistency between s 177(1), s 175 and the requirements of the Act governing assessment which calls for reconciliation of the nature identified in *Plaintiff S157/2002 v The Commonwealth*[66]. The point sought to be made here respecting the relationship between s 175 and s 177(1) and those requirements was expressed in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[67], by Dawson J as follows[68]:

> "The requirements of the Act which govern the making of an assessment do not produce any inconsistency with the provision that a notice of

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65 (1998) 193 CLR 173; [1998] HCA 9.

66 (2003) 211 CLR 476 at 486-488 [17]-[19], 500-501 [57]-[60].

67 (1995) 183 CLR 168.

68 (1995) 183 CLR 168 at 222-223. Toohey J spoke in somewhat similar terms: (1995) 183 CLR 168 at 233.

> assessment constitutes conclusive evidence in recovery proceedings. That is because s 175 provides that the validity of any assessment shall not be affected by reason of the fact that any of the provisions of the Act have not been complied with. ... Having regard to s 175, there is no inconsistency, apparent or otherwise, between the requirements of the Act relating to the making of an assessment and s 177(1), and no reconciliation is called for. Indeed, as I have said, s 177(1) does no more than give evidentiary effect to s 175."

68 It follows that there is no scope here for the operation of the so-called *Hickman* principle[69]. Futuris framed its case as if *Hickman* was engaged and by adoption of Dixon J's words[70]:

> "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".

But it was only the first mentioned consideration ("bona fide attempt") that was relevant at all in the judicial review proceeding. The notion of bona fides had the content explained earlier in these reasons and did not enter the case by the tortuous path of statutory construction and reconciliation with which Dixon J was concerned.

69 Something more should also be said respecting *Richard Walter*[71]. That case decided first, that the Act permits the Commissioner to issue assessments on an alternative basis to different taxpayers in respect of the same income and, secondly, that s 177(1) does not limit the jurisdiction conferred by s 39B of the Judiciary Act. Neither holding is challenged in this litigation.

70 Various views were expressed in *Richard Walter* respecting the construction of and relationship between s 175 and s 177(1). Reference was made to the then accepted distinction between mandatory and directory provisions[72], and to what seems to have been some doctrinal status then afforded

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69 After *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53.

70 (1945) 70 CLR 598 at 615.

71 (1995) 183 CLR 168.

72 (1995) 183 CLR 168 at 185 per Mason CJ, 223 per Toohey J, 240 per McHugh J.

to *Hickman*[73]. 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. Hence this appeal should be decided by the path taken in these 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*.

Orders

71 The appeal should be allowed with costs, the orders and declaration of the Full Court entered on 26 June 2007 be set aside and in place thereof the appeal to that Court be dismissed with costs.

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73 (1995) 183 CLR 168 at 179-180 per Mason CJ, 193-194 per Brennan J.

72 KIRBY J. This is an appeal from orders of the Full Court of the Federal Court of Australia[74]. That Court reversed the orders of the primary judge (Finn J)[75]. The Full Court declared that an amended assessment of income tax for the year ending on 30 June 1998, served upon Futuris Corporation Ltd ("Futuris"), was not a valid assessment for the purposes of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). It ordered that the amended assessment be quashed. By special leave, the Commissioner of Taxation ("the Commissioner") seeks to reverse the Full Court's orders and to restore the orders of the primary judge.

73 The Full Court's decision was based upon its conclusion that the Commissioner had "doubled counted" an amount of $19,950,088 in expressing the contested assessment ("the Second Amended Assessment"). Futuris submits that this amount was treated as a tax benefit that it obtained in connection with a scheme to which Pt IVA of the Act applied, before also being included in Futuris's taxable income. Evidence received at trial showed that the Commissioner had assumed that he could make a corresponding adjustment to the taxable income payable by Futuris, in reliance on s 177F(3) of the Act, if the Second Amended Assessment was later found to have wrongly included the contested amount.

74 The Full Court decided that the Commissioner had knowingly ("deliberately") double-counted the amount of $19,950,088 in issuing the disputed Second Amended Assessment[76]. It held that it was not open to the Commissioner to make a subsequent compensating adjustment under s 177F(3) of the Act to correct any overstatement of taxable income[77]. It concluded that the Second Amended Assessment was not a valid "assessment" in accordance with the Act. Whilst rejecting Futuris's submission that the Second Amended Assessment was invalid, by reason that it was tentative or provisional[78], the Full Court accepted the submission that it was invalid as it was not a *bona fide* exercise of the Commissioner's power to assess[79].

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74 *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257 per Heerey, Stone and Edmonds JJ.

75 *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2006) 63 ATR 562; [2006] ATC 4579.

76 *Futuris* (2007) 159 FCR 257 at 262 [10].

77 (2007) 159 FCR 257 at 264-265 [16] and 266 [23].

78 (2007) 159 FCR 257 at 273 [51].

79 (2007) 159 FCR 257 at 273 [53].

75 In this way, the Full Court decided that the Second Amended Assessment was not protected by ss 175 and 177(1) of the Act. Instead, it was held to fail at the threshold of legal validity. That conclusion attracted relief to Futuris in accordance with s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). It was on that footing that the Full Court made the declaration and order quashing the Second Amended Assessment now challenged in this Court.

76 The Commissioner disputed the foregoing decision of the Full Court. He asserted that the Second Amended Assessment was valid; involved no double-counting; and was definitive of the liability of Futuris to income tax in the relevant tax year. He also argued that the Second Amended Assessment was protected by ss 175 and 177 of the Act; that it was not subject to judicial review proceedings brought under s 39B of the Judiciary Act but only to proceedings brought under Pt IVC of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act"); that it was open to the Commissioner to contemplate, if necessary, a later adjustment to the Second Amended Assessment pursuant to s 177F(3) of the Act; and, in any event, that relief under s 39B of the Judiciary Act should have been denied on discretionary grounds.

77 In this Court, Futuris supported the reasoning of the Full Court. It also relied on a notice of contention that sought to extend the basis of the invalidity found by the Full Court. Specifically, Futuris contended that the Second Amended Assessment was tentative or provisional and not issued *bona fide* as it was known by its maker to overstate Futuris's taxable income and tax payable.

Constitutional starting points

78 *Criteria for valid tax laws*: Whilst neither party raised express constitutional arguments, the Constitution cannot be ignored in approaching the issues in this appeal. Necessarily, the Constitution stands behind and informs the meaning of the legislation under consideration. Every now and again, in these cases, the Court needs to return to the applicable constitutional moorings.

79 The constitutional power of the Federal Parliament to make laws imposing taxation is expressed in very wide terms[80]. Once engaged, both in matters of content and in the procedures envisaged, the power acknowledges few limits[81]. Nevertheless, the power is subject to constraints necessarily implied by the grant. Moreover, like all s 51 heads of power, the power to make laws with respect to taxation is subject to the requirements of other provisions of the Constitution and to implications derived from the terms and structure of that document.

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80 See Constitution, s 51(ii).

81 *R v Barger* (1908) 6 CLR 41 at 94-95 per Isaacs J; 114 per Higgins J; [1908] HCA 43.

80 As to the grant, to be a law with respect to "taxation", the provision must not be arbitrary. It must be based on an ascertainable criterion and be susceptible to judicial scrutiny. Such scrutiny is, at the least, inherent in the design of the Constitution because Ch III subjects the several grants of legislative power in s 51 to the examination of the independent Judicature.

81 This point was made by Dixon CJ in *Deputy Federal Commissioner of Taxation v Brown*[82]:

> "Although there is no judicial decision to that effect, it has, I think, been generally assumed that under the Constitution liability for tax cannot be imposed upon the subject without leaving open to him some judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed, that is to say that an administrative assessment could not be made absolutely conclusive upon him if no recourse to the judicial power were allowed."

82 From such observations, this Court has derived, and repeatedly expressed[83], the requirement that to be valid a tax cannot be incontestable. Any attempt by the Parliament to make a tax incontestable would exceed the legislative power that is granted. Thus, in *MacCormick v Federal Commissioner of Taxation*, the Court said that the[84]

> "… incontestability of a tax may go to its validity. The principle which lies behind the doctrine is a more general one of elementary constitutional law. It is simply that the legislature cannot determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power. …
>
> For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed. Not only must it be possible to point to the criteria themselves, but it must be

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82 (1958) 100 CLR 32 at 40; [1958] HCA 2. See also at 52 per Williams J.

83 See eg *Deputy Commissioner of Taxation v Hankin* (1959) 100 CLR 566 at 576-578; [1959] HCA 2; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639; [1984] HCA 20; *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at 1198 [15]; 198 ALR 250 at 254; [2003] HCA 31.

