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Statutory Judicial Review of the Administration of the Income Tax Assessment Act 1936

Abstract

This article examines recent developments which impact on the scope of judicial review to challenge actions taken by the Commissioner of Taxation. The author concludes that, while the scope of review remains extensive, recent cases have created uncertainty about the precise extent of statutory judicial review under the Administrative Decisions (Judicial Review) Act 1977.

Keywords

income tax, tax, Australia, Commissioner of taxation

STATUTORY JUDICIAL REVIEW OF THE ADMINISTRATION OF THE INCOME TAX ASSESSMENT ACT 1936



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This article examines recent developments which impact on the scope of judicial review to challenge actions taken by the Commissioner of Taxation. The author concludes that, while the scope of review remains extensive, recent cases have created uncertainty about the precise extent of statutory judicial review under the Administrative Decisions (Judicial Review) Act 1977.

INTRODUCTION

The purpose of the Income Tax Assessment Act 1936 (Cth) (the Assessment Act) is, broadly, to provide for the assessment and collection of income tax. The administration of the Assessment Act is the responsibility of the Commissioner of Taxation (the Commissioner).¹ Under the Assessment Act, the Commissioner is vested with numerous powers to assist in carrying out the functions of assessing and collecting tax. Prior to 1980, there was little scope for statutory judicial review of any action taken by the Commissioner in exercising those powers. A taxpayer who was dissatisfied with the Commissioner's actions was limited to challenging only the resulting assessment of taxable income and tax payable. This had to be done pursuant to the objection and appeal provisions contained in the Assessment Act, under which the merits of the assessment could be challenged.² The taxpayer could not go behind the assessment made

¹ Under s 8 of the Assessment Act.

² Objection and appeal provisions are now contained in Part IVC of the Taxation Administration Act 1953 (Cth).

by the Commissioner and seek to review procedural or other aspects of the making of the assessment.³

This position changed significantly when the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) came into operation on 1 October 1980. The ADJR Act created a new avenue of statutory judicial review which could be used by a taxpayer to challenge a broad range of acts undertaken by the Commissioner in administering the Assessment Act. In so doing, it subjected to judicial scrutiny areas of the Commissioner's administration of the Assessment Act which had previously gone without independent review. The ADJR Act makes such review and scrutiny available by providing that a person, who is aggrieved by a decision of an administrative character made under an enactment, may apply to the Federal Court for an order of review of the decision on grounds set out in the Act.⁴ The review is of the legality of the decision under challenge, and does not extend to a review of the merits of the decision. The grounds of review broadly correspond to the grounds for judicial review available under the common law. The ADJR Act also provides that a person, who is entitled to apply to the Court for an order of review, may request a written statement from a decision-maker which gives the reasons for the decision, and sets out findings on material questions of fact and the evidence or other material on which those findings are based.⁵ This statement essentially forms the basis upon which a decision can be scrutinised and its legality challenged.⁶

The aim of this article is to examine the scope of statutory judicial review which is available under the ADJR Act to challenge the Commissioner's administration of the Assessment Act.⁷ To assist in

³ For example, see *George v FC of T* (1952) 10 ATD 65 where an action by way of summons brought by a taxpayer seeking certain particulars of procedural steps taken by the Commissioner in making assessments was dismissed by the High Court on the ground that the conclusive nature of the assessments by virtue of s 177 of the Assessment Act rendered irrelevant the particulars sought.

⁴ See s 5 of the ADJR Act.

⁵ Section 13.

⁶ See further *ARM Constructions Pty Ltd v DFC of T* 86 ATC 4213 at 4218.

⁷ There is an alternative avenue of statutory judicial review which may be available under s 39B of the Judiciary Act 1903 (Cth). This alternative is not, however, dealt with in this article. For a discussion of the judicial review available under s 39B, refer Carbone D, "The Scope of Statutory Judicial Review of the Administration of the Income Tax Assessment Act 1936" *50th Annual Conference of the Australasian Law Teachers Association*, Revenue Law Interest Group, La Trobe University, September 1995 at 16-24.

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this examination, the first section of the article provides background information on the Assessment Act, and on the powers of the Commissioner under the Act. The article then provides a detailed examination of the operation of the ADJR Act in the context of actions taken by the Commissioner in administering the Assessment Act.

BACKGROUND

A brief background to the Assessment Act and the Commissioner's powers may conveniently be provided by outlining the following - how the Assessment Act is administered, how the tax process works, and what types of powers may be exercised by the Commissioner as part of that process.

Administration of the Assessment Act

Section 8 of the Assessment Act provides that "the Commissioner shall have the general administration of this Act". The Commissioner is then empowered under the Taxation Administration Act 1953 (Cth) (the Administration Act) to delegate to a Deputy Commissioner of Taxation, or any other person, all or any of the Commissioner's powers and functions under a taxation law, other than the power of delegation.⁸ This must be done by a written instrument signed by the Commissioner. In turn, the Deputy Commissioner specifically authorises taxation officers or occupants of certain positions within the Australian Taxation Office (the ATO) to exercise powers under the Assessment Act in the name of the Deputy Commissioner. It is through this process of delegation and authorisation that most of the Commissioner's powers and functions are distributed to taxation officers throughout the ATO.⁹

Outline of the tax process

The following are the basic steps which may be said to comprise the tax process:

- 1 towards the end of each financial year, the Commissioner publishes a notice in the *Commonwealth Government Gazette* requiring income tax returns to be lodged;¹⁰

⁸ See s 8 of the Administration Act.

⁹ See further Bray P, "The ADJR Act: Its Effect on Taxation Administration" (1991) 20 FL Rev 138.

¹⁰ Section 161 of the Assessment Act.

- 2 persons affected by the notice must lodge a tax return by
using the appropriate form issued by the Commissioner for
that purpose;¹¹
- 3 upon receipt of the tax return, the Commissioner makes an
assessment of taxable income and tax payable. The
assessment is made from the return and from any other
information in the possession of the Commissioner.¹² For
certain "relevant entities",¹³ there is a deemed assessment
when the return is lodged;¹⁴
- 4 the Commissioner then serves a notice of assessment on the
person liable to tax.¹⁵ Again, for relevant entities the deemed
assessment notice is deemed to have been served when the
return is lodged;¹⁶
- 5 a taxpayer who is dissatisfied with an assessment may lodge
an objection within the prescribed period;¹⁷
- 6 the Commissioner must decide to allow or disallow the
objection, and must serve a notice of the objection decision on
the taxpayer;¹⁸
- 7 a taxpayer who is dissatisfied with the objection decision may
apply to the Administrative Appeals Tribunal for a review of
the decision or appeal to the Federal Court against the
decision;¹⁹ and
- 8 there may be further appeals to the Full Court of the Federal
Court and, with special leave, to the Full Court of the High
Court.

Specific powers of assessment

To facilitate the process of making an assessment, the Commissioner has the following specific powers:

¹¹ Section 161 and s 162.

¹² Section 166.

¹³ For example, companies and superannuation funds which are subject to a full self assessment system.

¹⁴ Section 166A.

¹⁵ Section 174.

¹⁶ Section 166A.

¹⁷ Section 175A of the Assessment Act and s 14ZU and s 14ZW of the Administration Act.

¹⁸ Section 14ZY of the Administration Act.

¹⁹ Section 14ZZ. (Note that the onus of proof lies on the taxpayer: s 14ZZK and s 14ZZO.)

