David Jones Finance: New Avenues of Collateral Attack

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The Full Federal Court in *David Jones Finance and Investments P/L v FCT*[1] - a decision from which the High Court has refused special leave to appeal - recognised that s 39B of the *Judiciary Act* 1903 (Cth) gives original jurisdiction to the Federal Court in respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; and that the proper exercise of that jurisdiction, the 'due making' of the assessment and the amount and all particulars thereof is open to inquiry. Accordingly, an assessment can be challenged by way of common law writ where it is made: for an improper or extraneous purpose; in bad faith; taking into account irrelevant considerations or failing to take into account relevant considerations; or unreasonably.

The purpose of this paper is to explore the potential scope of the decision which, it will be argued, is revolutionary. It will be submitted that it approaches the former Pt V (now Pt IVC) of the *Taxation Administration Act* 1953 (Cth) ('TAA') dispute regime from a fundamentally different hypothesis from any previous decision. This shift of reasoning takes away much of the force of authority which restricted litigation and opens up new avenues which have quite dramatic scope for use and abuse.

It is submitted that the decision has been underestimated (or rather unappreciated) by the profession. When viewed in the light of recent judgements - such as that of the Full Federal Court in *Lighthouse Philatelics P/L v FCT*[2] - one may suggest that the conduct of taxation disputes may become less biased in favour of the Commissioner.

Background

There has been concern among practitioners and taxpayers alike that the Commissioner of Taxation may commence proceedings to recover income tax where he or she has disallowed objections and they await hearing by the Administrative Appeals Tribunal or by a court. What has been of more concern are the limited grounds upon which

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1 (1991) 91 ATC 4,315 (hereafter *David Jones Finance*).

2 (1991) 91 ATC 4,942.

taxpayers can resist judgment notwithstanding the pendency of such a hearing.

Divisions 4 and 5 of Part IVC of the TAA are the basis of the Commissioner's warrant (and duty) to recover unpaid tax. Section 14ZZM and s 14ZZR provide that the fact that review or appeal is pending in relation to an assessment does not interfere with the Commissioner's recovery of taxation. Section 204 of the *Income Tax Assessment Act* 1936 (Cth) ('ITAA') provides that income tax is 'due and payable' by the taxpayer liable to pay the tax on the date specified in the notice of assessment, which cannot be less than 30 days after service of the notice. Income tax which is 'due and payable' is, by s 208, deemed to be a debt due to the Commonwealth. Under s 209, the Commissioner can recover 'unpaid tax' in an ordinary debt recovery action.

The mere production in recovery proceedings of notices of assessments were said to deprive the courts of jurisdiction to entertain proceedings for prerogative writs or declaratory relief. This emerged from the protective provisions of ITAA ss 175 and 177 and the High Court decision in *FJ Bloemen v Commissioner of Taxation.*[3]

Section 175 provides that the validity of an assessment will not be affected by procedural errors.

Section 177(1) has two limbs:

- The first limb deems that the production of the notice of assessment is conclusive evidence of its due making.
- The second limb deems that all particulars of the assessment are correct.

It is important to note that, in the first limb, the 'due making' cannot be questioned at all, while the second limb allows only challenge in Part IVC TAA proceedings.

Accordingly, as the Commissioner invokes the section by production of the assessment notice, the taxpayer is unable in recovery proceedings to put in issue either the validity of the assessment itself or the correctness of the amount claimed. The High Court in *Bloemen's* case ruled that a Supreme Court, upon production to it of the notice of assessment, was bound to rule the assessment was both duly made and that the amount and the particulars of the assessment were correct. The conclusiveness of the production of a document pursuant to s 177(1) was such that it was impossible (save for some narrow exceptions) for the taxpayer to challenge the assessment on any

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3 (1981) 147 CLR 360.

ground. This was so even if an assessment was issued by the Commissioner for a non-statutory or collateral purpose. It was only in proceeding under Part V of the ITAA (now PT IVC of the TAA) that a taxpayer could dispute its substantive liability to tax.

Against this background, it is of little surprise that the Commissioner formed the attitude put to the Federal Court in *David Jones Finance*, that no matter how many 'Al Capone Acts' - a term in vogue during the trial - were used, or how he or she assessed, or was motivated in assessing, the taxpayer had no right to seek to have those assessments reviewed other than by accepting the objections and appeals procedure in Part V of the ITAA - as long as that took. In the meantime the Commissioner could recover the tax unpaid in a State Court.

This effectively qualifies not only the jurisdiction of the Federal Court under s 39B of the *Judiciary Act*, but even s 75(v) of the Constitution itself. *David Jones* strikes a blow against this result.

The Facts of David Jones

David Jones and Adsteam held shares, through nominees, in other companies. Relying on what was assumed to be the practice of the Commissioner of Taxation for 30 years, the applicants returned the dividends as assessable income under section 44 of the ITAA and claimed a s 46 rebate. The practice of the Commissioner was to accept beneficial corporate owners as shareholders for s 46 rebates and not to insist on registration.[4] However, the Commissioner as part of the Adsteam Group Audit, sought to apply selectively the High Court decision in *Commissioner of Taxation v Patcorp Investments Ltd*[5] to disallow the rebate and amend the assessments for the years 1985 to 1988.

The appellants claimed the issue of the amended assessments was an abuse of power in that:

- it was a departure from the practice upon which they had relied;
- it denied a rebate allowed to other taxpayers in like circumstances; and
- it was motivated by the improper purpose of seeking to recoup tax which was in fact due by the nominee companies, which companies had since been dissolved after the issue by the

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4 This practice may have been departed from in Pt IVA of ITAA cases.

5 (1977) 140 CLR 247.

Commissioner of a s 215 notice indicating the absence of any relevant taxation liability.

Further, the appellants argued, the decision not to apply the practice was ultra vires s 8 of ITAA under which the Commissioner has the general duty to administer the Act but administer it fairly.

Accordingly, the applicants sought injunctions restraining proceedings for recovery, declarations of invalidity of the amended assessments, and damages.

Motion to Dismiss

On motion to dismiss, O'Loughlin J recognised that s 8 ITAA imposes on the Commissioner a duty to exercise statutory powers with 'procedural fairness'. His Honour also recognised that, based on developments in the law of 'procedural fairness',[6] there was a legitimate expectation of treatment consistent with practice, so that a departure from such practice give rise to reviewable error. However, on the authority of *Bloemen*, ss 175 and 177 make Part V of the ITAA (equally applicable to Pt IVC TAA) in the nature of a code that controls the rights of a taxpayer seeking to challenge the assessment. Accordingly, his Honour allowed the Commissioner's motion to strike out the action.

