

Preserving the Constitutional Function of Courts and Increasing Confidence in the Tax System: Time to re-consider *Futuris*

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Abstract

Focusing on the discretionary power to amend an assessment at any time where the Commissioner is “of the opinion there has been fraud or evasion”, this article argues that the increasingly prevalent practice in the Federal Court of summarily dismissing judicial review applications not alleging either of the two jurisdictional errors identified by the plurality in *FCT v Futuris Corporation Ltd* (2008) 237 146, is both apocryphal and repugnant to the rule of law.

As will be shown, the current practice together with the serious limitations inhering in the statutory scheme for overturning an excessive assessment combine to render the tax practically incontestable; in turn reducing confidence in the tax system and striking an unfair balance between preserving the capacity of the Taxation Office to collect “legitimate income tax liabilities”¹ and taxpayer rights to petition courts to overturn an assessment purportedly made beyond power.

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¹ Treasurer, Peter Costello, *Press Release* (No. 098), 24 November 2003. (Press Release, 2003)

Introduction

Notwithstanding substantive reforms in 2006² to both the assessment and binding rulings regimes designed, primarily, to improve taxpayer confidence in the self-assessment tax system and ensure “the right balance has been struck between protecting the rights of individual taxpayers and protecting the revenue for the benefit of the whole Australian community”³, an article published in 2016 found that this has not occurred, at least in relation to rulings.

It was shown that the way the plurality’s decision in *Futuris* has been applied by the Federal Court, causes irremediable detriment⁴ for taxpayers adversely affected by a decision of the Commissioner to revise an earlier favourable private ruling or issue an inconsistent assessment without procedural fairness.⁵ It was further foreshadowed that this may not be “ultimately sustainable”⁶, particularly given the focus of Part IVC of the *Taxation Administration Act 1953* (Cth) (the Administration Act) on outcomes rather than procedure.

Since then, the Full Federal Court handed its decision in *Chhua* which, *inter alia*, purports to once-and-for-all settle any lingering doubts that the earlier cases were right to construe *Futuris* as exhaustively defining the two jurisdictional errors against which s 175 of the *Income Tax Assessment Act 1936* (the 1936 Act) offers no protection. In the process, their Honours disagreed with Porter J in *Woods v DCT* [2011] TASSC 68 for suggesting otherwise.⁷

Focussing on the Commissioner’s power under Item 5 of s 170(1) of the 1936 Act to amend an assessment at any time where the Commissioner is “of the opinion there has been fraud or evasion”, this article argues that intermediate courts are, respectfully, wrong to continue to suggest the plurality’s decision in *Futuris* has conclusively shut the gate on jurisdictional error relief as this fails to fully recognise the “rights protective effect”⁸ of s 75(v) of the *Constitution* (and its replicant in s 39B(1) of the *Judiciary Act 1903* (Cth) (JA)) and subsequent High Court authority suggesting it “is neither necessary, nor possible, to attempt the mark the metes and bounds of jurisdictional error”⁹.

² The reforms were foreshadowed in the Treasury’s *Report on Aspects of Income Tax Self-Assessment* (Cth of Australia, August 2004). (The 2004 Report).

³ Press Release, 2003.

⁴ See Azzi J., *Avoiding unfairness: A case for estopping the Commissioner of Taxation* (2017) Australian Tax Review 242-270. (Azzi (2017))

⁵ Azzi J., *Practical Injustice in the Context of Private Tax Rulings* (2016) UNSWLJ 1096. (Azzi (2016))

⁶ *Ibid.*, 1121.

⁷ *Chhua v FCT* [2018] FCAFC 86, [39] (Logan, Moshinsky and Steward JJ). (*Chhua*)

⁸ Cf Stephenson S., *Rights Protections in Australia* in Saunders C. & Stone A. (editors) The Oxford Handbook of the Australian Constitution (OUP, 2018) 905.

⁹ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 574 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). (*Kirk*)

Kirby J expressed similar concerns in his dissenting judgement in *Futuris*, remarking that expansion of the protective ambit of s 175 in the manner suggested by the plurality would not only “breathe validity into a purported ‘assessment’ that was not in law an ‘assessment’ as contemplated by the Act”¹⁰ but would also diminish the “ambit of the remedies”¹¹ provided by s 75(v) and s 39B.

In this article it will be shown that the growing tendency by the Federal Court to summarily dismiss judicial review applications not asserting either of the two jurisdictional errors identified by the plurality in *Futuris* is, respectfully, apocryphal particularly as the issue in *Futuris* concerned the validity of an assessment rather than whether the Commissioner had power to make the assessment. The current practice is equally apocryphal because it proceeds on the questionable premise that Part IVC provides an adequate alternative to judicial review in all cases.

It will be shown that the current jurisprudence expansively expounding the privative ambit of s 175 in accordance with the plurality’s reasons in *Futuris* renders the legislative criteria of fraud and evasion nugatory in most cases with courts impotent to safeguard against the arbitrary application by the Commissioner of Taxation of the criteria for liability, making the tax practically incontestable as the validity of the assessment will depend on the opinion of the Commissioner.¹²

As will appear, the judicial process in Part IVC is a poor substitute for that available under s 75(v) of the *Constitution* and s 39B JA where the taxpayer can, respectively, petition either the High Court or the Federal Court in their original jurisdiction to invalidate exercise of the amendment power on the ground that there was ‘no evidence’¹³ to justify the opinion of fraud or evasion or that the requisite opinion was not reasonably reached. By contrast, the taxpayer cannot succeed in discharging the statutory onus of proof in the absence of evidence “affirmatively”¹⁴ demonstrating that the preconditions of fraud or evasion did not exist.

¹⁰ *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146, 183 [126] (Kirby J, who agreed with the result but not the plurality’s reasons). (*Futuris*)

¹¹ *Ibid.*, 187 [138] (Kirby J).

¹² *Cf Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) (*Australian Communist Party*), cited with approval in *MacCormick v FCT* (1983-1984) 158 CLR 622, 640 (Gibbs CJ, Wilson, Deane and Dawson JJ). (*MacCormick*)

¹³ See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356 (Mason CJ) (*Bond*); and *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 418 [90]-[91] (Hayne, Heydon, Crennan and Kiefel JJ). (*Kostas*)

¹⁴ *McCormack v FCT* (1978-1979) 143 CLR 284, 303 (Gibbs J; Stephen, Jacobs and Murphy JJ agreeing). (*McCormack*)

Both s 75(v) and s 39B(1) JA introduce an “entrenched minimum provision of judicial review”¹⁵ that provides the “mechanism”¹⁶ by which the executive is subjected to the rule of law (on which the *Constitution* is framed¹⁷). In the words of Brennan J:

Judicial review is neither more nor less than the enforcement of the rule of law; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly.¹⁸

Toward the immediately preceding end, courts “should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise... The rule of law requires no less.”¹⁹ And they are duty-bound to intervene “where it is obvious that the public body, **consciously or unconsciously**, are acting perversely.”²⁰

To expound the preceding theme that a dangerous and unsound precedent is developing in Australia where, despite previous historical practice, intermediate courts are now summarily dismissing judicial review applications not alleging either a tentative assessment or one tainted with ‘conscious maladministration’, which are the two errors identified by the plurality in *Futuris*, the paper is organized as follows:

Part I (The Constructional Argument) bearing in mind that whether an issue is jurisdictional is “ultimately”²¹ a matter of construction, this Part examines the amendment power in item 5 of s 170(1) and argues that failure to form the requisite opinion constitutes jurisdictional error, albeit it is not of the kind identified in *Futuris*. To this end, it is argued the plurality’s decision does not foreclose all instances when an assessment will answer the statutory description

¹⁵ *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). (*Plaintiff S157/2002*)

¹⁶ *Re Paterson; Ex parte Taylor* (2001) 207 CLR 391, 415 (Gaudron J).

¹⁷ *Australian Communist Party*, 193 (Dixon J).

¹⁸ *Church of Scientology v Woodward* (1982) 154 CLR 25, 71 (Brennan J); cited with approval in *Plaintiff S157/2002*, 492 [31] (Gleeson CJ).

¹⁹ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J) (*Enfield*); cited with approval in *Re Refugee Tribunal; Ex parte Aala* (2000) 206 CLR 82, 108 [54] (Gaudron and Gummow JJ). (*Aala*)

²⁰ *Pulhofer v Hillingdon Borough Council* [1986] AC 484, 518 (Lord Brightman); cited with approval in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 626-627 [41] (Gleeson CJ and McHugh J). (Emphases added) (*Eshetu*)

²¹ See Aronson M. & Groves M., *Judicial Review of Administrative Action* (5th edition) (Lawbook Co, 2013), 942 (Aronson & Groves) referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390. (*Project Blue Sky*)

of assessment in s 175 given the particular and fairly unique circumstances arising in *Futuris*.

Part II (The Constitutional Argument) demonstrates that confining judicial review to the two jurisdictional errors identified by the plurality in *Futuris* is repugnant to the rule of law. In addition, it will be argued that construing s 175 so as to render all errors, save the two identified in *Futuris*, non-jurisdictional, stultifies exercise of federal judicial power to conclusively determine a matter in which original jurisdiction has been conferred on the court.

Part III (The Conclusion) summarises the preceding discussion and adds concluding observations.

I The Constructional Argument

(i) *The power to amend an assessment*

The power and duty of the Commissioner to make an assessment resides in s 166 of the 1936 Act. Relevantly, the Commissioner “must make an assessment” of the amount of taxable income of any taxpayer and the amount of tax payable thereon from the returns and any other information in his possession, or other sources.

The expression “assessment” is relevantly defined in s 6(1)(a) of the 1936 Act as “the ascertainment ... of the amount of taxable income ...; and ... the tax payable on that taxable income....” This definition “takes up”²² the description of assessment articulated by Isaacs J in *Ex parte Hooper* where his Honour, relevantly, said an assessment “is the Commissioner’s **ascertainment, on consideration, of all relevant circumstances, including sometimes his own opinion**, of the amount of tax chargeable to a given taxpayer.”²³

The Commissioner may amend an assessment either “within 2 years after the day on which the Commissioner gives notice of the assessment” (for individuals and small business entities) or 4 years (for large taxpayers).²⁴ The period for amendment was shortened in an effort to reduce taxpayer uncertainty.

Another way to reduce uncertainty is to give earlier finality to taxpayers who have tried to comply by shortening the period in which their assessment can be amended to increase their liability. Once the Tax Office can no longer amend a particular year’s assessment, **taxpayers can stop worrying about whether they ‘got it right’**.²⁵

²² *Gould v DCT* (2017) 343 ALR 275, 281 [24] (Logan J).

²³ *R v DCT; Ex parte Hooper* (1926) 37 CLR 368, 373. (Emphasis added)

²⁴ See, respectively, Items 1 and 4 of s 170(1) of the 1936 Act.

²⁵ *Report on Aspects of Income Tax Self-Assessment* (Department of the Treasury, ©Commonwealth of Australia, 2004), 4. (Emphasis added) (2004 Report)

As mentioned, however, the Commissioner may amend an assessment at any time if he is of the opinion there has been fraud or evasion. This is because taxpayers “who engage in **calculated behaviour** to evade tax should remain permanently at risk.”²⁶

The term ‘fraud’ is not statutorily defined. However, it is well established that fraud exists where a person makes a false statement or representation knowing it is false, or is recklessly careless of whether it is true or false.²⁷ Meanwhile, Dixon J (with whom McTiernan, Williams and Webb JJ agreed) in *Denver Chemicals* remarked that ‘evasion’ contemplates

... some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible ... An intention to withhold information lest the commissioner should consider the taxpayer liable to a greater extent ... is conduct which if the result is to avoid tax would justify finding evasion.²⁸

In *Denver Chemicals*, the High Court was required to consider the validity of exercise of the discretion to amend an assessment under s 210(2)(a) of the *Income Tax (Management) Act 1928*, which was expressed in substantially similar terms to item 5 of s 170(1) of the 1936 Act and formed part of a scheme “not materially different”²⁹ from the current scheme. Noting that the former Taxation Board of Review, and not the Court, is the tribunal to review opinions formed by the Commissioner, Dixon J held that even where the precise reasons for making an amended assessment are not known judicial review would lie where the decision-maker:

has not addressed itself to the question which sub-s. (2)(a) of s 210 formulates or if [its] conclusion ... is affected by some mistake of law, or if [it] has taken some extraneous consideration or if it excludes from consideration some factor which should affect the determination....³⁰

The above-mentioned errors of law are jurisdictional errors³¹ in that they can render an administrative decision invalid for exceeding its authority or power. Involving errors bearing on the due formation of the Commissioner’s state of mind, they are ordinarily unsusceptible to examination within the statutory

²⁶ Ibid, 31. (Emphasis added)

²⁷ *Derry v Peek* (1889) 14 App Cas 337, 374 (Lord Herschell).

