ANTI-AVOIDANCE DISCRETIONS: THE CONTINUING BATTLE TO CONTROL TAX AVOIDANCE

By
YURI GRBICH*

The battle to control tax avoidance has seen in the past the enactment of specific provisions to prevent particular forms of tax avoidance. This approach has been both inadequate and ineffective and the latest legislative strategy involves reposing wide discretions in the Commissioner. In this article Dr Grbich categorizes the types of discretions found in the Income Tax Assessment Act 1936 (Cth). The important questions addressed by Dr Grbich are upon what grounds will a court interfere with the exercise of a discretion and when will it exercise the discretion itself. Dr Grbich concludes that there is a coming battle between the courts and the bureaucracy for control of the exercise of discretions and suggests that if the use of discretions is to be successful in controlling tax avoidance, guidelines to structure the discretion need to be developed, articulated and monitored.

I. ANTI-AVOIDANCE STRATEGIES IN PERSPECTIVE

Tax avoidance has become a national obsession among some classes of Australian taxpayers. Extensive specific anti-avoidance provisions have been enacted in an attempt to stem the tide. More recently the strategy has been towards the use of widely phrased anti-avoidance discretions reposed in the Commissioner and his bureaucracy. This trend was obvious before the High Court under Barwick C.J. delivered the coup de grace and despatched the old section 260 of the Income Tax Assessment Act 1936 (Cth) into that forlorn purgatory reserved for legislative provisions which have fallen from judicial favour. However, it accelerated with the growth in the mass marketing of paper schemes and the constructionalist reading of the Act by the High Court which allowed many of them to succeed. The legislative strategy until the recent enactment of Part IVA, was to counter the judicial approach to tax avoidance schemes by moving the focus of decision-making back into the bureaucracy.

In the short term, there have been two consequences. First, wide discretions have intruded heavily into bread and butter tax work, requiring tax lawyers to develop administrative laws skills. Secondly, it appears to have led, or at least been part of the reason for, a recent realignment in executive and judicial relations in tax matters. The executive has presented a package of general anti-avoidance provisions whose key charging provision, section 177D, surprisingly uses so-called "objective" tests.

*Associate Professor of Law, Monash University.

Hence, wide discretions are delegated to the *judiciary* to develop detailed guidelines as to the type of tax avoidance which will be annihilated by the new mobile strike weapon. The High Court under Gibbs C.J. has unceremoniously dumped the doctrines of pedantic legalism which characterized the treatment of tax schemes in the Barwick era. The Court, anticipating and even going further than the new section 15AA of the Acts Interpretation Act 1901 (Cth), signalled its acceptance of the purposive, contextual approach to tax interpretation in *Cooper Brookes (Wollongong) Pty Ltd* v. *F.C.T.*[1] The tax avoidance debate continues to evolve rapidly and any attempt to present it as a static picture inevitably distorts it.

The reposing of wide anti-avoidance discretions in the agencies of the executive is, of course, only part of a much wider trend. The move to the monitoring and regulation of private sector activity is also taking place, for example, in corporate law and in the economic regulation of business. We are moving away from resolution of disputes by private individuals within a broad framework laid down by the judiciary into an era of collective regulation based on a balance of economic and distributional criteria. We are moving from private law to administrative law, from law to executive discretion controlled by law, from contract back again to status, but a status now based on economic rationality. The reality of history is that specialisation, new technology and the capital intensive nature of most modern economic activity demands more co-ordination and planning, either through public sector regulation or private planning. Notwithstanding attempts in the political arena to develop the rhetoric of deregulation and small government, the momentum of events is likely, in the longer term, to generate more pressure for wider participation in the making of decisions which impact on a wide range of interests, whether it be airline pricing, the impact of industry on the environment, oil prices imposed by the private sector, or the subsidizing of the job creating industries. Far from being an exception to the rule, taxation is one of the major tools for realising these demands and the archetypal arena where individual disputes with the executive have an impact beyond the individual parties to the tax dispute. If Curran pays less tax either Edna Everage pays more tax or gets less in unemployment benefits. Or, alternatively, the increase in the budget deficit means that every Tom, Dick and Harry pays the cost of tax avoidance through devalued currency. There are no free lunches in the tax system.

The foregoing is by the way of perspective. This paper deals with far more prosaic issues. My central objective is to critically assess the degree of control which a court or board of review is likely to assert over the exercise of the various types of anti-avoidance discretions in the Act. Happily the basic law on the subject is well covered in a useful recent essay by Professor Ryan.[2] We can set out this basic law in a short summary. This will free our limited resources for some critical second level analysis. First, to develop a simple typology of the main categories of anti-avoidance devices so we can see the wood for the trees of the detailed anti-avoidance provisions which increasingly saturate the Act. Second, to ask the central question about whether the courts, in particular, will step in and strike down the various types of discretion nominally reposed in the Commissioner and his bureaucracy. Third, to ask whether the courts will go on and substitute their own exercise of the Commissioner's discretion when they do quash his decision.

II. JUDICIAL CONTROL OF THE COMMISSIONER'S ANTI-AVOIDANCE DISCRETIONS: THE LAW IN BASTARD CHARCOAL

Wide discretions are reposed in the Commissioner's bureaucracy. Popular rhetoric attacks the arbitrary imposition of uncontestable taxes by faceless bureaucrats. Anti-avoidance discretions are granted in subjective language and repose the power to decide in the Commissioner or his delegates.[3] It is not, of course, for a *court* to say whether the exercise of a discretion is "right" or "wrong" according to the court's own opinion. The legislature has reposed that discretion or jurisdiction in the Commissioner and has, *a fortiori,* removed jurisdiction from the courts. If jurisdiction means anything, it must mean the power to decide "wrongly" as well as "correctly". In any event, there is a well recognised constitutional constraint on the courts which prohibits them from exercising non-judicial functions such as interfering in the exercise of administrative discretions *on the merits.*

This popular view does not stand up well to the most cursory analysis of the facts. The Australian tax system has, and has had for many years, a very highly developed system of judicial and quasi-judicial control of all bureaucratic decisions, including Commissioner's discretions. The system goes well beyond the recent and much heralded reforms in the new administrative law package which grant a power to review on the merits to the Administrative Appeals Tribunal[4] and reform judicial supervisory jurisdiction at Federal[5] and State level.[6] The jurisdiction of the courts under the system of objection and appeal in tax matters has substantially impaired, perhaps fatally wounded, the division of administrative and judicial powers on the Dicey model. Anti-avoidance discretions are vulnerable to the attack that they are uncertain, or that the expense of access to courts inhibits effective control, or that the courts have not adequately mobilized their undoubted powers to lay down and systematically structure the criteria for the exercise of the Commissioner's discretions. But it is highly misleading to characterize such discretions "uncontrollable" or capable of arbitrary exercise without the availability of judicial or open tribunal recourse.

The following extensive avenues of control are available to the taxpayer:

(a) An independent re-determination of the discretion by the Board of Review, provided there is an "assessment". Under section 193 of the Act, the Board of Review has all the powers of the Commissioner and its determinations are deemed to be those of the Commissioner. Because the Board gives fully reasoned decisions on the judicial model, this enables discretions to be fully reconsidered in an open forum. The potential exists for more active participation by the Board in the systematic development of guidelines for the exercise of wide discretions and for the critical evaluation of policy options in the exercise of bureaucratic discretions.

(b) Appeals to the court either directly from the assessment of a bureaucrat, to disallow an objection or from the Board of Review. The power of the court is a power of *appeal* and perhaps even full rehearing, not a mere supervisory jurisdiction. If the taxpayer goes directly to the court under section 187 of the Act it is a full appeal on the merits. If he goes to court from the Board it is an appeal if the Board decision involved any question of law. In practice, both give the judiciary

wide powers to maintain effective control of the guidelines for exercise of bureaucratic discretions.

(c) Administrative law remedies such as the prerogative writs of prohibition, *certiorari* and *mandamus* or equitable remedies like injunction and, in particular, declaration may be available to pre-empt, or to circumvent, impediments to normal objection and appeal procedures. An action for an interlocutory injunction was recently unsuccessful in *Lucas* v. *O'Reilly*[7] but an action for a declaration was successful in *Dyson* v. *Attorney-General*[8] to forestall a penalty for failing to return an unlawful land tax form. The recent High Court decision in *F. J. Bloeman Pty Ltd* v. *F.C.T.*[9] has gone a long way to dampen expectations of a rapid growth of administrative law in this area. Some of its wide language should be treated cautiously, as there may be unusual situations in which the courts may consider that the normal board and court objection procedures do not provide adequate remedies and may wish to penetrate by mobilizing the threshold argument that there has not been an "assessment" within the meaning of the Act or otherwise. All these remedies are at the discretion of the court.