The Decision of the Court

The Full Court consisting of Morling and French JJ (who delivered a joint judgment) upheld the appeal, Pincus J dissenting. Section 39B of the *Judiciary Act*, which reflects the language of s 75(v) of the Constitution, gives original jurisdiction to the Federal Court in respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. In the proper exercise of that jurisdiction, the 'due making' of the assessment and the amount and all particulars thereof are open to inquiry.

The reasoning of the Court in reaching this conclusion involves two interactions of three issues. The issues are as follows:

1 The Constitutional Guarantee of Review

- Section 75(v) of the Constitution confers a jurisdiction upon the High Court which cannot be limited or qualified by any statute. That jurisdiction authorised the court to control excesses of power or failure of duty by officers of the Commonwealth.

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6 *R v IRC ex p Presion* [1985] 1 AC 835; *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 93 ALR 51.

- Section 39B of the *Judiciary Act* confers on the Federal Court the full amplitude of the original jurisdiction of the High Court under s 75(v). Therefore the interaction of s 39B with s 177 ITAA must be considered on the same footing as the interaction of s 75(v) of the Constitution with that provision.[7]

2 The Scope of the Limbs of Section 177(1) ITAA

A more subtle part of the judgment is the analysis that the court took of the limbs in s 177(1) ITAA. The court began by recognising that s 177 distinguishes between:

- Matters going to procedure or the mechanism by which the tax liability is ascertained or assessed. This is the first limb for which, upon the production of the notice of assessment, there is deemed to be conclusive evidence of the due making of the assessment.
- Matters going to the substantive liability to taxation. This is the second limb which deems all the particulars of the assessment to be correct although challenge is permitted through the Pt IVC process.

The subtlety lies in the circumstance that the judgment seems to narrow the scope of the first limb. Their Honours implied that Kitto J in *McAndrew v Federal Commissioner of Taxation*[8] incorrectly decided that the existence of an opinion on the part of the Commissioner that avoidance of tax was due to fraud or evasion was an issue of procedure.[9] They were in agreement with the 'policy' of the majority in *McAndrew* which they saw as taking a restrictive view of the first limb. Indeed, they held that '[t]he process of ascertaining *the existence of* such *a state of facts* is not in any real sense *part of the process* of making an assessment and this is the function to which the first limb of the sub-section is precisely adverted'.[10]

This is quite telling. It may have an immediate impact on the rather fine distinction drawn in *Eldridge v FCT*[11] in relation to default assessments under s 167 ITAA. There it was accepted that such an assessment may represent a 'fair amount of guesswork' but that the

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7 For statutes postdating the introduction of s 39B in 1983, there will be a powerful presumption, in the absence of clear words to the contrary, that no such displacement, qualification or limitation is intended.

8 (1956) 98 CLR 268.

9 *David Jones Finance* at 4,329.

10 Ibid, quoting Taylor J in *George v FCT* (1952) 86 CLR 183, emphasis added.

11 (1990) 21 ATR 897.

Commissioner cannot simply 'pluck figures out of the air or make an uninformed guess'. This issue would, according to the *David Jones Finance* categorisation, *not* fall within the procedural category.

Further, the court reveals that 'facts outside' the procedural category 'whose existence or non-existence conditions the statutory power underlying the assessment' are 'not protected from inquiry by the first limb of s 177(1) although they would be caught by the second.'[12] The significance of this will become apparent later, but at this point it should be pointed out that the second limb is broadened at the expense of the first limb. Accordingly, the court avoids collision with *George v FCT*[13] and *McAndrew*, using them instead in support of this reallocation: if the matter is not procedural it must be substantive. Critically, the court decided that allegations of bad faith and improper purpose are not procedural but substantive.[14]

3 Privative Clauses and the Constitution

The critical innovation of the majority is to recognise that s 177 is a privative clause, that is, a provision ousting judicial review. The court then turned to cases in the industrial relations field where the conflict between privative clauses and the Constitution has been considered.

There is a variety of ways of construing privative clauses which are in conflict with the Constitution. The most obvious is to read them as directly displacing s 75(v); there is, indeed, a strong line of authority which has read clauses which expressly take away review as amounting to a direct displacement.[15]

Some judges have gone further and *suggested* that privative clauses violate s 75(v) and *may* be unconstitutional.[16] Other judges have gone further still and said such clauses are invalid in part.[17]

David Jones Finance is the first case which has dealt squarely with the issue and held that 'jurisdictional' privative clauses are inconsistent with s 75(v) and therefore ineffective. In so doing it

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12 *David Jones Finance* at 4,329.

13 (1952) 86 CLR 183.

14 *David Jones Finance* at 4,331.

15 *R v Central Reference Board, ex p Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 137; *R v Commonwealth Rent Controller, ex p National Mutual Life Association* (1947) 75 CLR 361 at 376; *R v Connell, ex p Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 428.

16 Eg *R v Kirby, ex p Transport Workers Union of Australia* (1954) 91 CLR 159 at 173-75.

17 *R v Hickman, ex p Clinton* (1945) 70 CLR 598 at 615.

draws a distinction between privative clauses which are 'jurisdictional' and those that are 'empowering'.

Essentially, 'empowering privative clauses' is the label that was given to the method of construction devised by Dixon CJ in *Hickman's* case[18] to avoid striking down privative clauses that would otherwise conflict with s 75(v).[19] Such clauses are not unconstitutional because the clause is not read as seeking to limit the jurisdiction of the Court but, rather, as working to extend the limits of the administrator's powers. The jurisdiction to review is unaffected. There will simply be little to review because the clause works to make what would otherwise be outside the administrator's power within the administrator's power. For instance, the clause works so as to extend the administrator's power to include making decisions based on irrelevant considerations and, although the exercise of powers is reviewable, the decision made based on irrelevant considerations is treated as being within the administrative powers and cannot be disturbed. By contrast, 'jurisdictional privative' clauses simply oust the court's jurisdiction and are therefore in conflict with the constitutional conferment of that jurisdiction.

The Full Court in *David Jones Finance* decided that both limbs of s 177 were jurisdictional. The first limb was jurisdictional because it has a conditional operation. It is conditional in that it requires the production of the notice of assessment before it operates to oust review. Accordingly, unless and until the notice of assessment is produced, it does not preclude review. This indicates that the powers of the Commissioner must have been fixed *before* the production of the notice of assessment (because the production of the notice of assessment does not go back to extend powers used in issuing that assessment).