²⁸ *Denver Chemical Manufacturing Company v FCT* (1949) 79 CLR 296, 313 (Dixon J; McTiernan, Williams and Webb JJ agreeing). (*Denver Chemical*)

²⁹ *Binetter v FCT* (2016) 249 FCR 534, 553 [94] (Perram and Davies JJ). (*Binetter*)

³⁰ *Denver Chemical*, 313 (Dixon J; McTiernan, Williams and Webb JJ agreeing).

³¹ See *Craig v South Australia* (1994-1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*Craig*), and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ). (*Yusuf*)

review and appeal mechanism provided in Part IVC given former s 177(1) of the 1936 Act (now Item 2 of s 350-10 of the Administration Act). This latter provision gives “evidentiary effect”³² to s 175 of the 1936 and treats production of the assessment as “conclusive evidence of the due making of the assessment.”³³

Referring to the distinction between ‘state of mind’ and ‘determination’ cases, where courts have not always made an “entirely satisfactory”³⁴ distinction, the Full Federal Court in *W R Carpenter* said that judicial review is nevertheless available in relation to matters concerning due formation of opinion about legislative criteria that go to substantive liability.

Where Parliament intended that the criteria for liability should include the due formation by the Commissioner of his state of mind, opinion or judgment, either in lieu of objective criteria, or as an addition to incomplete objective criteria, s 177(1) **has never denied the ability of a taxpayer to examine the due formation of that state of mind on judicial review grounds.** But where Parliament has exhaustively set out the criteria for liability by reference to objective matters, but has made the application of those criteria dependent upon a step being taken by the Commissioner, the step is procedural in the sense that it is not a step which forms part of the criteria for liability. The due making of such a determination is not subject to examination on judicial review grounds.³⁵

The taxpayer’s appeal to the High Court in *W R Carpenter* was unanimously dismissed in circumstances where the Court was satisfied that the power to make a determination under s 136AD³⁶ was not subject to judicial intervention as it did not affect the taxable income but rather the consideration for a supply. It would be a different matter, however, if the Commissioner, as here, is required to be satisfied of matters specified in the statute as a precondition to the liability to pay tax.

³² *DCT v Richard Walter Pty Ltd* (1994-1995) 183 CLR 168, 223 (Dawson J) (*Richard Walter*); cited with approval in *Futuris*, 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

³³ *George v FCT* (1952) 86 CLR 183, 207 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ). (*George*)

³⁴ *W R Carpenter Holdings Pty Ltd v FCT* (2007) 161 FCR 1, 7 [23] (Heerey, Stone and Edmonds JJ) (*W R Carpenter* (2007)) (cited with approval by Pagone J in *Chevron Australia Holdings Pty Ltd v FCT* (2017) 251 FCR 40, [110]).

³⁵ *W R Carpenter* (2007), 11 [43] (Heerey, Stone and Edmonds JJ). (Emphasis added).

³⁶ Forming part of (now repealed) Division 13 of the 1936 Act, s 136AD(4) authorizes the Commissioner to make determination of what constitutes ‘arm’s length consideration’ in relation to property supplied or acquired under an international agreement where he is satisfied the related parties are not dealing with each other at arm’s length.

But where the formation of opinion by the Commissioner is a criterion of liability, the area of the authority of the Commissioner is ‘guided and controlled by the policy and purpose of the enactment’ and **the exercise of that authority is examinable in the way explained by Dixon J in *Avon Downs Pty Ltd v FCT***.³⁷

In *Avon Downs*, Dixon J referred to the general principle propounded by Lord Halsbury in *Sharp v Wakefield* where his Lordship said that a discretion conferred on a public official must be exercised “according to the rules of reason and justice, not according to private opinion ...; according to law, and not humour”³⁸ and went on to explain that the Commissioner’s decision is examinable:

If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which affect his determination, on any of these grounds his conclusion is liable to review... If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition.³⁹

What follows demonstrates that formation of opinion about fraud or evasion is itself a substantive criterion of liability and thus amenable to judicial review. As will appear, failure to form the requisite opinion is more than a mere “procedural defect”⁴⁰ but an essential step enlivening the amendment power.

(ii) When is formation of opinion a jurisdictional fact?

In *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*, Latham CJ recognised that exercise of statutory power is unauthorised and thus beyond power where the forming of an opinion is the basis for exercise of the power and it is shown the opinion formed is not an opinion which could reasonably be formed.

[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it **can be formed by a reasonable man** who correctly understands the meaning of the law under which he acts. If

³⁷ *W R Carpenter Holdings Pty Ltd v FCT* (2008) 237 CLR 198, 205 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ). (Footnotes omitted and emphasis added) (*W R Carpenter* (2008))

³⁸ *Sharp v Wakefield* [1891] A.C. 173, 179 (Lord Halsbury); quoted with approval in *The Metropolitan Gas Co v FCT* (1932) 47 CLR 621, 632 (Gavan Duffy CJ and Starke JJ).

³⁹ *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, 360 (Dixon J). (*Avon Downs*)

⁴⁰ *Cf Richard Walter*, 206-207 (Deane and Gaudron JJ).

it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

...

What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. **If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed.** In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.⁴¹

In *Hetton Bellbird*, the High Court (by majority) found the Local Industrial Authority appointed under the *Coal Production (Wartime) Act 1944* had no authority to award increased remuneration to workers at certain collieries because it could not have been “satisfied” that the condition for the award existed, having misconstrued the meaning of the regulation expounding the condition.

By parity of reasoning, formation of opinion about fraud or evasion when exercising the amendment power in Item 5 of s 170(1) is, likewise, susceptible to judicial review to see if it was formed and, if formed, whether it was reasonably formed. Indeed, formation of opinion about fraud or evasion is a jurisdictional fact or ‘criterion for liability’ in that failure to form it “can produce an error in the amount of the substantive liability of the taxpayer”⁴². As the Full Federal Court explained in *Anvill Hill*:

The starting point for ascertaining whether a fact or circumstance is a jurisdictional fact must be the words of the statute, read in their context. Although there is no strict verbal formula, the existence of a jurisdictional fact is frequently signalled by the use of expressions such as “**where** ‘x’ exists”... then a person is empowered or obliged to act or refrain from action... Examples of this include “**where** in the opinion of the Minister ‘x’ exists”... Such language often indicates that the Minister ***must form the necessary opinion as a condition precedent to the power or duty, although the correctness of this opinion, once formed, is not a matter for review by the Court.***⁴³

⁴¹ *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430, 432 (Latham CJ). (Emphases added) (*Connell*)

⁴² *Cf W R Carpenter* (2008), 204 [6] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ); citing *FCT v Dalco* (1990) 168 CLR 614, 623 (Brennan J; Mason CJ, Deane J, Dawson J, Gaudron J and McHugh J agreeing). (*Dalco*)

⁴³ *Anvill Hill Project Watch Association Inc v Minister for Environment and Water Resources* [2008] FCAFC 3, [21] (Tamberlin, Finn and Mansfield JJ). (Bold emphases in original, but italicised bold emphasis added).

Unlike ordinary facts, satisfaction about fraud or evasion is essential to the validity of exercise of power to make an amended assessment out of time. The Commissioner's task in this regard is not unlike the administrative task under ss 36 and 65 of the Migration Act, which requires the decision-maker to be "satisfied" that a person meets the criteria of eligibility for a protection visa before the visa can be granted. This determination goes to the jurisdiction of the decision-maker and is reviewable under s 75(v). As Gummow J explained in *Eshetu*:

A determination that the decision-maker is not 'satisfied' that an applicant answers a statutory criterion which must be met before the decision-maker is **empowered or obliged** to confer a statutory privilege or immunity **goes to the jurisdiction of the decision-maker** and is reviewable under s 75(v) of the Constitution. This is established by a long line of authority in this Court which proceeds upon the footing that **s 75 is a constitutional grant of jurisdiction to the Court.**⁴⁴

Correspondingly, the 'opinion there has been fraud or evasion' goes to jurisdiction to amend an assessment beyond the 2-year statutory amendment period. It is tantamount to a determination by the Commissioner that he is satisfied the taxpayer had the requisite tax avoidance purpose to warrant exercise of the amendment power in item 5 of s 170(1) and is ordinarily susceptible to judicial review within the constitutional jurisdiction of Chapter III Courts.

Formation of opinion about fraud or evasion is an "essential factum of liability"⁴⁵ or "essential preliminary"⁴⁶ that is an integral part of the assessment process and on which the incidence of tax depends.⁴⁷ As Brennan J explained in *Dalco*, it "creates a condition precedent governing the power to make an amended assessment and that the satisfaction of the requirements of s. 170[(1)] is not merely part of the due making of the assessment which does not affect substantive liability..."⁴⁸

Since formation of opinion is a 'jurisdictional fact' which "enlivens the power"⁴⁹ to make an amended assessment, the court "may enter upon and consider the existence of the [jurisdictional] fact itself"⁵⁰ and whether it was reasonably

⁴⁴ *Eshetu* (1999) 197 CLR 611, 651 [131] (Gummow J). (Emphases added and footnote omitted).

⁴⁵ *Cf FCT v Clarke* (1927) 40 CLR 246, 277 (Isaacs ACJ).

⁴⁶ See *Project Blue Sky*, 389 [92] (McHugh, Gummow, Kirby and Hayne JJ).

⁴⁷ *Cf Azzi J., The binding rulings regime and the assessment process* (2018) 45 *Australian Bar Review* 163, 174-175. (Azzi (2018))

⁴⁸ *Dalco*, 622 (Brennan J (with whom Mason CJ, Deane J, Dawson J, Gaudron J and McHugh J agreed) expounding what was established in the seminal case of *McAndrew v FCT* (1956) 98 CLR 263). (*McAndrew*)

⁴⁹ *Cf Enfield*, 148 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁵⁰ Williams SC, N. & Shearer A., *Evidence in public law cases* in Williams SC N., (ed) *Key Issues in Judicial Review* (2014, Federation Press), 152.

reached.⁵¹ This is why Porter J in *Woods v FCT* refused to grant the Commissioner's application for summary dismissal of the taxpayer's s 39B application alleging jurisdictional error for failure to form an opinion about fraud or evasion as mandated by item 5 of s 170(1).

Noting both the existence of an opinion "is a pre-condition to an assessment [which] can be raised in appropriate proceedings as a matter of jurisdiction"⁵², and extant authorities supporting the taxpayer's submission that absence of an opinion about the existence of substantive legislative criteria is itself a jurisdictional fact, Porter J was satisfied that the taxpayer's "point is at least arguable"⁵³ and directed the proceedings to be transferred to the Federal Court.

As mentioned, however, the Full Court in *Chhua* disagreed with Porter J notwithstanding that their Honours found that the conditions of fraud and evasion "are matters going to the criteria for substantive liability"⁵⁴. In the seminal decision in *McAndrew*, the High Court similarly, said "the fulfilment of those conditions goes to the power of the Commissioner to impose the liability by amendment."⁵⁵

Finding "*Futuris* had exhaustively defined the two jurisdictional errors against which s 175 offers no protection"⁵⁶, their Honours in *Chhua* were satisfied that the alleged failure to form the requisite opinion is "unlikely to ground sufficiently an allegation of tentativeness or bad faith in the sense required by *Futuris*."⁵⁷ In which case, the only recourse available to the taxpayer was to seek redress under Part IVC, which together with s 175 of the 1936 Act and s 350-10 of the Administration Act was said to "form part of a scheme, one feature of which is to create this constitutionally necessary alternative of recourse to judicial power."⁵⁸

According to the plurality in *Futuris*, tentative assessments (which fail "to specify what is the amount of the taxable income ... and ... the tax payable thereon"⁵⁹) or assessments made in consequence of 'conscious maladministration' "do not answer"⁶⁰ the description of 'assessment' in s 175 of the *Income Tax Assessment Act 1936* (Cth) (the 1936 Act). All other errors in the assessment-making process were found to be insusceptible to judicial review.

