

PRACTICAL INJUSTICE IN THE CONTEXT OF PRIVATE TAX RULINGS

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I INTRODUCTION

A presumption of procedural fairness governs the exercise of a statutory or other power that is apt to destroy or prejudice a person's rights or interests.¹ A person who enjoys standing to seek a public law remedy with respect to the exercise of the power may attract the protection of this presumption² despite the absence of an express requirement in the relevant legislation that the principles of natural justice be observed.³ Only 'plain words of necessary intendment'⁴ can exclude this presumption. This, in turn, requires one to ascertain the will of parliament by construing the words of the statute.⁵

Given the preceding, it will be demonstrated below that an obligation of procedural fairness inheres in the purpose and policy of the provisions of the *Taxation Administration Act 1953* (Cth) ('*Administration Act*') governing private tax rulings. Specifically, it is argued that exercise of the power to revise a favourable ruling under section 359-55 of schedule 1 to the *Administration Act* generates a subjective and objective expectation of an opportunity on the part of the taxpayer to make representations refuting revision of the ruling. And, yet, despite that 'the concern of the law is to avoid practical injustice'

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1 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ) ('*Annetts*'), cited with approval in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) ('*Saeed*').

2 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 659 [68] (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff S10/2011*'). See also *A-G (NSW) v Quin* (1990) 170 CLR 1, 40 (Brennan J) ('*Quin*').

3 *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J) ('*Kioa*'), quoted with approval in *Saeed* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *A-G (Hong-Kong) v Ng Yuen Shiu* [1983] 2 AC 629 ('*Ng Yuen Shiu*') where the Privy Council held the applicant was unfairly denied an opportunity to make representations despite the absence of an express right to do so.

4 *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). See also *Plaintiff S10/2011* (2012) 246 CLR 636, 653 [44] (French CJ and Kiefel J).

5 See *Saeed* (2010) 241 CLR 252, 264-6 [31]-[34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

in circumstances where fairness is ‘essentially practical’,⁶ taxpayers adversely affected by the exercise of the power to revise are unable to access conventional statutory or discretionary remedies to protect their presumptive right to procedural fairness.

In essence, it will be shown that a ‘criterion of liability’⁷ upon which the exercise of the power to revise a private ruling depends is the formation by the Commissioner of Taxation of an opinion that there has been a ‘material change’ in the taxpayer’s circumstances since the original ruling was issued. Because this ‘directly affects’⁸ the taxpayer individually and not simply as a member of the public, such a determination is analogous to a ‘declaration’⁹ of the kind that attracts the requirements of procedural fairness and generates a ‘reasonable expectation’¹⁰ to make representations refuting revision.

Indeed, it is argued that practical injustice prevails whenever the Commissioner revises an existing ruling either by issuing a new ruling or by making a new assessment without first giving the adversely affected taxpayer a ‘fair opportunity’¹¹ to make representations challenging the revision. This is because a ‘detriment’ is suffered in circumstances where the taxpayer reasonably expects the Commissioner to take such a procedural step:

A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations ... it is the existence of a subjective expectation, and reliance, that results in unfairness. Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.¹²

Yet, relying on the joint reasons of the High Court in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (‘*Futuris*’),¹³ the Full Federal Court in *Mount Pritchard & District Community Ltd v Federal Commissioner of Taxation* (‘*Mount Pritchard*’) held that any procedural unfairness infecting revision of a private tax ruling and/or issue of an amended assessment of a taxpayer’s liability is not susceptible to judicial review without evidence of ‘conscious maladministration’ or ‘bad faith’.¹⁴ These will occur only in rare or exceptional circumstances.

6 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ) (‘*Pompano*’), quoting *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ) (‘*Ex parte Lam*’).

7 *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 [9] (The Court) (‘*W R Carpenter Holdings*’).

8 *Cf Kioa* (1985) 159 CLR 550, 584 (Mason J), quoting *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 452 (Jacobs J).

9 *Pompano* (2013) 252 CLR 38, 56 [30] (French CJ).

10 The expression ‘reasonable expectation’ has supplanted the term ‘legitimate expectation’ in Australian public law: see *Ex parte Lam* (2003) 214 CLR 1, 31 [92] (McHugh and Gummow JJ); see also at 11 [32] (Gleeson CJ).

11 *Cf Pompano* (2013) 252 CLR 38, 108 [188] (Gageler J).

12 *Ex parte Lam* (2003) 214 CLR 1, 13–14 [37] (Gleeson CJ), quoted in *Pompano* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ).

13 (2008) 237 CLR 146.

14 *Mount Pritchard* (2011) 196 FCR 549, 556 [47] (The Court). In *Futuris* (2008) 237 CLR 146, 157 [25], the plurality (Gummow, Hayne, Heydon and Crennan JJ) explained that apart from ‘tentative or

Instead, a dissatisfied taxpayer must invoke the review and appeal procedures in part IVC of the *Administration Act*. Part IVC provides the taxpayer with a ‘constitutionally derived’¹⁵ right to resist an assessment by ‘proving in the courts that the *criteria of liability* were not satisfied’.¹⁶ Regardless of whether evidence of material change exists, however, a dissatisfied taxpayer can only test the limits of the Commissioner’s power in section 359-55 upon the making of a ‘taxation decision’. This occurs once the Commissioner serves notice to revise, unless an assessment covering the period of the revised ruling has otherwise been made.¹⁷ Yet, because part IVC is concerned with outcomes rather than procedures,¹⁸ a taxation decision made in good faith, albeit procedurally unfair, is generally unassailable.

That neither part IVC nor judicial review proceedings may be raised to vitiate, for want of procedural fairness, the Commissioner’s decision to revise a private ruling is rather disconcerting given the central importance of private rulings to the self-assessment regime. Private tax rulings allow taxpayers to lodge tax returns in confidence without the risk of exposure to substantial tax penalties.¹⁹ Fulfillment of this important function necessarily entails a full and fair investigation of the taxpayer’s activities to ensure the Commissioner is appropriately and reasonably satisfied that a relevant change in the taxpayer’s circumstances has occurred to warrant revision. Otherwise, section 357-60 of schedule 1 to the *Administration Act*, which binds the Commissioner by a ruling that applies to the taxpayer, would be rendered largely futile and/or ineffectual.

Understandably, given the public interest in ‘operational flexibility’²⁰ and the comparatively limited number of tax officers employed to administer a tax system comprising some 16 million tax returns lodged annually, courts allow the Commissioner considerable latitude when enforcing tax laws. Yet, like other individuals adversely affected by an administrative decision, taxpayers stand to

provisional assessments which ... do not answer the description [of assessment] in s 175 [of the *Income Tax Assessment Act 1936* (Cth)] and which may attract a remedy for jurisdictional error ... conscious maladministration of the assessment process may be said also not to produce an “assessment” to which s 175 applies’.

15 *Denlay v Federal Commissioner of Taxation* (2013) 211 FCR 344, 352 [19] (Logan J).

16 *W R Carpenter Holdings* (2008) 237 CLR 198, 204 [9] (The Court), citing *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639–41 (Gibbs CJ, Wilson, Deane and Dawson JJ) (*‘MacCormick’*) and *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 (*‘Giris’*) (emphasis added).

17 *Administration Act* s 359-60; Commissioner of Taxation (Cth), *Taxation Ruling*, TR 2006/11, 4 October 2006, 19 [58].

18 See *Public Servant and Commissioner of Taxation* [2014] AATA 247 (28 April 2014) [4] (*‘Public Servant Case’*) where Senior Member Lazanas expressed dissatisfaction with pt IVC procedures in respect to a taxation decision made pursuant to section 359-55 of the *Administration Act*.

19 See *Federal Commissioner of Taxation v McMahon* (1997) 79 FCR 127, 133 (Lockhart J) (*‘McMahon’*); Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005 (Cth) 8 [1.9].

20 Operational flexibility directs decision-makers vested with administrative discretionary powers be given the flexibility to tailor an administrative decision to the particular circumstances of a particular case falling for decision: Philip Sales and Karen Steyn, ‘Legitimate Expectations in English Public Law: An Analysis’ (2004) (Autumn) *Public Law* 564, 564, 573 ff.

lose considerably from a decision by the Commissioner to withdraw a favourable ruling without fair notice.