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- 1 the Commissioner can require a person to furnish a further or fuller return, or any other return required by him for the purposes of the Assessment Act;²⁰
- 2 the Commissioner may make a default assessment if a person fails to lodge a tax return, or if the Commissioner is not satisfied with the return lodged, or has reason to believe that a person who has not lodged a return has derived taxable income;²¹
- 3 the Commissioner may make a special assessment during an income year of taxable income derived in that year or a part of it, and of the tax payable thereon;²² and
- 4 the Commissioner has power to amend an assessment within certain time limits.²³

It should be noted that under s 175 of the Assessment Act the validity of an assessment is not affected by reason that any of the provisions of the Act have not been complied with. Moreover, s 177 of the Assessment Act further provides that the production of a notice of assessment is conclusive evidence of the due making of the assessment and, except in review or appeal proceedings, that the amount and all the particulars of the assessment are correct.²⁴

Other specific powers of the Commissioner

The Commissioner also possesses, inter alia, specific powers to:

- 1 extend the time for payment of tax, or permit tax to be paid in instalments;²⁵
- 2 remit (in the sense of waive) the whole or part of additional penalty tax for late payment of tax, or penalty interest on late payment of tax;²⁶
- 3 sue for and recover any tax unpaid,²⁷ even where an assessment is challenged by a taxpayer;²⁸

²⁰ Section 162 and s 163 of the Assessment Act.

²¹ Section 167.

²² Section 168.

²³ Section 170.

²⁴ See *DFC of T v Richard Walter Pty Ltd* 95 ATC 4067 for the most recent consideration of s 177 by the High Court.

²⁵ Section 206.

²⁶ Section 207 and s 207A.

²⁷ Section 209.

²⁸ Section 14ZZM and s 14ZZR of the Administration Act.

- 4 issue a garnishee notice to a person who owes money to a taxpayer requiring the person to pay the money to the Commissioner;²⁹
- 5 have full and free access to all buildings, places, books, documents and other papers for any of the purposes of the Assessment Act;³⁰ and
- 6 require a person, whether a taxpayer or not, to furnish such information as the Commissioner may require, and attend and give evidence concerning that person's, or any other person's, income or assessment. The notice may also require the person to produce all books, documents or other papers whatever in the person's custody or control.³¹

In addition, the Commissioner is a member of the relief Board which has power to release a taxpayer, in whole or in part, from a tax liability in cases of hardship.³²

THE ADJR ACT

The basic requirement for the application of the ADJR Act is that there be a "decision to which this Act applies".³³ This expression is defined in s 3(1) to mean:

a decision of an administrative character made, proposed to be made or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision of the Governor-General, or a decision included in any of the classes of decisions set out in Schedule 1.³⁴

In the first instance, the scope of the definition is determined by the meaning given to the words "decision" made "under" an enactment. The central words "decision" and "under" are not, however, defined in the ADJR Act. The scope of the definition is also, of course, limited by the classes of decisions which are excluded by Schedule 1. There are classes of decisions listed in Schedule 1 which deal with certain decisions made by the Commissioner under the Assessment Act, and which are therefore excluded from review under the ADJR Act. These classes of decisions are set out in paragraphs (e) and (ea) of the

²⁹ Section 218 of the Assessment Act.

³⁰ Section 263.

³¹ Section 264 (for information held offshore, see s 264A).

³² Section 265.

³³ Sections 5, 6 and 7 of the ADJR Act.

³⁴ See also the extended definition of "making a decision" in s 3(2).

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Schedule. Of these two exclusions, the more important for present purposes is paragraph (e), which is expressed in the following terms:

decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending or refusing to amend, assessments or calculations of tax, charge or duty

It is apparent from these provisions that the scope of judicial review, under the ADJR Act, of the Commissioner's administration of the Assessment Act, is primarily determined by the following three questions:

- 1 is there a "decision" for the purposes of the ADJR Act?
- 2 is the decision made, proposed or required to be made "under" an enactment?
- 3 is the decision excluded from review by virtue of paragraph (e) of Schedule 1 of the ADJR Act?

These questions have come before the courts on numerous occasions in tax related cases and the discussion which follows examines how the courts have dealt with the questions.

Is there a "decision"?

The question of whether there is a "decision" for the purposes of the ADJR Act needs to be considered in light of the landmark decision of the High Court in *Australasian Broadcasting Tribunal v Bond*.³⁵ In that case, a majority of the High Court rejected a broader interpretation of the word "decision" than had previously been adopted by the courts.³⁶ Mason CJ, with whom Brennan and Deane JJ agreed, comprised the majority, who held that:

a reviewable "decision" is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the

³⁵ (1990) 170 CLR 321.

³⁶ See *Lamb v Moss* (1983) 49 ALR 533; *Symons v AG* (1984) 53 ALR 513; *Souter v Webb* (1984) 54 ALR 683; *Foord v DPP* (1965) 60 ALR 269; *Murphy v DPP* (1985) 60 ALR 299; and *Shepherd v Griffiths* (1985) 60 ALR 176.

decision, though an intermediate decision, might accurately be described as a decision under an enactment.

Another essential quality of a reviewable decision is that it be a substantive determination.³⁷

Mason CJ indicated that a substantive determination had to be contrasted with one that is merely procedural in character. His Honour also expressed the view that a mere expression of opinion or a statement, which can have no effect on a person, is not a "decision" for the purposes of the ADJR Act.³⁸ Given the High Court's rejection of the interpretation of "decision" adopted in earlier cases, the following discussion is limited to tax cases decided after *Bond*.

Shortly after *Bond* was decided, the question of whether there was a "decision" for the purposes of the ADJR Act (in light of that case) was considered in *Australian Wool Testing Authority Ltd v FC of T*.³⁹ The taxpayer wrote to the Commissioner in November 1989 requesting confirmation that it was exempt from income tax under s 23(h) of the Assessment Act, on the basis that it was a non-profit society or association established to promote the pastoral resources of Australia. The Commissioner responded in a letter dated 4 January 1990 advising that the income of the taxpayer qualified for exemption, and that it was not necessary for the taxpayer to lodge income tax returns unless specifically requested to do so at any time. By a second letter dated 14 June 1990, the Commissioner advised the taxpayer that its income was not exempt and that advice to the contrary in the earlier letter was withdrawn.

The taxpayer applied for an order of review under the ADJR Act and argued that the Commissioner's second letter contained two reviewable decisions made under an enactment. The first was that the taxpayer's income was not exempt, and the second was the withdrawal of the exemption from lodging income tax returns. The Commissioner objected to the competency of the application and, relying upon the decision in *Bond*,⁴⁰ argued that each of the letters contained an expression of opinion only, which did not constitute a "decision" for the purposes of the ADJR Act. The Commissioner contended that, in substance, the real issue between the parties was whether the income of the taxpayer was exempt, and the advice on this issue contained in the two letters amounted to no more than an

³⁷ (1990) 170 CLR 321 at 337.

³⁸ *Ibid* at 338.

³⁹ 90 ATC 4896.

⁴⁰ (1990) 170 CLR 321.

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expression of opinion on the construction and application of s 23(h) of the Assessment Act.

Northrop J dismissed the objection to competency and held that both letters disclosed a "decision" for the purposes of the ADJR Act. The relevant decision in the first letter was that the taxpayer need not lodge income tax returns unless specifically requested to do so. His Honour took the view that this decision was of a substantive character because it conferred a benefit upon the taxpayer, the benefit being that the taxpayer was relieved of the obligation under the Assessment Act to lodge tax returns. The relevant decision in the second letter was the revocation of the decision in the first letter. This was of a substantive character, since it deprived the taxpayer of a benefit which had been conferred upon it by the decision in the first letter.⁴¹ The approach of Northrop J highlights the need to identify correctly the relevant "decision" at issue, and indicates that one should not be unduly blinkered in making that identification. The defect in the Commissioner's argument was that it appears to have overlooked that the existence of a non-reviewable decision in the letters did not necessarily exclude the concurrent existence of another "decision" which was reviewable under the ADJR Act.