⁵¹ *Cf Hossain v Minister for Immigration and Border Protection* (2018) ALR 1, 11 [34] (Kiefel CJ, Gageler and Keane JJ). (*Hossain*) (Footnote omitted)

⁵² *Woods v FCT* [2011] TASSC 68, [48] (Porter J). (*Woods*)

⁵³ *Ibid.*, [59] (Porter J).

⁵⁴ *Chhua*, [29] (Logan, Moshinsky and Steward JJ). See also *Binetter*, 551 [91] (Perram and Davies JJ).

⁵⁵ *McAndrew*, 271 (Dixon CJ, McTiernan and Webb JJ).

⁵⁶ *Chhua*, [14] (Logan, Moshinsky and Steward JJ).

⁵⁷ *Ibid.*, [38] (Logan, Moshinsky and Steward JJ).

⁵⁸ *Ibid.*, [22] (Logan, Moshinsky and Steward JJ).

⁵⁹ *Stokes v FCT* (1996) 32 ATR 500, 506, Davies J; cited with approval in *Futuris*, 163 [50] (Gummow, Hayne, Heydon and Crennan JJ).

⁶⁰ *Futuris*, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

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 s 39B of the *Judiciary Act*.⁶¹

As a result, there are now at least 12 Federal Court (single judge and Full Court) decisions⁶² supporting the proposition that a dissatisfied taxpayer is definitively disabled from challenging the power to make an assessment by alleging jurisdictional error for failure to form the requisite opinion.

What follows demonstrates that ss 175 and 350-10 do not operate to render failure to comply with the legislative requirements in Item 5 of s 170(1) non-jurisdictional notwithstanding the plurality's reasons in *Futuris*.

(iii) The statutory scheme for overturning an 'excessive' assessment

Reading s 175 with s 175A and former s 177(1) of the 1936 Act (now s 350-10 of the Administration Act), the plurality in *Futuris* found that all errors of fact or law in the bona fide exercise of the assessment process do not attract a remedy for jurisdictional error, being errors that "occurred within, not beyond, the exercise of the powers of assessment...."⁶³

Turning specifically to each provision, it is noted s 175A(1) of the 1936 Act provides that "[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]." (Emphasis added) Use of the expression "may" in s 175A strongly indicates that the dissatisfied taxpayer is not precluded from also separately and concurrently seeking constitutional writs relief, which is generally controlled by principles of jurisdictional error. Traditionally, this is what taxpayers tended to do and, it seems, continue to do albeit the Federal Court is now increasingly dismissing such applications summarily.

Section 175 of the 1936 Act has been termed a 'no-invalidity' clause whose operation is said to be "at least as threatening to the entrenched minimum provision of judicial review and the rule of law as traditional privative clauses."⁶⁴ It provides "[t]he validity of an assessment shall not be affected by reason that any provisions of this Act have not been complied with."

Meanwhile, Item 2 of s 350-10 of Schedule 1 to the Administration Act provides that "production of a notice of assessment is conclusive evidence that (a) the

⁶¹ Ibid., 157 [24] (Gummow, Hayne, Heydon and Crennan JJ).

⁶² 11 decisions are listed in *Chhua*, [13] (Logan, Moshinsky and Steward JJ), with the 12th being the decision of Kenny J in *Nguyen v FCT* [2018] FCA 1420 (*Nguyen*), which principally concerned the role of the reviewing tribunal in a merits review under Part IVC.

⁶³ *Futuris*, 162 [45] (Gummow, Hayne, Heydon and Crennan JJ).

⁶⁴ McDonald L., *The entrenched minimum provision of judicial review and the rule of law* (2010) 21 PLR 14, 24, agreeing with Kirby J in *Futuris*, 187-188 [139]-[140].

assessment was properly made; and (b) except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment – the amounts and particulars of the assessment are correct.” According to the High Court in *Richard Walter*, this provision does not purport to oust the jurisdiction of courts to examine the validity of the assessment.⁶⁵ In *Futuris*, the plurality confirmed that:

[Section 350-10] 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 proceedings and in those proceedings the ‘conclusive evidence’ provision does not apply.⁶⁶

It follows a dissatisfied taxpayer is unable to complain in Part IVC proceedings about “all procedural steps, other than those if any going to substantive liability”⁶⁷. As Pagone J recently explained in *Chevron*:

The object of the provisions found in ss 175, 177, and now s 350-10, is to remove the Commissioner’s procedural irregularity from challenge in Part IVC proceedings and to ensure the taxpayer’s challenge to an assessment is directed to those substantive integers upon which liability depends. A taxpayer is entitled to establish the absence of facts the existence of which may be necessary for the substantive liability to arise under an assessment.⁶⁸

How the taxpayer establishes the absence of substantive criteria under Part IVC has been the subject of much discourse in both the High Court and intermediate courts. The following discusses the judicial process within Part IVC as it relates to the preconditions of fraud or evasion enlivening the amendment power in Item 5 of s 170(1).

(iv) Part IVC – the mechanics

Part IVC operates once the Commissioner has made a decision rejecting the taxpayer’s objection (i.e., ‘the objection decision’). It allows the Federal Court on appeal to examine whether the conditions for amending the assessment are met. Alternatively, Part IVC allows for a review on the merits of an objection decision by the Administrative Appeals Tribunal (AAT) to determine whether the relevant conditions did in fact exist.

⁶⁵ See *Richard Walter*, 184 (Mason CJ), 198 (Brennan J), 223 (Dawson J), Toohey J (231). The other members of the Court, Deane and Gaudron JJ, agreed (at 211) but only “where it is not alleged that the assessment is not bona fide....” McHugh J was silent on this issue.

⁶⁶ *Futuris*, 166 [64] (Gummow, Hayne, Heydon and Crennan JJ).

⁶⁷ *George*, 207 (Dixon CJ, McTiernan, William, Webb and Fullagar JJ).

⁶⁸ *Chevron Australia Holdings Pty Ltd v FCT* (2017) 251 FCR 40, [109] (Pagone J; Allsop CJ and Perram J agreeing). (*Chevron*)

In either review or appeal, the taxpayer bears the onus of proving that the assessment is excessive.⁶⁹ And this remains the case irrespective of the position that might otherwise exist under the *Administrative Appeals Tribunal Act 1977* (Cth) (the AAT Act), where in a merits review the tribunal is obliged to decide whether Commissioner's decision is the 'correct or preferable' decision.⁷⁰

Specifically, where the amendment power depends on the formation of opinion by the Commissioner of fraud or evasion, as here, the taxpayer carries the burden of "disproving fraud or evasion" in a merits review, with the AAT "able to substitute its opinion for that of the Commissioner".⁷¹ Before re-considering whether, on the evidence before it, there was an avoidance of tax due to fraud or evasion, "the Tribunal must determine whether the taxpayer has discharged the onus of showing that the opinion that there was fraud or evasion should not have been formed... [And i]f it determines the taxpayer has not discharged the taxpayer's onus, then the taxpayer will not succeed since the taxpayer will not have shown that the assessment is excessive."⁷²

In an appeal, on the other hand, "the Court will only interfere with the Commissioner's exercise of the amendment power if the Commissioner did not form the requisite opinion or the Commissioner's opinion ... is vitiated by some error of law...."⁷³ As with merits review, however, the taxpayer will not succeed unless the Court is satisfied, on the evidence before it, that the taxpayer has discharge the onus of proof showing there was no avoidance of tax due to fraud or evasion.

In *McAndrew*, the High Court relevantly said that "the *onus probandi* lies on the taxpayer"⁷⁴ to prove to the reasonable satisfaction of the Court that the taxpayer made full and true disclosure of all material facts to refute the implication that the taxpayer had the requisite tax avoidance purpose. By so doing, the taxpayer will be able to show the assessment invalid for excessiveness.

But bearing in mind that the word 'excessive' relates to the amount of the substantive liability it is not difficult to see that it will extend over the area in which the conditions mentioned in section 170(2) find a place... If [the Commissioner] cannot amend consistently with s 170(2) and so increase the amount of the assessment then it must be excessive.⁷⁵

⁶⁹ See, respectively, ss 14ZZK(2) and 14ZZO(2) of the Administration Act.

⁷⁰ See *Nguyen*, [126]-[130] (Kenny J), relying *inter alia* on *Rawson Finances Pty Ltd v FCT* [2013] FCAFC 26, [90] and [115]-[116] (Jagot J, Nicholas J agreeing).

⁷¹ *Binetter*, 552 [93] (Perram and Davies JJ; Siopis J agreeing).

⁷² *Nguyen*, [130] (Kenny J).

⁷³ *Binetter*, 552 [93] (Perram and Davies JJ; Siopis J agreeing); citing s 43 of the AAT Act.

⁷⁴ *McAndrew*, 269 (Dixon CJ, McTiernan and Webb JJ).

⁷⁵ *Ibid.*, 271 (Dixon CJ, McTiernan and Webb JJ). Section 170(2) was the predecessor provision to item 5 of s 170(1).

Demonstrating the assessment is wrong, or that the Commissioner made a “mere error”⁷⁶ in assessing the amount of taxable income on which the assessment is based, or that there was no material upon which the Commissioner could properly conclude the taxpayer was engaged in fraud or evasion is insufficient to discharge the onus of proof. Rather, the taxpayer must demonstrate on the balance of probabilities what amendments need to be made to the assessment to correct it.⁷⁷

It is not enough for the taxpayer to simply assert there is no evidence to establish the assessment excessive for want of a tax avoidance purpose.

If a taxpayer can succeed, simply because there is **no evidence** from which it can be concluded that the relevant purpose existed, that must mean that the burden of proving the existence of that purpose lies on the Commissioner. That in my respectful opinion would be to invert the onus of proof.⁷⁸

It follows the taxpayer must positively prove it did not engage in fraud or evasion by, as mentioned, showing it made full and true disclosure of all the material facts. However, this may prove an impossible task where, for example, the assessment is issued after expiry of the 5-year statutory period for retaining records⁷⁹ such that the taxpayer no longer holds the necessary evidence “to prove the elements of his challenge”⁸⁰.

While ordinary principles require an affected person to establish facts which give him/her/it prima facie entitlement to the relief sought, Part IVC requires “more than that”⁸¹. As mentioned, it expressly demands the taxpayer affirmatively show the assessment is excessive by disproving fraud or evasion. In this regard, it is not enough that the amount of the assessment may not be the true taxable income and tax payable by application of the relevant taxing provisions or that the taxpayer may have given an honest account about the absence of a tax avoidance purpose.

Provided the Commissioner has formed the requisite opinion ... the effect of the *Binetter* decision... may well be to make a fraud or evasion finding unchallengeable independently of the challenge to the assessability of the relevant amount.⁸²

⁷⁶ *Dalco*, 625 (Brennan J; Mason CJ, Deane J, Dawson J, Gaudron J and McHugh J agreeing).

⁷⁷ Refer *Rigoli v FCT* (2014) 141 ALD 529, 534 [14] (Edmonds, Jessup and McKerracher JJ). (*Rigoli*)

⁷⁸ *McCormack*, 303 (Gibbs J; Stephen, Jacobs and Murphy JJ agreeing). (Emphasis added)

⁷⁹ See s 262A of the 1936 Act.

⁸⁰ *Rigoli*, [20] (Edmonds, Jessup and McKerracher JJ).

⁸¹ *McAndrew*, 269 and 271 (Dixon CJ, McTiernan and Webb JJ).

⁸² *Nguyen v FCT* [2016] AATA 1041, [34] (O’Loughlin S.M.); upheld on appeal in *Nguyen*.

The comparatively more onerous burden of proof makes it practically impossible to resist an assessment for error of law where the Commissioner has taken an extraneous factor into account or has failed to consider a material factor, which would ordinarily warrant judicial intervention to set aside the assessment.⁸³

On the other hand, a complaint of no evidence may be raised in judicial review proceedings to invalidate exercise of administrative power or support an assertion that the fact-finding process was seriously irrational or illogical, particularly where it concerns jurisdictional facts bearing directly on the authority to exercise power.⁸⁴ And it is up to the courts to decide whether the material supports the no evidence claim.