84 (1984) 158 CLR 622 at 639-640 per Gibbs CJ, Wilson, Deane and Dawson JJ, calling on *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*") (1951) 83 CLR 1 at 258 per Fullagar J; [1951] HCA 5.

> possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner."

83 In this appeal, Futuris did not challenge any legislation, including ss 175 or 177(1) of the Act, as constitutionally invalid. Nevertheless, Futuris emphasised the centrality of having effective judicial review of the purported imposition upon it of liability to the taxation expressed in the Second Amended Assessment. This proposition was designed to address the contention that, in this case, Futuris should have sought merits review before the Administrative Appeals Tribunal, then appealed from that Tribunal to the Federal Court on a question of law[85] or under Pt IVC of the Administration Act.

84 Futuris insisted on the prior facility to challenge the Commissioner's assessment where a taxpayer was asserting that, in law, it was not an "assessment" at all and thus did not have the legal consequences that would flow from a valid "assessment". In effect, Futuris argued that a case such as the present was precisely the kind for which such relief was afforded by the Constitution[86] and the Judiciary Act[87]. To attempt to force a taxpayer, with a threshold and basic legal objection, to pursue other remedies could (depending on the circumstances) burden the facility of contestability before the courts. And such judicial contestability is, in Australia, the constitutional prerequisite for all valid federal taxation laws.

85 *The rule of law and s 75(v)*: The second starting point is connected and is just as fundamental. It derives from a recognition that the Constitution establishes a polity adhering to the rule of law. It affords law-making powers to the Federal Parliament that are ancillary, or incidental, to sustaining and carrying on government[88]:

> "[I]t is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."

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85 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44.

86 Constitution, s 75(v).

87 Section 39B.

88 *Communist Party Case* (1951) 83 CLR 1 at 193 per Dixon J.

86 Because this unstated but implied assumption permeates the Constitution, it is reflected in the purposes for which the constitutional writs, established by s 75(v), exist. Those writs afford remedies by which this Court is empowered to ensure that officers of the Commonwealth conform to the rule of law. Pursuant to the Constitution[89], s 39B of the Judiciary Act was enacted to grant a facility to the Federal Court to provide similar remedies[90]. The crucial role of such remedies, to ensure the conformity of federal officials to the Constitution and to laws made under it, was given fresh emphasis by this Court in *Plaintiff S157/2002 v The Commonwealth*[91].

87 *Plaintiff S157/2002* addressed s 75(v) of the Constitution. However, the same principles apply in relation to the powers provided to the Federal Court to grant relief under s 39B of the Judiciary Act, the provision invoked by Futuris. In *Plaintiff S157/2002* it was said that[92]

> "[Section] 75(v) … introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual reinforcement for what Dixon J said about the significance of the rule of law for the Constitution in [the *Communist Party Case*] …
>
> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action."

88 *Discretionary relief under s 75(v)*: The third starting point derives from the character of the constitutional remedies provided for in, or contemplated by,

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89 Constitution, ss 51(xxxix) and 77(i).

90 Judiciary Act, s 39B(1).

91 (2003) 211 CLR 476; [2003] HCA 2.

92 (2003) 211 CLR 476 at 513-514 [103]-[104].

s 75(v). Courts in 19th century England[93], and later this Court[94], have debated whether the remedies specified in s 75(v) (or at least the writ of prohibition) would in particular circumstances issue as of right. Decisions, especially more recent ones, have concluded that *all* of the remedies provided in s 75(v) are discretionary[95].

89 Nineteenth century English practice generally regarded the writ of *mandamus* as discretionary. Likewise, the remedy of injunction, being equitable in origin, was always so viewed. Looking afresh at the collection of s 75(v) remedies, it was therefore but a small step to conclude, as the Court did, that each such remedy was discretionary in character. Any entanglements in earlier practice and understandings were removed by an appreciation that the Constitution provided the remedies named in s 75(v) for high constitutional purposes. Those purposes had to be found within Ch III ("the Judicature") of the Constitution, the chapter in which s 75(v) appears.

90 Section 73 is a central provision of Ch III. It provides this Court, in its appellate jurisdiction, with the entrenched national supervision of the integrated Judicature of the Commonwealth. Thus, the constitutional writs and remedies contemplated by s 75(v) must operate in a context of an integrated court structure. That structure includes the facility of this Court to decide appeals coming before it, relevantly, from any other federal court, any court exercising federal jurisdiction, any Supreme Court of a State, or any other court identified within that section[96].

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93 See eg *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 279-280; *Chambers v Green* (1875) LR 20 Eq 552 at 555 per Sir George Jessel MR.

94 See eg *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 118-119; [1953] HCA 22; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201-202; [1979] HCA 6.

95 *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504 at 513 per Gibbs J, 522 per Aickin J; *R v Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471 at 484-485 per Mason J, 489 per Murphy J, 493 per Aickin J, 494 per Wilson J; [1981] HCA 33; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ; [1984] HCA 82; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375 per Mason J; [1985] HCA 67.

96 Constitution, s 73(ii).

91 With a fuller appreciation of the context and purpose of the writs and remedies provided by s 75(v), this Court, in *Re Refugee Review Tribunal; Ex parte Aala*[97], clearly affirmed the rule that all of the constitutional relief there mentioned is discretionary in character. Gaudron and Gummow JJ, in their joint reasons in *Aala*, gave a salutary warning[98]:

> "No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this Court under s 73 of the Constitution."

Their Honours acknowledged that those who exercise executive and administrative powers are as much subject to the law as those affected by such exercise[99]. They drew guidance[100] for withholding relief under s 75(v) of the Constitution from the examples given by this Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*[101]:

> "[T]he writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made."

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97 (2000) 204 CLR 82 at 89 [5] per Gleeson CJ, 107 [54]-[55] per Gaudron and Gummow JJ, 136-137 [145]-[148] of my own reasons, 144 [172] per Hayne J, 156-157 [217]-[218] per Callinan J; [2000] HCA 57.

98 (2000) 204 CLR 82 at 107 [55] per Gaudron and Gummow JJ citing *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 639, 651-655; [1995] HCA 31.

99 (2000) 204 CLR 82 at 107-108 [55] citing *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56] per Gaudron J; [2000] HCA 5.

100 (2000) 204 CLR 82 at 108 [56].

101 (1949) 78 CLR 389 at 400 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ; [1949] HCA 33.

92 In many cases before[102] and after *Aala*[103], including cases where relief had been sought against the Commissioner in reliance upon the Act, remedies of the kind mentioned in s 75(v) have been denied on discretionary grounds. Usually, this has been done for the first reason mentioned in *Ozone Theatres* that a "more convenient and satisfactory remedy exists"[104], specifically one which would be susceptible to ultimate recourse to this Court by way of an appeal.

93 Consistently with previous authority of this Court in similar proceedings[105], Futuris did not seek in these proceedings to invoke the original jurisdiction of this Court. Futuris did not claim constitutional writs or injunctive relief in respect of the conduct of the Commissioner for his allegedly invalid Second Amended Assessment, issued without relevant jurisdiction or power. Nor did Futuris claim such relief in respect of the Judges of the Federal Court for exceeding their jurisdiction in the decision they made. Instead, Futuris invoked the jurisdiction of the Federal Court by commencing proceedings for the relief provided by the Judiciary Act, s 39B(1). In respect of the Federal Court, s 39B(1) re-states the grant of remedies provided to this Court by s 75(v) of the Constitution. Decisions concerning the ambit of s 75(v) of the Constitution apply with equal force to the same remedies afforded to the Federal Court by s 39B(1).

94 *Conclusion: a significant context*: The foregoing three constitutional starting points assist this Court on the way in which it should approach the arguments of the parties in this appeal. Although neither party advanced arguments of constitutional invalidity, it is essential to acknowledge the constitutional setting before proceeding to interpret the relevant legislation and to resolve the issues in the appeal.

95 The first two starting points underlie, in part, the arguments proffered by Futuris. No construction of the contested legislation should be adopted which would effectively make the Commissioner a final judge of his own administrative decisions or would oust the jurisdiction of the courts to scrutinise a tax that the Commissioner has purported to impose on a taxpayer by an "assessment".

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102 eg *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1156 [37]; 173 ALR 145 at 156; [2000] HCA 37. The case was decided in June 2000, five months before *Aala*.

103 eg *Re Heerey; Ex parte Heinrich* (2001) 185 ALR 106 at 109-110 [17]-[18]; [2001] HCA 74.

104 (1949) 78 CLR 389 at 400.