The question of whether there was a "decision" also arose in *Pegasus Leasing Ltd v FC of T*,⁴² where the applicants had similarly sought confirmation from the Commissioner on the operation of certain provisions in the Assessment Act. The applicants provided financial and management services to various horse breeding syndicates. As there was an Irish element in the activities of the syndicates, the applicants were concerned to know whether the Commissioner would regard the syndicate operations as producing foreign source income. The concern for the applicants was the combined effect of s 79D and s 160AFD of the Assessment Act. These sections would quarantine allowable deductions connected with producing foreign source income, so that they could only be set off against foreign source income of the same class and source.

The applicants wrote to the Commissioner requesting confirmation that payments made by syndicate members to the applicants would not be treated as being incurred in producing foreign source income. An oral response was given by the Commissioner that the payments were capital in nature and therefore not allowable as deductions under s 51(1) of the Assessment Act. The applicants made a request under s 13 of the ADJR Act that the Commissioner provide them with

⁴¹ 90 ATC 4896 at 4902.

⁴² 91 ATC 4972.

a statement of the reasons for the oral response. The Commissioner refused to comply with the request, contending that the oral response was not a "decision" for the purposes of that Act. The applicants then applied to the Federal Court for a declaration that they were entitled to the statement of reasons.

O'Loughlin J concluded that the oral response amounted only to an expression of opinion and therefore held that the response was not a "decision" for the purposes of the ADJR Act. His Honour cited from the judgment of Mason CJ in *Bond*⁴³ and then gave the following reasons in support of this conclusion. First, the Assessment Act did not require the Commissioner to make the communication in question; no such communication was contemplated by the Act and, in that sense, it was not authorised by the Act. Secondly, the communication did not have the "character and quality of finality". That would only come at a later stage during the assessment process when the opinion expressed by the Commissioner would be applied and acted upon in assessing the taxable income and tax payable by syndicate members. Thirdly, the only specific evidence before the Court about the affairs of the applicants suggested the communication took place in the course of on-going investigations and opinions by the Commissioner - all of which would most probably lead, in due course, to a "decision".⁴⁴

The first of the reasons given by O'Loughlin J seems to ignore that communications of the Commissioner could be regarded as an incident of the exercise of the general administration power in s 8 of the Assessment Act, and could therefore be impliedly authorised by the Act. However, the second and third reasons given by His Honour are a sound application of the decision of the majority of the High Court in *Bond*.⁴⁵ The outcome of the case clearly indicates that advice per se, provided by the Commissioner on the operation of provisions of the Assessment Act, is unlikely to constitute a reviewable "decision" for the purposes of the ADJR Act.

In the more recent case of *Hutchins v DFC of T*,⁴⁶ the taxpayer sought to make an innovative use of the ADJR Act. The taxpayer had authorised a registered trustee to call a meeting of creditors to vote on a motion for a special resolution that creditors accept a composition of his debts. The Commissioner, to whom the taxpayer was indebted for income tax, voted against the motion. The taxpayer applied for a

⁴³ (1990) 170 CLR 321 at 336.

⁴⁴ 91 ATC 4972 at 4975-4976.

⁴⁵ (1990) 170 CLR 321 per Mason CJ, Brennan and Deane JJ.

⁴⁶ 94 ATC 4442.

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review of the decision to cast a vote against the motion, and the Commissioner responded by objecting to the competency of the application.

At first instance, Jenkinson J upheld the objection to competency on the ground that the decision to cast a vote against the motion was not made "under" an enactment. His Honour further indicated that if he were wrong in so holding on that ground, he would have concluded that the decision to vote against the motion was not a "decision" for the purposes of the ADJR Act. His Honour took the view that the decision lacked the characteristic of being "of a substantive nature", as it could not be seen to confer any benefit or impose any disadvantage on the taxpayer when it was made. The disadvantageous consequences of the exercise of the Commissioner's vote arose only when the votes of all the creditors were cast, and the disadvantage was caused by the cumulative effect of all the negative votes.⁴⁷

The taxpayer's appeal to the Full Federal Court was dismissed.⁴⁸ On the question of whether the decision to vote against the motion was a "decision" for the purposes of the ADJR Act, Black CJ and Lockhart J agreed with the judge at first instance. Black CJ said that the decision to vote was not of a substantive nature as it did not, of itself, determine anything. It was merely in the nature of a step along the way to the resolution of the body of creditors who attended the meeting.⁴⁹ Similarly, Lockhart J said that there was nothing final or operative or determinative about the decision to vote. Of itself, the decision neither conferred, nor denied any benefit to the taxpayer. It was simply a step taken by the Commissioner in the course of executing his duties of recovering income tax owed to the Commonwealth. Lockhart J also concluded that the decision was preliminary to the outcome of the voting and, accordingly, its import was uncertain when it was made. Thus, he noted that there was "no nexus in law" between the decision and that outcome.⁵⁰

Spender J dissented on the question of whether the decision to vote against the motion was a reviewable "decision". His Honour first expressed the opinion that a decision does not cease to be reviewable on the basis that it is not final or operative or determinative. As such, he correctly recognised that the requirements or qualities of a

⁴⁷ At 4446.

⁴⁸ 96 ATC 4372. The taxpayer's application for special leave to appeal to the High Court was refused.

⁴⁹ Ibid at 4376.

⁵⁰ Ibid at 4379.

reviewable "decision", as laid down by Mason CJ in *Bond*,⁵¹ are not absolute or essential in all cases. However, Spender J then adopted reasoning which can be criticised as being somewhat circular, begging the question at issue and contradictory. His Honour simply expressed the further opinion that if the decision to vote in a particular way at the meeting of creditors was "a decision made under an enactment, it is determinative of that matter under the enactment". He added that the fact the decision may not be "crucial", depending as it did on the way other creditors voted at the meeting, did not mean that it was not a substantive determination, or lacking the qualities referred to by Mason CJ in *Bond* as necessary for a decision to be reviewable.⁵² Spender J referred to s 16 of the ADJR Act which, he said, confers on the Court a discretionary power to refuse relief and allows the Court to decline to review a decision which otherwise satisfies the requirements of s 3(1) of the Act. His Honour noted that it might be a sound exercise of this discretion to decline to review the decision to vote if the way the vote was cast would not have affected the final outcome.⁵³

Is the decision made "under" an enactment?

It is well established that the word "under" in the context of the ADJR Act means "in pursuance of" or "under the authority of".⁵⁴ Notwithstanding this established meaning, Bowen CJ and Lockhart J observed, in *Australian National University v Burns*,⁵⁵ that difficulty will often lie in the application of the word to particular circumstances. Their Honours agreed with the following statement of Ellicott J at first instance:⁵⁶

In many cases the power exercised will be precisely stated in the legislation. In other cases the power to do a particular thing will be found in a broadly stated power. The Act should not be confined to cases where the particular power is precisely stated. In each case the question to be asked is one of substance, whether, in effect, the decision is made "under an enactment" or otherwise.

⁵¹ (1990) 170 CLR 321 at 337.

⁵² 96 ATC 4372 at 4381.

⁵³ Ibid at 4382.

⁵⁴ *Evans v Friemann* (1981) 35 ALR 428 at 436; *Australian National University v Burns* (1982) 43 ALR 25 at 31; *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 55 ALR 179 at 184; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 295; *Blurton v Minister for Aboriginal Affairs* (1991) 101 ALR 350 at 356; and, more recently, *Hutchins v DFC* of T 96 ATC 4372 at 4378 per Lockhart J.