A tribunal that decides a question of fact when there is ‘no evidence’ in support of the finding makes an error of law. What amounts to material that *could* support a factual finding is ultimately a question for judicial decision.⁸⁵

As shown above however, despite that there may be no evidence in support of the Commissioner’s opinion of fraud or evasion, the Court or the Tribunal will be unable to set aside the assessment for excessiveness where the taxpayer has not discharged the onus of showing the opinion should not have been formed. Upholding exercise of the amendment power in these circumstances not only undermines legislative changes designed to reduce taxpayer uncertainty by shortening the usual period for amending an assessment and emphasising the need for “**calculated behaviour** to evade tax”⁸⁶, it implies the taxpayer engaged in “unlawful”⁸⁷, blameworthy or dishonest conduct to conceal its affairs from the Commissioner.

In view of the preceding, it will be shown that precluding judicial review, save for the two jurisdictional errors identified in *Futuris*, renders courts impotent to invalidate an assessment issued out of time that is based on an opinion of fraud or evasion lacking an “evident and intelligible justification”⁸⁸ (which would

⁸³ *Avon Downs*, 360 (Dixon J).

⁸⁴ *Cf Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 648 [131]-[132] (Crennan and Bell JJ); 625 [40] (Gummow ACJ and Kiefel J). (*SZMDS*)

⁸⁵ *Kostas*, 410 [91] (Hayne, Heydon, Crennan and Kiefel JJ). (Footnote omitted and emphasis in original) See also *Bond* (1990) 170 CLR 321, 355-356 (Mason CJ).

⁸⁶ *Report of Aspects of Income Tax Self Assessment*, [2.21]. (<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2004/106.htm&pageID=003&min=phc&Year=2004&DocType=0>) (accessed 17/8/2018) (Emphasis added)

⁸⁷ *R v Meares* (1997) 37 ATR 321, 323 (Gleeson CJ; Sully and Bruce JJ agreeing). (*Meares*)

⁸⁸ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ). (*Li*)

ordinarily render the decision invalid for legal unreasonableness in judicial review proceedings). Citing a number of leading High Court and Federal Court authorities, Edelman J observed in *Hossain* that “it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power.”⁸⁹ The plurality, similarly, suggested that formation of the state of satisfaction about jurisdictional facts “must proceed reasonably and on a correct understanding and application of the applicable law.”⁹⁰

However, based on the conclusive application of the plurality’s decision in *Futuris* by intermediate courts, only tentative assessments or those made in consequence of exercise of statutory powers corruptly or with deliberate disregard to the scope of those powers are not protected by s 175. Understandably, the latter allegations “are not lightly to be made or upheld.”⁹¹ Yet, as will appear from the immediately following discussion, it is unclear why only conscious failure to administer the Act properly falls outside the purview of s 175 of the 1936 when exercise of any statutory power, including one encompassing formation of opinion, must be done “in good faith and within the scope and for the purposes of the statute.”⁹²

(v) Discerning the privative scope of s 175

A conflict appears to arise between the language of s 170(1) and s 175 of the 1936 Act. On the one hand the Commissioner is vested with limited power to amend an assessment beyond the prescribed time, whilst by reason of s 175 the assessment is deemed valid irrespective that the preconditions to exercise of the amendment power were not satisfied.

That an internal inconsistency arises between s 175 and the general requirements of the Act for making of an assessment was recognised by some members of the High Court in *Richard Walter*. In that case the High Court held that assessing more than one taxpayer in relation to the same income did not show that the assessments were not made bona fide. Relevantly, Brennan J found the “apparent conflict” between the general assessment provisions and s 175 “indistinguishable”⁹³ from the privative clause considered by the High Court in *Hickman*.

In both cases the legislature manifests an intention that the purported exercise of the power should have the effect of a valid exercise of power notwithstanding non-compliance with the conditions governing that exercise. Thus, when s 175 declares the validity of an assessment to be unaffected by non-compliance with the general provisions of the Act...

⁸⁹ *Cf Hossain*, 18 [67] (Edelman J, with whom Nettle J agreed).

⁹⁰ *Ibid.*, [34] (Kiefel CJ, Gageler and Keane JJ).

⁹¹ *Futuris*, 165 [60] (Gummow, Hayne, Heydon and Crennan JJ).

⁹² *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 523 [59] (French CJ). (Footnote omitted) (*K-Generation*)

⁹³ *Richard Walter*, 194 (Brennan J).

that provision is to be given an operation according to its tenor provided the elements of the *Hickman* principle are satisfied.⁹⁴

In *Hickman*, Dixon J said that Parliament can proscribe judicial review provided the decision given by the public authority was “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....”⁹⁵ It follows the protection afforded by s 175 would be “inapplicable unless there has been ‘an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province’.”⁹⁶

Another member of the Court in *Richard Walter*, Dawson J, could not discern any internal inconsistency, “apparent or otherwise”⁹⁷ and was thus “unable to discover ... anything which would warrant the application of the *Hickman* formula”⁹⁸. Examination of his Honour’s reasons, however, reveals that, like Toohey J⁹⁹, Dawson J was concerned primarily with the privative scope of s 177 rather than s 175, finding the former does not operate to render an assessment “conclusive for all purposes.”¹⁰⁰ But without expounding what those other purposes maybe.

Given the preceding, it is strongly arguable that an internal inconsistency exists between s 175 and Item 5 of s 170(1) considering the preconditions of fraud or evasion enlivening the amendment power. Construing the interrelation of the provisions in this way recognises that failure to form the requisite opinion is of “sufficient gravity”¹⁰¹ to constitute a fundamental failure to address the basal statutory regime.

It follows the court’s task is to adjust the meaning of the conflicting provisions to preserve the unity of the entire statutory scheme.

Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will

⁹⁴ Ibid., 194-195 (Brennan J). See also 179-180 (Mason CJ) and 210-211 (Deane and Gaudron JJ).

⁹⁵ *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 615 (Dixon J). (*Hickman*)

⁹⁶ *Cf Plaintiff S157/2002*, 489 [20] (Gleeson CJ); 502 [63] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). (Footnotes omitted)

⁹⁷ *Richard Walter*, 223 (Dawson J).

⁹⁸ Ibid., 222 (Dawson J).

⁹⁹ According to Toohey J, s 175 “plays no significant part in the disposition of the matter before the court.”: *Richard Walter*, 227 (Toohey J).

¹⁰⁰ *Richard Walter*, 221 (Dawson J).

¹⁰¹ *Cf Plaintiff S157/2002*, 513-514 [110] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.¹⁰²

Bearing in mind Part IVC is unconcerned with due formation of an assessment, it would be a simple matter to adjust the meaning of s 175 by stipulating that it does not apply to validate an assessment made without the requisite state of satisfaction about fraud or evasion. This would appear to accord with Toohey J's construction of s 175 in *Richard Walter* where his Honour said it "does not apply where the power of the Commissioner to make an assessment is at issue."¹⁰³ And draws support from Dawson J's observation that s 177(1) does not render the assessment conclusive for all purposes and from the comments of Keane CJ and Gordon J to the effect that a decision to issue an assessment without formation of the requisite opinion "is not a decision at all."¹⁰⁴

It is, respectfully, right that s 175 cannot withdraw the court's jurisdiction to review the validity an assessment in all cases for otherwise that would make the tax incontestable in view of the "manifest policy" of Part IVC whereby the "taxpayer will be concluded by the assessment and will not be entitled to go behind it for any purpose."¹⁰⁵ Given this, there is much force in Toohey J's suggestion that s 175 does not operate were issues of power are concerned.

Reading down s 175 in the manner suggested above enables it and s 170(1) to operate concurrently so as to give effect to "harmonious goals"¹⁰⁶ which protect and uphold the separate but important roles played by Part IVC and judicial review, which is encapsulated in s 175A of the 1936 Act by use of the word 'may'.¹⁰⁷ It recognises that the limitations on the exercise of amendment power in Item 5 of s 170(1) are an "indispensable"¹⁰⁸ condition to the Commissioner's jurisdiction to amend the assessment notwithstanding s 175. And reflects the well established proposition that satisfaction of the requirement of fraud or evasion is "a matter going to substantive liability"¹⁰⁹ with courts, historically, willing to "examine the due formation of that state of mind on judicial review grounds."¹¹⁰

¹⁰² *Project Blue Sky*, 382 [70] (McHugh, Gummow, Kirby and Hayne JJ).

¹⁰³ *Richard Walter*, 233 (Toohey J).

¹⁰⁴ *FCT v AAT* [2011] FCAFC 37; (2011) 191 FCR 400, [22] (Keane CJ and Gordon J). (*FCT v AAT*)

¹⁰⁵ *McAndrew*, 270 (Dixon CJ, McTiernan and Webb JJ); cited with approval in *Richard Walter*, 196-197 (Brennan J), 226 (Toohey J), 241 (McHugh J).

¹⁰⁶ *Cf Project Blue Sky*, 382 [70] (McHugh, Gummow, Kirby and Hayne JJ).

¹⁰⁷ Reading down internally inconsistent provisions accords with "broader principles of statutory interpretation" and the approach taken by English courts: Crawford L B, *The Rule of Law and the Australian Constitution* (Federation Press, 2017), 108. (Crawford (2017))

¹⁰⁸ *Cf Plaintiff S157/2002*, 488 [20] (Gleeson CJ).

¹⁰⁹ *Binetter*, 551 [91] (Perram and Davies JJ; Siopis J agreeing); *W R Carpenter* (2007) 161 FCR 1, 11 [43] (Heerey, Stone and Edmonds JJ). See also *Richard Walter*, 183 (Mason CJ).

¹¹⁰ *W R Carpenter* (2007), 11 [43] (Heerey, Stone and Edmonds JJ).

However, agreeing with Dawson J in *Richard Walter* that “no reconciliation is called for”¹¹¹, the plurality in *Futuris* instead drew on Aickin J’s exposition of the notion of bad faith in a case¹¹² concerning whether bad faith may be imputed to the Aboriginal Land Commissioner as representative of the Crown in an application under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to discern the limits beyond which s 175 affords no protection. What follows explains why *Futuris* should be “understood in the context of the case advanced”¹¹³ and not as conclusive authority for when s 175 will not operate to protect against invalidity or for the general proposition that Part IVC meets the requirement of the *Constitution* in relation to attacks on the manner in which the power to amend an assessment is exercised.

(vi) *Futuris* and why intermediate courts should reconsider their application of it

In *Futuris*, the High Court was concerned with whether the Commissioner “acted knowingly in excess of his or her power.”¹¹⁴ In the Court below it was found that issuing two assessments to the same taxpayer in respect of the same amount was tantamount to exercise of the assessment power in bad faith. In upholding the Commissioner’s appeal, the plurality, uncontroversially, acknowledged 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.¹¹⁵

Noting difficulties with ascertaining the meaning intended to be conveyed by the expressions “good faith” and “bad faith”, the plurality, as mentioned, turned to Aickin J’s formulation in *R v Toohey; Ex parte Northern Land Council* where his Honour discerned three distinct grounds upon which an exercise of an administrative power may be attacked for want of good faith.

There are three distinct bases upon which an exercise of administrative power or authority ... may be attacked; they are first the existence of a corrupt purpose, second the existence of an improper purpose and third ultra vires in the narrow sense of the act done being beyond the power of

¹¹¹ *Richard Walter*, 223 (Dawson J); cited with approval in *Futuris*, 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

¹¹² *R v Toohey; Ex parte Northern Land Council* (1980-1981) 151 CLR 170. (*Northern Land Council*)

¹¹³ Peadon C., *Scope for future development of constitutional and administrative law aspects of tax appeals*, a paper presented to the New South Wales Bar Association on 27 February 2014, 11 [40].

¹¹⁴ *Futuris*, 153 [11] (Gummow, Hayne, Heydon and Crennan JJ).