Therefore if the conduct *transcends the powers that existed before the production of the notice*, the first limb of s 177 purports to oust review of conduct that is *already* an excess of power. It does not go back and enlarge the Commissioner's powers so as to prevent the conduct being excessive. Accordingly, it is not an 'empowering provision' of the class considered in *Hickman*, but a 'jurisdictional provision' that purports to oust judicial review of conduct that is already in excess of power.

The Alternative Reason

The first interaction of the first issue of the judgment with the third issue results in s 177 being inoperative to the extent that it purports to

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18 Id at 615.

19 See *O'Toole v Charles David Limited* (1990) 96 ALR 1.

prevent judicial review of constitutionally guaranteed rights to review. There is, however, a second interaction with the introduction of an alternative reason for its decision. For the majority decided that if the first limb of s 177(1) (the procedural/due making limb) were really an empowering provision, it still must be read subject to the *Hickman* proviso, specifically subject to the presumption that the legislature did not intend to allow it to be used to protect the Commissioner against inquiry into the bona fides of any exercise of his powers under the Act.

The alternative reason is that since an empowering provision does not authorise conduct of the assessment process in bad faith, to some extent it must also mean that it will not authorise the conduct of the process for improper purposes. What the applicants had alleged was tantamount to bad faith and this allegation was not precluded from review by the first limb of s 177(1).

The sting in the tail comes with recognising the narrower scope of the first limb as a result of the second issue in the judgment. A greater range of conduct falls within the second limb, namely, matters going to substantive liability and not to procedure. The interaction of this issue with the constitutional provision is that the second limb is easier to appreciate as 'jurisdictional' rather than 'empowering'. It cannot work retrospectively to extend powers and make them valid while at the same providing a Pt IVC process of objection and appeal from the exercise of such powers. That is, allowing the powers to be challenged under Pt IVC assumes there must be something there to challenge: one simply cannot at the same time have power and not have power. Indeed, it would otherwise mean that s 177(1) gives the Commissioner one set of powers for objections and appeals and an enlarged set of powers for recovery proceedings. The majority conclude that 'it is beyond argument that the second limb which operates only to channel disputed assessments into the Pt V [now Pt IVC ITAA] process, has no effect on power'.[20] Accordingly, the effect of the subtle reallocation of matters between the two limbs is that, even if it is incorrect to decide that the first limb is empowering, it is beyond question that the second limb cannot be. Accordingly a vast number of issues will fall within this second limb.

Judicial Crafting

Positioning s 177 as a privative clause rather than as merely an evidentiary provision makes it difficult to deny that it is what it really is. Prior to *David Jones Finance* courts had not looked at the substance of s 177(1), but were content to take its form at face value and treat it

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20 *David Jones Finance* at 4,331.

as merely a rule of evidence,[21] as was Pincus J in dissent. By recognising sub-s.177(1) as a privative clause, the conflict between s 75(v) and s177(1) had to be confronted and resolved. The interaction of the issues in the judgment leaves a later court with little room to manoeuvre.

But what if a later court, wishing to avoid the decision, considers that the first limb is really an empowering provision? There are two points to notice. First, narrowing the scope of the first limb ensures that most matters will not fall within its terms. Secondly, even for that narrower band of disputes, there are still the *Hickman* provisos. These will be discussed later as providing a backdoor method for review even if both limbs of s 177 are regarded as empowering. The majority has already opened the gates by recognising that the ground of bad faith encompasses much of the ground of improper purposes.

Thus the court has effectively channelled most assessment disputes (such as those that arise under a s 167 assessment) into the second limb which, as mentioned, it is difficult to deny is jurisdictional. This renders otiose the Commissioner's powerful tactical s 167 default assessment: a s 167 assessment raises issues likely to fall within the second limb which is likely to be jurisdictional, thus precluding s 177 coming to the Commissioner's aid. Further, even if the second limb is found also to be 'empowering', by recognising s 177 as a privative clause, the *Hickman* provisos become available and the default assessment may well be attacked for failing to afford natural justice.

Section 177 as a Privative Clause

Once it is recognised that s 177 is a privative clause, other arguments arise which possibly support the conclusion in *David Jones Finance.* These should not be lightly dismissed.

To regard s 177 as a provision determining its own jurisdiction and simultaneously validating any errors of law, may amount to a grant of judicial power to the Commissioner. Central to this argument is that, by preventing judicial review, the provision gives an assessment 'finality'.

Finality is a crucial attribute of judicial power.[22] To give the Commissioner what is essentially judicial power would violate the

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21 Eg *Husten v Deputy Commissioner of Taxation* (1983) 49 ALR 566.

22 *R v Bowen, ex p Federated Clerks' Union* (1984) 154 CLR 207; *Cockle v Isaksen* (1957) 99 CLR 155 at 162-3; *R v Bevan, ex p Elias and Gordon* (1942) 66 CLR 452; *R v Hibble, ex p Broken Hill Proprietary Co* (1920) 28 CLR 455

Boilermakers doctrine - ie that the judicial power of the Commonwealth and those who exercise it must be separate from the executive and administration - and be unconstitutional.[23] The short point is that the judicial power of the Commonwealth must be exercised by the judiciary.[24]

Even if this goes too far, does not the presumption arising from the production of the notice of assessment that the assessment was 'duly made' and is correct in all particulars, carry with it some element of judicial power?

To this extent does that not require the affording of natural justice? If so, it would seem that s 8 of ITAA (which requires the Commissioner to act with procedural fairness) is to that extent inconsistent with the *Bloemen* interpretation of s 177 - the requirement to exercise statutory power with procedural fairness recently being affirmed in *Lighthouse Philatelic P/L v FCT*.[25] Thus, the Act itself suggests section 177 needs to be read down.

Further, when a dispute in relation to an assessment is brought before the court and the court begins to exercise judicial power in relation to the matter, it has exclusive right to exercise or control the exercise of functions which form part of that power or are incidental to it. Therefore would not the use of a s 263 or s 264 notice by the Commissioner whilst the matter is pending be an interference with judicial power when considered in the light of Section 177? In

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at 466; *Tramways Case (No. 1)* (1914) 18 CLR 54 at 76; *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603. Pincus J in dissent notes that privative clauses have this potential difficulty but does not treat s 177 as a privative clause.