⁵⁵ (1982) 43 ALR 25, at 31.

⁵⁶ (1982) 40 ALR 707, at 716-717.

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Accordingly, the question of whether a decision of the Commissioner has been made "under" an enactment, being the Assessment Act, must be determined as a matter of substance rather than form. The question cannot, therefore, be decided merely by the absence of a specifically worded provision in the Assessment Act which expressly provides the source of power to make the decision which is challenged under the ADJR Act.

The question of whether a decision of the Commissioner has been made "under" the Assessment Act has been considered by the courts on numerous occasions. A vast array of decisions of the Commissioner have been held to have been made "under" the Assessment Act. They include, for example:

- 1 the refusal to grant an extended period for the dissolution of a private company under s 47(2B);⁵⁷
- 2 the refusal to grant an extension under s 105AA of the period for a private company to declare a dividend to avoid additional tax on undistributed income;⁵⁸
- 3 the revocation of a provisional certificate and refusal to issue a final certificate for qualifying Australian films under s 24ZAB and 124ZAC;⁵⁹
- 4 the refusal to issue a withholding tax exemption certificate under s 128H;⁶⁰
- 5 the refusal of an extension of time to lodge tax returns under s 161;⁶¹
- 6 the making of an assessment under s 166;⁶²
- 7 the refusal of an extension of time to pay tax under s 206;⁶³
- 8 the institution of proceedings to recover unpaid tax under s 209;⁶⁴

⁵⁷ *Constable Holdings Pty Ltd v FC of T* 86 ATC 4329.

⁵⁸ *Intervest Corporation Pty Ltd v DFC of T* 84 ATC 4744.

⁵⁹ *Willara Pty Ltd v Min for Home Affairs and Environment* 84 ATC 4421, and on appeal at 84 ATC 4947.

⁶⁰ *Domaine Finance Pty Ltd v FC of T* 85 ATC 4465; *Mercantile Credits Ltd v FC of T* 85 ATC 4544.

⁶¹ *Balnaves v DFC of T* 85 ATC 4592.

⁶² *Independent Holdings Ltd v DFC of T* 92 ATC 4599 (but see paragraph (e) of Schedule 1 to the ADJR Act, which would operate to exclude such a decision from review).

⁶³ *Ahern v DFC of T* 83 ATC 4698, and on appeal at 86 ATC 4023; *The Hell's Angels Ltd v DFC of T (No 3)* 84 ATC 4683, and on appeal at 85 ATC 4034; *Thurecht v DFC of T* 84 ATC 4480; *ARM Constructions Pty Ltd v DFC of T* 86 ATC 4213; *Snow v DFC of T* 87 ATC 4078; *Nestle Australasia Ltd v FC of T* 87 ATC 4409.

- 9 the issue of a garnishee notice to debtors of a taxpayer under s 218;⁶⁵
- 10 the institution of prosecution proceedings against an employer for the offence of failing to make tax instalment deductions at the prescribed rate under s 221C(1A);⁶⁶
- 11 the refusal to vary the amount of tax instalment deductions made from the salary or wages of an employee under s 221D(1);⁶⁷
- 12 the exercise by the Commissioner of the power to estimate a taxpayer's taxable income for provisional tax purposes under s 221YDA(4);⁶⁸
- 13 the exercise of the full and free access powers under s 263;⁶⁹
- 14 the issue of a notice under s 264;⁷⁰
- 15 the issue of offshore information notices under s 264A;⁷¹ and
- 16 the refusal of the relief Board to grant a release from a tax liability under s 265.⁷²

In *Bond*,⁷³ the majority of the High Court also made comments which have impacted, unintentionally it would seem, upon the established meaning of the word "under" in the ADJR Act. Mason CJ observed that the reference in the definition in s 3(1) to "a decision of an administrative character made ... under an enactment" indicates that a reviewable decision must be one which a statute "requires or authorizes".⁷⁴ His Honour later concluded that a "reviewable 'decision' is one for which provision is made by or under a statute".⁷⁵

⁶⁴ *Terrule Pty Ltd v DFC of T* 85 ATC 4173; but compare *Hutchins v DFC of T* 94 ATC 4442 at 4444.

⁶⁵ *Huston v DFC of T* 83 ATC 4525; *Edelsten v Wilcox* 88 ATC 4484.

⁶⁶ *Stergis v FC of T* 89 ATC 4442. Note that in the recent case of *Schokker v FC of T* 96 ATC 4885, it was held that a decision by the Commissioner not to prosecute for an offence against the Assessment Act was a decision which was expressly authorised by the Assessment Act. As such, it was a decision made "under" an enactment which was reviewable under the ADJR Act.

⁶⁷ *Coco v DFC of T* 93 ATC 4330.

⁶⁸ *Clyne v DFC of T* 86 ATC 4580.

⁶⁹ *FC of T v Citibank Ltd* 89 ATC 4268; *Southern Farmers Group Ltd v DFC of T* 90 ATC 4056.

⁷⁰ *Clarke & Kann v DFC of T* 83 ATC 4764, and on appeal at 84 ATC 4273; *Sixth Ravini Pty Ltd & Eighth Oupan Pty Ltd v DFC of T* 85 ATC 4307; *Waterhouse v DFC of T* 86 ATC 4639.

⁷¹ *FH Faulding & Co Ltd v FC of T* 94 ATC 4867.

⁷² *Van Grieken v Veilands* 91 ATC 4423; *Rollo v Morrow* 92 ATC 4364.

⁷³ (1990) 170 CLR 321.

⁷⁴ *Ibid* at 336.

⁷⁵ *Ibid* at 337.

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In their joint judgment, Toohey and Gaudron JJ were more specific and went one step further in saying:⁷⁶

A decision under an enactment is one required by, or authorised by, an enactment. ... The decision may be expressly or impliedly required or authorised.

Section 8 of the Assessment Act as a source of power

In light of these comments, a question which arises is whether the general administration power in s 8 of the Assessment Act can, of itself, satisfy the "under" an enactment requirement of the ADJR Act.⁷⁷ This question was at issue in *Australian Wool Testing Authority*⁷⁸ and in *Hutchins*.⁷⁹

In *Australian Wool Testing Authority*,⁸⁰ the Commissioner argued in the alternative that, if there was a decision, it was not a decision "under" an enactment. The Commissioner relied upon the conclusion of Mason CJ in *Bond*⁸¹ that a "reviewable 'decision' is one for which provision is made by or under a statute", and contended that the decisions contained in the letters were not required by or authorised by the Assessment Act. The taxpayer contended that s 8 of the Assessment Act was the enactment under which the decisions were made. Northrop J relied upon the statement of Toohey and Gaudron JJ in *Bond*⁸² in rejecting the Commissioner's argument and held that s 8, by implication at the very least, should be construed as conferring upon the Commissioner a power to make the decision that the income of particular persons is exempt income under s 23 of that Act, thus relieving those persons from the obligation of lodging a tax return. His Honour concluded that where such a decision is made and

⁷⁶ Ibid at 377.

⁷⁷ For a tax case decided before *Bond*, see *Stergis v FC of T* 89 ATC 4442 at 4448-4449 where Hill J held that a decision of the Commissioner to prosecute for a breach of the offence provisions in the Assessment Act is a decision made "under" s 8 of the Act. See also *Molomby v Whitehead* (1985) 7 FCR 541 where Beaumont J held that a decision of the Managing Director of the Australian Broadcasting Corporation to refuse access by a director of the corporation to certain documents was a decision "under" s 10 of the Australian Broadcasting Corporation Act 1983 (Cth). Section 10 provided that the affairs of the corporation shall be managed by the Managing Director.