105 See *Glennan* (2003) 77 ALJR 1195-1196 at 1198 [17]-[18]; 198 ALR 250 at 254-255.

96 The second starting point also reinforces the contention that making a tax decision review inadmissible would take a purported tax outside the grant of power to the Federal Parliament. Irrespective of other remedies available to challenge assessments of taxation and other acts or omissions by officers of the Commonwealth, the exceptional jurisdiction provided by s 75(v) of the Constitution to this Court stands in reserve (and is mirrored, in the Federal Court, by s 39B of the Judiciary Act). These unique safeguards assure to the named courts the jurisdiction and power to scrutinise all relevant acts and omissions of Commonwealth officers against the applicable legal standards. Such a position is protected despite any attempts that may be made by legislative protections (privative clauses or otherwise) or by administrative practices, purporting to immure such officers and their conduct against the applicable judicial superintendence.

97 Nevertheless, superintendence by reference to legal criteria can be afforded in different ways. An important step in the argument of the Commissioner was that the provision of the remedies which Futuris invoked in the Federal Court, pursuant to s 39B(1) of the Judiciary Act, was misconceived. The correct and available avenue to challenge the Second Amended Assessment, addressed to the taxpayer, was in proceedings brought by the taxpayer under Part IVC of the Administration Act[106]. The relief sought under s 39B should therefore be refused on the basis of that Court's discretion.

The facts and legislation

98 *The facts*: The evidence of the transactions relevant to this appeal was detailed and complex. However, it was wholly documentary. The Full Court outlined the facts relevant to the underlying transactions[107] and to the assessments and appeals process[108]. It noted that such facts were not in dispute[109].

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106 Including proceedings where review had been sought before the Administrative Appeals Tribunal ("AAT") and by way of appeal on a question of law from a decision of the AAT pursuant to the *Administrative Appeals Tribunal Act* 1975 (Cth), s 44.

107 *Futuris* (2007) 159 FCR 257 at 259 [3] citing *Futuris* (2006) 63 ATR 562 at 564 [2]-[5]; [2006] ATC 4579 at 4581-4582.

108 (2007) 159 FCR 257 at 259-261 [4]-[6] citing (2006) 63 ATR 562 at 564-565 [6]-[13]; [2006] ATC 4579 at 4582-4583.

109 (2007) 159 FCR 257 at 259-260 [3]-[4].

99 In addition to the facts concerning the actions of Futuris and its associated companies (Vockbay, Walshville and Bristile[110]), the primary judge and the Full Court paid close attention to the records of the Australian Taxation Office ("the ATO") made during the relevant period. This was done in considering the application of Div 19A of Pt IIIA of the Act to determine the applicable capital gains and capital losses. This course was taken to ascertain the knowledge and intention of the Commissioner, through his officers, when he issued the Second Amended Assessment to Futuris[111]. This Court devoted considerable time during the hearing to an examination of the ATO files, memoranda and determinations.

100 The purpose of the Act, found in Div 19A, to address avoidance of income tax as deemed unacceptable by the Parliament, is explained in the reasons of Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons")[112]. The joint reasons also describe the dealings between Futuris and its associated companies; the return lodged by Futuris with the ATO stating its self-assessed taxable income for the income tax year ended 30 June 1998[113]; the subsequent service on Futuris in November 2002 of the First Amended Assessment[114]; and the later service of the Second Amended Assessment based on an application of Pt IVA of the Act, with special provisions addressed to "Schemes to Reduce Income Tax"[115].

101 The joint reasons explain the steps taken by Futuris between the First and Second Amended Assessments[116]. Specifically, Futuris initiated proceedings under Pt lVC of the Administration Act to challenge the First Amended Assessment by way of an "appeal" to the Federal Court against the Commissioner's disallowance of its objection to that assessment[117]. The invocation of Pt IVC remained undetermined during the proceedings in the

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110 The same abbreviations are used as in the joint reasons at [28] and the court below: (2007) 159 FCR 257 at 259 [3] citing (2006) 63 ATR 562 at 564 [3]; [2006] ATC 4579 at 4581.

111 (2007) 159 FCR 257 at 262-263 [8]-[12] citing the primary judge (2006) 63 ATR 562 at 566-568 [16]-[22]; [2006] ATC 4579 at 4583-4585.

112 Joint reasons at [30]-[31].

113 Joint reasons at [33].

114 Joint reasons at [34].

115 Joint reasons at [36].

116 Joint reasons at [35].

117 See *Futuris Corporation Ltd v Commissioner of Taxation* [2005] FCA 969 at [5].

Federal Court, which proceedings are now the subject of this appeal addressed to the validity of the Second Amended Assessment.

102 Critical to the challenge by Futuris to the validity of the Second Amended Assessment (and to Futuris's submission that it was not an "assessment" within the statutory powers afforded to the Commissioner) were many recorded exchanges between officers of the ATO. These expressed, and explained, their conclusions about the way the ATO (and hence the Commissioner) should assess the income tax payable by Futuris in the relevant year. Some of the applicable reports in the ATO files are extracted in the joint reasons[118].

103 Based on these extracts, Futuris sought to build its argument that the Second Amended Assessment was legally invalid. Its argument was essentially that the subject assessment was not an "assessment" within the meaning of the Act because, as was known to the ATO, it involved "double counting". It was therefore not a *bona fide* exercise of the Commissioner's power of "assessment" and was not definitive of Futuris's liability to income tax in respect of that taxation year. Instead, it was tentative and subject to revision. It thus lacked the certainty and finality postulated by the Act. It was therefore outside the jurisdiction and power granted to the Commissioner to assess the taxpayer. For that reason it was not covered by whatever protection ss 175 and 177(1) of the Act provided against judicial scrutiny of the Commissioner's actions in the challenge that Futuris presented in its s 39B(1) proceedings.

104 It is neither sensible nor necessary to extract more from the ATO internal memoranda than is contained in the joint reasons. Futuris placed great emphasis upon the importance, under the Act, of the provisions now applicable for self-assessment by the taxpayer[119]; the powers of the Commissioner to make an amended assessment that has burdensome[120] and immediate consequences for the taxpayer; and the high significance attached in the scheme of the Act to any such successive "assessments", effectively as the fulcrum around which rights and duties, liabilities and entitlements, as provided by the Act, operate.

105 The foregoing features of the "assessment process" were invoked by Futuris to support its contention that the assessment provisions and whole scheme of the Act required great care, accuracy, *bona fides* and finality in the Commissioner's assessments. Anything less would not suffice. Specifically, guesswork, self-protective over-estimation, imposition of assessments known to

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118 Joint reasons at [36]-[38].

119 Pursuant to the Act, s 166A(1).

120 See the Administration Act, ss 14ZZK and 14ZZO. See joint reasons at [24].

be false or purely provisional pending later developments would not fulfil the statutory requirements of an "assessment". Any purported "assessment" with these or similar flaws would not be an "assessment" within the Act and would not give rise to the statutory consequences for the taxpayer.

106 Futuris complained specifically that the Commissioner in the Second Amended Assessment knowingly and deliberately "double counted" Futuris's income tax liability. Futuris submitted that this was demonstrated by comparing the First and Second Amended Assessment documents. This demonstrated, so it was argued, that the Commissioner "knew, during the relevant period" that, by including the amount deemed to be included by the determination under s 177F of the Act on top of the taxable income in the First Amended Assessment, he was "double-counting" $19,950,088[121].

107 Three general comments may be made, based upon a review of the documentary evidence. First, in lodging its income tax return for the relevant taxation year, Futuris did not fully particularise the basis upon which it had applied the provisions of Div 19A of the Act to arrive at the specified taxable income of $82,950,090. Futuris simply attached a brief schedule and subsequently declined to supply comment and information requested by the Commissioner to elaborate and explain that schedule. Whilst this was possibly Futuris's legal right in the circumstances, it inevitably forced the Commissioner to review Futuris's self-assessment and to make his own amended assessments on the basis of potentially incomplete and imperfect information. As to the detail, Futuris was obviously in a position of advantage. Futuris's complaints about a lack of accuracy, certainty and finality in the Second Amended Assessment in this context therefore tend to fall on ears that are, to some extent at least, unreceptive.

108 Secondly, as the extracts from the ATO file demonstrate, the ATO officers appreciated that there was a risk of double-counting in the successive amended assessments issued by the Commissioner[122]. Nevertheless, the file notes clearly show that there was no intention to deceive or trick the taxpayer or, ultimately, to impose a double burden. The Pt IVA Panel, constituted within the ATO, noted that, depending on "the outcome of the Division 19A issue" (Futuris's appeal to the Federal Court being still outstanding) "a compensating adjustment can be made at a later stage if necessary". The provision of such an adjustment by the ATO was considered to be "obvious"[123]. The Commissioner's steps were

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121 [2008] HCATrans 144 at line 2724, 2732.

122 Joint reasons at [37].

123 Joint reasons at [38].

explained as designed to "protect the Revenue". Specifically, the Panel relied on a then recent decision of a judge of the Federal Court[124].

