DAVID JONES FINANCE AND INVESTMENTS AND ADSTEAM FINANCE AND INVESTMENTS V. FEDERAL COMMISSIONER OF TAXATION[1]

David Jones Finance gives rise to significant new developments in constitutional law, administrative law and the operation of the Income Tax Assessment Act. It has enabled the Federal Court to reconsider the effect of privative clauses under s. 75(v) of the Constitution. It also marks an important interpretation of the corresponding jurisdiction of the Federal Court under s. 39B of the Judiciary Act. This is applied in the context of s. 177 of the Income Tax Assessment Act 1936 (Cth) ('I.T.A.A.'). It is now arguably the case that in law, an assessment may be challenged on administrative law grounds in the Federal Court notwithstanding s. 177. The case of *F. J. Bloemen v. Federal Commissioner of Taxation*,[2] which asserted the authority of the Commissioner under s. 177 to make assessments which are immune from review except under Part V, has been substantially weakened.

THE FACTS

Both of the appellant companies were the beneficial owners of shares. The registered owners of these shares were nominee companies of the appellants. Dividends were received from four companies in which shares were held in the years of income ended 30 June 1985 to 30 June 1988 inclusive. Tax was not paid by these four companies, three of which were dissolved following the issue of notices to the liquidator of each by the Commissioner that there was no liability to tax. The fourth is in liquidation. The appellants claimed to be entitled to a rebate in respect of these dividends under s. 46 of the I.T.A.A. The Commissioner, however, claimed that the appellants were not entitled to the rebate, as they were not registered owners of the shares. Assessments to tax were issued on 23 May 1990 accordingly. The authority upon which the Commissioner relied was *Federal Commissioner of Taxation v. Patcorp Investments*.[3] The appellants instituted proceedings in the Federal Court, seeking declarations that the notices were not assessments of income tax, injunctions restraining the Commissioner from taking any proceedings to collect or recover tax under the notices and damages.

The grounds of this claim were that, notwithstanding *Patcorp Investments*, the Commissioner allowed and acquiesced in a general understanding of the part of the public and corporate taxpayers that beneficial ownership of shares was sufficient to qualify for the dividend rebate under s. 46. It was alleged that the Commissioner had adhered to this practice for more than 30 years. The appellants alleged that they relied upon this practice in the preparation of their returns and in allowing the shares to remain registered in the names of corporate nominees. It was claimed that the issue of the notices of assessment in these circumstances amounted to an abuse of power, in that it denied a rebate allowed to other taxpayers in like circumstances, that it involved a departure from a practice upon which the appellants had relied, and that it was motivated by the improper purpose of seeking to recoup tax which was in fact due by the dissolved companies. It was also argued that the Commissioner was under a duty to administer the Act fairly.

In the Federal Court, before O'Loughlin J., the Commissioner moved that the action be struck out. The Commissioner produced copies of the notices of assessment, and claimed that the Court lacked jurisdiction to make the orders sought by reason of ss. 175 and 177. Section 177(1) reads as follows:

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

1 Full Court of the Federal Court: Morling, Pincus and French JJ. Majority and minority judgments delivered 12 April 1991 and unreported at the date of writing.
2 (1981) 147 C.L.R. 360.
3 (1977) 140 C.L.R. 247.

The Commissioner also cited as authority *F. J. Bloemen,*[4] wherein it was held that the Supreme Court of New South Wales did not have jurisdiction to determine the validity of an assessment once a document satisfying s. 177(1) was produced. The appellants argued, however, that the Federal Court in this case did have jurisdiction by reason of s. 39B(1) of the Judiciary Act, which mirrors s. 75(v) of the Constitution, and reads as follows:

> The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

The appellants also argued that *F. J. Bloemen* did not preclude review on the facts of this case.

O'Loughlin J. allowed the motion, and the appellants appealed to the Full Court. By majority (Morling and French JJ.) the Full Court allowed the appeal and dismissed the strike out motion of the Commissioner. Pincus J. dissented. The entire matter in relation to the disputed tax has subsequently been settled. The likelihood of the Commissioner receiving special leave to appeal to the High Court is therefore small, as no live issue remains between the parties.