⁷⁸ 90 ATC 4896.

⁷⁹ 94 ATC 4442, and on appeal at 96 ATC 4372.

⁸⁰ 90 ATC 4896.

⁸¹ (1990) 170 CLR 321 at 337.

⁸² Ibid at 377.

communicated, the decision is a decision "under" an enactment for the purposes of the ADJR Act.⁸³

A contrary view was subsequently expressed by Jenkinson J at first instance in *Hutchins*.⁸⁴ His Honour referred to the decision in *Australian Wool Testing Authority*⁸⁵ and agreed that s 8 of the Assessment Act might be identified as the enactment in pursuance of which the Commissioner would make the decision in question to vote against the motion before the meeting of creditors. Without acknowledging that this should have satisfied the established meaning of the word "under" for the purposes of the ADJR Act, Jenkinson J then pointed out that a general power of management or administration conferred by an enactment would make susceptible to statutory judicial review a vast array of decisions, which he thought unlikely that Parliament intended to be subject to such review.⁸⁶ His Honour referred to the conclusion of Mason CJ in *Bond*,⁸⁷ that a reviewable decision is one for which "provision is made by or under a statute", and held that s 8 could not be understood as making provision in the sense intended by Mason CJ for any of the many decisions of the Commissioner which are made in exercising the authority conferred by the section. Jenkinson J reasoned that, while s 8 contemplates the making of decisions by the Commissioner, its function is merely to nominate the person by whom decisions of the character described in the section are to be made.⁸⁸

On appeal, the Full Federal Court⁸⁹ unanimously upheld the view expressed by Jenkinson J that s 8 of the Assessment Act does not, of itself, satisfy the "under" an enactment requirement, but for reasons which differed somewhat from those of the primary judge. Black CJ, with whom Spender J agreed, accepted that it is clear that a decision may be made "under" an enactment, notwithstanding that the enactment does not expressly require or authorise the decision but

⁸³ 90 ATC 4896 at 4902.

⁸⁴ 94 ATC 4442.

⁸⁵ 90 ATC 4896. It does not seem that Jenkinson J has always held this view, as is shown by the opinion expressed by His Honour in *Bettina House of Fashion Pty Ltd (in liq) v FC of T* 89 ATC 4345 at 4352 that if the decision of the Commissioner to send the letter there in question was a "decision" (which he doubted), it was made "under" s 8 of the Assessment Act.

⁸⁶ 94 ATC 4442 at 4444.

⁸⁷ (1990) 170 CLR 321 at 337.4

⁸⁸ 94 ATC 4442 at 4446.

⁸⁹ 96 ATC 4372.

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does so impliedly.⁹⁰ Where the authorisation is "very general", however, His Honour observed that it is difficult to see how the enactment can be said to "make provision" for a decision in the sense in which that expression was used by Mason CJ in *Bond*.⁹¹ Black CJ then concluded that a decision is unlikely to be made "under" an enactment if the decision is neither expressly, nor impliedly, required by the enactment and, although authorised, is authorised only in a very general way.⁹² His Honour reasoned that the connection between the text of the enactment and the decision is likely to be too remote for the decision to be characterised as having been made "under" an enactment.⁹³

Black CJ did not let the matter rest at this point. His Honour effectively further limited the meaning of the word "under" by also referring to *General Newspapers Pty Ltd v Telstra Corporation*, where Davies andinfeld JJ had stated that:⁹⁴

The ADJR Act is thus concerned with decisions which, being authorised or required by an enactment, *are given force or effect by the enactment* or by a principle of law applicable to the enactment.

Relying upon this statement, Black CJ further observed that a decision which is neither expressly authorised or required, nor impliedly required, by an enactment, but which has as its sole source of authority a general power of administration, is unlikely to be one that is given force or effect by the enactment, or by a principle of law applicable to the enactment.⁹⁵

With regard to s 8 in particular, Black CJ concluded that the section, of itself, gives no force or effect to the decision to vote at the meeting of creditors, and is far too general in its terms for it to be accepted that

⁹⁰ See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 and *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 404.

⁹¹ (1990) 170 CLR 321 at 337.

⁹² 96 ATC 4372 at 4375.

⁹³ Although not cited, see *Emanuele v Cahill* (1987) 18 FCR 304 at 315 where Neaves J said that, "it does not follow that because one cannot identify a particular legislative provision which, either expressly or by necessary implication, confers the power to make the decision, the decision falls outside the class of decisions to which the Judicial Review Act applies. The question is whether, as a matter of substance, the decision has *a sufficiently close connection* with the legislative provision to make it appropriate to speak of it as having been made 'under' that provision". (Emphasis added)

⁹⁴ (1993) 45 FCR 164 at 172. (Emphasis added by Black CJ)

⁹⁵ 96 ATC 4372 at 4375.

the section makes provision for that decision.⁹⁶ His Honour expressly disagreed with the conclusion about s 8 reached by Northrop J in *Australian Wool Testing Authority*.⁹⁷ Interestingly, His Honour also concluded that the combination of s 8 and s 208, while authorising the decision, does not "make provision" for the decision in the sense in which that expression was used by Mason CJ in *Bond*.⁹⁸ The relationship between the text of the two sections and the decision was too remote and non-specific for it to be said that provision was made for the decision by the Assessment Act. Adding s 209 to the combination did not assist, as the relationship between its text and the decision was even more remote and non-specific.

Lockhart J likewise accepted that, to be regarded as having been made "under" an enactment, the enactment must make provision for the making of the decision.⁹⁹ Such provision may be made by the enactment expressly or impliedly requiring or authorising the decision.¹⁰⁰ His Honour noted that no express provision for the decision to vote is made by s 8, s 208, s 209 or by any other section of the Assessment Act. He then simply expressed the view that a decision of the Commissioner to cast a vote at a meeting of creditors in a particular way does not answer the description of a decision made under s 8 of the Assessment Act. In other words, His Honour took the summary view that provision was not made impliedly by s 8 for the Commissioner's decision.¹⁰¹

At this point, Lockhart J dissented and adopted the view that the decision of the Commissioner to vote against the motion was made "under" an enactment, through the combination of s 8 and s 208 of the Assessment Act. His Honour reasoned that s 208, read in conjunction with s 8, impliedly authorises the Commissioner to do all things reasonably necessary to recover income tax, and among those things authorised are decisions to vote at creditors meetings. Therefore, such decisions are made "under" an enactment.¹⁰²

⁹⁶ Ibid at 4376.

⁹⁷ 90 ATC 4896.

⁹⁸ (1990) 170 CLR 321 at 337.

⁹⁹ 96 ATC 4372 at 4378.

¹⁰⁰ See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 377 per Toohey and Gaudron JJ; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302-303; and *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 404-406.

¹⁰¹ 96 ATC 4372 at 4378

¹⁰² Ibid at 4378-4379.

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Institution of recovery proceedings and s 209 of the Assessment Act

Another more specific question which has arisen is whether the institution of recovery proceedings by the Commissioner is a decision made "under" an enactment, and therefore subject to review under the ADJR Act. In *Terrule Pty Ltd v DFC of T*,¹⁰³ it was held by Jenkinson J that the decision to institute such proceedings was one made "under" s 209 of the Assessment Act, and thus is an act of the Commissioner which is reviewable under the ADJR Act. In that case, the Deputy Commissioner sued the taxpayer in the Victorian Supreme Court to recover outstanding income tax. The taxpayer applied to the Federal Court for review of a number of the Deputy Commissioner's decisions concerning the institution of the recovery proceedings.