Accordingly, it is difficult to accept that in most cases taxpayers will be precluded²¹ from seeking declaratory relief for procedural unfairness when the ‘law in Australia’²² mandates alignment of expectations as to exercise of power to the way in which the repository of power is to exercise it in a particular case if, as here, ‘the power is so created that the according of natural justice conditions its exercise’.²³

After all, tax is a special area generating an expectation of a ‘review process that emphasises procedural fairness and independence’.²⁴ In this regard, it is said that judges see themselves as performing an important and essential role and taxpayers look to courts to provide protection against the unilateral and unfettered exercise of power, whether in statutory interpretation or in the exercise of administrative discretion.²⁵

Admittedly, whilst not every denial of procedural fairness necessarily mandates relief, it is ‘more difficult’ to conclude that it would have made no difference to the result if denial of a fair opportunity to make representations affects ‘the entitlement of a party to make submissions on an issue of fact’.²⁶ As Megarry J in *John v Rees* said:

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.²⁷

Notwithstanding, the limitations of the conventional remedies discussed below mean that the Commissioner need not accord procedural fairness before withdrawing a private ruling. This, in turn, has resulted in the balance between operational flexibility and taxpayer rights to, unfairly, if inadvertently, shift in favour of the Commissioner.

In a separate, albeit related, development driven by concerns about the failure of the Australian Taxation Office to adhere to the model litigant rules and the inadequacy of the Taxpayers’ Charter²⁸ in protecting taxpayers’ interests and

21 In *Futuris* a plurality in the High Court reasoned that declaratory relief is generally unavailable because Parliament has provided appeal and review procedures in pt IVC: *Futuris* (2008) 237 CLR 146, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ).

22 *Ex parte Lam* (2003) 214 CLR 1, 28 [83] (McHugh and Gummow JJ).

23 *Quin* (1990) 170 CLR 1, 39 (Brennan J).

24 Murray Gleeson, ‘Outcome, Process and the Rule of Law’ (2006) 65 *Australian Journal of Public Administration* 5, 11.

25 See Jeff A King ‘The Pervasiveness of Polycentricity’ (2008) (Spring) *Public Law* 101, 111–12.

26 *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane and Dawson JJ).

27 *John v Rees* [1970] Ch 345, 402, cited with approval in *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 117 [81] (Gaudron and Gummow JJ).

28 Although not a legislated ‘Bill of Rights’, as is the case in the US, under the Taxpayers’ Charter, taxpayers can expect to be treated fairly and reasonably in their dealings with the Australian Taxation Office: Australian Taxation Office, ‘Taxpayers’ Charter: What You Need to Know’ (NAT 2548-06.2010, June 2010).

expectations, on 2 November 2015 the Inspector-General of Taxation announced ‘terms of reference for ... review into the Taxpayers’ Charter and taxpayer protections ... designed to strike a fair balance between the wide ranging powers of revenue authorities and taxpayer rights’.²⁹

The lack of an effective remedy for practical injustice could potentially lead to increased non-compliance or aggressive tax planning³⁰ as a result of taxpayer perceptions of unfairness or procedural injustice.³¹ This has led one commentator to question the logicity of narrowing the range of administrative law remedies for jurisdictional error.³² Considering current constraints, however, I argue elsewhere that the public law remedy of administrative estoppel can effectively be raised to estop the Commissioner withdrawing a favourable ruling without proper notice.³³ This would promote a fairer balance between private and public interests and facilitate the making of sounder administrative decisions.

To more fully expound the present theme of practical injustice in the context of private tax rulings, the article is divided into three parts. Part II briefly outlines the operation and object of the private tax ruling regime with particular focus placed on conditions informing exercise of the power to revise a private ruling. Part III examines the review and appeal procedures available under part IVC of the *Administration Act* to a dissatisfied taxpayer. Part IV demonstrates how practical injustice arises within the context of the private tax rulings regime and why the constitutionally entrenched ‘minimum’³⁴ requirement of judicial review will not ordinarily lie to vitiate a decision to revise a private tax ruling or issue an assessment contrary to an existing ruling.

II THE PRIVATE TAX RULINGS SYSTEM

A system of private rulings contained in part IVAA was introduced in the *Administration Act* on 30 June 1992 by the *Taxation Laws Amendment (Self Assessment) Act 1992* (Cth). This enabled a person to apply to the Commissioner for a private ruling on the way in which a tax law would apply to that person in

29 Inspector-General of Taxation, ‘IGT Review into Taxpayers’ Charter and Taxpayer Protections’ (Media Release, 2 November 2015) <<http://igt.gov.au/news-and-media/igt-review-into-the-taxpayers-charter-and-taxpayer-protections/>>.

30 See Kristina Murphy, ‘Aggressive Tax Planning: Differentiating Those Playing the Game from Those Who Don’t’ (2004) 25 *Journal of Economic Psychology* 307, 316, citing Valerie Braithwaite, ‘Dancing with Taxation Authorities: Motivational Postures and Non-compliant Actions’ in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, 2003) 15, 18.

31 See literature cited in Robin Woellner, ‘Problems in Paradise: Conscious Maladministration in the ATO’ (2015) 8 *Journal of the Australasian Law Teachers Association* 129, 129 n 4.

32 Ibid 134.

33 See John Azzi, ‘Estopping the Commissioner of Taxation to Ensure Administrative Accountability’ (Paper presented at the Australian Institute of Administrative Law National Administrative Law Conference, Brisbane, 21–22 July 2016).

34 The minimum provision of judicial review is entrenched in s 75(v) of the *Commonwealth Constitution* and is ‘essential’ for enabling judges to declare and enforce the ‘limits of the power conferred by statute upon administrative decision-makers’: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 667–8 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

respect of the year of income in relation to an ‘arrangement’ which either had been or proposed to be carried out.³⁵ Prior to this time, ‘taxation rulings, determinations and advance opinions were, in general, not legally binding on the Commissioner. This apparently was on the footing that no conduct on the part of the Commissioner could operate as an estoppel against the revenue laws administered by him’.³⁶

With effect from 1 January 2006, part IVAA was repealed by the *Taxation Laws Amendment (Improvements to Self Assessment) Act (No 2) 2005* (Cth) and replaced by divisions 357 to 360 of part 5-5 of schedule 1 to the *Administration Act*. The object of part 5-5 is to provide taxpayers with a way to find out how the Commissioner thinks the laws he or she administers apply, or would apply, to the taxpayer’s particular circumstances.³⁷ To this end, the Commissioner may make rulings about ‘any matter involved in the application of [a] provision’³⁸ the Commissioner considers relevantly applies to the specified scheme, including ‘issues relating to liability, administration, procedure and collection’.³⁹

Specifically, pursuant to division 359 a taxpayer may seek a private ruling about the way in which, in the Commissioner’s opinion, the law applies to them. Accordingly, a private ruling allows the taxpayer to file a tax return or proceed with a contemplated transaction with confidence.⁴⁰ It reduces uncertainty when a taxpayer self-assesses their obligation and protects against additional primary tax, penalties and interest.⁴¹ To facilitate this purpose, section 357-60 of schedule 1 to the *Administration Act* binds the Commissioner in certain circumstances. It states:

A ruling binds the Commissioner in relation to you ... if:

- (a) the ruling applies to you; and
- (b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling.

A Revising an Existing Ruling

Notwithstanding sections 357-60, the Commissioner may revise a binding private ruling irrespective of an application by the taxpayer.⁴² The Commissioner is not required to give the taxpayer an opportunity to refute the revision, as long as the taxpayer is provided with a copy of the revised ruling.⁴³ In addition, the scheme or the income year to which the earlier ruling relates must not yet have

35 *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 401 (Gummow J).

36 *Ibid.* Cf *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154 where the Court stated that the scheme of ‘binding public rulings’ in pt IVAAA of the *Administration Act* ‘leaves no room for the operation of any doctrine of estoppel or the reintroduction of that doctrine through administrative law remedy’: at 169.

37 *Administration Act* sch 1 s 357-5. See also *Yip and Federal Commissioner of Taxation* [2011] AATA 785 (4 November 2011) [3] (Deputy President Forgie).

38 *Administration Act* sch 1 s 359-5(2).

39 Commissioner of Taxation (Cth), *Taxation Ruling*, TR 2006/11, 4 October 2006, 6 [16].

40 Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005 (Cth) 32 [3.9].

41 See Commissioner of Taxation (Cth), *Practice Statement Law Administration*, PS LA 2008/3, [15]–[16].

42 *Administration Act* sch 1 s 359-55(3).