23 *R v Kirby, ex p Boilermakers' Society of Australia* (1956) 94 CLR 254, on appeal [1957] AC 288. See also *R v Coldham, ex p Australian Workers' Union* (1983) 153 CLR 415 at 419 and 428-429; *R v Heagney, ex p Tasmanian Breweries P/L* (1970) 123 CLR 361; *R v Foster, ex p Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 154-155; *R v Blakeley, ex p Association of Architects of Australia* (1952) 82 CLR 54 at 90; *R v Drake-Brockman, ex p Northern Colliery Proprietors Association* [1946] ALR 106 at 112; *R v Connell, ex p Hetton Bellbird Collieries* Ltd (1944) 69 CLR 407 at 428 and 441; *Shell Co of Australia Ltd v Australasian Coal and Shale Employees' Federation* (No. 1) (1930) 42 CLR 527 at 556; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422.

24 One way to avoid this result would be to suggest that s 177 (at least the first limb) is retrospectively *extending* the pre-existing *power* and in that way doing nothing by way of 'judging' its correctness.

25 Above note 3.

Pioneer Concrete v TPC,[26] Lockhart J suggested that it would. The High Court reversed this decision but on the basis that the issue of a notice under s 155 of the *Trade Practices Act* 1974 (Cth) (a s 263 equivalent) was not of itself decisive of anything. This decision may not however apply in relation to notices under ss 263 and 264 if s 177 is an empowering clause. If a Court decides that it is an empowering clause, then, is not the issue of the notice a part of the process in making an amended assessment that is automatically deemed to be correct no matter how it is made, something that is decisive in character?

Eroding the Authority of Bloemen

The next question to be addressed is the effect of this new approach on the status of the High Court decision in *Bloemen*. *David Jones Finance* distinguishes *Bloemen* to such an extent as effectively to overrule it - save as authority for limited procedural matters.[27] Although *Bloemen* has enjoyed a strong following,[28] the erosion of its authority is not new.

A line of decisions has been carving out exceptions to *Bloemen* on the basis that there is no true 'assessment' in the first place which s 177 can protect. This line of cases recognises both the qualitative

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26 (1980) 32 ALR 650, reversed on appeal see (1982) 43 ALR 449.

27 The Full Court thus contained the authority of *Bloemen:* 'the first limb of sub-section 177(1) excludes any inquiry into the question whether the making of the assessment was beyond power as directed to purposes other than those authorised by the Act'. 'This proposition', their Honours state, 'must no doubt be read in the light of the restrictions placed on the operation of the first limb in the judgments in *George* and *McAndrews''* (at 4,330). Earlier *George* and *McAndrews* are cited as authority for the proposition that the first limb of s 177 (1) is limited to precluding inquiry into matters of a procedural character which might otherwise have taken into account the validity of the assessment. Therefore *Bloemen* is authority for a narrower range of procedural matters only.

28 Eg *Mack v Federal Commissioner of Taxation* (1983) 83 ATC 4,043; *Huston v Deputy Commissioner of Taxation* (1983) 49 ALR 560; *Dorney v Federal Commissioner of Taxation* (1980) 30 ALR 93; Case 5190 (1990) 21 ATR 3331; Case 6647 (1991) 21 ATR 1165; *Winter v DCT* (1987) 19 ATR 244; *DCT v Erickson* (1987) 19 ATR 619; *DCT v Boothrovd* (1987) 19 ATR 670; *Saunders v FCT* (1987) 19 ATR 698; *DCT v Cameron* (1990) 21 ART 1091; *Oats v FCT* (1990) 21 ATR 1165. Indeed in *Linter Textiles (Aust) Ltd v Citibank* (1988) 20 ATR 1025 Brownie J applied the *Bloemen* principle to an assessment issued after proceedings by declaration had already commenced.

threshold requirements of the assessment[29] and the requirement of good faith.[30] Indeed as early as the decision in *Trautwein v FCT*[31] Latham CJ recognised that an assessment made 'upon no intelligible basis' could result in the Commissioner having breached his statutory duty to make an assessment. Accordingly, an assessment made arbitrarily or capriciously is no 'assessment' at all; *Bloemen* could not therefore protect it.

The Backdoor Method

In case the Full Court was incorrect in holding that the two limbs of s 177 are 'jurisdictional', or that *Bloemen* does not retain any significant authoritative status, it decided that s 177 still has to be read subject to the *Hickman* provisos,[32] specifically to the presumption that the legislature did not intend to allow the section to be used to protect the Commissioner against inquiry into the bona fides of any exercise of powers under the Act.

The *Hickman* provisos can open up a significant backdoor method for challenging assessments. These are too numerous to catalogue in this paper but by way of note, Dawson J in the High Court decision of *O'Toole v Charles David Limited*[33] recognises that challenges on the grounds of a denial of natural justice or procedural fairness could be included in this category. The duty on the Commissioner to act with procedural fairness was (as previously noted) also recently confirmed by the Full Court in *Lighthouse Philatelic Pty Ltd v FCT*.[34]

One consequence of this is that there is authority suggesting that denial of natural justice or procedural fairness embraces decisions

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29 Such as *R v DCT (WA), ex p Briggs* (1987) 72 FCR 249 where Sheppard J at 269 said that s 167 is not a gateway to fantasy and that it is not open to the Commissioner either to pluck a figure out of the air or to make an uninformed guess. See also *Eldridge v FCT* (1990) 21 ATR 897 and *FCT v Dalco* (1990) 90 ATC 4,088 at 4,098 per Toohey J.

30 See *Briggs*, note 29 above, at 386; *Lucas v O'Reilly* 79 ATC 4,081 at 4,087 per Young J; *Re Pezzano, ex p DCT (NSW)* (1989) 20 ATR 423 at 427.

31 (1936) 56 CLR 65 at 88.

32 These are that the decision: must be a bona fide attempt to exercise power; must relate to the subject matter of the legislation; and must reasonably be capable of reference to the power given. It seems that two further conditions may also be added: that the decision must not on the face of it show a jurisdictional error; and that the jurisdictional error must be a grave or basic one.

33 (1990) 96 ALR 1 at 455.

34 Note 2 above.

made with no evidence.[35] For instance, in *ABT v Bond*,[36] Deane J stated that procedural fairness would not be satisfied unless the actual decision was based on 'findings or inferences of fact' that were supported 'by some probative material on logical grounds'. Furthermore, the notion that a finding of fact must be based on some probative material meant that a *particular* finding of fact must likewise be based on relevant probative material.[37]

Take for example, a s 167 or s 168 assessment. There is very often little supporting evidence for these assessments. That is, indeed, the Commissioner's tactical advantage. Section 167 default assessments made on the basis of a 'T account' or on an 'assets betterment basis' may, in some situations, be ripe to be attacked on the ground of no evidence/procedural fairness/lack of bona fides via the *Hickman* provisos. As mentioned, because Section 177 is read subject to the requirement of good faith, it cannot be called into assistance by the Commissioner. In *Eldridge*[38] it was accepted that in making a default assessment 'the process may come close to guesswork and be lawful'. Such a proposition may now be called in question.