THE MAJORITY: MORLING AND FRENCH JJ.

Morling and French JJ. delivered a joint judgment. At the outset it was stated that the case involved a question 'in essence ... of jurisdiction'.[5] They therefore turned to s. 39B, which required consideration of its parent provision, s. 75(v) of the Constitution and its relationship with privative clauses.

(a) *S. 75(v) and privative clauses*

It was noted that s. 75(v) was inspired by a decision of the United States Supreme Court, *Marbury v. Madison*,[6] which held that the Supreme Court possessed only appellate jurisdiction, and not original jurisdiction, to issue writs against judicial officers of the United States. Morling and French JJ. went on to explain the 'character of para. 75(v) foreshadowed in these commentaries [Quick and Garran] and Isaacs' observations in the Convention debates as a provision conferring jurisdiction impervious to statutory erosion',[7] and that s. 75(v) afforded a jurisdiction enjoying 'constitutional security'.[8] Interestingly, they also quoted a passage by Gavan Duffy and Rich JJ. in the *Tramways Case (No. 1)*,[9] that '[t]he Commonwealth Parliament cannot take away a right granted by the Constitution'.[10] This may be seen to reflect the continuing judicial trend emphasizing guarantees of rights in the Constitution (see for example *Street v. Queensland Bar Association*[11]).

The judgment then considered the effect of privative clauses, which exclude judicial review, under s. 75(v) thus explained. Morling and French JJ. cited the observation of Isaacs, Powers and Rich JJ. in the *Ince Brothers* case,[12] that Parliament can 'by appropriate legislation limit the cases to which the remedy is applicable'.[13] The reasoning of Dixon J. in *R. v. Hickman; ex parte Fox*,[14] dealing with this issue, was examined at length. The proposition from this case was stated, that 'a privative provision could, subject to certain provisos, be construed as an element of the statutory power whose exercise it protected'.[15] Dixon J.'s three well known provisos were then set out: that any decision the subject of a private provision must be a *bona fide* attempt to exercise power; that it must relate to the subject matter of the legislation; and that it must be reasonably capable of reference to the power given to the decision-maker. These provisos were explained on the basis of subsequent authority as

4 (1981) 147 C.L.R. 360.
5 *David Jones Finance*, *supra* n. 1, majority judgment, 2.
6 5 U.S. 137 (1803).
7 *David Jones Finance*, *supra* n. 1, majority judgment, 19.
8 *Ibid.*
9 (1914) 18 C.L.R. 54.
10 *Ibid.* 83.
11 (1989) 168 C.L.R. 461.
12 (1924) 34 C.L.R. 457.
13 *Ibid.* 464.
14 (1945) 70 C.L.R. 598.
15 *David Jones Finance*, *supra* n. 1, majority judgment, 21.

'reflecting provisions on the basis that the legislature would not have intended to authorize bad faith decisions or decisions incapable of reference to the subject matter of the legislation or the powers conferred by it'.[16]

The cases following *Hickman* were then considered, in particular *R. v. Coldham; ex parte The Australian Workers' Union*[17] and *O'Toole v. Charles David Pty Ltd.*[18] These cases concerned s. 60 of the Conciliation and Arbitration Act 1904 (Cth), which protected awards from appeal or review and from being subject to prohibition, *mandamus* or injunction in any Court on any account. In a crucial passage, Morling and French JJ. explained the High Court's view in these cases that s. 60 was an 'empowering' provision,[19] enabling the Commission to go beyond its prescribed statutory limits without incurring review under s. 75(v), provided it did not contravene the three conditions set out in the *Hickman* case. The distinction is later drawn between such 'empowering provisions' and merely 'jurisdictional provisions'. In other words, there will be some privative clauses which 'empower' decisions to be made which, subject to the *Hickman* provisos, are immune from review under s. 75(v) (even if otherwise invalid) and there will be other privative clauses which, properly construed, do not confer such power and will therefore be overridden by s. 75(v).