109 It is possible that the ATO file contains self-serving statements. In this life it has been known for officials to leave a trail of protective memoranda so as to cloak themselves with an appearance of propriety in case of later official or judicial scrutiny. Suffice to say that there is no evidence of such conduct in the many ATO file entries presented to this Court. On the contrary, from the file contents, the officers appear to have struggled with a difficult problem of evidence and statutory application and to have done so conscientiously, honestly and candidly.

110 Thirdly, the file notes appear to have contemplated that Futuris would pursue its Div 19A "appeal" to the Federal Court. Consequential decisions would then be made either to enforce the First Amended Assessment (if upheld) or to enforce (with whatever modifications were then appropriate) the Second Amended Assessment. Instead of proceeding down this path of challenge, Futuris elected to pursue the remedy of judicial review in reliance on s 39B(1) of the Judiciary Act. That proceeding brought the parties to the Federal Court and now, by special leave, to this Court.

111 *The legislation*: The relevant provisions of the Act and of the Administration Act are set out in the joint reasons[125]. It is unnecessary for me to repeat them.

The decisions of the Federal Court

112 *The primary judge's decision*: The primary judge rejected Futuris's challenge to the validity of the Second Amended Assessment. His Honour stated[126]:

> "[T]he Commissioner goes on to say that, given the present uncertainty as to how the $19,000,000 was calculated, it may be that the two bases may in fact be found in this case to be cumulative. The Pt IVC proceedings [under the Administration Act] in relation to the first amended assessment will clarify that situation.

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124 *Australia and New Zealand Banking Group Ltd v Commissioner of Taxation* (2003) 137 FCR 1 per Kenny J ("*ANZ Banking Group*"). No appeal was pressed against this decision.

125 Joint reasons at [16]-[25].

126 *Futuris* (2006) 63 ATR 562 at 575-576 [59]-[63]; [2006] ATC 4579 at 4591-4592.

> … I agree with the Commissioner's submission. The present matter is one which falls naturally within both the language and the evident purpose of s 177F(3). But even if I am wrong in this, I equally am satisfied that at best all that Futuris has shown is that in making a definitive assessment (that is the second amended assessment) … the Commissioner proceeded upon a mistaken view of the applicability of s 177F(3). That mistake did not invalidate the assessment or evidence bad faith on the Commissioner's part in the exercise of the power to assess. The effect of the mistake could, and should properly, be addressed in Pt IVC proceedings.
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> … I am not satisfied that the Commissioner deliberately engaged in what [Futuris] calls double counting.
>
> I equally am satisfied that the assessment was intended to, and did, create a definitive liability notwithstanding that the Commissioner has acknowledged that Futuris' liability could be reviewed at a future date after the Div 19A Pt IVC proceedings were complete[127].
>
> … [S]uch relief as Futuris is entitled to in respect of [the Second Amended Assessment] is in Pt IVC proceedings and not by way of judicial review under s 39B of [the Judiciary Act]."

113 *The Full Court's decision*: The Full Court unanimously reversed the conclusions and orders of the primary judge. Doubtless influenced by the way the parties had presented their arguments, by reference to authority of this Court concerned with challenges to the validity of decisions by the Commissioner, the Full Court analysed Futuris's appeal in terms of what it described as the "two strands of invalidity"[128].

114 The Full Court rejected what it called the "Tentative/Provisional Strand"[129]. Their Honours were not persuaded that the Second Amended Assessment was "tentative" in the sense of "provisional", pending the resolution of the correctness of the First Amended Assessment. However, they upheld what they described as the "Lack of Good Faith Strand"[130]. They considered that the

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127 cf *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360 at 377-378; [1981] HCA 27; *ANZ Banking Group* (2003) 137 FCR 1 at 26 [70].

128 *Futuris* (2007) 159 FCR 257 at 267 [29]. This analysis drew on *ANZ Banking Group* (2003) 137 FCR 1 at 14-15 [36]-[37].

129 (2007) 159 FCR 257 at 268 [30] and 272 [47].

130 (2007) 159 FCR 257 at 270 [40] and 273 [53].

Second Amended Assessment contained "deliberate overstatements of taxable income and tax payable"[131]. To this extent "it was not a *bona fide* exercise of the power to assess"[132]. It was thus outside the Commissioner's powers as granted by the Act[133].

115 The Full Court allowed the appeal on that basis and declared that the Second Amended Assessment was not a valid assessment for the purposes of the Act. Upon that basis, it quashed that assessment. The Commissioner contests those orders in this appeal.

The issues

116 *Issues in contest*: Having regard to the written record and oral submissions, this Court must resolve the following issues:

(1) *The tentative/provisional assessment issue*: Was the Second Amended Assessment "tentative" or "provisional" in the sense that it was not an "assessment" according to the Act, and therefore "not touched" by ss 175 and 177(1) of the Act[134]?

(2) *The lack of good faith issue*: Was the Second Amended Assessment made with a lack of good faith, as in was it deliberately false and known to be such[135], corruptly made in deliberate disregard for the requirements of the Act[136] or otherwise made with *mala fides* on the part of the Commissioner, and therefore not protected by ss 175 and 177(1) of the Act[137]?

(3) *The other disqualifications issue*: Is the Second Amended Assessment invalid for any other ground that would attract relief under s 39B(1) of the Judiciary Act?

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131 (2007) 159 FCR 257 at 271 [46].

132 (2007) 159 FCR 257 at 273 [53].

133 (2007) 159 FCR 257 at 273 [54] citing *Darrell Lea Chocolate Shops Pty Ltd v Federal Commissioner of Taxation* (1996) 72 FCR 175 at 186-187.

134 *Bloemen* (1981) 147 CLR 360 at 377 per Mason and Wilson JJ.

135 Joint reasons at [55].

136 Joint reasons at [60].

137 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 199-200 per Brennan J; [1995] HCA 23.

(4) *The ss 175 and 177(1) issue*: Having regard to the conclusions to the foregoing issues, is the Second Amended Assessment a valid "assessment" under the Act and one that is protected in proceedings such as this by ss 175 and 177(1) of the Act?

(5) *The discretionary relief issue*: Having regard to the conclusions to the foregoing issues, the nature and circumstances of Futuris's challenge to the Second Amended Assessment and the availability of other, alternative, remedies (in particular under Pt IVC of the Administration Act with appeal to the Federal Court)[138], did the primary judge reject Futuris's application for judicial review on discretionary grounds? In any case, was the primary judge entitled to do so? And did the Full Court err by not exercising its discretion appropriately to dismiss the application for relief under s 39B(1) of the Judiciary Act?

117 *Issues resolved by joint reasons*: The first two issues are decided by the joint reasons in terms that I accept.

118 Thus, the tentative/provisional issue is resolved in favour of the Commissioner on the basis that the Second Amended Assessment was neither tentative nor provisional "in the sense that it was not definitive of Futuris' liability"[139]. The joint reasons uphold the decision of the Full Court in this respect, notwithstanding the arguments advanced by Futuris upon its notice of contention.

119 Although I consider that there was more substance to that contention than the joint reasons appear to allow, I would ultimately reach the same conclusion as all other judges who have considered this point. The first issue should be decided in favour of the Commissioner.

120 I also agree with the joint reasons that the second issue concerning the lack of good faith should be resolved in favour of the Commissioner[140]. The ATO records do not sustain a conclusion that the Commissioner (by any of his officers) acted with intentional falsehood, corruptly or in deliberate disregard for the requirements of the Act or otherwise with *mala fides* in the making of the Second Amended Assessment. In fact, scrutiny of the record demonstrates precisely the opposite conclusion. The Commissioner's officers might have been

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138 Joint reasons at [10].

139 Joint reasons at [51] referring to *Futuris* (2007) 159 FCR 257 at 272-273 [50]-[51].

140 See joint reasons at [59].

mistaken in law, but there is no evidence of *mala fides* or other wrongful intention on their part to afflict, oppress or act unlawfully towards Futuris. For this reason, the second issue (upon which Futuris succeeded in the Full Court) should likewise be decided in favour of the Commissioner.

121 These two conclusions effectively dismiss the central bases upon which Futuris sought to demonstrate that the Second Amended Assessment was not a lawful exercise of the Commissioner's power to make an "assessment". Without further elaboration, this would seemingly foreclose the claim by Futuris to relief under s 39B(1) of the Judiciary Act as propounded in the Full Court. Nevertheless, it is proper to address certain remaining issues. The joint reasons adopt this course in respect of the Commissioner's invocation of the ss 175 and 177(1) issue[141].

122 *Matters not in issue*: Before discussing the outstanding issues, it is appropriate to note two particular questions which, although contingently presented, were not part of the record:

(1) *The constitutional validity issue*: Whether, to the extent the Commissioner needed to rely upon them, ss 175 and 177(1) of the Act are invalid under the Constitution. This potential issue might arise on the basis that the provisions attempt to render unexaminable by the courts an administrative decision by a federal official imposing a tax, or to render such a decision examinable only under conditions that are inconsistent with the proper application of s 75(v) of the Constitution (and its counterpart, s 39B(1) of the Judiciary Act).