Section 168 assessments, similarly, are often found to have been made on little evidence. Again, the 'no evidence' ground seems available, s 177 not being capable of being used by the Commissioner.

One may even go further. There are cases that suggest that there may be a ground for challenge where the administrator has acted with *insufficient* evidence.[39] The real problem with this ground is that it transcends the boundaries of judicial review of the legality of a decision and becomes a review on the merits. The 'no evidence'

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35 Eg *R v Deputy Inquiries Commissioner* [1965] 1 QB 456 at 463; *Keller v Drainage Tribunal* [1980] VR 449 at 455; *Minister of Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 699 per Deane and Everett JJ; *Re Erebus Royal Commission* [1983] NZLR 662 at 671 per Lord Diplock; *LUU v Revenue* (1989) 91 ALR 391.

36 (1990) 170 CLR 321 at 366.

37 Id at 365 where Deane J added that 'in that regard it would not matter that the decision could be supported by some finding of fact which was open to the Tribunal but which the Tribunal had not made'.

38 Note 29 above.

39 Insufficient evidence is represented in the US by the 'no substantial evidence rule' (see *Consolidated Press Edison v NLRB* 305 US 197 (1938)). *Colleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 WLR 433 and dicta in *Ashbridge Investment Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 at 1326 evidence some acceptance of the American rule.

ground itself can come close to this. Inevitably, however, Courts do unavoidably tread on this blurred line.[40]

The Practical Application of David Jones Finance

So far the focus has been to examine the salient issues that arise from *David Jones Finance* and to point out some of the consequences that flow from it. The next part of this review draws upon these issues and consequences and outlines four of the more general applications of the case.

1 Direct and Collateral Attack on Assessment

The more obvious applications of the decision are the avenues created for both direct and collateral attacks on an assessment. As regards collateral attack, we have seen that the primary line of reasoning in *David Jones Finance* makes assessments amenable to review for being made ultra vires or unreasonably or for an improper purpose or for taking into account irrelevant considerations.

Further, even if the primary line of reasoning in *David Jones Finance* is subsequently overruled, the alternative line of reasoning gives rise to a number of avenues of attack via the *Hickman* provisos - more particularly where the assessment is made with a lack of bona fides or to some extent for an extraneous purpose. As noted, this backdoor method of review may allow challenges where the assessment is made without procedural fairness or natural justice. This may include assessments based on no evidence or insufficient evidence.

No 'judgment' - no assessment

There is also an interesting interaction of the alternative reason for decision in *David Jones Finance* with the decision in *Dalco v FCT*,[41]

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40 For instance, where factors taken into account in maintaining a decision are stated, courts have not only assessed whether the factors are relevant but also whether there is a factual basis for them: *Sordini v Wilcox* (1983) 70 FLR 326; *Secretary of State for Education v Tameside* [1977] AC 1017. Alternatively, giving improper weight to evidence may be an unreasonable exercise of power or even an abuse of power: *Whim Creek Consolidated NL v Colgan* (1989) 17 ALD 577 at 581. In *Re Moore, ex p Co-operative Bulk Handling* (1982) 56 ALJR 677 it was decided that although all relevant factors were taken into account and all irrelevant ones rejected the overall decision was still *unreasonable* because no reasonable tribunal would have weighted a particular set of facts as the tribunal in question had done.

41 (1988) 19 ATR 1601.

where Sheppard and Gummow JJ stressed that in making a default assessment under s 167 the Commissioner must make a 'judgment'; it is 'not sufficient for the Commissioner merely to form a view or have an opinion'.[42] This may give rise to avenues of both direct and collateral Part IVC attack. In respect of direct attack (that is, challenging the assessment as being excessive through the Part IVC process) the formation of a judgment may be a condition precedent to the existence of the taxpayer's substantiative liability. If so, this brings into play the decision in *FCT v Jackson*,[43] where the Full Federal Court held that a taxpayer may, in a case where its substantive liability depends upon the fulfilment of some condition precedent, establish that the assessment is excessive by showing that the pre-requisites to the making of the assessment are not present.

The interaction with the *Hickman* provisos comes into play with respect to collateral attack. If there is no honest and proper 'judgment', there may be an excess of power and, as a result, no 'assessment' in the first place in respect to which there is a requirement to prove excessiveness. In an AAT proceeding for instance, it could be argued that the Commissioner had not made an assessment in law that could be the subject of objection and review and that the invalid assessment should be remitted back to the Commissioner.

2 The Use of *David Jones Finance* in Recovery Proceedings

Under the self assessment system, where an amended assessment has been issued as a result of an audit, and where recovery proceedings are to be commenced in circumstances where the Commissioner's policy in Income Tax Ruling IT 2569 is not appropriate, then *David Jones Finance* is authority for seeking a declaration under s 39B of the *Judiciary Act*, to invalidate an ultra vires amended assessment and to obtain an injunction to restrain the Commissioner from commencing recovery proceedings.[44]

Can *David Jones* go further and provide a basis for obtaining a stay of execution against the continuation of recovery proceedings already commenced? It is submitted that this may be possible. The

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42 Id at 1607.

43 (1990) 21 ATR 1012.