The judges concluded this section with a brief summary: that s. 75(v) is a Constitutional provision which cannot be limited or qualified by any statute, which confers jurisdiction on the High Court to 'control excesses of power or failure of duty by officers of the Commonwealth'.[20] However, it is 'ambulatory',[21] in that its exercise depends upon the boundaries of the powers or duties in question, which requires 'construction of the relevant legislation . . . [which] may require that account be taken of any privative provisions able to be construed as extending the powers or contracting the duties'.[22]

(b) *Jurisdiction of the Federal Court under s. 39B*

The judgment sets out the history of the provision, inserted in 1983. It is concluded that 'it is apparent from the language of s. 39B, its identity with that of para. 75(v) and the Second Reading Speech, that the intention of the legislature was to confer on the Federal Court the full amplitude of the original jurisdiction of the High Court under para. 75(v)'.[23] The significant conclusion which they then stated was that 'the jurisdiction so conferred will not be displaced, qualified or limited by privative provisions in statutes pre-dating the amendment'.[24] Similarly, 'for statutes which post-date it, there will be a powerful presumption, in the absence of clear words to the contrary, that no such displacement, qualification or limitation is intended'.[25] The rationale for this was that otherwise the jurisdiction would simply be returned to the High Court.

(c) *S. 177 of the I.T.A.A. and s. 39B of the Judiciary Act*

The task facing the Court, following these conclusions, was to determine the effect of s. 177 of the I.T.A.A. in relation to this jurisdiction, in accordance with the analysis of privative clauses in the High Court authorities cited earlier.

It was noted that s. 177 is comprised of two limbs: first that 'the production of a notice . . . shall be conclusive evidence of the due making of the assessment';[26] and second that 'except in proceedings under Part V . . . [the production of a notice shall be conclusive evidence] that the amount and all particulars of the assessment are correct'.[27]

At the outset, two cases were referred to: *Mooney v. Commissioners of Taxation (N.S.W.)*[28] and

16 *Ibid.* 25.
17 (1983) 153 C.L.R. 415.
18 (1990) 96 A.L.R. 1.
19 *David Jones Finance*, *supra* n. 1, majority judgment, 24.
20 *Ibid.* 25.
21 *Ibid.*
22 *Ibid.* 25-6.
23 *Ibid.* 27.
24 *Ibid.* 27-8.
25 *Ibid.* 28.
26 Income Tax Assessment Act 1936 (Cth) s. 177(1).
27 *Ibid.*
28 (1906) 3 C.L.R. 221.

Parks v. Commissioner of Taxes (Qld).[29] These dealt with State provisions similar to s. 177. Slim authority was derived from *Mooney*, in particular, that the privative provision was of only limited effect. The reference in that case to the making of an assessment by the Commissioner as being an exercise of *juris* was also noted, in contrast to *vires*, a distinction which has always been basic to administrative law. Morling and French JJ. observed, however, that such language 'carries with it conceptual encrustations which are now outdated'.[30] While, in their opinion, the 'equation of jurisdictional error with *ultra vires* action was probably always possible',[31] 'the central principle of administrative law'[32] they now state to be simply 'that a public authority may not act beyond its powers'.[33] This can only be regarded as a very progressive approach. If adopted more widely, it could provide a new basis for administrative law, guided by substantive concerns as opposed to formalities.

Following these observations, the judgment returns to the analysis of the two limbs of s. 177. Two early authorities concerned with s. 177, *George v. Commissioner of Taxation*[34] and *McAndrew v. Federal Commissioner of Taxation*,[35] were both cited to establish that the scope of the first limb is limited to preventing enquiry into matters of a procedural character only. It was recognized, however, that facts outside that category would be caught by the second limb.