43 *Administration Act* sch 1 s 359-55(2).

begun.⁴⁴ The Commissioner must also be satisfied that ‘the factual position in a particular income year differs from that on which the ruling was based’.⁴⁵

Once revised, the original ruling no longer applies and cannot be relied upon.⁴⁶ Consequently, the Commissioner may issue an assessment contrary to an earlier binding ruling. In *Mount Pritchard*, the Full Federal Court explained that section 357-60 does not apply to bind the Commissioner where the taxpayer has either entered into a ‘different arrangement’⁴⁷ or there has been a change in the taxpayer’s circumstances since the issue of the original ruling. Yet, further examination of this provision, which mandates consideration of the statutory text in its context, including legislative history and extrinsic materials,⁴⁸ reveals that change in circumstances must be sufficiently material for section 357-60 not to apply.

This is confirmed in judicial decisions concerning former section 170BB, the predecessor to section 357-60 of schedule 1 to the *Administration Act*, which relevantly inform⁴⁹ construction of section 357-60 in circumstances where the scheme of private rulings established under part 5-5 in schedule 1 to the *Administration Act* substantially⁵⁰ reflects that which characterised former part IVAA.

According to *McMahon*, the leading case expounding the system of private rulings prior to 2006, the Commissioner was not bound by a private ruling ‘if the facts and circumstances as found are *materially different* from those which are the subject of the ruling’.⁵¹ This is not dissimilar to what their Honours observed in *Mount Pritchard*:

there is a factual issue to be determined whether the private ruling applies in the circumstances of the application. That factual issue is whether the activities of the applicant have *materially changed* from 2006 from those that existed at the time the Ruling was issued, so that the arrangement or scheme has not been implemented in the way set out in the Ruling.⁵²

Arguably, insistence on ‘material change’ better facilitates the object of division 357, which is to ‘[limit] the ways the Commissioner can alter rulings to a taxpayer’s detriment’.⁵³ It also reflects historical context and gives substance and meaning to the expression in section 357-60(1)(a) that ‘the ruling applies to you’. To require anything less would allow the operation of section 357-60 to be easily circumvented to the detriment of taxpayers. Without the qualification of

44 *Administration Act* sch 1 s 359-55(1)(b).

45 *Mount Pritchard* (2011) 196 FCR 549, 558 [59] (The Court).

46 *Administration Act* sch 1 s 359-55(4); see also Commissioner of Taxation (Cth), *Taxation Ruling*, TR 2006/11, 4 October 2006, 17 [49].

47 *Mount Pritchard* (2011) 196 FCR 549, 558 [60] (The Court).

48 *Federal Commissioner of Taxation v Consolidated Media Ltd* (2012) CLR 503, 519 [39] (The Court).

49 *AB v Western Australia* (2010) 244 CLR 390, 398 [10] (The Court).

50 *Yip and Federal Commissioner of Taxation* [2011] AATA 785 (4 November 2011) [10] (Deputy President Forgie). See also *Rosgoe Pty Ltd v Federal Commissioner of Taxation* [2015] FCA 1231, [1] (Logan J) (*‘Rosgoe’*).

51 *McMahon* (1997) 79 FCR 127, 150 (Emmett J) (emphasis added).

52 *Mount Pritchard* (2011) 196 FCR 549, 558 [58] (The Court) (emphasis added).

53 Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005 (Cth) 38 [3.20].

material change, the capacity to withdraw a binding ruling would be virtually unbounded, particularly given the propensity of the Commissioner to construe facts in a ‘self-fulfilling’ manner.⁵⁴

B When Will a Material Change in Circumstances Occur?

In *Mount Pritchard*, the taxpayer was issued with a private ruling in February 2004 (‘2004 Ruling’) stating that it would be exempt from income tax for the years of income ended 30 June 2003 to 30 June 2010 on the basis that it was established for the promotion of sport.

In June 2005 the Commissioner purported to withdraw the 2004 Ruling on the basis that the arrangement the subject of the 2004 Ruling had not commenced in relation to the year ended 30 June 2006. In April 2006 the Commissioner issued a second notice of private ruling pursuant to section 359-55 of the *Administration Act*, stating that the taxpayer was not exempt from income tax for the income years between 2006 and 2010.

Proceeding on the basis that the 2004 Ruling no longer applied, in June 2007 the Commissioner issued an assessment for the 2006 income year (‘2006 Assessment’) which assessed a taxable income of \$1 455 639 and tax thereon of \$436 691.70.

Although not required by law to do so, the Chief Tax Counsel stated in a letter (written in response to complaints by the taxpayer’s tax agent) that the so-called ‘amalgamation’ with another club in 2005/06 represented a ‘material change’ to the arrangement the subject of the 2004 Ruling warranting its withdrawal.⁵⁵ This is despite the Commissioner accepting that the taxpayer had provided all relevant information at the time of the 2004 Ruling, including the fact that:

the [taxpayer] supported sub-clubs representing 28 different sports including Rugby League ... Soccer ... Cricket ... Hockey ... Netball ... [and] leased and maintained five sporting fields and spent substantial amounts maintaining and operating a fitness centre and other sporting facilities.⁵⁶

It is certainly arguable that the Chief Tax Counsel was incorrect in asserting that a material change in the taxpayer’s circumstances occurred in *Mount Pritchard*. What constitutes ‘material change’ is not defined in the statute.⁵⁷ The common understanding of an ordinary English word such as ‘material’ is a question of fact,⁵⁸ which is unlikely to be susceptible to review on appeal (see Part III(B) below).

The term ‘material’ is relevantly defined in the *Macquarie Dictionary* as ‘of substantial import or much consequence’ or as ‘likely to influence the determination of a cause’.⁵⁹ Applying this definition to the particular circumstances arising in *Mount Pritchard* entails consideration of whether

54 See *Public Servant Case* [2014] AATA 247 (28 April 2014) [4] (Senior Member Lazanias).

55 *Mount Pritchard* (2011) 196 FCR 549, 552 [18] (The Court).

56 *Ibid* 551 [7] (The Court).

57 A reference to ‘material’ change appears in section 359-65(3) of sch 1 to the *Administration Act*.

58 See *Collector of Customs v Agfa-Geveart Ltd* (1996) 186 CLR 389, 395 (The Court).

59 *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 909.

amalgamation was of ‘much consequence’ considering the taxpayer’s wide-ranging activities and previous support for other ‘sub-clubs’. While not clear-cut, it is at least arguable that mere amalgamation at law made little difference, if any, or was of little consequence to the manner in which the taxpayer conducted its activities with the various sub-clubs it supported pre-amalgamation.

Notwithstanding this analysis, the Full Federal Court in *Mount Pritchard* held that the taxpayer was unable to seek judicial review in the absence of evidence of deliberate failure by the Commissioner to comply with provisions of the *Administration Act*⁶⁰ and the pendency of part IVC proceedings.⁶¹ Their Honours were satisfied that analysis of the extent to which the taxpayer’s activities had changed since the original ruling was issued could be undertaken in part IVC proceedings.⁶²

However, as the discussion in Part III immediately below demonstrates, any such analysis is, in general, incapable of ensuring the Commissioner undertakes the required procedural step before revising a favourable ruling or issuing an assessment inconsistent with the original ruling.

III PRIVATE RULINGS AND THE ASSESSMENT-MAKING PROCESS

An assessment contradicting a favourable private ruling is invalid unless the Commissioner is satisfied that the original ruling no longer applies. As Lockhart J explained in *McMahon*:

The assessment process continues notwithstanding the application for and the making of private rulings, subject to the constraint that, if a private ruling has been made, the facts as identified by the Commissioner which constitute the relevant arrangements will *govern* the assessment that issues in due course. If the facts turn out to be different from those identified by the Commissioner, then the ordinary assessment process applies and in that sense the private ruling becomes academic.⁶³

Consequently, the assessment process depends on formation of an opinion by the Commissioner that the scheme which is the subject of the ruling has not been implemented in the way set out in the original ruling. Formation of this opinion is evidenced by issue of notice to revise the original ruling which, in turn, is informed by whether there has in fact been material change in the taxpayer’s activities and circumstances compared with when the original ruling was issued. Otherwise, the original ruling continues to apply and binds the Commissioner.

Indeed, while section 359-55 of schedule 1 to the *Administration Act* does not explicitly impose substantive liability on the taxpayer, its importance to the assessment-making process means that formation of opinion about whether there has been a material change in circumstances to warrant exercise of discretionary

60 See *Mount Pritchard* (2011) 196 FCR 549, 558–9 [62] (The Court).

61 *Ibid* 559 [63] (The Court).