(d) Recourse may also be had, of course, to Federal and State ombudsmen and to members of parliament.

In exercising their wide appellate powers, courts typically, though not invariably, pay lip service to the idea that they do not exercise the discretion of the Commissioner or his delegates. The courts have, however, both asserted and exercised wide powers which allow them to penetrate to the merits of bureaucratic decisions. The following criteria are enumerated by Dixon J. in the leading statement of the law in *Avon Downs Pty Ltd.* v. *F.C.T.*:[10]

- Mistake of law.
- Failure to address the question in the legislation. In the case of discretions this might translate, *inter alia,* as a failure to sit down and exercise the discretion.
- Taking irrelevant considerations into account (*i.e.* "irrelevant" according to the court, not the official in whom the discretion is reposed).
- Excluding relevant considerations (*i.e.* "relevant" according to the court, not the official in whom the discretion is reposed).

The onus of establishing that the discretion was wrongly exercised lies, of course, on the taxpayer.[11] Thus stated, however, the limits imposed on courts in controlling the bureaucracy are no narrower than the power to interfere with the inferior courts in their own hierarchy. In practice, the restriction to questions of law is far less significant than it appears. It is not so much a restraint on judicial intervention as a means of delegating, to officials at grass roots level, decisions which do not involve sufficiently important questions of principle. In some authorities, the pretension of limiting review to mistakes of law alone is abandoned in favour of the proposition that if there was *any* question of law involved (and it is difficult to imagine a case in which this condition is lacking) whether it was decided *rightly* or wrongly the court can interfere in the *whole* decision[12] and do so on the basis of a *de novo* rehearing, thus asserting jurisdiction going beyond even that of an appellate court! Courts have openly examined "errors" of *fact* made in the exercise of discretions.[13]

The path to effective challenge of the exercise of discretions by the bureaucracy lies in obtaining the facts on which the official making the decision relied and the

reasons for the decision. The fuller the articulation of these vital pieces of information, the more ammunition there is for effective challenge. The process can be seen as one of intercepting internal information flows within the organisation and subjecting them to judicial examination and public scrutiny. Recent authorities and legislative interventions have seen a decisive momentum towards developing effective procedures for disclosure of information by the Commissioner's bureaucracy.

The decisions of bureaucrats or the Board can also be struck out on occasions without the need to demonstrate any particular appealable error, on the basis that the decision, including the exercise of any anti-avoidance discretion, was "capable of explanation only on the ground of some...misconception".[14]

After striking out the exercise by the Commissioner of an anti-avoidance discretion can the court exercise the discretion itself? This critical question must be taken to be unsettled. The exercise of an administrative discretion by a judicial body is in clear breach of the constitutional prohibition on judicial exercise of administrative functions. Yet the terms of section 199 of the Act give the court the widest power to "make such order as it thinks fit and [it] *may by such order*... increase...the assessment". Despite the constitutional limitations and *pro forma* deference to the fact that such discretions and, *a fortiori* the jurisdiction to exercise them, is reposed in the Commissioner and his delegates, some courts have asserted jurisdiction in such cases.

III. CLASSIFICATION OF COMMISSIONER'S ANTI-AVOIDANCE WEAPONS

The classifying of the various specific anti-avoidance weapons available to the Commissioner is designed to assist analysis and understanding. The list is not exhaustive and the categories merge into each other at the borderline. The main emphasis is on anti-avoidance discretions reposed in the Commissioner, but some other unusual devices which have been exploited for specific anti-avoidance purposes in recent legislation are also mentioned to give a balanced picture. Of course, it goes without saying that the legislature has not abandoned the use of the old fashioned and strategically flawed method of closing specific loopholes. But the brutal fact is that if specific loopholes are closed with carefully drafted specific anti-avoidance provisions, it is usually possible to exploit the new provision and keep one step ahead of a ponderous democratic process. The static, slow and stodgy defender is invariably vulnerable to the mobile, well-endowed and resourceful attacker. If you want confirmation of this truism ask any football coach about his defensive deployments or the French commanders of the Maginot Line against the Nazis or alternatively look at the appalling record of the United Kingdom in trying to close the loopholes in Estate Duty from attacks with successive life interests and discretionary trusts. After attempts with numerous generations of anti-avoidance provisions, dating from the *Finance Act* 1894 (Imp.) the tax was finally abolished in the seventies and replaced with the Capital Transfer Tax. While individual practitioners may not be heartbroken at the Commissioner's discomfort, it is hardly realistic to expect him to continue to fight a war with such outdated hardware. The

new generation of anti-avoidance provisions then are somewhere between the old loophole closing devices and a wide general anti-avoidance provision. Frequently, they impose a *prima facie* tax on a wide class of taxpayers and give the Commissioner wide discretions to dispense with liabilities. They can be classified in this way:

1. *Unstructured Discretions*

This is a wide discretion phrased in subjective terms. No objective criteria are laid down in the provision as guidelines for the exercise of the discretion. Typically it will use terms like "in the opinion of the Commissioner" or "the Commissioner may". It may lay down subjective criteria such as "if the Commissioner considers it reasonable": An example is contained in section 103AA(4)(e), part of an anti-avoidance provision directed at the use of off-shore repository companies as a device to avoid undistributed profits tax. The provision excludes, in the calculation of undistributed profits tax, "so much of the relevant dividend as the Commissioner is satisfied should be disregarded by reason of special circumstances". Another example is section 103AA(7) giving the Commissioner a wide relieving power in the operation of the same provisions.

2. *Partially Structured Discretions*

This is again a wide discretion phrased in subjective terms. Objective criteria are laid down in the Act for its exercise but the list of criteria is not exhaustive and there is jurisdiction for the Commissioner to take into account other factors, typically defined in a subjective catch-all phrase at the end. It must be emphasised that though the criteria for the exercise of the discretion are phrased objectively they are made to depend on the Commissioner's *subjective* satisfaction of this state of affairs. Considerable weight was put on this distinction by Stephen J. in *Green* v. *Daniels,*[15] a recent decision on unemployment benefits to school leavers. Stephen J. refused to issue a declaration to the effect that the bureaucrat should have been "satisfied" that the plaintiff had complied with the criteria laid down in the statute because the "legislation assigns the task of attaining satisfaction [to the bureaucrat] and the court should not seek to usurp that function".[16] The decision did involve supervisory rather than appellate jurisdiction and it did involve a social security matter, hence it should be treated with caution, but the warning is timely. The most notorious example of a partially structured discretion is the old section 99A(2) of the Act dealing with trust accumulations. The provision will, of course, be of limited importance with the recent imposition of the top marginal rate of tax on all but a small class of accumulations. The Commissioner could dispense with the top marginal rate (or the earlier "penal" rate of 50%) in favour of the individual rate scale in section 99 if he was "of the opinion that it would be unreasonable..." that the section 99A rate should apply. It was laid down that, in exercising this widely phrased subjective discretion, "the Commissioner shall have regard" to a wide range of circumstances regarding the trust and its transactions. But it added that "the Commissioner shall have regard to such other matters, if any, as he thinks fit".

3. *Fully Structured Discretions*

This is again a discretion granted in subjective terms but an exhaustive list of

objective criteria are laid down in the Act as guidelines for the exercise of the discretion. Such objective guidelines, since they are exhaustively stated, supply the basis on which the exercise can be attacked for error of law or on the substantial evidence rule. An example of a fully structured discretion appears in section 103A(6), which is an over-riding discretion giving the Commissioner power to remove the favourable public company status if various matters are capable of being varied so as to bring the company within the closely held characterization in terms of the "20/75" rules in section 103A(3). It lays down that "the Commissioner may treat a company as not being...a public company...if the Commissioner is of the opinion that, by reason of..." a number of factors concerning its constituent documents or agreements and the like, that voting rights or rights to dividends were capable of being varied to bring it within the "20/75" close control criteria.

4. *Discretions with Over-Riding Duties*

The discretion here is granted in subjective terms, often as a fully or partially structured discretion, but statutory duties are imposed on the Commissioner, either by the same section or some other provision, to take specific matters into account or to exercise the discretion when some condition exists. An example is contained in section 103A(4E), as it applies to section 103A(4D). The latter provision imposes an over-riding fully structured discretion to remove the favourable public company status from subsidiaries of public companies which are run in the interests of persons other than the holding company. It is an "anti-*Casuarina*" weapon.[17] But section 103A(4E) lays down that, in considering these matters, "the Commissioner *shall* have regard to" a long list of factors about the companies in the scheme and their dealings and "any other relevant matters". This imposes a formidable statutory duty on the Commissioner in the exercise of his powers and that exercise would be subject to challenge if he failed to consider the matters enumerated.