Morling and French JJ. then proceeded to confront the *F. J. Bloemen* case. It was recognized that that case entitles a court to inquire into whether a notice is a notice of assessment for the purposes of s. 177 or merely a notice relating to a provisional or tentative assessment. The authorities dealing with the issue of what is a notice of assessment in other situations, specifically *Federal Commissioner of Taxation v. Hoffnung*[36] and *R. v. Commissioner of Taxation (W.A.); ex parte Briggs*[37] were not referred to. It was also recognized, however, that in relation to the first limb of s. 177, *F. J. Bloemen* is authority that '[the production of an assessment] will put beyond contention the due making of the assessment so that the Court cannot find that no assessment was made or that, if made, it was made for an improper purpose'.[38] The reasoning in the judgment then proceeds quickly, and may be explained in steps:

(i) It was held that the quoted proposition in *F. J. Bloemen* must 'no doubt' be read in the light of the *George* and *McAndrew* cases;[39] in other words, that the first limb, as interpreted, relates only to procedural matters.

(ii) It was then argued to be necessary in accordance with the High Court authorities on privative clauses, to determine whether the first limb is an 'empowering provision', or instead is merely 'jurisdictional'. On the latter construction, its effect would accordingly be displaced by the jurisdiction afforded by s. 75(v), and by the jurisdiction granted under s. 39B of the Judiciary Act. As this issue was not debated in *F. J. Bloemen* (in the context of a similar conferment of jurisdiction upon the Supreme Court) it was held that '*a fortiori*, the case has nothing to say about the relationship between the privative operation of s. 177 and the jurisdiction conferred on the Court by s. 39B'.[40]

(iii) The first limb of s. 177(1) was accordingly held to be 'jurisdictional' only. The basis for this finding was the 'conditional operation'[41] of the section; in other words, that its operation depended upon production of a notice of assessment in Court. It was held to be an 'absurd possibility that the powers exercised in making an assessment are to be treated as greater in one proceeding where a notice is produced (say recovery proceedings) than in another where it is not produced (say judicial review proceedings)'.[42]

29 [1933] S.R. (Qld) 306.
30 *David Jones Finance*, *supra* n. 1, majority judgment, 32.
31 *Ibid.*
32 *Ibid.* 33.
33 *Ibid.*
34 (1952) A.L.R. 961.
35 (1956) 98 C.L.R. 263.
36 (1928) 42 C.L.R. 39.
37 (1986) 12 F.C.R. 301.
38 *Ibid.* 378.
39 *David Jones Finance*, *supra* n. 1, majority judgment, 39.
40 *Ibid.* 43-4.
41 *Ibid.* 40.
42 *Ibid.*

(iv) In conclusion it was held that the first limb 'was intended to operate and did operate to deny the Courts authority to enquire into the due making'[43] of the assessments. Being jurisdictional, however, it was overridden by s. 75(v) and therefore also by s. 39B. The *F. J. Bloemen* case was similarly overridden. Therefore, '[i]n this Court and in the proper exercise of that jurisdiction the "due making" of the assessment and the amount and all particulars thereof is open to inquiry'.[44] The scope of this inquiry would correspondingly extend to the entire range of administrative law grounds of review relevant to s. 39B remedies.

The judgment is concluded with two subsidiary issues. First Morling and French JJ. considered what the position would be if their conclusion in relation to the construction of the first limb was wrong, or in other words if this limb was an empowering provision. As they pointed out, in this case the three *Hickman* provisos would remain, and, in particular, review would be possible where the assessment was not made *bona fide*. It was then stated that this class of inquiry 'is, of course, closely related to the question of improper purposes'.[45] It was then held that the pleadings in this case made allegations 'which are tantamount to an allegation of bad faith ... [a]nd to that extent the inquiry raised by those allegations would not be affected by the operation of the first limb of s. 177(1)'.[46] Second, they considered the possibility that the matters in this case fell under the second limb. It was held that 'it is beyond argument that the second limb which operates only to channel disputed assessments into the Pt. V process, has no effect on power'.[47] Accordingly, it was jurisdictional only, and was displaced by s. 39B in the same way as the first limb.

On the points raised in the appeal, it was not necessary for the judges to consider whether the allegations were actually made out. The parting observation was made, however, that, as to whether the assessments were not made in good faith, '[i]t is sufficient to say ... that the point is arguable'.[48] The appeal was allowed with costs.

THE DISSENT: PINCUS J.