The Deputy Commissioner objected to the competency of the application on grounds which included that the decisions were not made "under" an enactment. In support of this ground, it was submitted that, as income tax is a debt due to the Commonwealth when it becomes due and payable,¹⁰⁴ the Executive Government of the Commonwealth could recover the debt by suit in a court. Section 209 of the Assessment Act merely authorised suit by the Crown through the agency of the Commissioner or a Deputy Commissioner, and the use for that purpose of their official name. It was further submitted that neither s 209, nor any other provision of an Act, authorised the actual bringing of the suit. Accordingly, the decision of the Deputy Commissioner to institute recovery of income tax was not a decision made "under" an enactment.

Jenkinson J overruled the objection to competency and held that s 209 conferred on the Commissioner and Deputy Commissioner the power to take court proceedings to recover income tax. His Honour regarded s 209 as the source of power to decide whether or not recovery proceedings should be instituted at a particular time against a particular person. Accordingly, the Deputy Commissioner's decisions concerning the institution of recovery proceedings were made "under" an enactment.

However, more recently in *Hutchins*,¹⁰⁵ Jenkinson J at first instance retreated from this position. By way of obiter, His Honour stated that he had reconsidered his reasons for judgment in *Terrule*.¹⁰⁶ He now had doubts about the conclusion he arrived at in that case, that s 209

¹⁰³ 85 ATC 4173.

¹⁰⁴ Under s 208 of the Assessment Act.

¹⁰⁵ 94 ATC 4442.

¹⁰⁶ 85 ATC 4173 at 4174-4176.

confers on the Commissioner and Deputy Commissioner the power to decide whether or not recovery proceedings should be instituted at a particular time against a particular person. His Honour explained that he now saw more force in the submission of counsel for the Deputy Commissioner in *Terrule*, that s 209 did not make provision for decisions of that character. Rather, the section merely authorised suit by the Commonwealth for recovery of income tax by the Commissioner or a Deputy Commissioner suing in their official name. Further, no other section of the Assessment Act, including s 8, made provision for such a decision.

On the view which counsel for the Deputy Commissioner contended in *Terrule*, Jenkinson J concluded in *Hutchins*¹⁰⁷ that the decision whether or not to institute the recovery of tax is an exercise of the executive power of the Commonwealth conferred by s 61 of the Constitution. Although it was not stated by His Honour, it would follow that the decision to institute recovery proceedings for outstanding income tax would not be reviewable under the ADJR Act, since it has been held that the Constitution is not an "enactment" for the purposes of that Act.¹⁰⁸

On the appeal in *Hutchins*¹⁰⁹ to the Full Federal Court, the question of whether recovery action by the Commissioner constitutes a non-reviewable exercise of the Executive power of the Commonwealth was not at issue and was not argued. Nevertheless, Spender J, by way of obiter, expressed the view that a decision made by the Commissioner to sue for unpaid tax is a decision which is expressly authorised under s 209 of the Assessment Act, and is thus a decision made under an enactment which is amenable to review.¹¹⁰ Consequently, there remains uncertainty about the question of whether the Commissioner's decision to institute recovery proceedings is one made "under" an enactment which is reviewable under the ADJR Act.

Is the decision excluded under paragraph (e) of Schedule 1?

Many of the tax related cases which have been litigated under the ADJR Act have also dealt with the question of whether a decision is excluded from review by virtue of paragraph (e) of Schedule 1. A difficult issue which has often been encountered is the definition of the boundary between decisions which are "decisions leading up to

¹⁰⁷ 94 ATC 4442 at 4447.

¹⁰⁸ See *Dixon v AG* (1987) 75 ALR 300.

¹⁰⁹ 96 ATC 4372.

¹¹⁰ *Ibid* at 4380-4381.

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the making of" an assessment and decisions which do not lead up to an assessment being made.

The leading authority on the issue is the decision of the Full Federal Court in *DFC of T v Clarke & Kann*.¹¹¹ The Commissioner had issued to a firm of solicitors notices pursuant to s 264¹¹² requiring them to provide information concerning the sale of shares in a former client company. The solicitors applied for a review of that decision under the ADJR Act and the Commissioner objected to the competency of the application on the ground that the decision fell within paragraph (e) of Schedule 1. At first instance,¹¹³ Sheppard J overruled the Commissioner's objection and the Commissioner then appealed to the Full Court.

In dismissing the Commissioner's appeal, the Full Federal Court said:¹¹⁴

Because para (e) plainly intends to exclude from review some decisions which are made prior to assessment, it must be taken to refer to not only assessments which have been made but to those which will be made.

The decisions which are excluded from review by para (e) of the Schedule are decisions making assessments, decisions forming part of the process of making assessments, and decisions leading up to the making of assessments. Each category provides for some extension of the former, but the overall effect is to emphasise the essential need for a connection between the decision and the assessment.

It is inappropriate to attempt to define the boundary between those decisions which are and those decisions which are not "decisions leading up to" the making of an assessment. However, a decision does not lead up to the making of an assessment merely because it precedes the making of an assessment or because its purpose is to facilitate the making of any assessment which may be made. A decision is not a decision leading up to the making of an assessment unless the making of the assessment has followed or will follow from the decision.

The Full Federal Court held that the information demanded in the s 264 notices could result in an assessment, or in a decision not to assess, or may be of no use. There was, therefore, no sufficient

¹¹¹ 84 ATC 4273.

¹¹² As that section was incorporated into the Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth).

¹¹³ See 83 ATC 4764.

¹¹⁴ 84 ATC 4273 at 4276.

connection between the demands for information and the making of an assessment to attract paragraph (e) of Schedule 1.¹¹⁵

The Full Federal Court also made specific mention of the argument by the solicitors that paragraph (e) only excludes from review those of the Commissioner's decisions which are otherwise reviewable under income tax legislation. Their Honours responded that the absence of an alternative method of review under the income tax legislation may not be immaterial to considering whether a decision is within paragraph (e). However, they thought it unnecessary to further consider the argument in the circumstances of the case.¹¹⁶

It has been held that a decision "affecting liability to tax" does not fall within paragraph (e) of Schedule 1. In *Australian Wool Testing Authority*,¹¹⁷ an argument advanced by the Commissioner was that the decisions contained in the two letters were, in substance, decisions as to whether the income of the taxpayer was exempt income, which would therefore be excluded from calculating the amount of taxable income. The Commissioner contended that such decisions were required to be made as part of the process of making an assessment of taxable income. The decisions were therefore excluded from review under paragraph (e), since they were decisions "making, or forming part of the process of making, or leading up to the making of" an assessment of tax.

Northrop J¹¹⁸ rejected the Commissioner's argument and said that one thing which is clear about paragraph (e) is that decisions "affecting liability to tax" are not within its scope.¹¹⁹ His Honour then held that neither the decision that the taxpayer need not lodge an income tax return, nor the decision to withdraw or revoke that decision, fell within the paragraph. He had earlier noted that each of the letters from the Commissioner were based on the established practice of relieving a person from the requirement to lodge income tax returns where the only income of that person is exempt income. This practice, on its face, did not form part of the process of making an assessment of taxable income from an income tax return lodged by that person.¹²⁰ Indeed, in the case in question the taxpayer had not lodged tax returns for the previous six income years.

¹¹⁵ For a similar outcome in regard to the exercise of the access powers under s 63, see *Southern Farmers Group Ltd v DFC of T* 90 ATC 4056.

¹¹⁶ 84 ATC 4273 at 4276.

¹¹⁷ 90 ATC 4896.

¹¹⁸ Ibid at 4904.