5. *Discretions Deemed to have Binding Effect*

A certificate on a matter of tax liability is conclusive evidence under section 10 of the *Crimes (Taxation Offences) Act* 1980 (Cth).

6. *Anti-Avoidance Provisions with Vague "Objective" Criteria*

Obviously, any anti-avoidance provision whose connotation is ambiguous will give some decision-maker a discretion (whether it be judge or bureaucrat). This can range from the open-ended terms of the main deduction provision in section 51 through the wide and vague terms of the second limb of section 26(a) to the *potentially* enormous scope of the general anti-avoidance provisions in section 177D. While such tests are "objective", in the sense that the judiciary is deemed to "know" the objective law reposing in Aladdin's cave in the sky, the tests lack that element of solidity which would enable reasonable men to agree about their content. Some specific anti-avoidance provisions define specified benefits which cause a scheme to infringe anti-avoidance provisions in such open-textured language that there is virtually no identifiable criterion for causally relating the offending benefit to the taxpayer. Such a provision is contained in section 105A(3) which excludes, in the process of calculating undistributed profits tax, dividends "paid in pursuance of an agreement under which...benefits were to be provided...to other persons...and the Commissioner is satisfied that the value of the

benefit...was...not substantially less than the amount of the dividend" [this is a heavily edited version]. Similarly, the provisions of section 99C(2) impose very tenuous causal tests in relation to deemed distributions of trust income. In section 99C(2)(c) there is taken to be an application of trust income for the beneficiary if "the beneficiary has received any benefit [including loans] provided directly or indirectly out of..." distributions. This is reminiscent of the old gifts with strings provision in death duty statutes.

7. *Mini Anti-Avoidance Formulas*

The legislature has also drafted specific anti-avoidance provisions, usually importing the formula of "ordinary family or commercial dealing" from the authorities on section 260. The device used in section 100A(12), dealing with trust strips, is to define an "agreement" to which the anti-avoidance provisions apply and *exclude* from that definition agreements entered into "in the course of ordinary family or commercial dealing". In this way the legislature has tried to get round reconstruction problems and, by putting it in the context of a specific anti-avoidance provision, to head off argument that the legislation intended to allow a choice. Variants on this device are used, for example, in the recent section 82KH(1) and section 103AA(4)(a)(ii), dealing with avoidance of undistributed profits tax with off-shore repository companies.

IV. WHEN WILL COURTS STRIKE DOWN THE EXERCISE OF ANTI-AVOIDANCE DISCRETIONS?

The central question is how far courts will strike down the exercise of anti-avoidance discretions by tax officials. The power given to the courts under the Act is not the normal supervisory jurisdiction exercised by courts over the executive. It is a power of appeal. The leading dicta is from *Avon Downs Pty Ltd* v. *F.C.T.*[18] But it is for the Commissioner,

> not for me [the Judge], to be satisfied...His decision, it is true, is not unexaminable. 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 should affect his determination, on any of these grounds his conclusion is liable to review.

Most of the judicial language referring to the control of administrative discretions adopts Mr Justice Dixon's lip service to the opinion of the official in the Commissioner's bureaucracy. On the basis of such dicta, the view has grown up that wide discretions, whether unstructured discretions or partially structured discretions, are not subject to judicial scrutiny. Such an inference would not explain what the courts have done in the authorities. Lip service to the fact that the discretion is reposed in the Commissioner or his delegates has not inhibited the courts from developing highly effective devices for intervention on the basis of the test in *Avon Downs.* Some authorities have gone further and abandoned these articulated constraints with wide assertions of jurisdiction to quash "mistakes" of fact and to rehear issues on the merits. Such dicta make no mention of the normal justification for judicial intervention into bureaucratic prerogatives based on errors

going to the jurisdiction of an official or tribunal or the existence of an error of law on the face of the record.

In *Krew* v. *F.C.T.*[19] Walsh J. asserts the widest *original* jurisdiction to exercise administrative fact finding prerogatives and to make his own decisions of fact. He said:

> I have accepted as correct the view that the jurisdiction of this Court under section 196 does not depend upon a decision by it that the Board of Review has made an error of law which has affected its decision. This is a point on which judicial opinion has not been unanimous, but I think that the view which I should accept is that this Court may, and should, hear an appeal if it is satisfied that a question of law arose for decision by the Board and that it does not matter for this purpose whether or not this Court holds that the decision of the Board on that question was right or wrong: see *F.C. of T.* v. *Sagar* (1946) 71 C.L.R. 421 at p. 423; *F.C. of T.* v. *Shaw* (1950) 80 C.L.R. 1 at p. 6-8; *Fisher* v. *D.C. of T. of the Commonwealth* (1966) 40 A.L.J.R. 328. As I have reached the conclusion that the appeal is properly before me the consequence is that the whole decision of the Board and not merely the question of law, is open to review. What is open to review is the decision of the Board. It has often been stated that in hearing such an appeal this Court is exercising original jurisdiction and it has been said that 'the appeal may be conducted as an original cause brought in this Court': see *F.C.T.* v. *Lewis Berger & Sons (Australia) Limited* (1927) 39 C.L.R. 468 at p. 469.[20]

While conceding that the question was not to be reconsidered in all respects as if it had never been before the Board Walsh J. concluded:

> I am of opinion that I am not restricted in hearing this appeal in the way in which appellate courts are restricted, according to established principles, when hearing appeals (by way of rehearing) from lower courts. I have a duty to reach my own conclusions on the questions of fact which have to be decided and to give effect to those conclusions. I am not limited to asking myself whether the findings of the Board are based on a misapprehension of the evidence or on the questions which had to be decided or were manifestly wrong. I must make my own decisions as to the facts.[21] The appropriateness of a rehearing in situations where it is necessary to draw inferences from contested facts was reaffirmed recently by the Full High Court in *McCormack* v. *F.C.T.*[22]

On the basis of the reasoning in *Krew* v. *F.C.T.*, if there was any question of law involved (and it is hard to envisage any case in which there would not be such a question) the court can step in and consider the issues on their merits. No error of law need be asserted. *Krew* involved an assessment of a taxpayer on an "assets betterment basis" due to an alleged understatement of the taxpayer's income. It was held that the taxpayer had successfully discharged the onus of proving that the assessment was wrong in part, by demonstrating that a discrepancy between his declared income and his inventory of assets could be explained on the evidence by gambling wins.

In *Duggan* v. *F.C.T.*[23] Stephen J. threw caution to the wind and asserted without qualification a jurisdiction over "errors of fact" in the exercise of the Commissioner's discretion under section 99A. If Mr Justice Dixon's cautious dicta in *Avon Downs,* reminiscent of the language used in authority on supervisory

jurisdiction, was meant to act as a restraint to inhibit the assertion of the literal statutory power of the judiciary in tax cases to exercise appellate powers over bureaucrats, it has been swept aside.

These authorities, if correct, are fatal to the assertion that the Court will only intervene on questions of law or that it will only intervene provided the threshold condition of an *error* of law is present to justify jurisdiction. Much of the dicta contains the assertion that courts will not consider discretions on the merits but the cases have not, when it comes to the crunch, repudiated the appellate jurisdiction accorded to the courts.

In all candour this conundrum need not delay us unduly since there has never been any doubt about the judicial ability, if it so chooses (which is not the same as saying it will do so), to characterize most important questions, before the Commissioner or Board of Review as questions of law, or as an error of fact or law going to jurisdiction.[24] Lord Radcliffe candidly conceded in *Edwards* v. *Bairstow*[25] that the dichotomy between errors of fact and errors of law does not exist to impose any real constraints on judicial jurisdiction. Rather, it is a device for filtering out matters of detail which can be entrusted to officials and to Boards of Review within the scope of more generally articulated judicial guidelines. It is a characterization used to denote those cases which contain points of principle of sufficient significance to justify judicial intervention. The full reasoning of Lord Radcliffe reads:

> the reason why the courts do not interfere with Commissioners' [for Special Purposes, the analogue of our Board of Review] findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion of the facts found is inconsistent with the determination come to, to say so without more ado.[26]

Perhaps a more interesting conundrum is why, given that courts have the most general appellate power in tax matters a judge as astute as Dixon C.J. should want to confuse it by reference to the rhetoric of supervisory jurisdiction. The answer must be speculative but, if the hypothesis advanced is correct, it is a nice paradox. In the case of supervisory jurisdiction courts must penetrate to the merits of disputes with various statutory construction devices so they can justify intervention by reference to the tattered myth that they are merely supervising bureaucrats to make sure they do not act outside their powers. Paradoxically, Dixon C.J. uses the same rhetoric in tax matters because his power to override bureaucratic decision is all too manifest. The Court wishes to maintain the myth that the norms it creates flow from parliament's words or its implementation of the same objective law, rather than

from norms superimposed by judges to override the executive and its bureaucracy. A sharp contrast is contained in the reasoning of Brennan J. in *F.C.T.* v. *Mantle Traders Pty Ltd*[27] where he adopts a principled borderline between judicial and administrative functions and holds that "[I]n an appeal to the Court, the issue is the validity [of the Commissioner's exercise of a discretion], not the correctness of the formation, of the function".