62 *Ibid* 558–9 [62] (The Court).

63 *McMahon* (1997) 79 FCR 127, 133 (Lockhart J) (emphasis added).

power under section 359-55 constitutes a ‘criterion of liability’ upon which the incidence of tax depends. Citing a general proposition of taxation espoused in *Giris*,⁶⁴ the High Court in *W R Carpenter Holdings* explained:

for an impost to satisfy the description of taxation in section 51(ii) of the *Constitution* it must be possible to point to the criteria by which the Parliament imposes liability to pay the tax; *but this does not deny that the incidence of a tax may be made dependent upon the formation of an opinion by the Commissioner*.⁶⁵

The impact that section 359-55 has on the assessment-making process differs from exercise of the assessment power considered by the High Court in *George v Federal Commissioner of Taxation*.⁶⁶ In that case, the taxpayer alleged that the assessment issued was excessive because the opinion or judgment contemplated by section 167 of the *Income Tax Assessment Act 1936* (Cth) (‘1936 Act’) had not been formed by the right person, and that in any case it had been formed in the absence of material. In dismissing the taxpayer’s complaint, the High Court observed that the formation of opinion is ‘no condition precedent to power to assess. It is part of the very process of assessment itself’.⁶⁷

In contrast, the criteria informing the exercise of the power under section 359-55 constitute a condition precedent to the power to assess. The Commissioner is prevented from issuing a notice to revise and ultimately a new tax assessment, unless the conditions for revision are satisfied. As mentioned, one such condition is that the scheme to which the original private ruling relates has not begun. Formation of an opinion that material change has occurred is another.

Yet, relying on the High Court decision in *McDonald v Commissioner of Business Franchises* (‘*McDonald*’),⁶⁸ the Full Federal Court in *Mount Pritchard* concluded that once a notice of assessment issues, it is protected by section 177(1) of the *1936 Act* ‘even though a condition governing the exercise of the power [to assess] is disputed’.⁶⁹ However, reliance on *McDonald* is, respectfully, either misconceived or inappropriate considering the High Court made the remark regarding the unimpeachability of tax assessments in *obiter* in circumstances where the issue before the High Court concerned the power to make assessments under the former section 19A(1)(d) of the *Business Franchise (Tobacco) Act 1974* (Vic) to a person carrying on business as a tobacco wholesaler.⁷⁰

At any rate, where, as here, an essential step in the making of an assessment is a determination by the Commissioner that a particular provision should apply to the taxpayer, reliance on the *McDonald* principle would appear to conflict with a fundamental proposition espoused in *MacCormick*⁷¹ and *Giris*,⁷² and affirmed

64 (1969) 119 CLR 365.

65 *W R Carpenter Holdings* (2008) 237 CLR 198, 204 [9] (The Court) (emphasis added) (citations omitted).

66 (1952) 86 CLR 183.

67 *Ibid* 203–4 (The Court).

68 (1992) 175 CLR 472, 477 (The Court).

69 *Mount Pritchard* (2011) 196 FCR 549, 556–7 [50] (The Court).

70 (1992) 175 CLR 472, 477 (The Court).

71 *Ibid* 474 (The Court).

72 (1969) 119 CLR 365, 378–9 (Kitto J).

by a unanimous bench of five justices in *W R Carpenter Holdings*. In the words of the High Court:

the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny to the taxpayer ‘all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case’.⁷³

In short, the Full Federal Court in *Mount Pritchard* erred in relying on *McDonald* in circumstances where the latter involved different facts, and the conclusion reached by the Court fails to take account of more relevant and appropriate High Court authority. The conclusion reached in *Mount Pritchard* appears to contravene core construction tasks imposed on Australian courts by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* – namely, to give meaning and effect to every word appearing in the provision to be construed and adjusting the meaning of competing provisions to ensure attainment of harmonious goals.⁷⁴

Section 357-60 of schedule 1 to the *Administration Act* is a core provision in the private tax rulings regime. It underpins the entire system and is fundamental to realising an important legislative purpose to give taxpayers certainty in a self-assessment environment. Without it the Commissioner could easily circumvent the binding nature of a private ruling by giving no regard to the important words in section 357-60(1)(b) – ‘you rely on the ruling by acting (or omitting to act) in accordance with the ruling’. These words offer taxpayers certainty and the confidence to justify seeking a private ruling.

It follows that to best give effect to the purpose and language of the private rulings scheme and, in turn, conform with the order in which part 5-5 in schedule 1 to the *Administration Act* should be read,⁷⁵ section 357-60 should be ascribed ‘leading provision’ status in the event of conflict between it and section 359-55:

Reconciling conflicting provisions will often require the court ‘to determine which is the leading provision and which is the subordinate provision, and which must give way to the other’. Only by determining the hierarchy of the provisions will be it be possible in many cases to give the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.⁷⁶

Therefore, to ensure the power of revision in section 359-55 is not applied arbitrarily, the Commissioner must first determine whether the taxpayer is in fact acting in accordance with the ruling. This, in turn, requires the making of a determination about whether a material change in circumstances has occurred since the original ruling. As a consequence, section 357-60 becomes the ‘leading

73 *W R Carpenter Holdings* (2008) 237 CLR 198, 204 [9] (The Court) (citations omitted).

74 (1998) 194 CLR 355, 381–2 [70]–[71] (McHugh, Gummow, Kirby and Hayne JJ).

75 In *Patman v Fletcher’s Photographics Pty Ltd* (1984) 6 IR 471, Priestley JA explained that, ordinarily, a later provision in the relevant statutory scheme (namely, s 359-55) must be read ‘in the light of the purpose thus discerned in [the preceding provision – namely, s 357-60]’: at 474–5. This was followed in *Girardi v Commissioner of State Taxation* [2013] SASC 43, [8] (Gray J). See also D C Pearce and R S Geddes *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 149–50 [4.5].

76 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [70] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

provision' in the event of a conflict due to it governing the circumstances when the Commissioner can invoke the power to revise in section 359-55.

Based on the approach adopted by the Full Federal Court in *Mount Pritchard* however, section 357-60 is ascribed 'subordinate provision' status and its meaning adjusted so as to render it impotent against an assessment issued in consequence of exercise of revision power, irrespective of whether formation of opinion about the taxpayer's change in circumstances was validly made or otherwise.⁷⁷ This would be anathema to the fundamental proposition espoused by the High Court in *W R Carpenter Holdings*, particularly where, as shown, the private tax rulings scheme makes the incidence of tax dependent on formation of opinion by the Commissioner.

The immediately following discussion amply demonstrates the ineffectiveness of part IVC procedures in aligning a dissatisfied taxpayer's expectation of procedural fairness with the conditions governing exercise of the Commissioner's power to revise or issue an assessment contradicting a favourable ruling.

A Objecting to a Taxation Decision

A taxpayer dissatisfied with a tax ruling or assessment may invoke the review and appeal procedures under part IVC of the *Administration Act*.⁷⁸ However, a dissatisfied taxpayer can only object to the Commissioner's decision to revise once the revised ruling has been issued.⁷⁹ This is because an objection can only be lodged against a 'taxation decision' which is taken to be made once the revised ruling issues.⁸⁰

If the Commissioner instead issues a new assessment, a dissatisfied taxpayer must object to the assessment.⁸¹ In each case, a dissatisfied taxpayer must lodge a 'taxation objection' under section 175A of the *1936 Act* within a specified time.⁸² The Commissioner, in turn, must give an 'objection decision' pursuant to section 14ZY of the *Administration Act*, which includes a decision to make a different private ruling under section 14ZY(1A)(b) of the *Administration Act*.

A taxpayer who disagrees with the objection decision may either apply to the Administrative Appeals Tribunal ('AAT') for review of the objection decision or appeal to the Federal Court.⁸³ Taxpayers generally have the option of review or appeal except where the objection is against an 'ineligible income tax remission

77 See above n 73 and accompanying text.

78 See *Mount Pritchard* (2011) 196 FCR 549, 557 [53] (The Court). See also Australian Taxation Office, 'Mount Pritchard v Commissioner of Taxation' (Decision Impact Statement, 5 September 2012) <<http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/NSD85of2011/00001>>.

79 *Administration Act* sch 1 ss 359-60(2), 359-60(3)(a).

80 *Administration Act* sch 1 s 359-60(2).

81 *Administration Act* sch 1 s 359-60(3).

82 *Administration Act* s 14ZW.