At the outset, Pincus J. made observations concerning the grounds of the claim which were much less favourable to the appellants. These observations were nevertheless critical of the Commissioner, for allowing a practice to occur at odds with the High Court decision in *Patcorp*:

> One activity of the respondent Commissioner which may escape scrutiny is the selective relaxation of taxation laws ... I can find nothing in the Act suggesting that the respondent has a discretion to issue assessments on the basis that companies which are not shareholders are entitled to a rebate.[49]

Similarly, he stated that to hold otherwise would be to allow the Commissioner 'to decide that for reasons which seem good to him the tax laws shall be applied against one citizen and not against another'.[50]

Pincus J. then turned to a consideration of s. 75(v) and privative clauses as the majority had done. The finding which is crucial to his judgment concerns the *Hickman* case. Unlike the majority, in his opinion the statement by Dixon J. in that case did not represent any binding principle as to the scope for valid privative clauses under s. 75(v):

> The important point is that the *Hickman* test arises, at least substantially, out of a process of reconciling apparently inconsistent provisions of the statute [in question].[51]

Even more directly, he stated that the test 'does not purport to define the extent to which Parliament may, directly or otherwise, abrogate the High Court's power under s. 75(v). It appears never to have been necessary for the High Court to determine, as a separate issue, that precise point'.[52]

43 *Ibid.* 41.
44 *Ibid.*
45 *Ibid.* 42.
46 *Ibid.*
47 *Ibid.* 43.
48 *Ibid.* 44.
49 *David Jones Finance*, *supra* n. 1, minority judgment, 6.
50 *Ibid.* 7.
51 *Ibid.* 9-10.
52 *Ibid.* 10.

Hence, *Hickman* was reduced in authority to a statement of statutory interpretation of the Conciliation and Arbitration Act. The distinction which the majority drew between 'empowering' and 'jurisdictional' privative clauses was therefore not touched upon.

The next step which Pincus J. took was to examine the issue of interpretation of s. 177, and how its provisions should be reconciled. This issue he regarded as conclusively determined by *F. J. Bloemen*, stating that '[since *Bloemen*] it cannot be argued that s. 177(1) must be read down on the ground of necessity of reconciling it with the provisions of the I.T.A. Act which limit the Commissioner's power'.[53]

It was recognized, however, that *F. J. Bloemen* did not determine the issue of the validity of the provision, thus reconciled, under s. 75(v), as '*Bloemen*'s case turned on no constitutional consideration, but merely upon a reading of the I.T.A. Act'.[54] It was therefore necessary to determine whether the Federal Court had acquired the High Court's jurisdiction by virtue of s. 39B. Pincus J. held that the Federal Court had not acquired this jurisdiction. This decision was based upon the following reasoning:

(i) The authority of the *O'Toole* case, in which the Federal Court was found to possess jurisdiction under s. 39B to review an industrial decision, was rejected. The basis of this rejection was apparently that *O'Toole* simply allowed the Federal Court to adopt the *Hickman* reconciliation of s. 60 of the Conciliation and Arbitration Act. It therefore had nothing to say about the transfer of any broader constitutional power in this case under s. 39B.

(ii) The fact that there was no settled construction of this constitutional power was a factor which stood against that power being transferred by s. 39B.

(iii) Legislative intention also made it unlikely that s. 39B had effected this transfer. It was noted that s. 39B was made law less than three years after *F. J. Bloemen*, and at a time when the Federal Court already possessed appellate jurisdiction in income tax cases. Pincus J. then referred to the views of Morling and French JJ., and observed that 'the substantial weakening of such a critical part of the tax collection system in this country could hardly have been intended to be effected by a mere implication'.[55] This arguably reflects at least an implicit recognition that s. 177, as reconciled in *F. J. Bloemen*, would fall foul of s. 75(v).