V. JUDICIAL STRATEGIES FOR STRUCTURING DISCRETION

Perhaps the best vehicle for analysing the judicial strategy for controlling the exercise of anti-avoidance discretions is supplied by the authorities on section 99A. This discretion, while still there, is of limited importance after the 1979 changes which apply the top marginal rate to virtually all accumulations not deemed to be distributed. It will be recalled that section 99A(2) said that the "penal" rate applied unless "the Commissioner is of the opinion that it would be unreasonable that this section should apply". In forming that opinion he had to take into account the diverse factors articulated in section 99A(3), which was not fully structured because it had a clause in section 99A(3)(c) allowing him to have regard to such other matters, if any, as he thinks fit. The legislature's strategy, of course, was to draft the provisions so that the penal rate of tax applied automatically unless the Commissioner exercised his discretion, in which case the normal rate of tax under section 99 would apply. There are many other anti-avoidance provisions in the Act which utilise this device of deeming penal provisions to apply and then granting dispensation. The initial shots in the battle were fired with a constitutional challenge by a taxpayer in *Giris Pty Ltd* v. *F.C.T.*[28] based on the primary ground that section 99A was an inadmissible delegation of parliamentary legislative power. While the judges of the High Court refused to strike down the provision on this ground, some of them indulged in what might fairly be characterized as "uncomplimentary dicta" about the wide discretion in this provision. For example, Windeyer J., while holding that the provision did not on the whole go beyond constitutional validity, thought it "very close to the boundary, and that it would be questionable as a precedent for legislation of a similar character."[29] Barwick C.J. castigated it as a "*legislative* discretion" and said that it gave the Commissioner "a wider charter which it might have been thought he was ill-equipped to exercise"[30] and that it delegated a function of the legislature to an official. He did not explain why the Court was any better qualified to exercise a *legislative* prerogative.

The taxpayer made two related submissions. He argued that section 99A did not amount to a law with respect to taxation within the meaning of section 51(ii) of the Constitution because it prescribed no rule at all. It amounted, he said, to an unchallengeable or uncontestable tax. In the process of rejecting these submissions, the High Court foreshadowed the strategy for controlling discretions of the type delegated in section 99A. The reasoning went as follows:

(a) Barwick C.J. indulged in an uncharacteristic flirtation with the substance concept. In a quite inexplicable shunning of the elegant *Duke of Westminster* doctrine,[31] which requires formalism in tax cases, he observed that while "as a matter of verbiage" the penal tax was *prima facie* imposed on all accumulations,

subject to a dispensing discretion, he was "not prepared to treat the section [99A] in isolation from section 99 and to give literal effect to what after all is not much more than a draftsman's device".[32] While this analysis supports this general approach, it does make one wonder how the Chief Justice could consistently scorn a similar approach against paper schemes in cases like *Curran* v. *F.C.T.*[33] or *Cridland* v. *F.C.T.*[34]

(b) The Commissioner was under a duty to sit down and form an opinion whether it was unreasonable for the penal rate in section 99A to apply.

(c) The Court could decide whether:

- He did hold the opinion;
- Whether it was formed "arbitrarily or fancifully";
- Whether it was formed upon facts or considerations which could not be regarded by any court as relevant; and
- Whether it was unreasonable to apply the taxing provision to a particular taxpayer.[35]

(d) The Court, according to Windeyer J., could insist that the Commissioner was "guided and controlled by the policy and purpose of the enactment, so far as that is manifest in it".

The important inference to draw from the reasoning in *Giris,* rejecting the argument that section 99A was "an unchallengeable tax", was the insistence by the Judges that the *Court* could examine the reasonableness of the Commissioner's opinion and scrutinise in detail the reasons for it. Windeyer J. articulated it most clearly when he held that:

> the Commissioner's decision is not removed entirely from examination by the Court, because I think that he could be asked by a taxpayer to state the grounds of his opinion; and if asked, that he should do so. The case would then be one in which, within limits, it would be appropriate to remember Coke's statement — 'and so it is of reasonable fines, customs and services... for *reasonableness in these cases belongeth to the knowledge of the law* and therefore to be decided by the justices...'.[36]

The Court, said Barwick C.J.,[37] is not without the means of obtaining the factual basis upon which the Commissioner had formed his opinion. When examined more closely, the argument that there is an "unchallengeable tax" is no more than a euphemism for the assertion that the Courts should not allow the legislature to diminish their jurisdiction by reposing final decision in the bureaucracy. While rejecting this argument, the Judges in *Giris* make it clear that they will not allow judicial jurisdiction to be excluded by such devices. Such jurisdiction can be asserted by requiring articulation of the grounds for exercising discretions and controlling the articulated basis on which the Commissioner's bureaucracy makes its decisions. Both Kitto and Owen J.J. give the "unchallengeable tax" argument short shrift. Kitto J.J. rejected the argument that a tax could be described as uncontestable or unchallengeable merely because the liability of the taxpayer depended on the opinion of the Commissioner and the grounds of that opinion were not necessarily ascertainable and for that reason were not, from a purely practical view, always susceptible to challenge.[38] Owen J. took a very similar line and added that a tax does not become "an uncontestable tax" merely because the person assessed is unable to

produce the evidence necessary to reverse the opinion of the Commissioner on which the liability depends.[39]

The final part of the saga to bring the wide discretion in section 99A to heel is contained in the decision of Stephen J. in *Duggan* v. *F.C.T.*[40] In this case we find the Commissioner, as a result of the decision in *Giris* and earlier authority, articulating the basis of his exercise of the partially structured discretion to refuse to apply the penal rate of tax in section 99A. We see the Judge, Stephen J., closely examine the basis on which the Commissioner purports to exercise that discretion and boldly strike down that exercise of the discretion because there was an error of *fact:* In other words, Stephen J. displays no timorousness in asserting jurisdiction to quash decisions of fact which lie within the discretion of the Commissioner's bureaucracy. The way is then open for the judiciary to lay down, as a matter of law, the guidelines which ought to be taken into account.

In *Duggan* the settlor created 16 settlements in favour of each of his 16 grandchildren. The taxpayers were the trustees of these trusts. In the three trusts before the Court, the trustees were assessed at the then "penal" tax rate 50%. In his letter of reply to the taxpayer's objection the Commissioner stated three grounds for his refusal to hold that the penal rate did not apply: the declaration of discriminatory dividends by the private companies in which the trusts hold shares; the existence of loans by parents of the beneficiaries to the respective private companies in which the trusts hold shares and the subsidiaries of these companies; and the powers and the articles of association of the private companies in which the trusts hold shares to issue shares with variable dividend rights and conferring upon the governing directors right to compulsorily acquire shares of the members in consideration of payment of a sum equal to the amount paid up on the shares. Stephen J. held that these grounds contained errors of fact which were so fundamental as to vitiate the opinion of the Commissioner. He struck out the grounds and remitted the matter to the Commissioner to make further assessments. The basis of the learned Judge's holding that there was an error of fact can be fairly characterized as "legalistic". On the first ground, there were four classes of shares and no dividends were declared on A class shares which had voting rights but, from the date of allotment, no rights to dividends. It was held that on no fair meaning could this be described as a "discriminatory dividend". While the Commissioner's delegate clearly used loose language, it is obvious that he meant that the existence of different rights to dividends was a potential source of tax avoidance. On the second ground it was held that no loans were made to the relevant private company. What occurred was that, instead of demanding prompt payment of the purchase price of certain shares, much of that purchase price was permitted to remain outstanding. Again, while loosely expressed, the gist of the Commissioner's delegate's meaning is clear. The third ground turned on a loose use of the term "subsidiaries" to refer to one member of a group of companies. While disclaiming the jurisdiction of the Court to determine for itself whether or not it was unreasonable that section 99A should be applied, the Court was quite willing to hold that the Commissioner formed his opinion upon a mistaken view of relevant facts and relied on *Giris* to reject the argument that, upon the vitiation of the Commissioner's discretion,