¹¹⁵ *Ibid.*, 153-154 [11] (Gummow, Hayne, Heydon and Crennan JJ). (Citation omitted)

the body concerned, **irrespective of the motive or intention of the person or body exercising the power.**"¹¹⁶

According to Aickin J, *Television Corporation Ltd v The Commonwealth*¹¹⁷ "was a case of ultra vires in the narrow sense.¹¹⁸ In that case, the majority (Kitto J and Taylor, Windeyer and Owen JJ) held the power of the Postmaster-General to impose further conditions upon the plaintiff, which held a license as a commercial television station, was invalidly exercised because the proposed conditions were too uncertain to allow for consideration as to whether they had been complied with.¹¹⁹ Apart from this one example, it is generally agreed that it is not possible to give a "comprehensive definition"¹²⁰ of the many ways in which an administrative decision may be made in bad faith. Suffice to note that mere "procedural blunders along the way will usually not be sufficient to base a finding of bad faith."¹²¹

Regardless of the foregoing, a softer sense of bad faith did not arise in *Futuris*. As the plurality noted:

... 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.¹²²

Rather, the plurality was concerned with the first two senses of bad faith discerned by Aickin J. These involve "a degree of moral obliquity"¹²³ that correlate the absence of good faith with, respectively, "the existence of a corrupt purpose ... identified [by] the doing of an act for personal gain ... [or] to indicate the presence of an improper purpose outside the scope of the power but without any endeavour to obtain personal gain."¹²⁴ And, commonly, require establishment of deliberate error in the assessment-making process.

¹¹⁶ *Northern Land Council*, 232-233 (Aickin J). (Emphasis added) Nowadays, most judgments use the expression 'ultra vires' "interchangeably" with 'jurisdictional error': Aronson & Groves, 15.

¹¹⁷ *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59.

¹¹⁸ *Northern Land Council*, 234 (Aickin J).

¹¹⁹ *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59, 70 (Kitto J). (*Television Corporation*)

¹²⁰ *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361, [43] (Tamberlin, Mansfield and Jacobson JJ) (*SBBS*); cited with approval in *Godwin Street Developments Pty Ltd v DSD Builders Pty Ltd* [2018] NSWCA 276, [26] (Basten JA, Leeming and White JJA agreeing). (*Godwin Street*)

¹²¹ *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8] (Heerey and Kiefel JJ) (*SBAN*); cited with approval in *Godwin Street*, [27] (Basten JA, Leeming and White JJA agreeing).

¹²² *Futuris*, 154 [13] (Gummow, Hayne, Heydon and Crennan JJ).

¹²³ *Ibid.*

¹²⁴ *Ibid.*, 154 [12] (Gummow, Hayne, Heydon and Crennan JJ).

... deliberate failures to administer the law according to its terms ... manifest jurisdictional error and attract the jurisdiction to issue the constitutional writs.¹²⁵

Accordingly, there was no need for the plurality to consider the interrelation of s 175 and s 350-10 and the softer sense of bad faith which arises where an administrative act is done beyond power regardless the motive or intention of the decision-maker. It follows that intermediate courts should, respectfully, be more circumspect when applying the plurality's reasons in *Furturis*, especially when *Furturis* concerned the validity of an assessment and not, as here, whether the power to issue an amended assessment outside the amendment period was validly exercised. The difference can be significant, as Toohey J suggested in *Richard Walter* (supra).

Yet, without ascribing any importance to the different facts and circumstances considered in *Furturis* or attempting to resolve the internal inconsistency identified above, the Full Court in *Chhua*, as mentioned, summarily dismissed the taxpayer's judicial review application. There was also no attempt by their Honours to reconcile the statement from *W R Carpenter* confirming judicial review in the *Avon Downs* sense where formation of opinion is a 'criterion of liability'.

In *Binetter*, assessments were issued out of time on the basis the Commissioner was of the opinion there had been an avoidance of tax due to fraud or evasion. In dismissing the taxpayer's appeal, the Full Court confirmed, as mentioned, that the taxpayer bore the onus of proving the absence of fraud or evasion but that the Court would nevertheless intervene where the Commissioner's opinion of fraud or evasion is vitiated by some error of law.¹²⁶ Among other things, the Full Court drew on Dixon J's famous dicta in *Avon Downs*, which courts generally rely on in defining the scope of judicial review for jurisdictional error where "statutory provisions which operate upon the state of satisfaction, or lack of satisfaction, of an administrative decision-maker"¹²⁷ are concerned.

Curiously, the Full Court in *Chhua* relied on *Binetter* albeit for the authority that if it were the case that no authorised officer of the Commissioner had formed the requisite opinion of fraud or evasion this would "be a matter which might be raised in a tax appeal instituted under Pt IVC".¹²⁸ It is unclear how their Honours in *Chhua* could reach such a conclusion when the High Court in *George* had earlier held that a similar complaint about the right person not forming the

¹²⁵ Ibid., 165 [55]-[56] (Gummow, Hayne, Heydon and Crennan JJ).

¹²⁶ See *Binetter*, 552 [93] (Perram and Davies JJ; Siopis J agreeing).

¹²⁷ *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 77 ALJR 1165, 1168 [8] (Gleeson CJ). (*Ex parte S20/2002*)

¹²⁸ See *Chhua*, [38] (Logan, Moshinsky and Steward JJ).

necessary opinion was merely a procedural irregularity and thus unsusceptible to attack in Part IVC proceedings.¹²⁹

Regardless, if the Full Court in *Chhua* is right to proscribe judicial review for all but the two errors identified in *Futuris*, then there would be no scope to overturn an assessment for failure to reasonably reach the requisite opinion or exercising the amendment power for an ulterior purpose (e.g., to get the assessed party to divulge information about a related third party in defence of its Part IVC proceedings). Both instances could, arguably, amount to bad faith in the narrow and technical sense but not “actual bad faith”¹³⁰, which is tantamount to “deliberate disregard of [the] duty to assess in accordance with the law.”¹³¹

Ultimately, that positive proof is required to show an assessment is excessive, and the lack of any obligation to retain documents beyond a defined period, means that unless a taxpayer is exceptionally asserting an assessment is vitiated by one of the two jurisdictional errors identified in *Futuris* they will be unable to resist the assessment by alleging the criteria of liability were not satisfied in their case. Of course, there may be some who can produce evidence showing they did not engage in fraud or evasion, but this would be highly unlikely and/or unusual as gleaned from the outcome in decisions such as *Binetter*¹³², *Nguyen*¹³³, *Hii*¹³⁴ and *Chhua*¹³⁵.

In the majority of cases where taxpayers will not have the necessary evidence to show an assessment excessive for want of fraud or evasion, the high evidentiary burden in Part IVC operates to render the jurisdictional fact of fraud or evasion “otiose”¹³⁶ or “nugatory”¹³⁷ and the Commissioner’s discretionary power to amend an assessment virtually unbounded given the definitive narrowing of jurisdictional error by reference to the two errors identified in *Furturis*. Thus effectively denying the taxpayer the right to resist an assessment by asserting the criteria of liability were not satisfied in her/his/its case. Such an unsatisfactory outcome explains why it was suggested elsewhere that the way the Federal Court has applied *Futuris* may not be ‘ultimately sustainable’. As the High Court in *W R Carpenter* explained:

¹²⁹ See *George*, 203-4, 206-207 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

¹³⁰ *Denlay v FCT* (2011) 193 FCR 412, 433 [76] (Keane CJ, Dowsett and Reeves JJ). (*Denlay*)

¹³¹ *FCT v Donoghue* (2015) 237 FCR 316, 345 [115] (Davies J, agreeing with Kenny and Perram JJ). (*Donoghue*)

¹³² *Binetter*.

¹³³ *Nguyen*.

¹³⁴ *Hii v FCT* (2015) 230 FCR 385. (*Hii*)

¹³⁵ *Chhua*.

¹³⁶ *Cf Roads and Maritime Services v Desane Properties Pty Ltd* [2018] NSWCA 196, [211]-[212] (Bathurst CJ, Ward and Payne JJA). (*Desane*)

¹³⁷ *Cf Ross v R* (1979) 141 CLR 432, 440 (Gibbs J; Barwick CJ, Stephen, Mason and Aickin JJ agreeing). (*Ross*)

... the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny the taxpayer 'all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case'.¹³⁸

As shown, in most cases courts will be unable to safeguard against arbitrary application of the criteria for liability. Thus casting serious doubt on whether recourse to judicial process under Part IVC does in fact meet "the requirement of the *Constitution* that a tax may not be made incontestable"¹³⁹ or is "a constitutionally necessary alternative of recourse to judicial power" in all cases, as suggested by the Full Court in *Chhua*.

According to their Honours in *Chhua*, there are two reasons why the taxpayer's "grossly prolix"¹⁴⁰ application asserting jurisdictional error because the Commissioner could not have formed the requisite opinion because he failed "to take into account certain relevant matters and had also taken into account irrelevant considerations"¹⁴¹ fails:

First, even if ss 175 and s 350-10 did not extend to the formation of an opinion about fraud or evasion, that would be of no moment, as the validity of the resulting assessment would remain protected by those provisions, save for the two jurisdictional errors identified in *Futuris*. Secondly, and more importantly, the conditions upon which s 170 of the 1936 Act turns, are matters going to substantive liability which are capable of being challenged in a tax appeal under Pt IVC of the [Administration Act].¹⁴²

The fact that the pre-conditions of fraud or evasion are matters capable of being challenged in Part IVC proceedings should not preclude the taxpayer from also seeking discretionary relief for lack of bona fide. In these circumstances, the pendency of Part IVC proceedings "would normally mean no declaratory relief should be made"¹⁴³. Arguably, therefore, the Full Court in *Chhua* should have merely stayed the judicial review proceedings pending the outcome of the Part IVC proceedings. This would be a more preferable course of action considering the impossibly high evidentiary burden inhering in Part IVC.

And as will become clearer, suggestions that the plurality in *Futuris* was "surely right... because the tax laws give very generous appeal rights in lieu of judicial

¹³⁸ *W R Carpenter*, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ). (Footnotes omitted)

¹³⁹ *Futuris*, 153 [9] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁴⁰ *Chhua*, [7] (Logan, Moshinsky and Steward JJ).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, [29] (Logan, Moshinsky and Steward JJ).

¹⁴³ *Mount Pritchard & District Community Club Ltd v FCT* (2011) 196 FCR 549, 559 [63] (Edmonds, Middleton and Jagot JJ) (*Mount Pritchard*), citing *Futuris*, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ).

review”¹⁴⁴, or that Part IVC provides “a comprehensive appeals mechanism, which include[s] both merits and judicial review”¹⁴⁵, or that it is “capable of correcting for jurisdictional error”¹⁴⁶ or addresses “residual concerns about accountability”¹⁴⁷, respectfully, fail to appreciate the ‘rights protective effect’ of s 75(v) and the minimum provision of judicial review it entrenches, which enables courts to discern and declare the express and implied limits of the law without the need for evidence affirmatively showing the assessment was ‘excessive’ for want of criteria for liability.

Precluding judicial review in the manner suggested by the Federal Court, following *Futuris*, is also particularly harsh considering there is no scope to invalidate exercise of the amendment power under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) in view of para (e) of Sch 1, which expressly excludes from review decisions in administration of assessment provisions. And despite suggestions to the contrary in *Richard Walter* (supra), according to the plurality in *Futuris*, there is also “no scope... for the operation of the so-called *Hickman* principle.”¹⁴⁸ It is curious the plurality in *Futuris* drew support for this latter proposition from Dawson J’s comments in *Richard Walter* without advertent to or seeking to resolve their apparent inconsistency with the reasons of other members of the Court.

It is therefore apocryphal for the Federal Court to, conclusively, apply the plurality’s reasoning in *Futuris* given the uncertainty surrounding the privative scope of s 175 and whether it protects against bad faith in the narrow sense. Until these issues have been resolved, intermediate courts should, respectfully, resist the current practice of summarily dismissing judicial review applications not alleging the two jurisdictional errors identified in *Futuris*.

The following discussion explains why confining the scope for judicial review to the two jurisdictional errors identified in *Futuris* is repugnant to the rule of law and stultifies exercise of federal judicial power, denying taxpayers the opportunity to set aside an assessment purportedly made beyond power.

II The Constitutional Argument

(i) *Judicial review is integral to the rule of law*

¹⁴⁴ Aronson M., *Commentary on ‘The entrenched minimum provision of judicial review and the rule of law’ by Leighton McDonald* (2010) 21 Public Law Review 35, 38-39.

¹⁴⁵ Boughey J. & Weeks G., *Government Accountability as Constitutional Value* in Dixon R (ed.), Australian Constitutional Values (Bloomsbury Publishing PLC, 2018) 99, 115. (Boughey & Weeks (2018))

¹⁴⁶ Spigelman J., *The centrality of jurisdictional error* (2010) 21 Public Law Review 77, 91.