44 Similarly, the decision by the Commissioner to commence recovery proceedings can also be challenged through ADJR: see *Hells Angels Ltd v DCT* (Vic) *(No. 3)* (1984) 15 ATR 1008. Both the *David Jones Finance* action and the ADJR action can be run concurrently, for s 10 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) provides that remedies available under the Act are additional to any other remedies available. However, the court has discretion under s 16 to refuse the ADJR application on this basis.

leading relevant authority is the decision of the Full Court of the Supreme Court of Victoria in in *Cywinski v DCT*,[45] the broad effect of which is that the former s 201 ITAA, several provisions of Pt IVC and s 177 together provide a statutory code governing the recovery of unpaid tax as well as a dispute resolution mechanism in relation to the tax owing. According to this code, it is the policy of the former section 201 to create a hierarchy which distinguishes between the superior right of the Commissioner to recover unpaid tax as a debt due and owing and the inferior taxpayer's right to dispute the correctness of that debt. A stay of recovery proceedings would defeat the policy in s 201 that the Commissioner's rights to have the tax paid have priority over the right of the taxpayer to challenge the decision by way of appeal. Now, ss 14ZZR and 14ZZM preserve the policy of the former s 201 and provide that the pendency of an appeal or review in relation to a taxation decision, including an assessment, does not interfere with or affect the decision, and income tax, additional tax or other amounts payable under the ITAA may be recovered as if no appeal were pending.[46]

However, *David Jones Finance* can be distinguished from *Cywinski* for at least two reasons. First, the whole issue which the *Cywinski* line of cases address is the statutory code provided by Pt IVC TAA (the Former Part V of the ITAA), the recovery provisions (Part VI ITAA) and the evidentiary provisions for challenge. Reflective of *Bloemen* reasoning, they contemplate the statute as providing an exclusive code which creates both the rights in the taxpayer to appeal and the right in the Commissioner to recover the unpaid tax. It is the statute, and only the statute, which confers these rights and which creates the hierarchy by subjecting the taxpayers right to the superior right of the Commissioner.

In *Cywinksi*[47] Kaye J states that 'the policy stated in s 201 arises out of the combined operation of several provisions of Part VI of the Act which provide for the collection and recovery of tax', and, after referring to the 'evidentiary provisions of s 177(1)', his Honour concludes that a stay 'would defeat the policy apparent in the provisions of s 204, 208, 209 and 177(1)'. Similarly King J catalogues these sections and concludes:

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45 (1989) 20 ATR 672.

46 Although s 14ZZR refers to an 'appeal' and not specifically to the situation of an objection pending resolution, the decision in *DCT (NSW) v Niblett* (1965) 8 FLR 134 subsumes this situation within the policy of the former s 201, and this decision would equally apply to ss 14ZZR and 14ZZM.

47 Note 45 above, at 675.

> The effect of these provisions is that on an action to enforce an assessment a defendant cannot raise a defence that the assessment is incorrect. Against this background s 201 makes it clear that the status of an assessment, for the purpose of these provisions, is unaffected by the institution and prosecution of an appeal against the assessment.[48]

However, their Honours say nothing about the constitutionally guaranteed common law rights of challenge. It may be argued that in seeking a declaration invalidating the ultra vires assessment or an injunction restraining the continuation of recovery proceedings, the taxpayer is exercising its common law rights and these are outside the statutory hierarchy created by the statutory code. This notion of a self-contained code, reflective of pre-*David Jones Finance* thinking, no longer holds good. Therefore cases such as *Cywinski* provide no answer to the rights which the code does not create and which are not constrained by the code.

Secondly, there is authority that where the action pending is not a Pt IVC action, there is no requirement for the court to apply s14ZZR. For example, in *DFCT (WA) v Briggs*[49] the appeal pending was not only an appeal under the former Pt V process but also an appeal against the judgment for tax. Olney J granted a stay on the basis that the former s 201 was confined to appeals under Pt V of the ITAA. Further ss 14ZZR and 14ZZM would not apply to an appeal from the decision of the court to refuse a stay of execution.

3 Declarations and Their Use as an Alternative to a Private Ruling

The self assessment regime has the necessary consequence of requiring taxpayers wishing to avoid the potential of penalties and interest, to seek private rulings in relation to transactions where liability is not crystal clear. The s 39B declaration procedure could well be a ready alternative which is speedier and which effectively achieves res judicata between the parties. This is not, of course, a consequence of the *David Jones Finance* decision itself. However that decision does facilitate the procedure.

Take the common situation where complicated transactions take place and solicitors, carefully considering the taxation implications thereof, produce documentation and give advice but cannot be confident that the Commissioner will take the same view. One party may seek a declaration disputing the interpretation of the documentation adopted by the other party and the Commissioner is joined as a defendant so as to bound by the court's decision. In *Linter*

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48 Id at 681.

49 (1986) 17 ATR 369.

Textiles (Australia) Ltd v Citibank,[50] the court accepted the procedure was perfectly proper.[51] However, the Commissioner issued a notice of assessment before a decision could be reached and accordingly it was held that, although the procedure was properly instigated, once the notice was produced the court was deprived of jurisdiction by s 177.[52] As we have seen, *David Jones Finance* overcomes this latter aspect of the decision.

The advantages of this procedure are obvious where there is a second party whether it be a taxpayer's own subsidiary or an external party. However it may be used by a taxpayer simply as against the Commissioner provided the matter is more than a hypothetical and there is a real issue between the parties. Courts are reluctant to decide hypothetical questions in applications for declarations. In *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* Lord Dunedin said:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.[53]

However, courts do recognise that declaratory quia timet relief of its very nature necessarily involves elements which are premature.[54] Indeed the very attractiveness of the declaration remedy

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50 (1989) 89 ATC 4,762.

51 Id at 4,763 where Brownie J said: 'The plaintiffs therefore contend, and the third defendant [the Deputy Commissioner of Taxation] does not dispute that at the time of the issue of the summons the plaintiffs might properly have invoked the jurisdiction of the Court to make appropriate declarations; there was a real question between the parties, and the plaintiffs had a real interest to raise that question for decision, and the third defendant *was a proper contradictor*. It did not matter that the real purpose or a real purpose of the plaintiff was to resolve the issue, in effect, by forestalling the need to being an appeal under the provisions of Pt V of the Income Tax Assessment Act 1936'.

52 This confirms that the majority in *David Jones Finance* was correct in relation to the *conditional* operation of s 177.

53 [1921] 2 AC 438 at 448. See also *Faber v Gosford UDC* (1903) 88 LT 549; *Bruce v Commonwealth Trade Marks Label Association* (1907) 4 CLR 1569.