section 99A was left to operate upon the accumulated income of the trust estate. In *Duggan,* since the challenge to the basis of the exercise of this partially structured discretion depended on technicalities, upon reversal the Commissioner's bureaucracy could repair the defect and re-assert its jurisdiction through the subjective wording in the terms of the statutory delegation. But this decision supplies the basis on which the courts (or certainly a Board of Review) can construct criteria for the valid exercise of the discretion based on the purpose of the authorizing legislation. That the Courts have not gone further in this direction is probably due to cost factors in getting matters to court and the fact that there has been no need to test discretions because more obvious ways were generally available for circumventing anti-avoidance provisions. As the more obvious loopholes are closed and the new section 177 makes more blatant paper schemes less readily available, it is likely we will see a more concerted testing of the demarcation of the power of the courts and bureaucracy in this area. In particular, and contrary to the insistence of Stephen J. that the court has no ability to substitute its own exercise of discretion for that of the Commissioner or his delegate, other authority gives some basis for supposing that the courts will assert this jurisdiction.

VI. JUDICIAL INFERENCES ABOUT THE PURPOSE OF AN ENACTMENT AS A BASIS FOR CONSTRAINING DISCRETION

The most potent weapon for constraining the exercise by the Commissioner's bureaucracy of a subjective discretion, is to construe criteria from the authorizing legislation. The court uses its own judicial inferences about the purpose of the particular provision based on its interpretation of the general words of the provision and its context in the whole of the Act. It uses this as a basis for striking down particular exercises of anti-avoidance discretions or to transform permissively expressed discretions into mandatory requirements. Over a period of time it develops comprehensive guidelines to structure and to control the exercise of subjectively phrased discretions.

This device was used in *Stocks and Holdings (Constructors) Pty Ltd* v. *F.C.T.*[41] to strike down the exercise of the very wide discretion in section 103A(5) to deem a private company to be a public company. This was an unusual case. The very wide dispensing discretion in section 103A(5), a partially structured discretion, was granted to enable the Commissioner to dispense with the stringent tests for the attainment of public company status in the other provisions of section 103A. In this particular case however, the company did not have an undistributed profits problem or a rebate problem but was attempting to avoid the then higher rates of tax on public companies. The Commissioner, however, purported to exercise this wide dispensing discretion so that the higher rates of primary tax were applicable to the company. The Full High Court would have none of it. They contrasted the wide dispensing provisions of section 103A(5) with the more circumscribed provisions of section 103A(6). Despite the phrasing of the discretion in general terms, the Court held that the wide provisions of section 103A(5) were only available to the Commissioner to dispense with the onerous operation of the earlier provisions of section 103A. Stephen J., delivering a judgment in which the rest of the High Court

concurred, held[42] that it was not open to the Commissioner to exercise this power to increase the rate of primary tax. It followed that, despite the widely phrased subjective discretion, the Commissioner's opinion was not properly formed as a matter of law. The legislature in 1973 legislated to neutralize the effect of this decision with section 103(5A).

VII. INFORMATION AS A BASIS FOR CHALLENGING THE EXERCISE OF ANTI-AVOIDANCE DISCRETIONS

To bring an effective challenge to the exercise of a subjectively phrased discretion the taxpayer usually needs effective access to the information on which the exercise of the discretion was based. If the taxpayer can get access to the facts relied on by the tax official, the inferences drawn from those facts and his reasons for the decision, he has gained the basic material, as *Duggan* shows, on which he can base arguments about errors of law or errors of fact. In demonstrating such error, or more accurately to allow the court some basis on which it can, if it so chooses, assert jurisdiction, the taxpayer must rely on the information before the official at the time he exercised his statutory discretion.

Of course, the Commissioner is bound to supply to a Board of Review the reasons for disallowing the claim under Regulation 35 of the Income Tax Regulations. But the reasons communicated to a Board of Review under this provision are often brief and *pro forma* and do not communicate any real information on which the taxpayer can base a challenge. In *R* v. *Cain; Ex parte Evatt*[43] a taxpayer's attempt to lever out further information about the steps in the tax official's reasoning failed. The prerogative writ of *mandamus* was refused by a Full High Court on the basis that the formal document communicated to the Board fulfilled the Commissioner's duty under the regulation. Regulation 39(2), requiring persons (including officials of the Commissioner's bureaucracy), to "furnish the Board with such information as, in the opinion of the chairman, is necessary for the purpose of review" may be a source of information.

The most fruitful source of information is likely to be the calling and cross-examination of Commissioner's officials[44] and, in the case of matters which come to court, the normal judicial procedure for gathering information such as discovery and interrogatories. It will on some limited occasions be possible for the taxpayer to avail himself of the wide powers to gain information from the far-reaching provisions in the new administrative law package such as section 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth); section 8 of the Administrative Law Act 1978 (Vic.); section 27 of the Administrative Appeals Tribunal Act 1975 (Cth); and possibly under the recently introduced Freedom of Information Act 1981 (Cth).

The Full High Court in *Bailey* v. *F.C.T.*[45] re-asserted in the widest terms the power of the court to order the disclosure of particulars necessary to the proper conduct of litigation. Aickin J. delivered a fully reasoned judgment in which the other members of the High Court concurred. He asserted that the inherent jurisdiction of the Court clearly went to discretions which would otherwise be unchallengeable unless the Commissioner gave the basis of the fact on which he

relied. But the jurisdiction extended to the general proposition that, when particulars are necessary to the proper conduct of litigation, they will be ordered so that the issues may be clearly defined in evidence led and arguments advanced directed to those issues.[46]

Barwick C.J., went further with assertions of a duty on the Commissioner of specific identification and disclosure of the aspects of facts on which he relies for the operation of the particular statutory provision.[47] Mason J. specifically rejected an argument that the Commissioner "should be accorded some special immunity from particulars on the ground that to expose him to an order for particulars would in some undefined way prejudice or inhibit the collection of revenue".[48] Aikin J. reserved to the Court the discretion to "decide in each case whether particulars should be ordered".[49] It is the duty of the Commissioner to supply to the taxpayer the result of the exercise of discretion including the opinions where required, the facts the Commissioner has taken into account in reaching his conclusion and, possibly, the grounds for his opinion, if we rely on the assertions by Barwick C.J., and Windeyer J. in *Giris.*

VIII. APPEAL UNDER THE SUBSTANTIAL EVIDENCE RULE

While most attacks on the exercise of anti-avoidance discretions will rely on errors of law or errors of fact on the face of the Commissioner's reasoning, an appeal is available without such demonstrated errors. A version of the substantial evidence rule used for appeals from inferior to superior courts was articulated in the context of tax discretions by Dixon J. in *Avon Downs Pty Ltd* v. *F.C.T.*[50]

> Moreover, the fact that [the Commissioner] has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. 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. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

While the second sentence of this formulation is not particularly wide, the latter part gives the Court the basis for a full appeal and rehearing of the grounds on which the discretion was exercised. This wide assertion of the substantial evidence rule belies the earlier lip service to the Commissioner's discretion. The defence proposed by such a rule really goes no further than that accorded by any superior organ in a hierarchical organisation to organs lower in the same hierarchy. No superior court, or any bureaucrat higher in an organisational hierarchy, will want to interfere with decisions unless they are manifestly wrong. To do so is to risk rehearing every single case and to make the lower levels of the hierarchy redundant. The inference is clear. The appeal power in the Income Tax Assessment Act 1936 (Cth) means what it says. The criteria in *Avon Downs* provides the judiciary with the

basis on which to assert a posture over the Commissioner's bureaucracy, which is little removed from the position in relation to their own inferior courts, and, if *Krew* is to be taken seriously, even more dominant.

Reference should also be made to the test based on the material that was before the Commissioner. If the taxpayer can produce evidence to show, for example, that the Commissioner or some official higher in the hierarchy reversed a finding of a lower official without any evidence there may be a basis for interference. Such a basis of interference is asserted by Lord Denning in *Coleen Properties Ltd* v. *Minister of Housing & Local Government*[51] where the English Court of Appeal asserted jurisdiction to quash a Minister's decision to reverse an inspector's finding of fact because there was no evidence before the Minister to justify the reversal.