¹¹⁹ See, for example, *Mercantile Credits Ltd v FC of T* 85 ATC 4544 at 4548 per Morling J, and the cases there cited.

¹²⁰ 90 ATC 4896 at 4900-4901.

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A decision to issue an assessment adjusting the income tax returns lodged by a taxpayer was held not to be reviewable in *Independent Holdings Ltd v DFC of T*,¹²¹ because it fell within paragraph (e) of Schedule 1. The taxpayer had acquired Australian Grocers Co-operative Ltd (AGC) in 1989. Subsequently, the ATO undertook a tax audit of AGC and in the course of the audit the Deputy Commissioner wrote to the taxpayer stating that it was intended to adjust the tax returns of AGC and, where appropriate, to impose additional tax in respect of false or misleading statements made in the returns. These tax returns had each disclosed a nil taxable income and, consequently, no assessments of tax payable had been made by the Deputy Commissioner.

The taxpayer applied for review of the decision to make the adjustments to the tax returns and the Deputy Commissioner objected to the competency of the application. Spender J held that while the decision was a "decision made under an enactment",¹²² it clearly fell within paragraph (e) of Schedule 1. His Honour pointed out that, once the "threatened assessments" were issued effecting the adjustments, the taxpayer's remedy was to challenge the actual assessments through the normal objection process in the Assessment Act.¹²³

The question of whether an "assessment" had been made for the purposes of paragraph (e) of Schedule 1 arose in *Winter v DFC of T*.¹²⁴ The taxpayer had sought an extension of time to apply for review under the ADJR Act of the Commissioner's decision to issue duplicated assessments, under which the same income had been assessed to three different but related taxpayers. The Commissioner conceded that the duplication was of such a kind that the assessments raised could not all stand together. The taxpayer argued that the assessments in question were issued as an "ambit" claim, and were tentative and provisional pending the establishment of definitive assessments in due course. The assessments were therefore not "assessments" as defined in s 6(1) of the Assessment Act and the decision to issue them was not excluded under paragraph (e) of Schedule 1.

Burchett J indicated that it was unnecessary for him to come to a firm conclusion on the matter for the purposes of exercising the discretion to extend the time for making the ADJR Act application. To grant the

¹²¹ 92 ATC 4599.

¹²² Namely, s 166 of the Assessment Act.

¹²³ 92 ATC 4599 at 4610 and 4611.

¹²⁴ 87 ATC 4065.

extension of time sought he only had to be satisfied that the taxpayer had an arguable case. His Honour held that the taxpayer had an arguable case that the assessments fell short of being an "ascertainment of the amount of taxable income and the tax payable thereon" within the meaning of the definition of "assessment" in s 6(1).¹²⁵ Accordingly, he granted the extension of time sought.¹²⁶

The meaning of the term "tax" in paragraph (e) has been considered in two cases. The first was *Clyne v DFC of T*,¹²⁷ where Jackson J said he had no doubt that the act of estimating and calculating provisional tax by the Commissioner under s 221YDA(4) of the Assessment Act involved the making of a "decision" for the purposes of the ADJR Act. Further, the act was a step forming part of the process of making, or leading up to the making of, a calculation of an "amount payable" under the Assessment Act. However, His Honour held that paragraph (e) of Schedule 1 did not apply because provisional tax was not a "tax" under the Assessment Act within the context of paragraph (e). Rather, it was an amount payable provisionally on account of tax calculated in accordance with other provisions of the Act. A determination under s 221YDA(4) was therefore not a decision which was a calculation of "tax".¹²⁸ Accordingly, the decision did not fall within paragraph (e) and was not excluded from review.

In *Coco v DFC of T*,¹²⁹ Spender J similarly took the view that, while a decision of the Commissioner under s 221D of the Assessment Act is a step forming part of the process of making, or leading up to the making, of a calculation of an amount payable under the Act, the calculation of "pay-as-you-earn" (PAYE) tax instalment deductions should not be regarded as a calculation of "tax" or the assessment of "tax" under that Act. Rather, the PAYE instalments were an advance payment on account of an employee's ultimate liability to income tax. His Honour therefore held that paragraph (e) of Schedule 1 did not apply to exclude from review the Commissioner's decision to refuse to consider the taxpayer's application to vary the amount of PAYE instalments deducted from his wages.

¹²⁵ Ibid at 4067.

¹²⁶ Interestingly, when the substantive issue was considered by the Federal Court, the taxpayer's application for review was dismissed on the ground that the mere existence of two assessments in respect of the same income does not deprive either assessment of its protection under s 177(1) of the Assessment Act. Furthermore, the application of paragraph (e) of Schedule 1 was not argued before the Court. See 87 ATC 4655.

¹²⁷ 86 ATC 4580.

¹²⁸ Ibid at 4582-4583.

¹²⁹ 93 ATC 4330 at 4335.

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An important limitation on the operation of the exclusion in paragraph (e) of Schedule 1 was confirmed in *Intervest Corporation Pty Ltd v DFC of T*.¹³⁰ The taxpayer was a private company which had certain deductions disallowed in an assessment issued by the Commissioner. This increased the taxpayer's taxable income and had the effect that the taxpayer had not made a sufficient distribution of its profits. The taxpayer made a request for further time under s 105AA to make a sufficient distribution, which would have avoided a liability for additional tax on undistributed income. The request was refused by the Commissioner and the taxpayer applied for a review of that decision. The Commissioner challenged the competency of the application on the basis that a refusal to extend the time to pay a dividend was a decision which fell within paragraph (e) of Schedule 1.

Smithers J rejected the Commissioner's challenge to competency and held that, although the refusal of the extension of time was relevant to the liability of the taxpayer to pay the additional tax demanded in the notice of assessment which had issued, it was not a decision "making, or forming part of the process of making, or leading up to the making of" the assessment. The relevant assessment had already been made and the grant of the taxpayer's request for an extension of time, if it could have led up to anything, only led up to the making of an amended assessment. His Honour then observed:¹³¹

But a decision leading up to the making of an amended assessment is not a decision within the scope of cl (e) of the First Schedule to the ADJR Act. In so far as that clause refers to decisions which lead up to assessments or calculations of tax, they are decisions "leading up to the making of assessments or calculations of tax" and not "decisions amending or refusing to amend assessments or calculations of tax".

It is worth noting that this observation has been the subject of adverse comment by the Administrative Review Council¹³² (the ARC) which has expressed the view that it is a questionable reading of paragraph (e). The ARC refers to s 173 of the Assessment Act which provides that "every amended assessment shall be an assessment for all the purposes of this Act". Given this section, the ARC expressed the view that it is difficult to argue that the expression "decisions ... leading up to the making of assessments ... under the Assessment Act" do not

¹³⁰ 84 ATC 4744.

¹³¹ *Ibid* at 4747-4748. See also *Hadfield Finance Pty Ltd v FC of T* 88 ATC 4300.

¹³² Report No 32, "Review on the ADJR Act: The Ambit of the Act", at paragraphs 275 to 276.

encompass decisions leading up to the making of amended assessments.

There are, however, two difficulties with the ARC's views. First, s 173 of the Assessment Act operates to treat an amended assessment as an assessment only for the purposes of that Act. The section does not have this operation for the purposes of the ADJR Act as well, and the latter does not have a similarly-worded provision. Secondly, the distinction between an original and amended assessment is expressly acknowledged in the actual wording of paragraph (e), where the words "leading up to" are included only with respect to original assessments. The omission of these words when reference is made in the paragraph to amended assessments suggests that limitation of the exclusion was deliberate, as observed by Smithers J.