54 In *Rediffusion (Hong Kong) v AG (Hong Kong)* [1970] AC 1136 at 1158 Lord Diplock said: 'All questions involving quia timet proceedings are hypothetical and future. To exclude the jurisdiction of the Court to inquire into them in order to decide whether to exercise its discretion to grant relief, the defendants would have to show that the questions were purely abstract questions, the answers to which were incapable of affecting any existing or future legal rights of the plaintiffs'.

is that it is anticipatory relief.[55] In *Commonwealth v Sterling Nicholas Duty Free Ltd*[56] a declaration was sought that the proposed business activities were not in violation of customs legislation contrary to the view expressed by the Customs Department. Barwick CJ endorsed the jurisdiction to grant a declaration:

> The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion, the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the Court to declare what he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction.[57]

As a result there is a need for some view to be expressed by the Commissioner in respect to the legal issue in respect of which a declaration is sought. This can be a ruling, material in a practice

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55 In *Dyson v Attorney General* [1911] 1 KB 410, a declaration was granted that the applicant had no obligation to fill in the forms that were sent to him by the Revenue Authority. Had the applicant waited he would have had to raise the defence in a prosecution. Similar recognition of the remedy is found in *University of NSW v Moorehouse* (1975) 133 CLR 1; *Re The Trade Practices Act and Re an Application by Tooth & Co Ltd* (1978) 19 ALR 191; *Attorney General (Vic) v Cth* (1945) 71 CLR 237. Pinpointing the divide between, on the one hand, where the future and uncertain element does not detract from there being a real issue and, on the other hand, a purely hypothetical question, is a matter of degree. In *Re The Trade Practices Act and Re an Application by Tooth & Co Ltd* (1978) 19 ALR 191 at 209 Brennan J concluded that: 'A controversy as to the lawfulness of future conduct cannot be said to be immediate and real if it is unlikely that the applicant will engage in the conduct: *Golden v Zwicker* (1909) 394 US 103 at 109. If the prospects of the applicant engaging in the conduct are uncertain, the uncertainty may deprive the controversy of a sufficient immediacy and reality to warrant the making of a declaration: *Steffel v Thompson* (1973) 415 US 452 at 460. The degree of uncertainty as to whether the applicant will engage in the conduct proposed will usually determine whether the circumstances call for making the declaration'. Indeed, the more recent trend is to allow matters to be decided where there is a real question despite the facts having not all yet occurred. The court must frame a declaration that is limited to the dispute: *Dormer v Solo Investments (No. 2) Pty Ltd* [1974] 1 NSWLR 428 at 434-5; *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286; *Sterling Nicholas Duty Free Pty Ltd v The Commonwealth* [1971] 1 NSWLR 352.

56 (1972) 126 CLR 297.

57 Id at 305.

manual, assessment hand book, cell determination or the like. Alternatively, if no such view is expressed, a court may still be persuaded to exercise its jurisdiction in exceptional circumstances,[58] for example, where the issue raises matters of vital importance to taxpayers in general.

4 The Use of *David Jones Finance* to Curtail an Audit and Investigation

One more controversial question arising from the recognition in *David Jones Finance* of the scope of s 39B of the *Judiciary Act* is whether injunction or declaration proceedings can prevent the commencement, or continuance, of audits and investigations in respect to 'matters' brought within the cognisance of the Court in the course of proceedings. The argument is that audit or investigation proceedings in respect of such matters would constitute an interference with the process of the Court and contempt of Court.

Contempt of court by investigation

The concept of an investigation amounting to a contempt of court was given modern recognition by Lockhart J in *Pioneer Concrete v TPC*[59] and by Franki J in *Brambles Holdings v TPC*.[60] In *Brambles* an issue of a s 155 notice under the *Trade Practices Act* 1974 (Cth) - for present purposes broadly equivalent to a s 263 notice - in relation to issues that were relevant to proceedings on foot between the Trade Practices Commission ('TPC') and Brambles was held to be in contempt of court. Relying on the High Court decisions in *Melbourne Steamship Co Ltd v Moorehead*[61] and *Appleton v Moorehead*,[62] Franki J explained the principle of contempt by investigation. Once the proceedings had been commenced in court all the matters for determination were

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58 *The Trustees of Church Property of the Diocese of Newscastle v Ebbeck* (1960) 104 CLR 394 at 400-401.

59 (1980) 32 ALR 650, reversed on appeal, see note 66 below.

60 (1980) 32 ALR 328.

61 (1912) 15 CLR 333. In this case, the High Court was concerned with the ancestor of the s 155 notice. Griffith CJ stated (at 340) that 's 15B does not apply to questions asked for the purpose of obtaining information for use in proceedings already commenced against other persons, and does not empower the Comptroller-General to require answers to questions asked for such purpose'. His Honour continued at 341 to say that when proceedings are commenced 'from that time the matter becomes subject to judicial power, or, to adapt a familiar phrase, in transit in litem pendentem. The section cannot therefore ... be used for the purpose of collecting evidence in a pending suit'.

62 (1909) 8 CLR 330.

submitted to the jurisdiction of the court.[63] Therefore the investigation pursuant to the notice was an attempt to divert the ordinary course of justice[64] in such a way that issues would be determined otherwise than in accordance with the rules and practice of the court. The rules and practice of the Court in respect to the proceedings on foot did not permit the TPC to require such information from the recipient of the notice. In other words, the notice was an attempt to obtain information which the TPC could not otherwise obtain *by the process of the court*. Franki J. decided he would mark the court's disapproval by ordering costs against the TPC on a solicitor-client basis.

Therefore, once proceedings commence, or are known to be imminent, matters for determination come within the cognisance of the court and only court procedures can operate on them. Any attempt to obtain by investigation information outside the normal course of proceedings may be a contempt of court. For convenience this will be referred to as the 'not otherwise available through discovery' principle of contempt.

In *Pioneer Concrete v TPC*[65] Lockhart J extended the concept from where the administrator has a proceeding pending with the party to where the administrator is seeking to investigate a party that has proceedings pending with a third party. Although this extension was reversed by the High Court on appeal,[66] it is clear that Gibbs CJ was inclined to the view that the investigative powers could not be used to assist a party in proceedings already pending in a way that would give a party advantages not otherwise available through the normal process of discovery.[67] Otherwise, Gibbs CJ approved the 'not otherwise available through discovery' principle in *Brambles*.[68]

The concept of contempt by investigation was introduced in the tax context by Northrop J in *Commercial Bureau (Australia) Pty Ltd v*

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63 In *Melbourne Steamship*, note 61 above, at 346 Barton J said: 'When the point has been reached at which the Crown institutes such proceedings in respect of the subject matter of the questions, there is no right in the Comptroller-General to institute such an inquiry. That subject matter has passed into the hands of the courts alone'.

64 In *R v Castro; Skipworts Case* (1873) LR 9 QB 230, cited by Lord Simon in *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 316, 'the ordinary course of justice' was said to mean in this context 'the ordinary and unimpeded course of legal proceedings'.

65 Note 59 above.

66 *Pioneer Concrete v TPC* (1982) 43 ALR 449.