In *F.C.T.* v. *Brian Hatch Timber Co. (Sales) Pty Ltd*[52] the Full High Court refused to interfere with the exercise of the Commissioner's discretion in a case on past year losses. The case is an unusual one because the taxpayer deliberately chose not to obtain further information from the Commissioner. There was more evidence before the Court at the date of hearing on the merits but the Court refused to speculate about the factors which moved the Commissioner to exercise his discretion. Menzies J. thought that it was unnecessary to arrive at any conclusion about the effect of the evidence because the evidence was only imported insofar as it bore upon the question whether the Commissioner had failed to exercise his discretion properly.[53] Owen J., with whom Windeyer J. concurred, seemed to go further and support the Commissioner's exercise of discretion on the merits.[54] Thus, the decision does not go very far, but if any useful inferences can be drawn it might be that the Court will not be sympathetic to the exercise of the substantial evidence rule if the taxpayer has not made all reasonable efforts to discover the basis for the Commissioner's exercise of the discretion.

The practical implications are clear. The taxpayer will have the best chance of success if he can get the official to articulate the fullest reasons and inferences from the facts as a basis for appeal. Given the Court's sympathy to attempt to curb wide anti-avoidance discretions, particularly if it is willing to pick carefully over the reasons of the official, or is hostile to the particular exercise of the discretion because it was based solely on suggestions of tax avoidance objectives, there may be some basis for quashing it. Error or fact or law can be construed if the official can be "flushed out" on the face of the record. But if the taxpayer has tried to get the reasoning of the official on the record and failed the court may be prepared to invoke the substantial evidence rule and apply literally the wide words of section 187(b) ("treat his objection as an appeal to the...Court") or section 196 ("appeal to the...Court from any decision of the Board that involves a question of law"). Read literally, both provide a wide basis for exercise of judicial control over the Commissioner's discretions.

IX. JUDICIAL EXERCISE OF SUBJECTIVE DISCRETIONS

The most difficult outstanding question is whether and to what extent the courts will substitute their own exercise of the Commissioner's anti-avoidance discretions after striking down the exercise of the power. The accepted view, based on the

constitutional separation of powers doctrine and on the authority of *MacCormick* v. *F.C.T.*[55] and the cases cited therein, is that the courts will not exercise a discretion reposed by the legislature in the Commissioner. When error is disclosed in the exercise of discretion, the court will strike out the decision and remit it to the bureaucracy for reconsideration. But the words of section 199 of the Act give the court hearing an appeal direct from the Commissioner the widest power "to make such order as it sees fit". "The court may by such order confirm, reduce, *increase,* or vary the assessments." Powers on appeal from the Board of Review under section 196 *appear* to be more limited because the appeal lies from a decision "that involves a question of law", but such appeals by way of rehearing appear to give the court scope which is almost as wide as that of the direct appeal. The "question of law" qualification does not limit the Court to considering questions of law, provided the case appealed from raises such questions. The constraints imposed on the courts are self-denying ordinances based on constitutional limitations or case law. Recent decisions appear to have tested this conventional wisdom to its limits.

Kolotex Hosiery (Australia) Ltd v. *F.C.T.*[56] is an unusual authority from which to draw the proposition that the court can substitute its own exercise of a discretion for that of the Commissioner. In that case the Full High Court found a clear error in the initial exercise of the Commissioner's discretion but in the course of forming its own opinion and ultimately upholding the Commissioner's exercise of discretion the Court admitted evidence subsequent to that exercise. The Commissioner was killed with kindness! While assisting him to correct a manifest error the Court created a far-reaching precedent. While it is true that the decision can be distinguished for the reason that the Commissioner himself was prepared to exercise the discretion according to the new criteria, it certainly represents the exercise of a discretion by the courts. The *Kolotex* decision involved a complex transaction dealing with the sale of a loss company. The Commissioner originally formed the opinion that he was not satisfied about a continuity of beneficial ownership but in the formation of that opinion there were clear mistakes of law. For that reason it was held that the Commissioner's delegate did not reach the requisite degree of satisfaction under the past year loss provisions. Gibbs J., with Stephen J., concurring on this point and Barwick C.J. dissenting, asserted the jurisdiction to consider the exercise of the discretion on the basis of further material before the Court. He held that:

> Once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available.[57]

Barwick C.J. on the other hand, relied on the "objective attitude" of the Commissioner. He said:

> Where his lack of satisfaction has material upon which it may properly be based and is not arrived at through error of law, the Court as well as the taxpayer will be bound by his conclusion.[58]

It is the Commissioner's state of mind at the point of assessment which is determinative and where the Commissioner has in fact been satisfied he may not resile from his exercise of discretion. The Commissioner is bound by his own subjective conclusion. This is, in effect, estoppel by exercise of statutory duty. Stephen J. held that the Court must form its own opinion of what should have been the Commissioner's conclusion and the Court would do so, not because it would support the Commissioner's already vitiated state of dissatisfaction "but rather because they may assist the *Court* in determining whether a contrary conclusion should be *substituted* for the Commissioner's original failure to be satisfied".[59] While it is true that this reasoning appears in a case in which the Commissioner would, but for the errors, have been satisfied and in which the Court, on subsequent evidence, nevertheless upheld the validity of such dissatisfaction, the dicta does assert the right of the Court to exercise a statutory discretion.

The high-water mark of judicial intervention is *Finance Facilities* v. *F.C.T.*[60] The Full High Court ordered the exercise of a partially structured discretion when the Commissioner conceded that he was satisfied as to one of the criteria on which the exercise of the discretion depended. Under section 46 of the Act, in the normal case, private companies are granted only a half rebate for inter-group dividends. Section 46(3) provides that the Commissioner *may* allow a further rebate if *he* is satisfied that dividends would not be paid by the shareholder company *or* by its shareholder or if he is satisfied that "having regard to all the circumstances, it would be reasonable to allow the further rebate". It was held, that upon the Commissioner conceding that he was satisfied that dividends would not be paid, he was obliged to allow the further rebate even though his partially structured discretion was expressly subject to the catch-all condition at the end and even though this was an alternative basis on which he could exercise his discretion. Windeyer J., in the leading judgment, reasoned that the power must be exercised "having regard to the policy and purpose of the statute" and not to promote "some end foreign to that policy and purpose".[61] On this basis he imposed an obligation to exercise this permissively expressed discretion. Thus the Commissioner could not exercise his discretion to disallow a tax avoidance scheme, even though the discretion was reposed in him and even though wide criteria were spelt out in section 46(3)(c), in all probability for this very purpose. Barwick C.J. concurred in the judgment of Windeyer J., Owen J. wrote a separate concurring opinion and McTiernan J. dissented. Windeyer J. read down the permissive word "may" granting the Commissioner's discretion by reference "to the policy and purpose of the statute referring the authority and the duties of the officer to whom it was given".[62] For this reason he did not think much could be built upon the subjective language and that, on the Commissioner conceding he was in fact satisfied no dividends would be paid, he was *bound* to exercise the power to grant the extra rebate to the private company. Nowhere does the learned judge squarely consider the problem that the Court may be prohibited through constitutional limitation or previous authority, from exercising the Commissioner's discretion in this way. The judicial finding that "may" would be read as "shall" can hardly be an adequate escape from the dilemma. On this basis any court could circumvent constitutional limitations.

X. CONSTITUTIONAL LIMITATIONS ON JUDICIAL EXERCISE OF ADMINISTRATIVE DISCRETIONS

The Act gives a clear right of appeal and the courts have in these limited examples asserted the right to substitute their opinion for that of the Commissioner. It might be reasonable to enquire on what basis the courts purport to exercise this administrative discretion. After all, the courts imposed a self-denying constitutional restriction on themselves in the famous *Boilermaker's* case[63] in holding that non-judicial functions could not be vested in federal courts. But we have seen that this self-denying ordinance is honoured in the breach as well as the observance. Professor Sawer says that such jurisdictional creep is facilitated by a process of what he calls "severing":

> the Court will readily treat as open for its consideration only the aspects of the administrative decision which are governed by reasonably determinate criteria, and so *make* [my emphasis] the 'appeal' constitutional.[64]