83 *Administration Act* ss 14ZZ(1)(a)(i)–(ii). An appeal under s 14ZZ of the *Administration Act* falls within the Federal Court's original jurisdiction: see *Trylow Pty Ltd v Federal Commissioner of Taxation* (2004) 55 ATR 408.

decision', in which case the taxpayer can only appeal to the Federal Court.⁸⁴ However, once the review path is elected, the taxpayer is precluded from taking an original appeal to the Federal Court.⁸⁵

In a proceeding for either review under section 14ZZK or appeal under section 14ZZO, the taxpayer bears the burden of proving the assessment excessive,⁸⁶ or that the private ruling should have been made differently.⁸⁷

An assessment issued contrary to a favourable ruling will be deemed excessive where it 'imposes a substantive liability on a taxpayer in excess of that to which it may lawfully be subjected'.⁸⁸ This will be the case if the original favourable ruling still applies.⁸⁹ This, in turn, requires a factual investigation to be undertaken to discern whether there has been a relevant change of circumstances to justify the Commissioner's decision to issue an amended assessment.⁹⁰

However, despite the fact that the AAT 'stands in the shoes' of the Commissioner in a review proceeding,⁹¹ review of the Commissioner's decision is not at large. The 'only material which need be before the [AAT] would be the ruling and particulars of the person, the tax law, the year of income and the arrangement identified in the ruling'.⁹² The AAT 'has no true fact finding role'⁹³ when reviewing the correctness of a private ruling. It cannot make a decision on a matter that was not the subject of a decision by the primary decision-maker.⁹⁴ Rather, it can only consider a question framed by reference to the particular scheme specified by the Commissioner:

As the prefatory provision of Div 359 (s 359-1) explains, '[a] private ruling is an expression of the Commissioner's opinion'. As that opinion concerns a particular question about the application of tax law to the facts identified in the ruling comprising the specified scheme, the [AAT's] jurisdiction is therefore limited to a review of the Commissioner's opinion on that same question. The question before the [AAT] is whether the Commissioner's opinion was correct. The answer to that question therefore depends upon the scheme on which the ruling is founded – the [AAT's] review turns on the specified scheme just as the ruling did.⁹⁵

84 *Administration Act* s 14ZZ(b). An 'ineligible income tax remission decision' is defined, relevantly, as one relating to remission of additional tax imposed under certain provisions of the *1936 Act: Administration Act* s 14ZS(1).

85 *Punin v Deputy Commissioner of Taxation* (2000) 44 ATR 233, 246 [67] (Emmett J).

86 See *Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 7 ATD 333, 337 (Latham CJ), quoted in *Healey v Federal Commissioner of Taxation* (2012) 208 FCR 333, 338 [40] (Lander and Gilmour JJ).

87 *Administration Act* s 14ZZK(b)(ii).

88 *Mount Pritchard* (2011) 196 FCR 549, 557–8 [54]–[56] (The Court), citing *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 282 (Talyor J).

89 See *Mount Pritchard* (2011) 196 FCR 549, 558 [57] (The Court).

90 *Ibid* 558–9 [61]–[62] (The Court).

91 See *Administrative Appeals Tribunal Act 1975* (Cth) s 43 ('AAT Act').

92 *McMahon* (1997) 79 FCR 127, 150 (Emmett J).

93 *Public Servant Case* [2014] AATA 247 (28 April 2014) [7] (Senior Member Lazanas).

94 See *Rosgoe* [2015] FCA 1231, [12]–[13] (Logan J). In *Comcare v Burton* (1998) 50 ALD 846, the Federal Court set aside a decision of the AAT that had purported to consider the question of entitlement to compensation when the issue before the AAT was whether there was a right to be paid taxi fares for treatment: Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis, 2003) [9.14].

95 *Cooper Bros Holdings Pty Ltd and Commissioner of Taxation* [2013] AATA 99 (26 February 2013) [6] (Deputy President Alpins) (citations omitted).

In the *Public Servant Case*, the AAT expressed dissatisfaction with the part IVC review process, finding that, because of the ‘self-fulfilling manner’ in which the Commissioner identified the relevant scheme, it had no choice but to find that the revised private ruling identified by the Commissioner was correct.⁹⁶

Indeed, the AAT upheld the ruling despite finding a ‘problem’⁹⁷ with how facts underpinning the specified scheme on which the law was to be applied were identified by the Commissioner. The AAT explained that the Commissioner ‘knew or should have known that information was omitted from the scheme ... [and] about the futility of the Public Servant providing evidence in this proceeding’.⁹⁸ Yet, because it could not have regard to the additional information, the AAT was unable to overturn the ruling, with Senior Member Lazanas ultimately stating that:

The [AAT’s] role with respect to the review of an objection decision regarding a private ruling is confined to reviewing the correctness of the ruling premised on the ‘specified scheme’ in the private ruling and it has no role whatsoever in fact finding.⁹⁹

Because the role of the AAT is confined to the correctness of the ruling premised on the specific scheme identified in the ruling, documents bearing on the fairness of the assessment-making process are not relevant and need not be produced.¹⁰⁰ As a consequence, part IVC proceedings are unconcerned with arguments about the ‘due making’ of assessments.¹⁰¹ Meanwhile, the provision of a fair hearing in the AAT cannot substitute for any procedural unfairness tainting the pre-revision material change determination in circumstances where the AAT and the Commissioner are not ‘engaged in the one decision-making process’.¹⁰²

The AAT is not obliged to redress any procedural unfairness visited on the taxpayer by the Commissioner’s material change determination.¹⁰³ Therefore, it is neither to the point – nor, with respect, enough to state, as the Full Federal Court does in *Mount Pritchard*, that:

The arguments which the Commissioner intends to make in Pt IVC proceedings will not only concern the proper construction of the private ruling regime provisions but will also involve an analysis, on the evidence, of the extent to which the applicant’s activities have changed in the period between the date the Ruling was issued and the income years to which the assessments relate.¹⁰⁴

As may be gleaned from the preceding, whether the Commissioner properly refused to consider a factual matter in making a taxation decision is beyond the

96 *Public Servant Case* [2014] AATA 247 (28 April 2014) [4] (Senior Member Lazanas).

97 *Ibid* [7] (Senior Member Lazanas).

98 *Ibid* [52] (Senior Member Lazanas).

99 *Ibid* [53] (Senior Member Lazanas). See also *Rosgoe* [2015] FCA 1231, [12] (Logan J).

100 See *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566.

101 *Gashi v Federal Commissioner of Taxation* (2013) 209 FCR 301, 310 [42] (The Court), citing *FJ Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360, 376–8 (Mason and Wilson JJ).

102 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578 (Mason CJ, Dawson, Toohey and Gaudron JJ).

103 Cf Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 464–6 [7.310].

104 *Mount Pritchard* (2011) 196 FCR 549, 558 [61] (The Court).

scope of merits review by the AAT. Equally, because formation of opinion preceding revision is not a ‘taxation decision’, the taxpayer cannot invoke section 359-65(2) of schedule 1 to the *Administration Act* to oblige the Commissioner to tell the taxpayer what information was considered and to give the taxpayer a ‘reasonable opportunity to respond before allowing or disallowing an objection’.¹⁰⁵

On the other hand, an appeal under section 14ZZO of the *Administration Act* invoking the Federal Court’s original jurisdiction is more constrained than a merits review, particularly where the dispute involves exercise of the Commissioner’s discretion. This would arise where the taxpayer takes issue with the manner in which the Commissioner identified the relevant scheme for the purposes of section 359-55. Unlike the AAT, however, the Court cannot interfere merely because it would have exercised the discretion in a different way to that of the Commissioner.¹⁰⁶

Indeed, the Court’s capacity to interfere with the exercise of the power to revise under section 359-55 is further limited by the fact that it can only consider material that was before the Commissioner when assessing whether the Commissioner has exercised discretion according to law.¹⁰⁷ And as with review applications generally, where the taxation decision the subject of appeal concerns an assessment, the taxpayer bears the burden of proving the assessment is excessive or otherwise incorrect and what the assessment should have been. In any other case, the taxpayer must prove that the taxation decision should not have been made or should have been made differently.¹⁰⁸ In each case, it is not enough for the taxpayer to demonstrate some error in the Commissioner’s judgment.¹⁰⁹

Consequently, vitiation of the exercise of the power to revise a private ruling for want of procedural fairness will not succeed in either statutory review or appeal proceedings under part IVC given the limited capacity to review exercise of discretion and/or facts identified by the Commissioner. As is evident from the discussion immediately below, this applies equally to appeals under section 44 of the *AAT Act*.¹¹⁰

B Appealing a Decision of the AAT

Whilst failure by the AAT to afford procedural fairness or to take into account a relevant fact constitutes an error of law that engages the Federal

105 *Administration Act* sch 1 s 359-65(2).