67 Id at 453.

68 Ibid.

Allen, ex p FCT[69] who applied the 'not otherwise available through discovery principle' in relation to s 263 notices. Similarly, in *Saunders v FCT*[70] the concept was recognised but not applied because of the particular facts of the case. Significantly, these particular facts are no longer relevant under the new Part IVC procedure.[71]

What is the test for contempt?

In *Pioneer Concrete v TPC*[72] the High Court seems to require that, before it can constitute a contempt, there must be a *real risk* that the investigation would, in the circumstances, interfere with the course of justice. Thus a mere speculative and hypothetical possibility will not suffice. In *Saunders*,[73] Northrop J distinguished the mere speculative possibility that the information obtained under the s 263 notice would *ever be used* in unrelated pending criminal prosecutions by a different body which did not amount to contempt, from *Brambles*[74] where his Honour considered there was a real risk that the TPC would use the information against the addressee of the notice in the pending proceedings.

In the result, it is submitted that within the tax context an investigation could well amount to a contempt where the investigation does relate to, say, a current or imminent s 39B proceeding where that investigation would yield information that the Commissioner could

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69 (1984) 84 ATC 4198.

70 (1988) 88 ATC 4,349.

71 The taxpayer argued that because he had referred the Commissioner's disallowance of an objection to the Federal Court under the former s 187, that referral constituted the institution of proceedings (s 189 (3)). Therefore, the Commissioner's use of the s 263 power (which is outside discovery) was argued to be in contempt. Northrop J decided that because the matter had not yet been referred to the Federal Court, there were no proceedings pending and contempt did not arise. His Honour considered that contempt of contemplated proceedings is not possible. There are two points to notice here. First, the situation in *Saunders* would not arise under Section 14ZZ(a) of the TAA as the taxpayer would lodge the application for review of the objection by the AAT or the appeal to the Federal Court directly. Secondly, the only authority upon which Northrop J relies, *James v Robinson* (1963) 109 CLR 592 (a criminal publication case), runs against a whole array of English authorities. It is submitted that proceedings are sub judice so that contempt applies not only where they are 'pending' but also where they are 'imminent'. Consider, eg *Brambles Holdings v TPC* (1980) 32 ALR 328 at 339 lines 36-7.

72 Note 66 above.

73 Note 70 above.

74 Note 71 above.

use against the taxpayer in circumstances where the information would not otherwise be available under court rules.

How broad can a 'matter' be?

It is, of course, only with respect to a 'matter' in the cognisance of the Court that there could ever be contempt. The investigation would only ever have a real risk of prejudicing the taxpayer (by yielding information not otherwise available through the ordinary course of justice) where the investigation was relevant to the matter that is pending. Therefore, the wider the scope of the 'matter' that is before the court, the greater the protection obtained.

As *David Jones Finance* allows all avenues of judicial review to operate in relation to decisions relating to assessments - more relevantly here, amended assessments - there is potential for the 'matter' to be rather broad. For instance, under the ITAA the Commissioner has an enormous number of discretions in the process of leading up to the making of an assessment; in exercising these, he or she could have taken into account irrelevant considerations or he could have failed to take into account relevant considerations. These considerations, when enumerated and drafted in broad terms, have potential to enlarge the scope of a 'matter' that is under the cognisance of the court and in relation to which an investigation may be in contempt.

Further scope for protection may be recognised when one considers that for complex transactions to be fully articulated before the court, they need to be given context. The greater the details, the greater the likelihood that a potential investigation may be relevant to a 'matter' by encroaching upon those details.[75]

When the matter is considered together with the imminence of the proceedings, the High Court test in *Pioneer*[76] would seem at least prima facie to be satisfied as early as the taxpayer becoming targeted for audit. Say, for example, that the taxpayer self assessed in accordance with a ruling, cell determination, policy statement or assessment handbook, but does not believe that the view held by the Commissioner is correct in law, because the Commissioner has taken into account irrelevant considerations or failed to take into account relevant considerations or the determination is unreasonable. Then the Commissioner is deemed, by s 166A, to have made an assessment

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75 Especially for those who recall the pre-*Lighthouse* (not too distant) days where objections could extend over hundreds of pages!

76 Above note 66.

accordingly,[77] and the self-assessed return is deemed, again by s 166A, to be an assessment by the Commissioner which becomes reviewable under s 39B. Assume the taxpayer becomes aware the assessment is targeted for audit and seeks a s 39B declaration. A proceeding is imminent or pending.[78] From that moment it seems that an investigation that would yield information *outside* the court procedures relevant to the matter for the proceedings, could well be a contempt of court. The targeting raises the potential risk of the investigation interfering with the course of justice from a remote and hypothetical possibility to a real risk. If not from the moment of targeting, then at least from the moment the decision to audit is made, the risk becomes *real*. Thereafter an investigation 'not otherwise available through discovery' could well be in contempt. The taxpayer could then seek an interlocutory injunction to restrain the investigation proceedings.

A retaliatory default assessment issued in circumstances where supporting evidence is soft could also potentially be itself reviewable for failing to afford procedural fairness.

Conclusion

To regard the decision in *David Jones Finance* as anything less than revolutionary is to understate its potential significance. By bringing to the forefront the conflict between s 177 ITAA and s 39B of the *Judiciary Act* and by recognising that s 177 is a privative clause, it opens up as never before potential challenges to a Commissioner's assessment in the same way as that to any other administrative decision maker. The revolutionary aspect of the decision is that it approaches the Pt IVC TAA (formerly Pt V ITAA) process on a basis that is more true to the substance of regime, as opposed to the former approach which superficially avoided a conflict with the Constitution.

The opportunities *David Jones Finance* affords taxpayers have not yet been fully appreciated. The interaction of the decision with the comments in *Dalco* and *Eldridge* suggests it is not limited to collateral challenges of the Commissioner's decisions, but can also be used within the Pt IVC process itself. The opening up of the s 39B avenue not only allows for the whole array of administrative law grounds of review, but upsets the reasoning in a whole line of authorities which made the obtaining of a stay of execution in recovery proceedings next to impossible. Significantly it allows an alternative to the private ruling system, giving those taxpayers who disagree with the

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77 See *Coates v Commissioner of Railways* (1961) 78 WN (NSW) 377; *City of Hobart v Chen* [1966] Tas SR 271; *Wainter v Rippon* (1979) 29 ALR 643.

78 The auditors are to apply rulings, policy statements, etc.

Commissioner's interpretation of the law the possibility of obtaining a declaration against the Commissioner. A more controversial aspect is the potential it allows for freezing a tax investigation by the simple drafting of a wide 'matter' that is the subject of a declaration brought within the cognisance of the court.