Professor Sawer concedes some circularity and a problem of epistemology, which is a polite way of saying that it does not make sense, but thinks the test the "best available". It might be perfectly understandable that the judiciary should insist that properly constituted courts maintain a monopoly on judicial functions and, correlatively, refuse to dilute judicial legitimacy by lending their name to day to day administration. But the test of whether a dispute is capable of being reduced to "reasonably determinate criteria", while it might provide a basis for first refusal by the judiciary to step into disputes which are not justiciable, hardly provides a principled basis for critical questions about the demarcation of functions between the judiciary and the executive. These two arms of the polity are the only institutions with real clout in an age of party discipline and big complex government. It is the *executive* who would want clear articulation and habitual recourse to a clearly defined line. After all, the vast majority of executive functions are, no less than judicial rules, capable of being, and typically are, exercised according to "reasonably determinate criteria". Large bureaucracies could function in no other way. Thus the judiciary, while locking others out of "judicial" functions, are free to encroach on executive prerogatives and more specifically, executive discretions, on the basis of their *own* finding that it is "judicial" (read: "is governed by reasonably determinate criteria"). A far better test would be one built on comparative expertise or on a fair attempt to discover, from the legislation, in whom the legislature intended to repose jurisdiction. Perhaps, in all honesty, it is going beyond human comprehension to expect any institution with effective power to maintain a self-denying ordinance in the long run solely on the basis of an abstract conception of division of power and a sense of public duty. The inevitable exigencies demanded by the exercise of power might demand some institutional restraint. One consequential point is that since the characterisation of a dispute as "judicial" turns on whether there are determinate criteria, if the legislation articulates such criteria in fully or partly structured discretions then, even though the discretion is reposed in the Commissioner and his lawful delegates, it is judicially controllable. But as *Avon Downs* shows the courts can also infer criteria from construction of the whole authorizing legislation.

XI. TAX AVOIDANCE PURPOSES AS THE BASIS FOR EXERCISE OF DISCRETION

Windeyer J. in *Finance Facilities* berated the Commissioner for exercising his widely phrased discretion against the taxpayer because the taxpayer was a participant in a tax avoidance scheme. Windeyer J. said:

> But that a taxpayer company is able to avoid a liability which if the law or the facts were different it would incur, cannot be a ground for denying it a rebate that the Commissioner, being satisfied of the relevant facts for allowing it, is empowered to allow. I can well understand that *Gibbs J.* described the arrangement in which the appellant played a part as an artifice. It was an ingenious and elaborate expedient to avoid taxation. But it was not dishonest. Its legal character was not disguised or recondite. Having regard to recent decisions of this Court, it cannot be said that a taxpayer company by availing itself of a choice that the law allows puts itself within the reach of section 260.[65]

Here Windeyer J. is merely extending the choice principle to an area in which jurisdiction is reposed in the Commissioner. The operation of the choice principle as a blanket defence to tax avoidance is a matter of some controversy.[66] The learned judge has simply extrapolated his reasoning, without any articulated justification, into an area falling within the Commissioner's jurisdiction. It is reasonable to suppose that in granting the wide discretion reposed in the Commissioner by section 46(3)(c) the legislature had tax avoidance transactions in mind. The prevention of various schemes using pipelines of companies and variants of this device would seem to be the whole point of disallowing the full rebate in section 46. Certainly the reasoning does nothing to help demarcate in any principled way the function of the judiciary and the bureaucracy and makes no attempt to explain how the choice principle can be transplanted into such foreign soil. It is difficult to reconcile this reasoning with the general approach of Windeyer J. in *Giris,* where he said of the Commissioner's discretion under section 99A and the purpose for which it could be exercised:

> That purpose I take it is to enable the Commissioner to keep s.99A as an instrument to prevent avoidance of taxation by the medium of trusts, but not to use it when to do so would seem to *him* not in accordance with that purpose.[67]

The latter view is consistent with the general approach of Stephen J. to the section 99A problem in *Perron* v. *F.C.T.*[68] But the former accords with the view of Barwick C.J. in *F.C.T.* v. *Brian Hatch Timber Co. (Sales) Pty Ltd* where he said:

> it is not for the Commissioner to entertain dissatisfaction in cases of this kind merely because the taxpayer has sought to produce a state of facts which when they exist entitle him under the statute to benefit in the assessment of income tax. The taxpayer is quite entitled to create such a state of affairs if he can. It is not for the Commissioner because he might regard the use of the statutory provision in that fashion as detrimental to the interests of the revenue to show his disapproval in any manner whatsoever.[69]

While that may be the judicial view, the Commissioner may form a different view having regard to the jurisdiction reposed in him. It is difficult to see how it can be argued that such a difference in political philosophy can be elevated into an issue of

law to justify the intervention of the judiciary into executive prerogatives. Indeed, in the case of many of the anti-avoidance discretions and given public pronouncements by generations of Treasurers that the Government wishes to crack down on artificial avoidance, any reasonable man can infer a legislative intention to attack artificial tax avoidance schemes. It would be ironic if the guardians of the rule of law, the law courts of Australia, were *seen* to be frustrating the manifest intentions of a "supreme" legislature by tolerating the mobilisation of legalistic construction artifices. While a taxpayer *is* entitled to organise his affairs so that he pays less tax, it does *not* follow that extremely artificial arrangements for such purposes cannot be the subject of legislative attack or the basis for the exercise of properly conferred executive discretions.

Judicial intervention is difficult to explain in such circumstances if the jurisdiction to decide is reposed by the legislature in an executive agency. In such a situation, it is not necessary that the judiciary actually exercise its power very often. The mere *ability* to do so should make decision-making in the Commissioner's bureaucracy subservient to judicial norms and to idiosyncratic values, such as those articulated above.

XII. CONCLUSION

Generations of lawyers have been raised on an ideology which contrasts the "uncertain and crooked cord of discretion" with the "golden and streight metwand of the law".[70] Adam Smith is invariably invoked to assert the need for certainty in taxing statutes as the white knight to rescue us from black and arbitrary executive powers. But such sweeping rhetoric can blunt our perception of the issues in the many and varied situations in which the judiciary are asked to override decisions of the executive bureaucracy. The polarisation can so easily paper over the real dilemmas. That bureaucrats are powerful when they exercise discretions is an undoubted fact. That they are human and need checking and controlling by their democratically responsible "masters" is beyond dispute. Few would quarrel with the need to structure wide discretions, to provide guidelines and some semblence of certainty to the taxpayer engaged in normal commercial and personal decisions. But to contrast "The Law" as a set of disembodied objective principles is a mischievous half-truth. If we must generalise, a far fairer generalisation would recognise that law *too,* certainly when one gets to contentious areas like tax avoidance, is government by men as much as government by rules. Both judges and bureaucrats do and must use rules to maintain consistency and order in their rule-governed spheres of power. But as any serious analyst of law knows, in the application of statutes or the illusive concept of the binding rule from previous judicial authority, judges, just like bureaucrats, exercise considerable freedom of choice in the process of translating statutory words of ambiguous connotation into operational decisions. The words of statutes, within parameters, delegate important decision-making functions to judges or bureaucrats. If any one doubts this truism, compare the judicial *imprimatur* given to the paper tax avoidance scheme of the majority in *Curran* v. *F.C.T.*[71] with the fully reasoned and articulate dissent of Stephen J., or the vastly different approaches to fundamentally similar dividend-stripping schemes by the Privy

Council in *F.C.T.* v. *Newton*[72] and the High Court, "bound" by that decision in the absence of an over ruling, in *Patcorp Investments Ltd* v. *F.C.T.*[73] To apply the line of the eminent Oxford legal philosopher Ronald Dworkin, judges exercise discretion whenever words are used in a statute which are reasonably capable of more than one interpretation or where there is no higher court to tell a court that its construction of statutory words is wrong or where the court, particularly in complex areas like tax, can choose from two or more lines of authority to justify different conclusions.[74] One need only look at the wide concept of income in section 25 or the open-ended formula defining the deductibility of expenditures in section 51 to appreciate how wide judicial discretions can be.

What lessons can we learn from our immediate past experience with anti-avoidance provisions? Contrived paper schemes without any serious commercial or family justification were allowed to succeed. The High Court conducted a highly public assault on the old section 260 with variants of the choice principle and the antecedent transaction doctrine. Some members of the profession are still rashly encouraging a frontal attack on the new general anti-avoidance provisions and on the new section 15AA of the Acts Interpretation Act 1901 (Cth). Newspaper reporters, not privy to our universe of artificial legal subtleties, have publicly berated the profession and the courts for lending their *imprimatur* to schemes whose only serious justification was a doctrine of legalism pushed to its limits. Lawyers committed their main fire power, their operational ideology of legalism, to a battle in which it was highly vulnerable to a flanking manoeuvre. This built up a coalition of support for a vigorous counter-attack against both paper tax schemes and, more significantly, against conventional tax planning with devices such as trusts.