(2) *The jurisdictional error issue*: Whether, to attract relief under s 75(v) of the Constitution (or s 39B(1) of the Judiciary Act), the applicant must show more than legal error (here, the Commissioner making a legally flawed assessment under the Act) and must demonstrate that any such error took the Commissioner outside his lawful jurisdiction and power.

123 Neither party raised the foregoing constitutional questions in written or oral submissions. No notices were given as required under the Judiciary Act[142]. However, where fundamental questions as to the operation of the Constitution are necessarily raised in judicial proceedings, it is sometimes essential, subject to procedural fairness, for a court to address the questions even though the parties have elected not to do so[143].

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141 Joint reasons at [41]-[49], [64]-[70].

142 Section 78B.

143 See eg *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144]; [2002] HCA 57.

124 Paying proper regard to the fundamental principle of the rule of law[144] and to the role of s 75(v) of the Constitution (and s 39B(1) of the Judiciary Act) in defending its objectives, the constitutional validity of ss 175 and 177(1) of the Act may be in doubt. Given recent explanations of the meaning, purpose and application of s 75(v) of the Constitution[145], 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"[146].

125 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.

126 In the generality of its language, s 175 of the Act may be an over-broad provision which could not successfully breathe validity into a purported "assessment" that was not in law an "assessment" as contemplated by the Act. This appears to have been acknowledged by this Court, at least so far as this Court has accepted the disqualifying consequences of assessments that are tentative or provisional, or made with a lack of good faith. In such cases (and, as I am inclined to believe, others) a document that purports to be an "assessment" under the Act, if fundamentally flawed, is not a statutory "assessment" at all. Section 175 could not then, as the case authorities say, "touch it".

127 The questions that follow this logic are:

(1) What other relevant grounds of invalidity would take a purported assessment outside the power of assessment given to the Commissioner by the Act; and

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144 *Communist Party Case* (1951) 83 CLR 1 at 193 per Dixon J; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89] per Gummow and Hayne JJ; [1998] HCA 22.

145 *Plaintiff S157/2002* (2003) 211 CLR 476 at 513-514 [103]-[104]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668-669 [44]-[46]; [2007] HCA 14.

146 See the terms of the Act, s 175.

(2) What then is the purpose and valid effect of ss 175 and 177(1) of the Act given that when validity matters most, namely where it is in doubt, such provisions may not in law stand against the irremovable facility of judicial review guaranteed by the Constitution?

128 To answer these questions, and to confine ss 175 and 177(1) of the Act to an ambit regarded as tolerable when measured against the provisions of the Constitution, this Court has propounded a *discrimen* of "jurisdictional error". Thus, ss 175 and 177(1) of the Act will not prevent a judicial determination of invalidity where the making of an assessment involves "jurisdictional error". They may prevent such a determination where the error, even if one of law, is a "non-jurisdictional error". The former type of "error" takes the decision-maker *outside* or *beyond* the available jurisdiction or power. The latter is an error made *within* jurisdiction, and accordingly the decision-maker would still be competent to make it. Protective, privative-type provisions such as ss 175 and 177(1) of the Act are then enlivened and take effect.

129 I have previously criticised the so-called "jurisdictional error" category[147] despite the support it derives from the current doctrine of this Court. The classification is conclusory. It is very difficult to define and to apply[148]. In recent years it has been substantially discarded by English legal doctrine[149]. Jurisdictional error is nearly impossible to explain to lay people even though the Constitution (including the central provisions in s 75(v)) belongs to them. Most non-lawyers would regard it as a lawyer's fancy.

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147 See eg *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 122-123 [211]-[212]; [2001] HCA 22; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439-440 [173]; [2002] HCA 16; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1185 [122]; 198 ALR 59 at 86; [2003] HCA 30; cf *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 405-406 [106], where Gummow, Hayne and Heydon JJ described "jurisdiction" as a "slippery term"; [2004] HCA 20.

148 Aronson, "Jurisdictional error without the tears", in Groves and Lee (eds), *Australian Administrative Law – Fundamentals, principles and doctrines*, (2007) 330 at 330 and 341. Professor Aronson does not agree with the abolition of the category of "jurisdictional error", although he accepts that the expression is "conclusory". See at 344.

149 Wade and Forsyth, *Administrative Law*, 9th ed (2004) at 279-280. See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 194-195; Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 205-206; *E v Secretary of State for the Home Department* [2004] QB 1044 at 1064; *Re McBain* (2002) 209 CLR 372 at 439-440 [173].

130 Whatever the position may have been under the "prerogative" writs before and at 1901, there is no reason why the constitutional idea sustaining the writs expressed in s 75(v) (and s 39B(1) of the Judiciary Act) should not evolve into a broader concept of "legal error". Since 1901, the remedies referred to in s 75(v) have themselves evolved so that we now recognise the discretionary character of all the constitutional remedies[150]. We should likewise accept a parallel evolution and simplification of the grounds for the named constitutional relief[151]. There are few, if any, strict constitutionalist originalists in Australia today[152].

131 Because of the state of the record and the arguments of the parties in this appeal, it is appropriate for me to put each of the foregoing constitutional questions to one side. They will not completely go away and the future will look after them. I therefore return to the issues that remain outstanding upon the record and within the current doctrine of "jurisdictional error" and hence to the operation of ss 175 and 177(1) of the Act as interpreted consistently with that doctrine.

The remaining issues: jurisdictional error, ss 175 and 177(1)

132 *Available categories of judicial review*: Rejection of the invalidity arguments of the Second Amended Assessment, based on tentative or provisional character and lack of good faith, is not the end of the "jurisdictional error" issue for Futuris.

133 For decades, taxation decisions arising in judicial review proceedings have typically concerned the suggested tentative or provisional character of such decisions or their lack of good faith. This does not justify treating these two categories as covering the entire field of disqualifying legal (or "jurisdictional") error for s 39B purposes. As the two nominated categories of invalidity have

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150 See above, these reasons at [88]-[89].

151 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1191 [156]; 198 ALR 59 at 94.

152 Consider, for example, the reasons for the decision of this Court in *Sue v Hill* (1999) 199 CLR 462 which seem to reject an originalist approach. Compare the reasons of Gleeson CJ, Gummow and Hayne JJ at 492 [65], Gaudron J at 526-528 [168]-[173]; [1999] HCA 30. See also *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522-523 [111]-[112] of my own reasons; [2000] HCA 14.

arisen in taxation cases for at least 80 years[153], there is a risk that specialists in taxation law will overlook, or ignore, the considerable subsequent advances in administrative law, in particular within judicial review. Specialist disciplines, including in law, can occasionally be myopic and inward-looking. In commenting on the advances in administrative law, Lord Diplock declared that they had been the "greatest achievement of the English courts in [his] judicial lifetime"[154]. The same is at least partly true in Australia. The expression "jurisdictional error", for example, whilst first used in this Court by counsel in 1954[155] was not used by the Court itself in its reasons until 1983 in *R v Coldham; Ex parte Australian Workers' Union*[156].

134 The recognised "jurisdictional error" categories in Australia are not closed. Least of all are they confined to the two classifications beloved by tax lawyers. According to a leading Australian academic authority on the subject[157], the following categories have been recognised[158]:

> "1. A mistaken assertion or denial of the very existence of jurisdiction.
>
> 2. A misapprehension or disregard of the nature or limits of the decision maker's functions or powers.

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153 For example, see *Federal Commissioner of Taxation v Australian Boot Factory Ltd* (1926) 38 CLR 391 at 397 per Isaacs J; *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39 at 54-55; [1928] HCA 49.

154 *R v IRC; Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641.

155 Attributed to Dr Coppel QC in *R v Kirby; Ex parte The Transport Workers' Union of Australia* (1954) 91 CLR 159 at 168; [1954] HCA 19. See joint reasons at [5].

156 (1983) 153 CLR 415 at 423 per Murphy J citing Bath, "The Judicial Libertine – Jurisdictional and Non-Jurisdictional Error of Law in Australia", (1982) 13 *Federal Law Review* 13 at 49; [1983] HCA 35.

157 Aronson, "Jurisdictional error without the tears", in Groves and Lee (eds), *Australian Administrative Law – Fundamentals, Principles and Doctrines*, (2007) 330 at 335-336.

158 The author notes that the first six points in their catalogue derive from *Craig v South Australia* (1995) 184 CLR 163 at 176-180; [1995] HCA 58. The two additional categories of "bad faith" and "breach of natural justice" are attributed to Lord Reid's speech in *Anisminic* [1969] 2 AC 147 at 171.