106 *MacCormick v Federal Commissioner of Taxation* (1945) 71 CLR 283, 307 (Dixon J), 308 (McTiernan J agreeing).

107 *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28, 57 (Windeyer J), quoting *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (Dixon J) (*‘Avon Downs’*).

108 Section 14ZZO(b) of the *Administration Act*, which is virtually identical to section 14ZZK(b) of the *Administration Act*.

109 *Rigoli v Federal Commissioner of Taxation* (2014) 96 ATR 19, 29 [26] (The Court).

110 *Rosgoe* [2015] FCA 1231, [16] (Logan J).

Court's appellate jurisdiction,¹¹¹ it is unlikely the Federal Court will be able to discern error by reason of the AAT failing to take into account a relevant fact, given the AAT's limited fact-finding role. And even if error is discerned, an appeal will only succeed if a different decision would have been obtained had the error of law not been made.¹¹² To this end, courts have been cautioned not to scrutinise the AAT's reasons 'too closely ... for the purpose of searching for errors of law in what may simply be imprecise language'.¹¹³

What amounts to material that could support a factual finding or help to determine whether a fact is supported by evidence generally involves a question of law.¹¹⁴ However, if there is some probative evidence of a fact and some logical ground to support it, the finding will not involve error of law.¹¹⁵ Indeed, failure by the decision-maker to attribute weight to particular information the taxpayer contends is relevant is not a reviewable error of law.¹¹⁶ The weighing of evidence forms part of the fact-finding function.¹¹⁷ A decision based on information that is not true will also not be vitiated for error in law.¹¹⁸

Likewise, a finding reached on other than logical grounds merely involves faulty reasoning, which generally does not raise a question of law; and neither will a decision reached on unsound but justifiable grounds.¹¹⁹ In contrast, illogicality may involve a question of law if there was no foundation for the conclusion reached.¹²⁰ However, no question of law arises if objective evidence exists which could 'give rise to different processes of reasoning and if logical or reasonable minds might differ in respect of the conclusions to be drawn from that evidence'.¹²¹

Moreover, due to the 'extraordinary amount of clutter'¹²² around the issue of whether or not application of law to facts raises a question of law, appeals to the Federal Court under section 44 of the *AAT Act* are 'usually fraught'.¹²³ This is not

111 *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6, 12–13 (Davies and Beazley JJ), cited in *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 360–1 [126] (The Court) ('*Haritos*').

112 *Waterford v Commonwealth* (1987) 163 CLR 54, 77 (Brennan J).

113 *Times Consultant Pty Ltd v Collector of Customs (Old)* (1987) 16 FCR 449, 463 (Morling and Wilcox JJ).

114 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 418 [91] (Hayne, Heydon, Crennan and Kiefel JJ); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355 (Mason CJ).

115 *Rawson Finances Pty Ltd v Federal Commissioner of Taxation* (2013) 296 ALR 307, 335 [84] (Jagot J), 332–3 [76] (Jessup J agreeing), 351 [142] (Nicholas J agreeing).

116 See *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303, 308–9 [24]–[25] (North and Lander JJ), 310 [35] (Katzmann J agreeing).

117 *Ibid* 308 [24] (North and Lander JJ) 310 [35] (Katzmann J agreeing).

118 See *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 [11] (The Court). Special leave to appeal to the High Court was refused: Transcript of Proceedings, *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCATrans 126 (10 March 2005).

119 *Rawson Finances Pty Ltd v Federal Commissioner of Taxation* (2013) 296 ALR 307, 335 [85], 336 [87], 341 [103] (Jagot J), 332–3 [76] (Jessup J agreeing), 351 [142] (Nicholas J agreeing).

120 See *Tisdall v Webber* (2011) 193 FCR 260, 295–7 [125]–[126] (Buchanan J), 286 [93] (Tracey J agreeing).

121 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 648 [131] (Crennan and Bell JJ).

122 Aronson and Groves, above n 103, 215 [4.260].

123 *Ibid* 200 [4.130].

surprising given that appellate courts must not ‘usurp the fact-finding function of the [AAT]’ with appellate jurisdiction being engaged where ‘the subject matter of an appeal ... is a question or questions of law’.¹²⁴ In turn, the question of law must be stated with precision.¹²⁵ A mixed question of fact and law may not be enough.¹²⁶ In *Kelly v Australian Postal Corporation*, Griffiths J suggested that ‘judicial self-restraint’ should be applied to ensure section 44 appeals are confined to their ‘proper province’.¹²⁷

Indeed, it is not often easy to identify whether an issue concerns a question of law or a mixed question of fact and law. It is said ‘[t]he difference can be subtle and the distinction obscure’¹²⁸ or ‘elusive’.¹²⁹ For example, a decision that is based on a misunderstanding of evidence – or even overlooking an item of evidence in considering an applicant’s claims – will be unassailable.¹³⁰ As will ‘faulty reasoning’ or even a decision that is ‘justifiable’ but ‘not sound’.¹³¹ And because credibility issues, which are so often at the heart of tribunal determinations, are *par excellence* issues of fact,¹³² it is ‘most difficult of all to challenge’¹³³ an administrative decision where the decision-maker simply was not persuaded to accept the challenger’s account.

In practical terms, there is also an obvious imbalance in resources available to individual taxpayers contesting the validity of an assessment issued on the basis of a revised ruling compared with the vast resources of the Australian Taxation Office (‘ATO’). Empirical evidence indicates that of the 15.9 million tax returns filed in 2011/12, 0.2 per cent of all assessments resulted in objections,¹³⁴ with 3 per cent of those objections (838 cases) resulting in tax disputes.¹³⁵ In the same period, 86 per cent of tax disputes were litigated in the AAT with the Commissioner’s decisions affirmed in the great majority of cases.¹³⁶

124 *Haritos* (2015) 233 FCR 315, 384 [194] (The Court).

125 *TNT Skypack International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175, 178 (Gummow J).

126 *Federal Commissioner of Taxation v Trail Bros Steel & Plastics* (2010) 186 FCR 410, 415 (Dowsett and Gordon JJ). In *Haritos* (2015) 233 FCR 315, the Court explained that ‘the right of appeal does not extend to mixed questions of fact and law where, in order to decide the question of law, the Court must positively determine a question of fact itself, rather than judicially review the Tribunal’s fact-finding’: at 383 [192].

127 (2015) 67 AAR 359, 373–4 [60].

128 *Federal Commissioner of Taxation v Crown Insurance Services Ltd* (2012) 207 FCR 247, 251 [20] (Lander and Foster JJ), citing *Grealy v Federal Commissioner of Taxation* (1989) 24 FCR 405, 407 (The Court).

129 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287 (The Court).

130 *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303, 309 [28] (North and Lander JJ).

131 See *Rawson Finance Pty Ltd v Federal Commissioner of Taxation* (2013) 296 ALR 307, 335, [85], 336 [87] (Jagot J), 332–3 [76] (Jessup J agreeing), 351 [142] (Nicholas J agreeing).

132 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, 423 [67] (McHugh J).

133 See Aronson and Groves, above n 103, 200 [4.130].

134 During 2011–12, 226 private ruling objections were received: Commissioner of Taxation, ‘Annual Report 2011/12’ (Report No NAT 0995-10.2012, Australian Taxation Office, 4 October 2012) 94.

135 *Ibid* 92 (Figure 2.18).

136 *Ibid* 96 (Table 2.32).

In contrast, only 42 per cent of all tax disputes resolved by courts in 2012/13, where disputes of complex tax issues involving large businesses or highly wealthy individuals are more likely to be litigated, were favourable to the Commissioner.¹³⁷ Of the 17 tax decisions made by the High Court between 2008 and 2012, 10 were favourable to the taxpayer.¹³⁸ Considering the risks and vast costs involved however, it is not surprising that most taxpayers can ill afford to pursue the appeal route.

As shown, being concerned with outcome rather than procedure, statutory remedies do not ensure a dissatisfied taxpayer is accorded procedural fairness prior to the exercise of power under section 359-55 in circumstances where formation of opinion about the presence or absence of material change does not constitute a 'taxation decision' for the purposes of part IVC.