¹⁴⁷ Stellos J., *Federal Jurisdiction* in Saunders C. & Stone A. (editors) The Oxford Handbook of the Australian Constitution (OUP, 2018) 879, 891.

¹⁴⁸ *Futuris*, 167 [68] (Gummow, Hayne, Heydon and Crennan JJ). (Footnote omitted)

The rule of law is an inviolable feature of the separation of powers doctrine and confirms that the powers of the three branches of government “are derived from, distributed and limited by”¹⁴⁹ the *Constitution*. In the *Australian Communist Party*, Dixon J famously said the “rule of law forms an assumption”¹⁵⁰ upon which the *Constitution* is framed.

Notwithstanding, the full implications of the rule of law are “complex and contested”¹⁵¹ with some academics advocating a ‘thick’ or substantive notion focusing on what is needed to ensure a legal system is “morally legitimate”, whilst the proponents of the ‘thin’ version focus upon the requirements to ensure the law is “calculable, or capable of guiding human conduct.”¹⁵² It is said that a “[m]ore precise definition or description of the rule of law, if possible, is neither necessary nor desirable.”¹⁵³

For present purposes, it suffices to note that the rule of law “encompass[es] the notions that the executive and legislature are bound by the Constitution and that it is the Court’s role to enforce the Constitution against other arms of government... [and that] executive action cannot be completely shielded from judicial review.”¹⁵⁴ According to the Administrative Review Council, the rule of law is one of the “public law values” underlying judicial review. The others being the “safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation.”¹⁵⁵

Section 75(v) of the *Constitution* (and by corollary s 39B(1) JA) constitutes “textual reinforcement”¹⁵⁶ or “a basic element”¹⁵⁷ of the rule of law. It serves a “double function”¹⁵⁸ which: (i) confers power on the Court to grant the constitutional writs of mandamus and prohibition, including the “ancillary

¹⁴⁹ Crawford L B., *The Rule of Law* in Dixon R. (ed.), Australian Constitutional Values (Bloomsbury Publishing PLC, 2018) 77, 88. (Crawford (2018))

¹⁵⁰ *Australian Communist Party*, 193 (Dixon J).

¹⁵¹ Crawford (2018), 81.

¹⁵² *Ibid.*, 79. (Footnotes omitted)

¹⁵³ Hayne QC, K., *Rule of Law* in Saunders C. & Stone A. (editors) The Oxford Handbook of the Australian Constitution (OUP, 2018) 167, 170. (Hayne (2018))

¹⁵⁴ Stephenson S., *Rights Protections in Australia* in Saunders C. & Stone A. (editors) The Oxford Handbook of the Australian Constitution (OUP, 2018) 905, 926. (Stephenson (2018))

¹⁵⁵ Administrative Review Council, *The Scope of Judicial Review – Report to the Attorney-General* (Commonwealth of Australia, 2006), Preface (vii).

¹⁵⁶ *Plaintiff S157/2002*, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁵⁷ *Ibid.*, 482 [5] (Gleeson CJ).

¹⁵⁸ Cf Aitken L., *Jurisdiction, Liability and ‘Double Function’ Legislation* (1990) Federal Law Review 31.

remedy”¹⁵⁹ of certiorari (which is one of the two “principal grounds”¹⁶⁰ for jurisdictional error relief) in relation to a “matter”, and (ii) provides litigants with the means to obtain such a remedy. This, in turn, justifies and sustains judicial review.¹⁶¹

It follows judicial review is integral to the rule of law, which the *Constitution* “underscores”¹⁶² and which “derives from the constitutional role of the judiciary”¹⁶³ to “declare[] and enforce[] the limits of the power conferred by statute upon administrative decision-makers.”¹⁶⁴ And is particularly pertinent in relation to a notice of assessment, the service of which crystallises the taxpayer’s liability and makes the tax assessed due and payable. In the words of Brennan J:

As the process of assessment in exercise of the Commissioner’s statutory power is apt to affect the rights and liabilities of a taxpayer in these ways, an exercise of those powers is amenable to judicial review by this court under s 75 of the *Constitution*... [and] cannot be excluded by any law enacted by the parliament.¹⁶⁵

As a “constitutional grant of jurisdiction”¹⁶⁶, Parliament cannot oust the jurisdiction conferred on the High Court by s 75(v) by withdrawing any matter from the grant of jurisdiction or otherwise abrogate or qualify the grant. And unless repealed or amended by a later statute, it cannot likewise qualify or abrogate grant of jurisdiction under s 39B(1) JA, which “vests in the Federal Court the entirety of the jurisdiction which s 75(v) confers on the High Court.”¹⁶⁷ However, Parliament can limit the scope for judicial review by defining the content of the law amenable to the Court’s original jurisdiction, which is “a source of federal jurisdiction rather than of substantive rights”¹⁶⁸.

Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it

¹⁵⁹ *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [64] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). (*Bodruddaza*)

¹⁶⁰ The other ground of relief being “error of law on the face of the record”: *Kirk*, 567 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁶¹ *Cf* Gageler S., *The legitimate scope of judicial review* (2001) [Australian Bar Review](#) 279, 280. (Gageler (2001))

¹⁶² *Part II – The Significance and Constitutional Scope of Judicial Review*, para. 2.4 (<https://www.arc.gov.au/Documents/jrpart2.htm>) (accessed 4 July 2018)

¹⁶³ Gageler (2001), 291.

¹⁶⁴ *Bodruddaza*, 668 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Graham v Minister for Border Protection* (2018) 347 ALR 350. (*Graham*)

¹⁶⁵ *Richard Walter*, 192 (Brennan J). (Footnotes omitted)

¹⁶⁶ *Ibid.*, 179 (Mason CJ). (Footnote omitted)

¹⁶⁷ *Ibid.*, 181 (Mason CJ).

¹⁶⁸ *Ibid.*, 232 (Toohey J, relying on *Werrin v Commonwealth* (1938) 59 CLR 150, 167 (Dixon J) and *Maguire v Simpson* (1977) 139 CLR 362, 404 (Jacobs JJ)).

cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.¹⁶⁹

Indeed, Parliament can if it chooses confer extremely broad (but “not unlimited”¹⁷⁰) powers on the executive. This includes the power to make an administrative decision without affording the affected person natural justice,¹⁷¹ irrespective whether this is implied at common law or from a presumption of statutory interpretation.¹⁷² Irrespectively, parliamentary intention must be “clearly manifested by unmistakable and unambiguous language.”¹⁷³

In any case, s 350-10 of the Administration Act does not deprive the Federal Court of the jurisdiction which s 39B(1) confers but rather “constrains the jurisdiction of any court to inquire into the making of an assessment”¹⁷⁴ unless “an appropriate document is not produced.”¹⁷⁵ A similar conclusion was reached by the plurality in *Futuris* in relation to s 175, where their Honours said “[t]he section operates only where there has been what answers the statutory description of an ‘assessment’.”¹⁷⁶

As shown above however, it is unclear whether and, if so, why the capacity of courts to examine the due making of an assessment should depend on whether “allegations of corruption and other deliberate maladministration”¹⁷⁷ rather than by reference to the *Hickman* principle, as suggested by some members of the Court in *Richard Walter*.

Arguably, construing the scope of s 175 by reference to the *Hickman* principle rather than the deliberateness of the process error would prevent the validity of an assessment being impugned for mere defect or procedural irregularity but without depriving courts of their jurisdiction to examine whether the purported assessment: (i) is a bona fide attempt by the Commissioner to exercise the amendment power (which extends to an examination of subjective motivation¹⁷⁸), (ii) relates to the subject matter of the Act and (iii) is reasonably capable of reference to those powers.

¹⁶⁹ *Plaintiff S157/2002*, 483 [5] (Gleeson CJ); see also the joint judgment at [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) and *Graham*, 360 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

¹⁷⁰ *Boughey & Weeks*, 99.

¹⁷¹ *Contra Abebe v Commonwealth* (1999) 197 CLR 510, 583-584 (Kirby J) (*Abebe*) and *Aala*, 137 (Kirby J).

¹⁷² See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83-84 [90] (Gaudron J). (*Miah*)

¹⁷³ *Plaintiff S157/2002*, 492 [30] (Gleeson CJ).

¹⁷⁴ *Richard Walter*, 232 (Toohey J). Dawson J spoke in somewhat similar terms at 222-223 (see *Futuris*, 167 (fn. 94)).

¹⁷⁵ *FJ Bloemen Pty Ltd v FCT* (1981) 147 CLR 360, 376 (Mason and Wilson JJ). (*Bloemen*)

¹⁷⁶ *Futuris*, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁷⁷ *Ibid.*, 167 [66] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁷⁸ *Richard Walter*, 211, footnote 106 (Deane and Gaudron JJ).

The immediately preceding observation is consonant with Toohey J's statement in *Richard Walter* expounding legislative capacity where, as mentioned, his Honour found attacks on the power to make an assessment fall outside the ambit of s 175 and, by corollary, unsuitable for proceedings under Part IVC. In contrast, however, the Full Court in *Chhua*, as shown, said nothing turned on this distinction as failure to form the requisite opinion is unlikely to constitute jurisdictional error in the sense contemplated by the plurality in *Futuris* with Part IVC, in any case, capable of operating where the taxpayer can positively prove lack of a tax avoidance purpose.

What follows explains further why the judicial process provided by Part IVC does not meet the requirement of the *Constitution* in relation to formation of opinion attacks and that it is repugnant to the rule of law for the Federal Court to continue to confine taxpayers to Part IVC proceedings where the power to Commissioner to amend an assessment is at issue.

(ii) *Judicial review of the Commissioner's state of satisfaction about fraud or evasion*

The principle governing judicial review where the jurisdictional fact is a state of satisfaction or opinion may be "traced back"¹⁷⁹ to Latham CJ's decision in *R v Connell, Ex parte Hetton Bellbird* (supra). As appeared, this imposes a duty on courts to intervene where an administrative decision-maker has failed to 'act in good faith' or that satisfaction about the existence of matters on which exercise of power depends was not 'reasonably reached'. In the words of Gibbs J in *Buck v Bavone*:

... the authority must act in good faith; it cannot act merely arbitrarily or capriciously... Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision so reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it.¹⁸⁰

The above statement that courts will intervene where no reasonable authority could have arrived at the decision is based on the principle from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1. The modern law in Australia, however, has now "well and truly departed"¹⁸¹ from

¹⁷⁹ *Commissioner of Police v Ryan* [2007] NSWCA 196, [47] (Basten JA; Spigelman CJ and Santow JA agreeing). (*Ryan*)

¹⁸⁰ *Buck v Bavone* (1975-76) 135 CLR 110, 118 (Gibbs J). (*Buck*)

¹⁸¹ *EDK17 v Minister for Immigration and Border Protection* [2018] FCA 1258, [12] (Derrington J). (*EDK17*)

this overly stringent test. Legally unreasonable decisions are no longer limited to those which are “manifestly unreasonable”¹⁸².

Now, the unreasonableness test can be outcome focused and has been described as providing a “safety net”¹⁸³ that sets the minimum standard expected of a decision-maker. To this end, a legal presumption of reasonableness applies to regulate exercise of statutory discretion.

... there is a legal presumption that a discretionary power, statutorily conferred, must be exercised reasonably in the legal sense of that word. That is, when something is to be done within the discretion of the decision-maker, it is to be done according to the rule of reason and justice; it is to be done according to law.¹⁸⁴

Legal unreasonableness may be established by the making of “[u]nwarranted assumptions”¹⁸⁵ when the decision-maker forms an opinion about a jurisdictional fact. In these circumstances, the decision-maker is deemed to have failed to exercise jurisdiction or that his/her finding is illogical, irrational or otherwise not founded on any probative evidence.