> 3. Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances …
>
> 4. … Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact … or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion.
>
> 5. Disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act's requirements constitute preconditions to the validity of the decision maker's act or decision. …
>
> 6. Misconstruing the decision maker's Act … in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers …
>
> 7. [Acting in] bad faith.
>
> 8. [A] breach of natural justice."

135 Such categories go well beyond the two that have engaged virtually the entire attention of the Federal Court and of this Court in these proceedings and other cases like it. There is a risk that the broader categories will be overlooked in such taxation matters if reference is made only to past authority in tax appeals. Once disqualifying invalidity ("jurisdictional error") is propounded, these other categories are necessarily enlivened. When a suggestion of invalidation is made, it is not sufficient for the courts, or the parties, simply to cite taxation cases[159].

136 To give a semblance of order in the exposition of "jurisdictional error", the decision-maker must test the proposition that such an error exists by reference to a legal concept (and thus the emerging classification of past instances). It is not sufficient to consider only instances where the propounded error has been examined in the judicial review of decisions of taxation administrators, purporting to proceed under the Act. In short, taxation law specialists must make the sometimes enlightening acquaintance of developments in administrative law and judicial review more generally.

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159 For example *Hoffnung* (1928) 42 CLR 39; *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243; [1963] HCA 51; *Bloemen* (1981) 147 CLR 360; *Richard Walter* (1995) 183 CLR 168.

137 *Importance of the categories*: I do not insist on the foregoing approach for taxonomical neatness alone. In Australia, the issue is of considerable constitutional importance. It is bound up in my misgivings about the notion of "jurisdictional error" and the far from atypical approach adopted by the Federal Court in these proceedings.

138 If courts, dealing with judicial review of administrative decisions in taxation law, confine consideration to categories such as "the tentative/provisional strand" and the "lack of good faith strand"[160], they necessarily restrict or ignore consideration of the broader categories now available in the judicial review of taxation decisions and other administrative decisions in the Commonwealth. Inferentially, they diminish the ambit of the remedies provided by the Judiciary Act, s 39B(1) and, by parity of reasoning, the Constitution, s 75(v). Section 75(v) is vital to ensuring officers of the Commonwealth comply with the requirements of the law[161]. I could not therefore agree to any approach to the judicial review powers available to the Federal Court, in a case such as the present, which confined or narrowed the categories of invalidity in such a way.

139 It is a flawed legal approach to confine a case such as the present, in law or substance, to an inquiry into whether an assessment was invalid because it was impermissibly tentative or provisional, or because it was made with a lack of good faith. Such an approach prevents judicial review of the much wider ambit of inquiry available in this Court under s 75(v) of the Constitution or in the Federal Court under s 39B(1) of the Judiciary Act. To uphold the wider applications of the s 75(v) power it is essential to maintain, and assert, the broader categories of "jurisdictional error" now recognised in Australian law. This Court should do nothing in this case to affirm or suggest that the ambit of the s 75(v) power is confined to the two instances identified above. We should not allow instances of judicial review of tax decisions dating back 80 years, *sub silentio*, to suggest a confinement of the power ultimately traced to s 75(v) of the Constitution.

140 I accept that a diminution of judicial remedies was probably not intended in this case. However, unless courts approach such problems conceptually (so far as the notion of "jurisdictional error" allows) there are risks in proceeding in taxation cases only by reference to particular historical categories. Classification as "jurisdictional error" recognises that certain features of the administrative

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160 *Futuris* (2007) 159 FCR 257 at 268 [30] and 270 [40].

161 *Plaintiff S157/2002* (2003) 211 CLR 476 at 482-483 [5] per Gleeson CJ, 513-514 [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

decision in question (here a Commissioner's "assessment" under the Act) will be so alien to the character of that decision as afforded by the Parliament as to invalidate the purported performance and to render it no decision (ie no "assessment") at all.

141 *Claims in the present case*: It follows that an important question here is whether, in its attack on the validity of the Second Amended Assessment, Futuris confined its arguments challenging the assessment on the grounds that it was tentative or provisional in character, or lacked good faith. Clarifying the precise way Futuris challenged the Second Amended Assessment was important in the proceedings in terms of the relevant evidence. If a challenge appeared to have some legal substance, a question would then arise as to whether the Commissioner was "entitled to the privative clause protections of ss 175 and 177 of [the Act] in respect of the second amended assessment"[162]. Finally, identifying the exact objection to the Second Amended Assessment was also important because at the trial, by motion, the Commissioner had sought pre-emptively to have Futuris's claim under s 39B(1) of the Judiciary Act struck out as "unarguable and doomed to failure"[163].

142 Futuris's statement of claim certainly identified the alleged lack of good faith on the part of the Commissioner in his exercise of powers conferred by ss 166 and 170 of the Act. Nevertheless, two further grounds of invalidity were specifically mentioned. First, that the exercise of powers did not relate to the subject matter of the Act and secondly, that it was not reasonably capable of reference to those powers.

143 Such grounds presented a fairly standard formulation for a challenge by way of judicial review to the validity of an administrative action. The expressed grounds appear to reflect the drafter's endeavour to attract to these proceedings the general approach of this Court in respect of attempted privative provisions[164]. On the face of its pleading, it follows that Futuris does not appear to have confined its case to the two "streams" dealt with by the Full Court of the Federal Court.

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162 *Futuris* (2006) 63 ATR 562 at 564 [1]; [2006] ATC 4579 at 4581.

163 (2006) 63 ATR 562 at 564 [1]; [2006] ATC 4579 at 4581. That motion was dismissed with costs in light of the primary judge's conclusion on the Commissioner's substantive contentions: see at 576 [64]; 4592.

164 As expressed in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 per Dixon J; [1945] HCA 53.

144 In the appeal to this Court, Futuris's notice of contention contests the decision of the Full Court rejecting its argument that the Second Amended Assessment was "tentative" or "provisional" (ground 1(a)). Moreover, in succeeding grounds, Futuris also challenges the expressed ambit of the category of review upon which it succeeded in the Full Court. Effectively, it therefore asserts that the review for lack of good faith, undertaken by the Full Court, was needlessly narrow. Moreover, Futuris contends that the Full Court erred in failing to find that the Second Amended Assessment was not an "assessment" within the meaning of the Act because, whether or not it was issued *bona fide*:

> "(b) … it was known to overstate the taxpayer's taxable income and tax payable;
>
> (c) … there was no intention that the full amount of tax payable stated in it be payable by the taxpayer".

145 Before this Court Futuris contended that, according to the available categories of jurisdictional error, the Commissioner's decision to issue the Second Amended Assessment was also affected by "jurisdictional error" (ground 1(d)). It was thus not an "assessment" to which ss 175 and 177(1) of the Act could apply (ground 1(e)). This Court must address those contentions unless, during argument, they were abandoned or not pressed.

146 In its written and oral submissions before this Court[165], Futuris did not confine its argument of invalidity to infection with *mala fides*, deliberate falsehood or corrupt and deliberate disregard of the law. To that extent, any inquiry by this Court confined to whether such a ground was made out would fail, in my respectful view, to engage fully with the way Futuris actually presented its case.

147 The terms of the original statement of claim in the Federal Court and of the notice of contention in this Court do not constrict Futuris to such a narrow conception of the available categories of judicial review. Why would Futuris confine its argument to defects expressed in terms of *mala fides* and provisional or tentative action when the available categories of invalidity (derived ultimately from s 75(v) of the Constitution) are so much wider? The only explanation for such a narrow approach to a claim of judicial review (essential both to the available relief and to avoiding the propounded pitfalls of ss 175 and 177(1)) would be oversight or misapprehension of the other available categories of invalidating error. Parties and their lawyers can sometimes adopt unduly confined views of their legal rights. This might be based on mistakes born of

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165 [2008] HCATrans 144 at lines 3288-3295, 3301-3315, 3334-3347, 3698-3708, 3769-3785.

undue attention to historical and specialised cases. However, I would not attribute that error to Futuris. Its submissions were in most competent hands. As I understood them, they relied on broader grounds of invalidation. Indeed from the start, in commencing Pt IVC proceedings in the Federal Court (as required within 60 days of the disallowance of the objection to the Second Amended Assessment[166]) Futuris expressly reserved its right to contend, in other proceedings, that there had been "no valid assessment" at all[167].

148 There are several important aspects of Futuris's submissions that the Second Amended Assessment was not an "assessment" within the meaning of the Act:

- the pivotal role of the Commissioner's assessment in the application of the overall scheme of the Act;
- the practical and financial burden which the duty of immediate compliance imposes on the taxpayer;
- the fact that the taxpayer may be left in consequence with insufficient assets to pursue review or appeal proceedings; and
- the commercial burden faced by a taxpayer deprived of moneys by an "assessment" that allegedly involves "double counting".