The discussion immediately below examines public law principles underpinning the constitutionally entrenched discretionary relief for jurisdictional error, which includes failure to provide procedural fairness. As will appear however, courts are, in general, enjoined from granting discretionary relief for purported procedural breaches not constituting conscious maladministration or bad faith.

IV PRACTICAL INJUSTICE AND DISCRETIONARY RELIEF

As noted, the concern of the law is to avoid practical injustice which commonly arises where a public authority fails to take a procedural step, resulting in loss of opportunity for the adversely affected person to make representations. Practical injustice 'is generally found in the very circumstance that the applicant has been denied the opportunity to address the adverse material'.¹³⁹ It is particularly pertinent where the denial involves an important factual matter that may deprive the adversely affected person 'of the possibility of a successful outcome'.¹⁴⁰

In the absence of clear contrary statutory language, a presumption of procedural fairness inheres in favour of a person whose interests, whether or not

137 Australian Taxation Office, *Court Litigation* (23 September 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Litigation-statistics/Court-litigation/>>.

Unusually, the ATO was 'an extremely successful litigant in 2015' compared with the previous four years: Joanne Dunne et al, '2015 Case Review: High ATO Success Rate Continues' (2016) 50 *Taxation in Australia* 609, 609.

138 Commissioner of Taxation, 'Annual Report 2011–12' (Report No NAT 0995-10.2012, Australian Taxation Office, 4 October 2012) 97. For a discussion of the Commissioner's approach to anti-avoidance litigation, see John Azzi, 'Judicial Review of the Accountants' Concession: A Case for Improving Tax Administration and Accountability' (2011) 21 *Revenue Law Journal* 107, 122. Elsewhere, it has been shown that the ATO has not always been the 'model litigant': Robin Woellner and Julie Zetler, 'Judge Not Lest Ye Be Judged: The Trials of a Model Litigant' (2013) 6 *Journal of Australasian Law Teachers Association* 189, 196. See also *Donoghue v Federal Commissioner of Taxation* (2015) 323 ALR 337, 342 [24] (Logan J).

139 *Jagroop v Minister for Immigration and Border Protection* (2014) 255 FCR 482, 505 [107] (The Court).

140 *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 147 (Mason, Wilson, Brennan, Deane and Dawson JJ).

amounting to strict legal rights,¹⁴¹ are affected by exercise of ‘any power which is apt to affect interests in a way that is substantially different from the way in which it is apt to affect the interests of the public at large’.¹⁴² A person so affected, *ex hypothesi*, entertains a legitimate expectation disabling the repository of power from validly exercising such power without according procedural fairness to those whose interests will be especially affected.¹⁴³

In *FAI Insurances Ltd v Winneke*,¹⁴⁴ the High Court found that an applicant for the renewal of approval to carry on the business of insurance may have a legitimate expectation that a renewal will be approved, unless some good reason exists for refusing it. This, in turn, meant that a decision not to renew without giving the company an opportunity to be heard was void.

The existence of legitimate expectations may bear upon the content of the procedural fairness obligation.¹⁴⁵ However, the obligation to accord procedural fairness is not founded on whether the individual’s legitimate expectations have been defeated: ‘The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed’.¹⁴⁶

Notwithstanding this limitation, legitimate expectations will inform the content of what must be done to accord procedural fairness if, and only if, exercise of power is conditioned on affording procedural fairness to an adversely affected person – namely, ‘a person whose interests might be affected by an exercise of the power’.¹⁴⁷

The decisions in *Ng Yuen Shiu* and *Haoucher v Minister for Immigration and Ethnic Affairs* (*‘Haoucher’*)¹⁴⁸ aptly illustrate when courts will recognise a legitimate expectation and provide redress for a detriment suffered by reason of loss of opportunity to make representations. In *Ng Yuen Shiu*, the Privy Council held that, notwithstanding the absence of any statutory provision expressly requiring an inquiry to be held, the applicant was unfairly denied an opportunity to explain that he was a partner in a business rather than an employee. Entitlement to such a hearing was founded on the publicly announced government policy that each case would be considered on its individual merits, which, in turn, generated in the applicant a legitimate expectation to be heard.¹⁴⁹

141 See *Kioa* (1985) 159 CLR 550, 619 (Brennan J), quoted with approval in *Plaintiff S10/2011* (2012) 246 CLR 636, 658 [66] (Gummow, Hayne, Crennan and Bell JJ).

142 *Quin* (1990) 170 CLR 1, 40 (Brennan J). See also *Saeed* (2010) 241 CLR 252, 258 [11]–[12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350 [26] (French CJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 264 [171] (Kiefel J).

143 See *Quin* (1990) 170 CLR 1, 40 (Brennan J).

144 (1982) 151 CLR 342.

145 In the words of McHugh and Gummow JJ: ‘the expectation of a particular party as to the exercise of the power in question may be relevant to the way in which the repository of the power is to exercise it in the particular case’: *Ex parte Lam* (2003) 214 CLR 1, 16 [48]; see also at 12–13 [34] (Gleeson CJ).

146 *Ex parte Lam* (2003) 214 CLR 1, 12 [34] (Gleeson CJ).

147 *Quin* (1990) 170 CLR 1, 39 (Brennan J), accepted by McHugh and Gummow JJ as ‘representing the law in Australia’: *Ex parte Lam* (2003) 214 CLR 1, 28 [83].

148 (1990) 169 CLR 648.

149 *Ng Yuen Shiu* [1983] 2 AC 629, 634, 639 (Lord Fraser). See also *Ex parte Lam* (2003) 214 CLR 1, 11–12 [31]–[32], 13–14 [37] (Gleeson CJ).

In *Haoucher*, a majority of the High Court held a deportee was entitled to know and make representations about ‘exceptional circumstances’ and ‘strong evidence’¹⁵⁰ which would have entitled the Minister to overrule a recommendation of the AAT in the deportee’s favour, contrary to the Minister’s general policy not to depart from recommendations of the AAT. It was explained that the expectation in *Haoucher* was founded in the detailed policy statement to the House of Representatives as to what would guide exercise of the deportation power.¹⁵¹

Since the decision in *Ex parte Lam*, however, reliance on the notion of legitimate expectation in Australia has become ‘somewhat limited’¹⁵² with the majority in *Plaintiff S10/2011* describing the phrase as ‘an unfortunate expression which should be disregarded’.¹⁵³ Instead, the term ‘reasonable expectation’ is preferred.¹⁵⁴ Regardless of which expression is preferred, the meaning of either is interchangeable and the reason for introducing the concept in the first place remains unchanged – namely, ‘to indicate that an interest less than a right may nevertheless warrant protection of the rules of ... procedural fairness’.¹⁵⁵ At any rate, it has been held that *Ex parte Lam* ‘does not reverse’ decisions such as *Ng Yuen Shiu* or *Haoucher*.¹⁵⁶

In *Ex parte Lam*, the High Court rejected a visa applicant’s submissions concerning want of procedural fairness for defeat of legitimate expectation. In the words of Hayne J, the applicant’s argument could not succeed ‘because the Department *said* it would do something, which it was not bound to do, and which, done or undone, did not affect what [the visa applicant] did or what representations he made to the Minister’.¹⁵⁷ Instead it was found that the visa applicant was given the opportunity to submit, and did submit, all materials and arguments in support of his case before the decision was made. In this regard, ‘it was not incumbent upon the applicant to show that he had turned his mind to the matter and believed he could rely upon the subsistence of his visa until it was cancelled according to law’.¹⁵⁸

Yet, despite its tendency ‘to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect’,¹⁵⁹ recent Federal Court authority suggests that legitimate

150 *Haoucher* (1990) 169 CLR 648, 655 (Deane J), 671 (Toohey J), 684 (McHugh J).

151 *Ex parte Lam* (2003) 214 CLR 1, 31 [94] (McHugh and Gummow JJ).

152 *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, 20 [68] (Kirby J) (*‘Applicant NAFF’*).

153 *Plaintiff S10/2011* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

154 See *Ex parte Lam* (2003) 214 CLR 1, 30–1 [92] (McHugh and Gummow JJ); *Haoucher* (1990) 169 CLR 648, 652 (Deane J).

155 *Haoucher* (1990) 169 CLR 648, 658 (Dawson J).

156 *SZSSJ v Minister for Immigration and Border Protection [No 2]* (2015) 234 FCR 1, 27 [92] (The Court).

157 *Ex parte Lam* (2003) 214 CLR 1, 36 [113] (Hayne J) (emphasis in original). The Immigration Department had earlier advised the applicant that his children’s carer would be contacted prior to visa cancellation. This did not occur: at 19 [55] (McHugh and Gummow JJ).