Before leaving paragraph (e) of the Schedule 1, it is also worth noting that the ARC¹³³ has recommended that the paragraph ought to be repealed. The ATO has strongly opposed this and has pointed to the established appeal procedures under the income tax legislation as providing an adequate avenue for challenging assessments. The ATO submission also argued:¹³⁴

Recourse to the AD(JR) Act is of limited benefit to a taxpayer genuinely seeking review of an assessment as the Federal Court may only consider whether a decision is made according to law and cannot review the merits of a decision. If review were available under AD(JR) this would undoubtedly be used to delay and frustrate the assessment process and to explore the information the Commissioner possessed in relation to the taxpayer. ... Perhaps of even more fundamental importance is that to allow review of decisions affecting assessments would radically disturb the onus of proof which, as an integral part of the taxation system, quite properly lies with the taxpayer. It is the taxpayer, not the Commissioner, who is best aware of the taxpayer's own affairs.

While it is doubtful that the onus of proof would be so disturbed, since an applicant taxpayer still bears this onus in an application under the ADJR Act, the ATO submission appears to have found favour with the Parliament, which has not implemented the ARC recommendation.

¹³³ Recommendation 5 of Report No 32.

¹³⁴ Above n 132 at para 265.

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CONCLUSION

It can be readily concluded that the scope of the statutory judicial review which is available under the ADJR Act to challenge actions taken by the Commissioner in administering the Assessment Act is quite extensive. This is so, notwithstanding the limits imposed upon review by the need for there to be a "decision" made "under" an enactment, and by the exclusion in paragraph (e) of Schedule 1. However, there is some uncertainty about the precise requirements of these limits, and therefore about the precise extent of the judicial review which is available under the ADJR Act.

This uncertainty is demonstrated by the general and imprecise nature of the qualities required of a reviewable "decision" which were laid down by the majority of the High Court in *Bond*.¹³⁵ There will, no doubt, be exceptions to the general requirements of a decision being "final or operative and determinative", as alluded to by Spender J on the appeal in *Hutchins*.¹³⁶ These exceptions will, in time, come to light in subsequent challenges made under the ADJR Act. However, it is unlikely that such challenges will in the future be made in tax cases, as taxpayers are more likely to avail themselves of the extended rights of objection, review and appeal which became available from 1 July 1992 under the Private Ruling system.¹³⁷ These rights provide a more appropriate avenue for challenging decisions of the Commissioner which are in the nature of advice on the operation of provisions of the Assessment Act, and which are not reviewable under the ADJR Act.¹³⁸

The uncertainty in the scope of statutory judicial review is further demonstrated by the conflict which existed between the approaches of Northrop J in *Australian Wool Testing Authority*¹³⁹ and Jenkinson J at first instance in *Hutchins*¹⁴⁰ to the question of whether s 8 of the Assessment Act satisfies the "under" an enactment requirement.

¹³⁵ (1990) 170 CLR 321 at 337.

¹³⁶ 96 ATC 4372 at 4381.

¹³⁷ See Part IVAA of the Administration Act.

¹³⁸ See further Woellner R, "Private Tax Rulings: Principles, Process and Problems", *50th Annual Conference of the Australasian Law Teachers Association*, Revenue Law Interest Group, La Trobe University, September 1995; Harris P, "Private Tax Rulings: An Advanced System" (1994) 23 AT Rev 22; Still D, "The CTC decisions: Private Rulings reviewed by the Federal Court", *CCH Tax Focus*, Issue 3, 18 March 1994; and Barton G, "The Rulings System: Twilight Zone of Tax Law" 1 *Taxation in Australia Red Journal* 284.

¹³⁹ 90 ATC 4896.

¹⁴⁰ 94 ATC 4442.

While this conflict must be regarded as having been resolved by the Full Federal Court in favour of the approach of Jenkinson J, albeit for different reasons, the approach adopted by Black CJ and Spender J on the appeal can be criticised for giving excessive weight to the form of the text of an enactment. This is in apparent contradiction of the approach previously recommended by the Full Federal Court in *Australian National University*,¹⁴¹ which requires the question to be determined as a matter of substance rather than form. The point may also be made that the reliance upon the observations of Mason CJ in *Bond*,¹⁴² which were directed at identifying necessary qualities of a reviewable "decision", to determine the question of whether a decision has been made "under" an enactment, appears to take His Honour's observations out of the context in which they were made. It would seem that, in the absence of a specific provision in the Assessment Act requiring or authorising a particular decision, the approach of Northrop J in *Australian Wool Testing Authority*¹⁴³ is preferable, provided the decision has the qualities laid down by Mason CJ in *Bond*¹⁴⁴ of being final or operative, determinative and substantive.

As noted, Black CJ and Spender J in *Hutchins*¹⁴⁵ also relied upon the statement of Davies and Einfeld JJ in *General Newspapers Pty Ltd v Telstra Corporation*¹⁴⁶ that the ADJR Act is concerned with decisions which, in addition to being authorised or required by an enactment, are given force or effect by the enactment. Clearly, the need to show that an enactment not only authorises or requires a decision, but also gives force or effect to the decision, constitutes a further significant limitation on the meaning of the word "under". This excessively narrow and overly technical view of the word "under" is unwarranted, especially given that it is accepted that the ADJR Act is remedial in operation and therefore should not be narrowly construed.¹⁴⁷

It should also be mentioned that the recent retreat by Jenkinson J at first instance in *Hutchins*¹⁴⁸ from his reasons for the decision in *Terrule*¹⁴⁹ is regrettable. It has created uncertainty about the

¹⁴¹ (1982) 43 ALR 25 at 31.

¹⁴² (1990) 170 CLR 321 at 336 and 337.

¹⁴³ 90 ATC 4896.

¹⁴⁴ (1990) 170 CLR 321.

¹⁴⁵ 96 ATC 4372 at 4375.

¹⁴⁶ (1993) 45 FCR 164 at 172.

¹⁴⁷ See, for example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 335-336 and *DFC of T v Clarke & Kann* 84 ATC 4273 at 4277.

¹⁴⁸ 94 ATC 4442.

¹⁴⁹ 85 ATC 4173.

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reviewability of a significant aspect of the Commissioner's powers to collect tax, namely the decision to institute recovery proceedings against a taxpayer. It is to be hoped that His Honour's views in *Terrule* will ultimately prevail when the issue again comes before the courts, so that the making of such a decision is held to be made "under" s 209 of the Assessment Act, and thus be reviewable under the ADJR Act. This is especially so given that the institution of recovery proceedings against a taxpayer can often have drastic implications. An example of this could be a breach of a term in a financing agreement which may result in a lender calling in loans made to the taxpayer. If the Commissioner's decision to institute recovery proceedings is held to be an exercise of the executive power under the Constitution, it would follow that it would not be amenable to review under the ADJR Act.

The cases dealing with paragraph (e) in Schedule 1 indicate that the courts have tended to confine the operation of the exclusion. This is to be welcomed, as it is often far from certain whether the vast array of decisions made by the Commissioner will be followed by an assessment. The confinement of the exclusion will mean that a greater variety and number of the Commissioner's decisions will be subject to judicial scrutiny prior to the issue of an assessment. It also leaves open a greater scope for taxpayers to challenge decisions of the Commissioner without the spectre of a tax liability hovering over them, and the associated penalties which automatically accrue from this.

A final conclusion which may be drawn is that in weighing up the competing policy considerations of, on the one hand, the ADJR Act allowing persons aggrieved by administrative decisions of government a convenient and effective means of redress, and, on the other hand, avoiding the impairment of efficient administration of government, the courts in more recent times appear to be tilting the balance in favour of the latter. This is particularly so with respect to the narrowed interpretation adopted by the courts of the central words "decision" made "under" an enactment.