IMPLICATIONS

The difference between majority and minority arguably depends to a large extent upon differing views of the effect of the *Hickman* case on privative clauses under s. 75(v). The majority were prepared to draw certain principles from the case, concerning the issue of 'empowering' provisions and also the degree of supervision which the Court will always exercise regardless of privative clauses (the 'three provisos'). The test which they applied in this case is nevertheless one of considerable uncertainty. In particular, further clarification is required of the 'absurdity' which led the majority to conclude that s. 177(1) was jurisdictional. Pincus J. in contrast, confined *Hickman* to a statement of construction of the provision at issue in that case. This would appear to be at odds with the accepted view that *Hickman* has, at least subsequently, come to represent a statement of principle.[56] Moreover, the finding that s. 39B did not confer the wider constitutional powers, which were not, in his opinion, defined in *Hickman*, simply defers the issue of s. 177(1) and s. 75(v) back to the High Court. An opportunity to embark upon the resolution of this issue was therefore missed. Finally, Pincus J.'s judgment leaves unclear the extent of Federal Court jurisdiction under s. 39B. His interpretation of the *O'Toole* case is that it enabled the Federal Court to adopt the reconciliation of s. 60 in *Hickman* which, presumably, it would have been able to do in any event. Similarly, the fact that he regarded *F. J. Bloemen* as binding in this case indicated that s. 39B had added nothing in the context of privative clauses.

53 *Ibid.* 10-1.
54 *Ibid.* 11.
55 *Ibid.* 14.
56 See, for example, Lanham and Tracey, *General Principles of Administrative Law* (3rd ed. 1990), 409-10.

The following implications of the case may be noted:

(i) The authority which may be drawn from this case marks a shift in agenda in relation to privative clauses. The inquiry is now focused primarily upon the constitutionality of privative clauses, and whether they are 'empowering'. Arguably, the nature of the power being exercised will only be a factor in this enquiry. Clauses which are only 'jurisdictional' will not preclude review under s. 75(v). The application of the *Hickman* provisos, and the question of whether the decision is a nullity, are now subsidiary issues, in the case where a provision is found to be empowering. In this context, the majority indicated a willingness to regard the distinction between *juris* and *vires* as superseded.

(ii) The interpretation of privative clauses has become a particularly vital issue, as the Federal Court now possesses the jurisdiction of the High Court by virtue of s. 39B. Whether the State Supreme Courts possess this jurisdiction is, however, an open question.

(iii) The administration of the I.T.A.A. has, at least as a matter of theory, been radically altered. Prior to this case, a challenge to the substantive details in an assessment was undertaken primarily under Part V proceedings. The due making of an assessment was not subject to review in such proceedings. Alternatively, in recovery proceedings in which the Commissioner sought to rely upon the assessment, certain challenges to the assessment could be made. The principal such challenge, recognized in *F. J. Bloemen*, was that the assessment was not a notice of assessment for the purposes of s. 177. The *Briggs* case further decided that an assessment will not be an assessment under s. 177 where the Commissioner is motivated by improper or collateral purposes, in the sense that the Commissioner 'never intended to embark, and did not in fact embark, upon the process of ascertaining the taxpayer's income'.[57]

Now that s. 75(v) has been brought into play, however, the Federal Court possesses jurisdiction to determine the validity of an assessment when it is issued, including its due making and its content, outside Part V. This will include challenge on any grounds, as s. 177 has been displaced, and is not limited to the grounds enabling challenge after *F. J. Bloemen* and *Briggs*. In those (perhaps rare) situations where recovery proceedings are brought before a Part V appeal can be instituted, review outside Part V may be grounds for a stay in the recovery. Alternatively, *prima facie* grounds of invalidity may enable an interlocutory injunction to be obtained from the Federal Court itself to restrain the Commissioner. It should be noted, however, that all remedies in administrative law are discretionary. An applicant may need to show strong grounds for challenging an assessment outside Part V. Cases such as *Briggs* will otherwise remain relevant in defence pleadings in the recovery action itself.

(iv) The exercise of discretion by the Commissioner in situations similar to this may need to be modified. The decision not to apply *Patcorp*, and then retrospectively to reinstate it in one instance, incurred the opprobrium of all members of the Court. The tentative equation of this with actual bad faith which the majority made is particularly notable. This, arguably, will be a beneficial result of the further subjection of the Commissioner to the standards of administrative law.

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57 (1986) 12 F.C.R. 301, 308.

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