Use of bureaucratic discretions for anti-avoidance purposes can be seen as a move in the battle between two competing bureaucracies for the critical power over decision-making in the contentious gladiatorial arena where we decide who picks up what share of the tax burden. When the legal bureaucracy (by which I mean the whole organisation of legal and accounting advisers topped by the courts) was pushed into an untenable forward position by their clients seeking to avoid tax with transparently legalistic paper schemes, they overran their public support and left a power vacuum. Prompted by the public back-lash and a serious haemorrhage of revenue (the real loss ran much higher than the carefully described derisory amounts in the $100 millions conceded in the press), the Treasurer was persuaded to step into the vacuum with Commissioner's discretions. But as we have seen, in the tax arena the courts have developed one of the most formidable array of devices to control bureaucratic discretion known to the law and this gives the judiciary considerable control over the Commissioner's anti-avoidance discretions. This control will now be mobilised by taxpayers both against specific anti-avoidance provisions and against aspects of the new general anti-avoidance package in Part IVA. One can assume that is the end of the beginning, not the beginning of the end of the demarcation dispute.

Let us suppose that there is one hypothetical observer left in Australia, naively believing in a fair distribution of the tax burden and believing that a degree of mutual forbearance, if not reciprocity, is necessary if Australian society is to remain a stable and pleasant place to live in the midst of unprecedented technological and

social change. Suppose that such a person was seriously interested in developing a process which, on the one hand, avoided the abyss of uncontrolled discretions exercised *ad hoc* by faceless tax officials without fully reasoned opinions or effective public accountability but which, on the other hand, avoided pedantic legalism which created great non-accountable *judicial* discretion and made our tax system vulnerable to the exploitation by promoters of artificial paper tax avoidance schemes. How would she react? The key would be an understanding of exactly what we can do with rules and what properly must be done by discretion. The key is to understand what functions should be delegated and which of these should be exercised by courts and which functions would better be exercised by specialist boards of review. It would lie in a proper appreciation of what guidelines should be set out in legislation and the optimum (as opposed to maximum) degree of articulation. It would lie in developing procedures for public articulation of more detailed rules with openness and participation by the public in formulating them. At all stages such a strategy would optimise, rather than maximise, the use of impersonal rules to structure and to control bureaucratic discretions in the tax system and keep a firm balance between control by parliament and delegation to expert decision-makers. A central thread of such a strategy would be the establishment of effective procedures and institutions for the development of satisfactory tax avoidance guidelines. More specifically, the strategy would charge boards of review to be more active in articulating guidelines to structure discretions and more clearly identify the function of courts. In the course of adjudicating specific problems, boards would overtly monitor the internal rules in the Commissioner's bureaucracy controlling the exercise of discretions so as to ensure that they are consistent with the terms of the Act and would, applying the important recent Federal Court decision in *Drake* v. *Minister of Immigration,*[75] specifically examine internal rules in the bureaucracy and adjudicate on the *merits* of policies developed within the tax bureaucracy in exercise of anti-avoidance discretions. They would consciously set about articulating internal guidelines to structure discretions and create consistency in the exercise of discretions. The boards would develop a framework of articulated economic and distributional criteria so we can break out of the closed rule models which have plagued decision-making. The strategy might also require the development of an adequately funded, high-ranking unit, possibly with a connection to the existing policy unit of the central office of the Commissioner, staffed with a multi-disciplinary team of first class lawyers, accountants and economists with high standards of professionalism and a degree of autonomy. Such a team would monitor court decisions, which, after all, purport to do no more than apply the words of the Act and recommend on-going reforms according to articulated administrative, economic and horizontal equity criteria. It might also be used to conduct public hearings in order to articulate guidelines for the structuring of discretions and rules within the Commissioner's bureaucracy. But, above all, it would stimulate continuing critical assessment of the operation of a very important piece of legislation, the Income Tax Assessment Act 1936 (Cth).

FOOTNOTES

1. (1981) 55 A.L.J.R. 434; 81 A.T.C. 4292.
2. K. W. Ryan, "Curbing the Commissioner's Discretionary Powers" (1979) 1 *Tax Essays* 1.
3. See s.13 Income Tax Assessment Act 1936 (Cth) and s.8 Taxation Administration Act 1953 (Cth).
4. Administrative Appeals Tribunal Act 1975 (Cth).
5. Administrative Decisions (Judicial Review) Act 1977 (Cth).
6. Administrative Law Act 1978 (Vic).
7. (1979) 79 A.T.C. 4081.
8. [1911] 1 K.B.410.
9. (1981) 55 A.L.J.R. 451; 81 A.T.C. 4280.
10. (1949) 78 C.L.R. 353, 360; 4 A.I.T.R. 195, 201-202.
11. *McCormack* v. *F.C.T.* (1979) 79 A.T.C. 4111.
12. *Krew* v. *F.C.T.* (1971) 71 A.T.C. 4213.
13. *Duggan* v. *F.C.T.* (1972) 129 C.L.R. 365; 72 A.T.C. 4239.
14. *Avon Downs Pty Ltd* v. *F.C.T.* note 10 *supra.*
15. (1977) 13 A.L.R. 1.
16. *Id.*, 12.
17. *F.C.T.* v. *Casuarina Pty Ltd* (1971) 127 C.L.R. 62.
18. Note 10 *supra.*
19. Note 12 *supra.*
20. *Id.*, 4215-4216.
21. *Id.*, 4216.
22. Note 11 *supra.*
23. Note 13 *supra,* 369; 4243.
24. *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; *Pearlman* v. *Keepers and Governors of Harrow School* [1978] 3 W.L.R. 736.
25. [1956] A.C. 14, 38.
26. *Id.*, 38-39.
27. (1980) 33 A.L.R. 276, 292; 80 A.T.C. 4588, 4600.
28. (1969) 119 C.L.R. 365; 69 A.T.C. 4015.
29. *Id.*, 385; 4024-4025.
30. *Id.*, 372; 4017 (emphasis added).
31. *Commissioners of Inland Revenue* v. *The Duke of Westminster* [1936] A.C. 1.
32. Note 28 *supra,* 372; 4017.
33. (1974) 131 C.L.R. 409; 74 A.T.C. 4296.
34. (1977) 16 A.L.R. 354; 77 A.T.C. 4538.
35. Note 28 *supra,* 374; 4018.
36. *Id.*, 384; 4024 (emphasis added).
37. *Id.*, 373; 4018.
38. *Id.*, 378-379; 4021.
39. *Id.*, 389; 4027.
40. Note 13 *supra.*
41. (1973) 129 C.L.R. 617; 73 A.T.C. 4053.
42. *Id.*, 627; 4058.
43. (1975) 133 C.L.R. 37; 75 A.T.C. 4254.
44. *F.C.T.* v. *Brian Hatch Timber Co. (Sales) Pty Ltd* (1972) 128 C.L.R. 28, 59-61; 72 A.T.C. 4001, 4012.
45. (1977) 136 C.L.R. 214; 77 A.T.C. 4096.
46. *Id.*, 229; 4104.
47. *Id.*, 217-218; 4098.
48. *Id.*, 220; 4099.
49. *Id.*, 232; 4106.
50. Note 10 *supra.*
51. [1971] 1 W.L.R. 433.
52. Note 44 *supra.*
53. *Id.*, 51; 4007.
54. *Id.*, 62; 4013.
55. (1945) 71 C.L.R. 283.
56. (1975) 75 A.T.C. 4028.
57. *Id.*, 4049.

58. *Id.*, 4031.
59. *Id.*, 4054.
60. (1971) 71 A.T.C. 4225.
61. *Id.*, 4229.
62. *Ibid.*
63. *Attorney-General (Cth)* v. *R, Ex parte Boilermakers Society* (1957) 95 C.L.R. 529; but see the more recent retreat in *R* v. *Joske* (1974) 130 C.L.R. 87, 90, 102; *R* v. *Joske* (1976) 135 C.L.R. 194, 201.
64. G. Sawer, *Australian Federalism in the Courts* (1967) 164.
65. Note 60 *supra,* 4229-4230.
66. See Y. Grbich, G. Munn and H. Reicher, *Modern Trusts and Taxation* (1978) 147.
67. Note 28 *supra,* 384; 4024 (emphasis added).
68. (1973) 128 C.L.R. 595; 72 A.T.C. 4169.
69. Note 44 *supra,* 46; 4003.
70. Note 31 *supra,* 19 *per* Lord Tomlin.
71. Note 33 *supra.*
72. (1957) 96 C.L.R. 578.
73. (1976) 76 A.T.C. 4225.
74. See R. H. Dworkin, "The Model of Rules" (1967) 35 *Uni. Chi. L. Rev.* 14.
75. (1979) 2 A.L.D. 60.