... a decision might be said to be illogical or irrational if, for example, a decision was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.¹⁸⁶

Notwithstanding, the safety net of legal unreasonableness could only feasibly be accessed through the Court’s constitutional jurisdiction given the manifest policy of Part IVC and its focus on outcomes rather than procedure. To this end, the court’s task would be to review the process by which the Commissioner reached the requisite opinion to discern an evident and intelligible justification for it. This task differs fundamentally from statutory judicial review which, as appeared, can only be invoked where the taxpayer can produce evidence purportedly refuting a tax avoidance purpose to, in turn, prove the assessment was excessive. No such requirement exists for discretionary relief and this important fact should not be

¹⁸² *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408, 428 [82] (Nettle and Gordon JJ). (*SZVFW*) See also *Applicant in WAD531/2016 v Minister for Immigration and Border Protection* [2018] FCAFC 213, [20] (White, Moshinsky and Colvin JJ). (*WAD531/2016*)

¹⁸³ Hooper G., ‘*Minister for Immigration and Border Protection v SZVFW: The High Court on Unreasonableness and the Role of Judicial Review*’ on **AUSPUBLAW** (5 September 2018) (<https://auspublaw.org/2018/09/minister-v-szvw-the-high-court-on-unreasonableness-and-the-role-of-judicial-review/>).

¹⁸⁴ *SZVFW*, 430 [89] (Nettle and Gordon JJ; Kiefel CJ, Gageler J and Edelman J concurring).

¹⁸⁵ See *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94, [36] (Perram, Perry and O’Callaghan JJ). (*BZD17*)

¹⁸⁶ *Ibid.*, [33] (Perram, Perry and O’Callaghan JJ) relying, *inter alia*, on *SZMDS*, 649-650 [135] (Crennan and Bell JJ).

overlooked despite that evidence to establish excessiveness can also be used to establish jurisdictional error.

Most of the authorities expounding legal unreasonableness and irrationality relate to applications arising under the *Migration Act 1958* (Cth) (the Migration Act). These cases also confirm that the right of a person adversely affected by an administrative decision to petition the court to overturn an unfair decision (in a practical sense¹⁸⁷), is implied in the *Constitution* and is said to preserve the separation of powers, albeit it is a “controversial feature[] of Australia’s constitutional landscape.”¹⁸⁸

Regardless, the Full Court in *Chhua* disapproved reliance on migration cases because, unlike the Tax Act, “Parliament intended that the rules and procedures set out in the Migration Act must be complied with.”¹⁸⁹ True as that may be, nevertheless it would be a mistake to ignore the migration cases, particularly as they provide important guiding principles expounding the limits of administrative power generally and what courts must do to give force to the “animating principle”¹⁹⁰ from *Enfield’s* case against which the discretion with respect to “all remedies” in s 75(v) of the *Constitution* (and, by inference, s 39B(1) JA) must be exercised to ensure the executive always acts within the limits of the law and thus uphold the rule of law.

In any case, whether Parliament could validly proscribe judicial review of the amendment power for legal unreasonableness is not currently of relevance. Suffice to note there is no clear language in the statute authorising the Commissioner to act unreasonably when making an amended assessment under s 170(1) of the 1936 Act. And if there was, it would surely be struck down as falling foul of the principle expressed by Professor Wade and adopted by Brennan J in *Quin*,¹⁹¹ which recognises that “[w]ithin the bounds of legal reasonableness’ the repository has ‘genuinely free discretion’”¹⁹²; or otherwise offending the ability of courts to enforce the legislated limits of the Commissioner’s power. To fulfil this constitutional function:

... requires an examination not only of the legal operation of the law but also of the **practical impact** of the law on the ability of a court, through the application of judicial process, to **discern and declare** whether or not

¹⁸⁷ The concept of ‘practical injustice’ expounded by Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 13-14 [37] (*Lam*), was said to be a “concern of the law” by the plurality in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ). (*Pompano*)

¹⁸⁸ Stephenson (2018), 915.

¹⁸⁹ *Chhua*, [20] (Logan, Moshinsky and Steward JJ).

¹⁹⁰ *Aala*, 107 [55] (Gaudron and Gummow JJ).

¹⁹¹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J). (*Quin*)

¹⁹² *SZVFW*, 421 [51] (Gageler J; concurring with Nettle and Gordon JJ).

the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case.¹⁹³

It follows that by continuing to conclusively interpret the plurality's decision in *Futuris* as foreclosing the grounds for jurisdictional error, courts are impermissibly, if inadvertently, constraining their capacity and duty to discern and declare the limits of the amendment power. This is particularly so given the impracticalities of showing an assessment is excessive under Part IVC (supra).

Indeed, whilst “remedies for which s 75(v) provides do not lie as of right”¹⁹⁴ with courts directed, as mentioned, to “refuse”¹⁹⁵ declaratory relief (including prohibition and certiorari) pending the outcome of Part IVC proceedings, nevertheless, this should not preclude taxpayers from accessing remedies within the court's original jurisdiction. After all, it is incumbent on courts to respect and protect the right of affected persons to invoke the original jurisdiction of the court, albeit as a jurisdiction of last resort, to ensure Commonwealth officers are always acting within their authority.

Whilst it may be preferable that dissatisfied taxpayers pursue their statutory rights under Part IVC ahead of discretionary remedies, “the case for discretionary refusal is weakened” where the grounds of appeal are “significantly restricted” and leave is not required to proceed with a judicial review application.¹⁹⁶

It follows courts should not summarily dismiss discretionary relief applications where an adversely affected taxpayer complains the Commissioner erred in reaching a state of satisfaction about fraud or evasion but has no evidence to affirmatively prove the assessment was excessive. It is particularly important that adversely affected taxpayers are not prematurely precluded from seeking constitutional writs relief in relation to exercise of the amendment power given the ‘rights protective effect’¹⁹⁷ of s 75(v) of the *Constitution*, which directs courts to ‘provide whatever remedies are available and appropriate’ to preserve the rule of law.

Indeed, without judicial review the taxpayer has no way to overturn an assessment purportedly made beyond power given the impracticalities of the onerous evidentiary burden in Part IVC. In these circumstances the rule of law would be “diminished”¹⁹⁸ to the extent the taxpayer cannot have access to justice as there is no redress under Part IVC where the Commissioner has either not reached the requisite state of satisfaction and/or there is no tangible evidence to

¹⁹³ *Graham*, 361 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). (Emphases added)

¹⁹⁴ *Glennan v FCT* (2003) ALJR 1195, 1198 [17] (Gummow, Hayne and Callinan JJ). (*Glennan*)

¹⁹⁵ *Futuris*, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁹⁶ Refer Aronson & Groves, 801-802.

¹⁹⁷ Refer Stephenson (2018), 905.

¹⁹⁸ *Cf Hayne* (2018), 188.

justify the opinion that the taxpayer has engaged in fraud or evasion. And, unless exceptionally alleging the amendment power was exercised with “wilful blindness”¹⁹⁹ to the requirements of the law, neither can the taxpayer seek to invalidate the assessment for jurisdictional error under s 75(v) or s 39B given the limitations identified in *Futuris*.

It follows Part IVC does not provide “a more convenient and satisfactory remedy”²⁰⁰ than that available under s 75(v) of the *Constitution* or s 39B JA in relation to formation of opinion attacks. If anything, it creates an inferior and restrictive alternative to judicial review, operating with the *Futuris* limitation to make tax, practically, incontestable. Moreover, the suggestion that Part IVC creates a ‘constitutionally necessary alternative of recourse to judicial power’, ignores the practical operation and effect of the statutory scheme and the reality that limiting discretionary relief in the manner suggested in *Futuris* incapacitates courts from discharging their constitutional function to uphold the rule of law and ensure accountability in all cases.

The immediately following discussion builds on the preceding discussion by expounding the judicial power of the Commonwealth and why the plurality’s decision in *Futuris* stultifies it.

(iii) Federal Judicial power

Section 71 of the *Constitution* relevantly provides “The judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates....” This provision speaks of the “function rather than the law which a court is to apply in exercise of its function.”²⁰¹ After reviewing a number of relevant authorities, it was observed that judicial power:

... centrally involves ‘a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy’ by ‘application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process’, including ‘exercise, where appropriate, of judicial discretion’ and incidental powers....²⁰²

Incidental powers, in turn, include:

¹⁹⁹ See *Roberts v DCT* [2013] FCA 1108, [28] (Besanko J). (*Roberts*)

²⁰⁰ *Cf R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ). (*Ozone Theatres*)

²⁰¹ *Leeth v Commonwealth* (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ) (*Leeth*); cited in *APLA v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 407 [233] (Gummow). (*APLA*)

²⁰² Azzi J., *Prosecuting Court-Appointed Liquidators in Non-Appointing Courts: A Case for Overturning Outdated Law* (2011) Mon ULR 97, 125. (Footnotes omitted) (Azzi (2011))

... '[e]verything necessary to the effective exercise of a power'; 'everything that is reasonably necessary to carry [the power] into effect'; a provision that is conducive to the success of the legislation'; a 'choice of means to an authorised end [that] was to complement, and **not supplement**, the power granted'....²⁰³

However, legislative attempts to regulate the way in which a court exercise its jurisdiction may amount to a "usurpation of, or interference with, the exercise of judicial power."²⁰⁴ In particular, a law which attempts "to preclude the determination by a federal court of facts in controversy"²⁰⁵ or causes the court "to act in a manner contrary to natural justice"²⁰⁶ would constitute and impermissible intrusion into the exercise of judicial power. These observations are echoed in Gaudron J's judgment in *Re Nolan; Ex parte Young*, where her Honour said:

[A]n essential feature of judicial power is that it must be exercised in accordance with the judicial process ... the general features of that process ... include ... the application of the rules of natural justice, the ascertainment of the facts ... followed by an application of that law to those facts.

Conversely, courts cannot usurp the legislative power of Parliament by striking down a law they consider undesirable or even "disproportionately harsh"²⁰⁷. To the contrary, there must be "faithful adherence of the courts to the laws enacted by Parliament, however undesirable the courts may think them to be...."²⁰⁸

It follows, where a person with standing approaches the court complaining about a matter arising under the taxation Act,²⁰⁹ the court must exercise the judicial power in s 71 of the *Constitution* to quell the controversy by applying the relevant law to the facts in controversy.²¹⁰ Committing these matters exclusively to the exercise of judicial power of the Commonwealth upholds the rule of law,

²⁰³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 580 [122] (Gummow and Hayne JJ). (Footnotes omitted) (Emphasis added) (*Wakim*)

²⁰⁴ *Richard Walter*, 184 (Mason CJ).

²⁰⁵ *Ibid.*, 185 (Mason CJ).

²⁰⁶ *Leeth*, 470 (Mason CJ, Dawson and McHugh JJ).

²⁰⁷ *Kuczborski v Queensland* (2014) 254 CLR 51, 118 [217] (Crennan, Kiefel, Gageler and Keane JJ). (*Kuczborski*)

²⁰⁸ *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ). (*Nicholas*)

²⁰⁹ A matter arises under the Act "if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement": *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ) (*Barrett*); cited with approval in *McJannet; Ex parte Australian Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654, 656-657 (Brennan CJ, McHugh and Gummow JJ). (*McJannet (No 2)*)

²¹⁰ Refer *McJannet (No 2)*, 656-657 (Brennan CJ, McHugh and Gummow JJ).

ensuring “that the rigidity of the Constitution can be maintained, and its division of powers ... effected.”²¹¹

Finding the conclusive evidence rule in former s 177 of the 1936 Act does not ‘cut down’ the jurisdiction of the High Court under s 75(v) of the *Constitution* or the Federal Court under s 39B JA, McHugh J in *Richard Walter* went on to find that the provision, similarly, does not interfere with judicial power of the Commonwealth.²¹²

... the procedural acts of the Commissioner in making an assessment do not give rise to any legally enforceable duty that can attract the operation of s 75(v) of the *Constitution* or s 39B of the Judiciary Act. The procedural steps by which the Commissioner makes an assessment are not justiciable in courts invested with federal jurisdiction.²¹³

As appeared however, McHugh J’s above statement is, respectfully, incorrect to the extent that it contradicts Dawson J’s statement from *Richard Walter*, with whom the plurality in *Futuris* agreed. To reiterate, Dawson J considered the position “would plainly be different”²¹⁴ if s 177 operated to render the assessment conclusive for all purposes, with Toohey J, separately, finding the taxpayer may go behind the assessment where the power to make an assessment (as opposed to its validity) is in issue.

To reiterate, the taxpayer may go behind the assessment when complaining about the lack of criteria enlivening the amendment power. In those circumstances it is the “duty and jurisdiction”²¹⁵ of courts to discern and declare the limits of the power conferred (including any implied limits) and the legality of its exercise. Yet, because of the manner in which the Federal Court has definitively narrowed the categories of jurisdictional error by reference to the two errors identified by the plurality in *Futuris*, the right of taxpayers to petition the Federal Court in relation to non-deliberate, albeit material, errors in the assessment-making process is seriously constrained; thus interfering with the capacity of the court to quell a controversy pertaining to any limitations (express or implied) on the amendment power.