149 Futuris argued that this notion of an "assessment" and the Commissioner's suggested belief that his "assessment" could be "fixed up" on appeal or in later proceedings whilst he retained the fruits of any double counting in the interim, was alien to the scheme and provisions of the Act. In my view, these submissions have much more merit as a basis of judicial review for "jurisdictional error" than the two grounds dealt with by the Full Court. Indeed, the practical burden imposed on Futuris of paying the assessed tax immediately under the Second Amended Assessment was, in strict legal theory, inconsistent with its contention that the assessment was flawed by a "tentative" or "provisional" character.

150 Further, the argument that the Second Amended Assessment was made without good faith was very difficult to establish. It was, in my view, virtually impossible once the internal minutes of the ATO were examined and properly

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166 Administration Act, s 14ZZN.

167 Invoking the language of *Bloeman* (1981) 147 CLR 360 at 371 per Mason and Wilson JJ and *Richard Walter* (1995) 183 CLR 168 at 182 per Mason CJ, 198 per Brennan J.

analysed. The Commissioner might have made a decision erroneous in law or his Second Amended Assessment might have evidenced a misapprehension or disregard of the nature or limits of his statutory functions or powers[168]. However, by focusing on a lack of good faith, Futuris and the Full Court arguably assumed an unnecessary burden which was doomed to failure.

151 Under current doctrine, upon rejection of the two "streams" of invalidity identified by the primary judge and the Full Court, questions would remain as to whether any error that had occurred was *within* the exercise of lawful jurisdiction to make an "assessment" as distinct from one that took the Commissioner *outside* his jurisdiction and powers. This distinction is itself as conclusory in character as the label of "jurisdictional error". However, the starting point is to identify precisely the grounds of "jurisdictional error" that were propounded. Whatever argument it finally presented before the Full Court, I am not convinced that Futuris confined itself in this Court to the "tentative/provisional strand" and the "lack of good faith strand".

152 *Conclusion: remaining issues*: The consequence is that, whilst I agree with the joint reasons that Futuris was not entitled to succeed in its claim for judicial review based on the "tentative/provisional" category or the "lack of good faith" category, other categories for judicial review remained available to it. They were ostensibly raised by Futuris's pleadings in the Federal Court. They were also advanced in argument before this Court. They should not be confined or ignored as this would involve a serious misunderstanding of the ambit of s 39B(1) of the Judiciary Act.

The proper application of the remedial discretion

153 *The remedial discretion*: The foregoing conclusions oblige me to face squarely the discretionary issue, given that, on my approach, there are outstanding questions of invalidity presented by Futuris's arguments. Decisions must consequentially be made about the possible engagement of ss 175 and 177(1) of the Act[169]. Given the availability to Futuris of alternative remedies in proceedings under Pt IVC of the Administration Act, should this Court now proceed to examine the still outstanding categories of "jurisdictional error"? Or should the Court withhold remedies in this case on discretionary grounds? What outcome would represent a proper application of the discretionary remedies under s 39B so far pursued by Futuris in the courts?

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168 See *Craig* (1995) 184 CLR 163 at 176-180.

169 Above, these reasons at [116].

154 *Invocation of the discretion*: As the joint reasons recognise, the Commissioner argued throughout these proceedings and at every level that, as a matter of discretion, relief might be, and should have been, withheld given the other available legal remedies provided by Pt IVC of the Administration Act[170].

155 In this Court, the Commissioner relied on two grounds of appeal that effectively requested the proper exercise of the discretion by this Court. These grounds suggested that Futuris's attack on the validity of the Second Amended Assessment was not available in this case "in proceedings other than those under Part IVC of the [Administration Act]"[171]. Thus, in the present facts and circumstances, Futuris could submit only under Pt IVC proceedings that the Second Amended Assessment was invalid. As Futuris had the right and standing to invoke relief under s 39B(1) of the Judiciary Act by way of judicial review, the only meaning that can be attached to these two grounds of appeal is that they suggest withholding that remedy in the exercise of the Court's dispositive discretion, stimulated to do so by the Commissioner's added reliance on ss 175 and 177(1).

156 *Applying the discretion*: On conventional theory, the propounded discretion is enlivened in these proceedings because:

(1) The remedies under Pt IVC of the Administration Act have been enacted by the Parliament as the ordinary and regular recourse specifically afforded for legal challenges of the kind advanced by Futuris;

(2) Futuris has initiated such proceedings[172], albeit whilst protesting the validity of the Second Amended Assessment and declaring that it did so only so as to not lose remedies under Pt IVC of the Administration Act, should they alone remain; and

(3) The purported anxiety, expressed by Futuris, that remedies under Pt IVC of the Administration Act might have no application if the Second Amended Assessment were ultimately found not to be an "assessment" at all. This concern appears to be without substance given established and repeated authority to the contrary in analogous circumstances[173].

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170 Joint reasons at [10].

171 Appellant's grounds of appeal, pars 2(b) and (c).

172 See *Futuris* (2006) 63 ATR 562 at 565 [12]; [2006] ATC 4579 at 4582.

173 *Annamunthodo v Oilfields Workers' Trade Union* [1961] AC 945 at 956; *Ridge v Baldwin* [1964] AC 40 at 80-81 per Lord Reid; *Calvin v Carr* [1980] AC 574 at

(Footnote continues on next page)

157 *Discretionary refusal of relief*: The refusal of relief to an applicant for judicial review because other and more appropriate remedies are available by law is not a new concept. The availability of such an alternative remedy has always been a relevant consideration to the grant, or refusal, of such relief.

158 In 1780, a matter arose that involved the invocation of the prerogative writ of *certiorari* to challenge a criminal conviction[174]. Lord Mansfield CJ remarked that a court would not grant the writ "if they had power to do it, for [the applicant's] objections are, more properly, the subject matter of an appeal, and the defendant has not chosen to resort to that remedy"[175].

159 A long line of English[176] and Australian[177] authority in respect of writs affording judicial review has repeatedly made the same point. Where other remedies produce the same or better legal outcomes, courts may apply the criteria of appropriateness[178]; convenience[179]; consideration of the public interest in the deployment of judicial remedies[180]; and avoidance of collateral attacks on decisions that are susceptible to broader appellate reconsideration[181].

589-590 (PC); *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 248; *Macksville and District Hospital v Mayze* (1987) 10 NSWLR 708 at 716-719.

174 *R v Whitbread* (1780) 2 Dougl 549 [99 ER 347].

175 (1780) 2 Dougl 549 at 553 [99 ER 347 at 349].

176 eg *R v Justices of Surrey* (1870) LR 5 QB 466 at 473; *R v Stafford Justices; Ex parte Stafford Corporation* [1940] 2 KB 33 at 43 per Sir Wilfred Greene MR.

177 eg *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 517-519 per Isaacs and Rich JJ; [1924] HCA 61; *Ex parte Corbishley; Re Locke* [1967] 2 NSWR 547 (CA); *Meagher v Stephenson* (1993) 30 NSWLR 736 (CA) at 738.

178 Woolf, Jowell and Le Sueur, *De Smith's Judicial Review*, 6th ed (2007) at 827 citing *R v Hillingdon London Borough Council; Ex parte Royco Homes Ltd* [1974] QB 720 at 728.

179 *R v Huntingdon District Council; Ex parte Cowan* [1984] 1 WLR 501 at 507 per Glidewell J; [1984] 1 All ER 58 at 63.

180 *Meagher* (1993) 30 NSWLR 736 at 738-739.

181 *Re Preston* [1985] AC 835 at 852 per Lord Scarman, 862 per Lord Templeman.

160 *The discretion in this Court*: Having affirmed that the relief afforded by s 75(v) of the Constitution (and hence by s 39B(1) of the Judiciary Act) is always discretionary[182], it is not surprising that this Court has refused such relief in matters before it (including under the ancillary statutory writ of *certiorari*[183]) for discretionary reasons. I have done so myself where parties, who enjoy remedies of review or appeal before other independent tribunals or courts, have sought direct access to the original jurisdiction of this Court pursuant to s 75(v) of the Constitution.

161 In *Re Carmody; Ex parte Glennan*[184], with facts admittedly different from the present, I took into account the availability to the taxpayer of remedies provided under Pt IVC of the Administration Act and refused relief[185]. I remarked that, ordinarily, the appropriate way to proceed was under Pt IVC, and whilst no hard and fast rule could be laid down, the availability (and actual initiation) of remedies of review and appeal under the Administration Act was normally the relief proper to such a case[186]. Despite the different facts of *Glennan*, the general discretionary considerations explained in that decision are valid. They are applicable to these proceedings.