As shown, the judicial process provided by Part IVC is ineffective in upholding the implied obligation of reasonableness conditioning the amendment power where the taxpayer cannot disprove a tax avoidance purpose by affirmatively showing that the fraud or evasion opinion could not have been formed. In judicial review proceedings, by contrast, the taxpayer can establish legal unreasonableness by simply alleging there was no evidence to justify the requisite opinion. And it is ultimately a question for the court whether the evidence supports such an allegation. In contrast, the discretion of the court or

²¹¹ Hayne (2018), 173.

²¹² *Richard Walter*, 242 (McHugh J); see also 185-186 (Mason CJ).

²¹³ *Ibid.*, 242 (McHugh J).

²¹⁴ *Ibid.*, 221 (Dawson J).

²¹⁵ *Quin*, 35 (Brennan J).

the tribunal in Part IVC proceedings is severely circumscribed where the taxpayer cannot produce evidence affirmatively showing want of fraud or evasion.

Therefore, to suggest, as courts and many commentators have increasingly done, that Part IVC guarantees and protects in all cases, other than the two instances identified in *Futuris*, the constitutional right and duty to invalidate an assessment purportedly made beyond power, respectfully, misunderstands the role and scope of judicial review.

However necessary the reason for limiting the ability to seek judicial review for jurisdictional error under s 75(v) and s 39B maybe, this must not obfuscate the reality that Pt IVC proceedings are directed to the excessiveness of the assessment and not whether it was duly and/or reasonably made. As appeared, that an assessment is not shown to be excessive does not necessarily mean that it was not purportedly made beyond power.

It follows that defining a court's constitutional jurisdiction by reference to the two jurisdictional errors identified by the plurality in *Futuris*, as intermediate courts have increasingly done, impermissibly restricts the right and duty of courts to invalidate an assessment for error of law that affects exercise of the power to amend under item 5 of s 170(1). Ordinarily, an administrative decision-maker falls into an error of law, which invalidates exercise of statutory power, by

... identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power ... [and] results in the decision-maker exceeding the authority or powers given by the relevant statute.²¹⁶

Finding “[t]he distinction between right and remedy is deeply embedded in the corpus of the law”, Gummow and Hayne JJ in *Abebe* said that a law defining the jurisdiction of the Federal Court with respect to a matter arising under a Federal law by “excluding grounds for relief which otherwise would be available has the effect of restricting or denying the right or liability itself. This stultifies the exercise of the judicial power.”²¹⁷

That Parliament has provided a separate statutory regime for dissatisfied taxpayers is insufficient to pre-empt and preclude taxpayers from also petitioning the court in exercise of its constitutional jurisdiction to invalidate a purported unreasonable exercise of the amendment power. The judicial power and function exercised in this latter regard differs from the judicial process under Part IVC which is principally concerned with whether the taxpayer made full and true disclosure rather than whether the Commissioner's fraud or evasion opinion lacks an evident and intelligible justification.

²¹⁶ *Yusuf*, 351 [82] (McHugh, Gummow and Hayne JJ).

²¹⁷ *Abebe*, 562 [143] (Gummow and Hayne JJ).

Undeniably, there is some correlation between full and true disclosure and whether the requisite opinion is justified. However, any such evidentiary overlap cannot account for other circumstances where courts can inquire into whether the Commissioner has applied the law properly irrespective that the taxpayer may not have adequate proof. To reiterate, the evidentiary burden in judicial review proceedings is significantly and comparatively less onerous, allowing courts to invalidate administrative action where the decision-maker fails to take account of relevant considerations, or has taken into account irrelevant considerations, albeit that this would likely be insufficient for Part IVC purposes.

What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law.²¹⁸

Clearly, exercise of federal judicial power should be untrammelled by misconceived and impermissible restrictions on the courts' constitutional jurisdiction to discern and declare the limits of the power to amend under item 5 of s 170(1) in view of s 175 of the 1936 Act. In this regard, the notion of jurisdictional error is the bedrock for judicial review in Australia. Embracing "a number of different kinds of error"²¹⁹, it is used by courts to determine the lawfulness of executive action whilst remaining faithful to Brennan J's "canonical statement"²²⁰ that "the court has no jurisdiction to cure administrative injustice or error."²²¹

Broadly, jurisdictional error arises "if the decision-maker makes a decision outside the limits of the function and powers conferred on him or her, or does something which he or she lacks power to do."²²² Yet, following *Futuris*, taxpayers are increasingly being denied relief 'which otherwise would be available' because intermediate courts are misconstruing the protective power of s 175 to cover all jurisdictional errors but the two identified in *Futuris*.

That the limitation from *Futuris* is not contained in an act of Parliament but rather developed by the judicature is irrelevant given the fact that statutory interpretation is an important part of the judicial power vested by s 71 of the *Constitution* and must "reflect and serve the rule of law"²²³. Accordingly, it can operate to stultify judicial power by putting an "artificial gloss"²²⁴ on the text of s 175, restricting the circumstances when courts can discern the implied limits of a law and declare an administrative action or decision invalid on grounds of jurisdictional error.

218 *Yusuf*, 348 [74] (McHugh, Gummow and Hayne JJ).

219 *Ibid.*, 351 [82] (McHugh, Gummow and Hayne JJ).

220 Crawford (2018), 86.

221 *Quin*, 35 (Brennan J).

222 *Aala*, 141 (Hayne J).

223 Crawford (2018), 90.

224 *Cf* Crawford(2018), 90.

A similar impermissible infringement was observed in relation to application of a well-established common law principle requiring “anyone aggrieved by [the liquidator’s] conduct to apply to [the] Court in the action in which he was appointed.”²²⁵ In Australia, this principle was famously applied by McLelland J and became known as the *Re Siromath* injunction after the case of the same name in which his Honour raised an injunction proscribing parties from litigating proceedings relating to the duties and obligations of a Court-appointed liquidator in a non-appointing Court without leave from the appointing Court.

Finding it was ‘plainly wrong’ for Australian courts to continue to apply this outdated principle in view of the national corporations scheme, it was, relevantly, said:

... the *Re Siromath* injunction effectively ‘stultifies the exercise of judicial power’ by restricting the right to litigate proceedings against a liquidator in a non-appointing court ... This injunction impermissibly ‘supplements’ the [Corporations] Act and is not conducive to its success. It improperly establishes that only the court appointing the liquidator is capable of regulating the liquidator’s conduct and protecting the court’s processes... This flies in the face of the national scheme established under the Act and the powers of all courts ... to protect against abuse of process²²⁶

As currently applied, the *Futuris* limitation, similarly, operates to restrict the ambit of judicial power to quell a controversy, abrogating the constitutional function of courts to protect, by means of judicial review, the constitutionally-implied rights of citizens to set aside an unauthorized exercise of executive or administrative power. It impedes the capacity of courts to correct for jurisdictional error not otherwise proscribed by s 175 of the 1936 Act. Now, attacks on formation of opinion by the Commissioner may only be instituted in Part IVC proceedings, according to the Full Court in *Chhua*.

However, the Full Court’s faith in Part IVC, respectfully, is misconceived to the extent that it fails to appreciate that the protection of rights-related implications in the *Constitution* cannot be fully realized by exercise of judicial power in Part IVC proceedings. As shown, even if there is no evident or justifiable basis for formation of opinion about fraud and evasion this is insufficient to result in an excessive assessment under Part IVC.

By parity of reasoning, narrowing the grounds for jurisdictional error relief has the effect of impermissibly supplementing or modifying judicial power exercised in furtherance of the court’s constitutional jurisdiction. It threatens the entrenched minimum provision of judicial review, impermissibly constraining the ability of courts to discern and declare exercise of administrative power as legally unreasonable which is not otherwise possible by exercise of judicial power under Part IVC. As gleaned, the right to petition a court for discretionary

²²⁵ *Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283, 286. (*Re Maidstone*)

²²⁶ *Azzi* (2011), 129.

relief in these circumstances and the concomitant duty of the court to provide appropriate relief are implied in the *Constitution*.

It follows that by putting a judicial gloss on the text of s 175 in relation to formation of opinion attacks, when it is not clear from the legislation or *Futuris* that this is warranted, needlessly “curtails”²²⁷ intermediate courts’ constitutional function of protecting the interests of a person whose tax liability has increased in consequence of the Commissioner’s decision to amend an earlier issued assessment. Narrowing the grounds for jurisdictional error relief and thus the scope for judicial review in this way has the effect of stultifying exercise of judicial power by excluding grounds for relief which would otherwise have been available.

III *Concluding Observations*

The above demonstrated that the current practice of summarily dismissing judicial review applications not asserting either of the two jurisdictional errors identified by the plurality in *Futuris* is not only apocryphal, given the myriad uncertainties with the plurality’s decision, but is repugnant to the rule of law. Reading the text in Item 5 of s 170(1) of the 1936 Act in its context, it was shown that formation of the requisite opinion of fraud or evasion is a jurisdictional fact enlivening the power to amend an assessment at any time and that its existence or otherwise is reviewable for jurisdictional error despite the privative ambit of s 175.

As shown, only when courts are exercising judicial power within their constitutional jurisdiction can they totally safeguard against arbitrary application of the substantive criteria for liability and thus ensure the tax is not made incontestable given the shortcomings and impracticalities with the alternative mechanism provided by Part IVC.

Yet, because of the conclusive way in which the Federal Court has been applying *Futuris*, confining complaints about exercise of the amendment power to Part IVC proceedings, the purported assessment cannot be invalidated unless the taxpayer can affirmatively disprove fraud or evasion regardless that the opinion enlivening the amendment power may have lacked an evident and intelligible justification. Whilst evidence of true and full disclosure may establish both excessiveness and legal unreasonableness, this is not always the case where the taxpayer makes an allegation there was no evidence to justify the opinion. Such an allegation cannot be entertained in Part IVC proceedings.

Indeed, the constitutional function and duty of courts should not have to depend definitively on the existence or otherwise of material disproving tax avoidance for fraud or evasion, particularly where the opinion informing the decision to amend was based on “unwarranted assumptions”²²⁸ or not supported by evidence. The sufficiency of material in this latter regard is, ultimately, a

²²⁷ Cf *Plaintiff S157/2002*, 483 [6] (Gleeson CJ).

²²⁸ Cf *BZD17*, [36] (Perram, Perry and O’Callaghan JJ).

question for the judiciary in judicial review proceedings which is not otherwise possible in Part IVC proceedings.

It follows that proscribing judicial review for all but the two jurisdictional errors identified by the plurality in *Futuris* has the potential to breach the central maxim that “a stream cannot rise higher than its source”²²⁹ by making validity of the assessment depend on the opinion of the Commissioner with no practical means to examine the opinion for legal unreasonableness despite that this conditions exercise of any statutory or discretion. To reiterate, parliament cannot prevent courts from discerning and declaring if the Commissioner’s state of satisfaction proceeded reasonably and on a correct understanding and application of the applicable law.

As currently applied however, the current practice adopted by intermediate courts means that unless the taxpayer is, exceptionally, alleging the assessment is either tentative or tainted by conscious maladministration, courts would be unable to discern whether the opinion regarding the legislative criteria enlivening the power to amend was reasonably reached. Such practice not only inappropriately conflates attacks on the power to amend an assessment with attacks on its validity, it also offends the duty of courts to discern and declare the legislated limits of the law (both express and implied) and could potentially contravene the duty to intervene where the authority is acting perversely, consciously or otherwise.

It is therefore unsound, if not dangerous, for intermediate courts to continue to summarily dismiss judicial review applications alleging jurisdictional error for failure to form the requisite opinion as this effectively incapacitates them from safeguarding against arbitrary application of criteria for liability. Not only does such practice undermine the rule of law, it also undermines confidence in the tax system by creating more uncertainty for taxpayers affected by exercise of the amendment power. In turn, defeating legislative efforts to ensure “the right balance [is] struck between protecting the rights of individual taxpayers and protecting the revenue for the benefit of the whole Australian community.”²³⁰

²²⁹ *Australian Communist Party*, 258 (Fullagar J).

²³⁰ Press Release (2003).