162 *Re Heerey; Ex parte Heinrich*[187], which involved the *Bankruptcy Act* 1966 (Cth), addressed similar considerations. A constitutional writ was sought to be directed to the judges of the Federal Court. Although federal judges have been held to be "officers of the Commonwealth"[188], the writ was refused on discretionary grounds because other, seemingly more appropriate, relief was available, namely the invocation of the appellate jurisdiction of this Court. I remarked[189]:

> "Although this court has the jurisdiction to provide that relief against the respondents, and the power to do so if the other requirements

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182 Above, these reasons at [88]-[89], [130].

183 See Judiciary Act, s 33.

184 (2000) 74 ALJR 1148; 173 ALR 145.

185 (2000) 74 ALJR 1148 at 1156 [37]; 173 ALR 145 at 156.

186 (2000) 74 ALJR 1148 at 1157 [40]-[42]; 173 ALR 145 at 157.

187 (2001) 185 ALR 106.

188 *Ozone Theatres* (1949) 78 CLR 389 at 399.

189 (2001) 185 ALR 106 at 109 [17].

> of law are fulfilled, ordinarily … where an appellate facility is available, this court will, as a matter of discretion, refuse to issue a constitutional writ. It will do so where the applicant has failed, or omitted, to engage the appellate jurisdiction as provided by s 73 of the Constitution."

163 The approach adopted by me in *Heinrich*[190], which in turn applied the approach explained by me in *Glennan*, was expressly approved by a Full Court of this Court in *Glennan v Commissioner of Taxation*[191]. In that decision, earlier and possibly different approaches to the provision of relief under s 75(v) of the Constitution were disapproved. The discretionary approach was described as the correct doctrine.

164 The circumstances in *Glennan* and *Heinrich* were relatively straight-forward. The applicant in each case was obviously seeking to bypass the requirements of special leave to gain direct access to this Court in its original jurisdiction. Futuris's case is not so clear cut. The parties have proceeded through the requirement of special leave and this Court is now exercising its appellate jurisdiction. Nonetheless, there remain discretionary considerations. These arise out of the relief originally sought in the Federal Court under s 39B(1) of the Judiciary Act; the earlier conduct and focus of these proceedings; and the availability and invocation of other more appropriate avenues of review and appeal under Pt IVC of the Administration Act.

165 Without any need to rely on ss 175 and 177(1) of the Act, these considerations persuade me that the Commissioner was correct in suggesting to the Federal Court that Futuris's complaints about the making of the Second Amended Assessment would more properly be considered in Pt IVC proceedings available to (and already initiated by) Futuris. In such proceedings, no issue would arise to be considered under s 177(1) of the Act as to the correctness of the amounts and particulars of the Second Amended Assessment.

166 *Identifying discretionary considerations*: I acknowledge that there are features of this litigation that support Futuris's invocation of the remedies provided by s 39B(1) of the Judiciary Act. These include:

(1) The evidence in the case was wholly documentary and the basic facts were not contested;

(2) The Parliament has afforded the remedies under s 39B(1) of the Judiciary Act as well as those provided by Pt IVC of the Administration Act,

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190 (2001) 185 ALR 106 at 109-110 [17]-[18].

191 (2003) 77 ALJR 1195 at 1198 [17]; 198 ALR 250 at 255.

thereby recognising that each course of action (and occasionally perhaps both) will sometimes be appropriate;

(3) The Commissioner's approach to the Second Amended Assessment, whilst convenient to him, imposed an arguable hardship on Futuris, as the taxpayer liable to pay immediately the tax payable on the assessment the taxpayer contested. It relieved the Commissioner, on his theory, of the obligation to determine whatever "assessment" he truly asserted;

(4) In a clear case of jurisdictional error, relief under s 39B(1) may be an appropriate and beneficial procedural shortcut when compared to a review of the substantive merits or legal appeal proceedings as contemplated by Pt IVC;

(5) It will sometimes be necessary, or suitable, to obtain s 39B(1) of the Judiciary Act relief to vindicate basic constitutional rights or to uphold fundamental principles that demand observance of the rule of law by federal officials and relief from superior courts empowered to command such observance. The availability of this relief will be "very jealously" maintained by the courts[192];

(6) The Federal Court has, in the event, already proceeded to hear and decide the claim for relief under s 39B(1); and

(7) Whilst accepting that the exercise of a discretion is ultimately unavoidable, discretionary considerations that control the provision of relief should not be needlessly expanded.

167 I give full weight to these and like considerations. However, a number of countervailing factors convince me that relief under s 39B(1) of the Judiciary Act ought to have been declined in the present case, at the outset, in the exercise of the Federal Court's discretion. The parties should have been required, in effect, to proceed as Pt IVC of the Administration Act envisages. I base this conclusion on the following considerations:

(1) In its character, relief under s 39B(1) is always discretionary. This feature of the relief often presents, as it did here, a threshold question of whether the proceedings invoking such relief should continue, or whether the parties should instead be required to use the specifically provided avenues

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192 *Ballam v Higgins* (1986) 17 IR 131 at 133 (CA) per McHugh JA referring to *Master Retailers' Association of NSW v Shop Assistants Union of NSW* (1904) 2 CLR 94 at 98 per Griffiths CJ; [1904] HCA 39; Bingham, "Should Public Law Remedies Be Discretionary?", [1991] *Public Law* 64 at 72.

of review or appeal where remedies exist as of legal right and not by way of discretionary orders;

(2) The Parliament has provided a detailed legislative scheme for review on the merits as well as appeal for error of law in accordance with Pt IVC of the Administration Act. The primary judge concluded that, if the Commissioner had made a mistake in making the Second Amended Assessment, any such mistake could, and should, properly be addressed in the Pt IVC proceedings[193]. In the circumstances, that was a correct conclusion. Without more, it justified the threshold refusal of remedies by way of judicial review in the exercise of the Federal Court's discretion. The Full Court ought to have adopted that approach. Much time and cost might have then been avoided;

(3) The relief under Pt IVC of the Administration Act is broader than the relief available under s 39B(1) of the Judiciary Act. The nature of the dispute, as identified by Futuris, involved whether the Commissioner's officers had engaged in "double-counting" and thereby made an "assessment" which was invalid (or would later give credit to avoid such double-counting). These issues were more appropriate to final resolution between the parties in the Pt IVC proceedings. Judicial review, on the other hand, was unlikely to produce finality. As events have proved, it will not do so in this case;

(4) Although the basic facts were contained in documents and were not in dispute, they were inescapably complex. Not only were proceedings available under Pt IVC of the Administration Act, but such proceedings had actually been *invoked*. That fact has always been a most powerful discretionary consideration to deny the provision of discretionary relief. It should have led the Full Court, in this case, to refuse to entertain a collateral claim for judicial review[194]; and

(5) The facts and circumstances here did not indicate the existence of any specific constitutional right that a party sought to be vindicated. Futuris's submission of a lack of good faith was technical, designed to enliven a

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193 *Futuris* (2006) 63 ATR 562 at 575-576 [63]; [2006] ATC 4579 at 4592.

194 cf Joint reasons at [48]. Cf *Corbishley* [1967] 2 NSWR 547 (CA) at 548 per Wallace P, 548 per Jacobs JA, 551 per Holmes JA; *Ultra Tune (Australia) Pty Ltd v Swann* (1983) 8 IR 122 (CA) at 122 per Hutley JA; *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 at 510-513.

particular category of jurisdictional error. Any examination of the documents would quickly have disclosed the absence of intentional oppression; corrupt purposes; or *mala fides* on the part of the federal officials. Such considerations, if present, might indeed justify pursuit of the remedies available under s 39B(1) of the Judiciary Act. However, those considerations were not present in this case. If the officials did make a mistake (including a mistake of law), it was manifestly one proper for consideration, correction and appropriate orders under Pt IVC of the Administration Act rather than under s 39B(1) of the Judiciary Act.

168 *Conclusion: discretionary dismissal*: The foregoing analysis is not intended to diminish the importance of judicial review and the role that s 39B(1) of the Judiciary Act, and similar provisions, may sometimes play in ensuring that public officials conform to the rule of law. Considering the way the litigation was conducted in the present case, it is not completely clear that Futuris always identified with appropriate clarity any further categories of jurisdictional error that it wished to advance to demonstrate the invalidity of the Second Amended Assessment. If, however, there remained any different grounds of jurisdictional error that Futuris relied on to invalidate the impugned assessment, they would not warrant further consideration in this appeal. The proper place for any such argument was, as the primary judge concluded, in the Pt IVC proceedings. He was correct to so conclude. Upon this basis, his orders should be restored.

169 This conclusion removes any necessity for me to consider the suggested operation of ss 175 and 177(1) of the Act. Such consideration should be left to a case in which it would be essential for the decision.

Orders

170 For these reasons, which agree in part and differ in part from the joint reasons, I agree in the orders there proposed.