158 *Ibid* 31 [93] (McHugh and Gummow JJ).

159 *South Australia v O’Shea* (1987) 163 CLR 378, 411 (Brennan J), cited in *Plaintiff S10/2011* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

expectation remains a ‘useful concept’,¹⁶⁰ albeit that Australian jurisprudence has shifted from ‘doctrinal reliance’¹⁶¹ on this concept toward an examination of the fairness of the process.

According to Kirby J, who delivered a separate concurring judgment in *Applicant NAFF*, the concept of legitimate expectation aids in drawing attention to the defect in the performance of the requisite task by the decision-maker and what must be done to give procedural fairness to a person adversely affected by the exercise of administrative power rather than the applicant’s disappointment.¹⁶² In *Applicant NAFF*, the High Court held a visa applicant was denied procedural fairness when misled into thinking that the decision-maker had considered particular relevant information favourable to the applicant.

Given the preceding, it could be argued that a taxpayer who relies on a private ruling entertains a reasonable (ie, legitimate) expectation that the Commissioner will be bound by such ruling unless some good reason exists for ignoring it – namely, that the taxpayer’s circumstances have materially changed.¹⁶³ In those circumstances, and in the absence of plain words of necessary intent, practical injustice will be visited on the taxpayer where the Commissioner withdraws the original ruling by either issuing a revised ruling or an amended assessment contradicting the original ruling without first affording the affected person a fair opportunity to make representations refuting revision.

Having explained in general terms how the notion of legitimate expectation focuses attention, albeit in a limited way, on what must be done to alleviate practical injustice, the following identifies the source of the procedural fairness obligation in the specific context of the private rulings regime.

A Discerning the Source of the Procedural Fairness Obligation

Depending on the statutory framework within which the relevant power falls to be exercised and the facts and circumstances of the particular case, words or conduct by the decision-maker as to the procedure which will be followed prior to exercise of power can inform the content of the procedural fairness obligation and, if not followed, lead to a conclusion that the affected individual has not been afforded procedural fairness.¹⁶⁴

Toward the preceding end, the source of the expectation of procedural fairness need not be an express promise as to the manner of future exercise of power.¹⁶⁵ In *Haoucher*, Deane J remarked that the law seemed ‘to be moving

160 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 137–8 [18] (Flick and Gleeson JJ), 144 [40] (Nicholas J agreeing). On 4 November 2015, the High Court handed down decision dismissing an appeal from the decision of the Full Federal Court: *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25. Nevertheless, a plurality in the High Court cautioned against reliance on the notion of legitimate expectation as a ‘touchstone of the requirement that a decision-maker accord procedural fairness to a person affected by an administrative decision’: at 32 [30] (Kiefel, Bell and Keane JJ).

161 *SZSSJ v Minister for Immigration and Border Protection [No 2]* (2015) 234 FCR 1, 27 [92] (The Court).
162 (2004) 221 CLR 1, 20 [67]–[69] (Kirby J).

163 Cf *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 509 (Aickin J).

164 *WZARB v Minister for Immigration and Citizenship* (2013) 302 ALR 657, 665–6 [20] (Logan J).

165 *Ex parte Lam* (2003) 214 CLR 1, 16–17 [48] (McHugh and Gummow JJ).

toward a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making'.¹⁶⁶ Since then, the High Court has confirmed that a presumption of procedural fairness conditions the exercise of statutory power that is apt to have a deleterious effect on the circumstances of the affected person.¹⁶⁷

The private ruling system contains many provisions explicitly requiring the Commissioner to give reasonable notice to an applicant for private ruling. Whilst designed 'to reduce uncertainty for taxpayers',¹⁶⁸ the new provisions nevertheless allow 'the Commissioner to consider information other than that supplied by the applicant in making a private ruling, *provided the applicant is informed*'.¹⁶⁹

If the Commissioner takes into account information from third parties, the taxpayer must be informed and given a reasonable opportunity to respond before the Commissioner makes the ruling.¹⁷⁰ Similarly, before issuing a private ruling, the Commissioner is obliged to tell the applicant which assumptions the Commissioner proposes to make in making the ruling, and give the applicant a reasonable opportunity to respond.¹⁷¹ The Commissioner is further required to tell the taxpayer of any new information the taxpayer may not have that the Commissioner intends to consider in making the ruling, and to give the taxpayer a reasonable opportunity to respond.¹⁷² This is irrespective of the source of information.

Arguably, the rationale for the preceding notification provisions is that by acting in accordance with a private ruling, the taxpayer can rely on it as binding against the Commissioner.¹⁷³ Accordingly, the Commissioner cannot make additional assumptions or take into account additional information about a relevant arrangement without first informing the taxpayer and giving them a reasonable opportunity to respond.

In contrast, the Commissioner is not explicitly required to afford procedural fairness to a taxpayer before withdrawing a favourable ruling the taxpayer reasonably believes applies to him or her. It is unclear why the legislation

166 (1990) 169 CLR 648, 653, cited with approval in *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). See also *Ex parte Lam* (2003) 214 CLR 1, 27 [81] (McHugh and Gummow JJ).

167 In the immigration area, the High Court stated: 'Procedural fairness is required as an implied condition of the exercise by the officer of statutory power to engage in the process of assessment where the exercise of that power is apt to prolong immigration detention': *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29, [77] (The Court).

168 Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005 (Cth) 8, [1.9]. See also Treasury (Cth), 'Report on Aspects of Income Tax Self Assessment' (Report, 16 December 2004) <<http://selfassessment.treasury.gov.au/content/report.asp>>.

169 Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005 (Cth) 32–3 [3.10], 73 [4.34] (emphasis added).

170 *Administration Act* sch 1 s 357-120.

171 *Administration Act* sch 1 s 357-110. Under the former pt IVAA of the *Administration Act*, an assumption was treated as an aspect of the arrangement to which the private ruling relates that had to be identified in the ruling: *Administration Act* s 14ZAS, as repealed by *Tax Laws Amendment (Improvements to Self Assessment) Act (No 2) 2005* (Cth) sch 2 item 16; *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 415 (Gummow J).

172 *Administration Act* sch 1 s 359-65(2).

173 *Administration Act* sch 1 ss 357-60, 359-20(2).

requires disclosure when making assumptions or relying on additional information but not when making a determination of material change, which preconditions the revision power in section 359-55. In each instance the taxpayer's interests and reasonable expectations are adversely affected.

In the absence of clear words to the contrary, the interrelation between provisions mandating notification in sections 357-105, 357-110, 357-120 and section 359-65(2) and section 359-55 should be such that the Commissioner is compelled to notify and give the taxpayer a reasonable opportunity to respond to evidence the Commissioner considers relevant in making a determination of material change irrespective of the source of information on which the Commissioner relies.¹⁷⁴ Inferring a requirement of procedural fairness in such circumstances is not contrary to the legislative scheme.

Ordinarily, the Commissioner will be satisfied that material change has occurred to warrant withdrawal of an earlier ruling when he has received additional information or made assumptions about future events not otherwise made in the original ruling. In *Mount Pritchard*, the taxpayer provided the Commissioner with information about an amalgamation of the taxpayer with another sporting club after the 2004 Ruling. Nevertheless, and contrary to the expressed view of the Chief Tax Counsel, it is arguable the so-called amalgamation did not constitute a material change to the arrangement ruled upon in the original 2004 Ruling. In those circumstances, the concern of the law should be to ensure the taxpayer is heard as to why the original ruling should not be withdrawn. This is particularly pertinent given the gravity of consequences visited on the taxpayer by the Commissioner's decision to revise the previous favourable ruling, resulting in issue of a revised tax assessment in the amount of \$436 691.70 where previously the taxpayer was treated as exempt from taxation.

Support for the preceding proposition may, analogously, be drawn from the High Court decision in *Plaintiff M61/2010E v Commonwealth* ('*Offshore Processing Case*').¹⁷⁵ In that case, the High Court was tasked with characterising ministerial powers for lifting the bar on visa applications made by an offshore entry person, and in particular, whether recommendations to the Minister made as a result of an independent assessment and review of the relevant application had to be procedurally fair.¹⁷⁶

Finding that the assessment and review process involved 'inquiries made after a decision to consider exercising the relevant powers and for the purposes of informing the Minister of matters that were relevant to the decision whether to exercise one of those powers in favour of a claimant',¹⁷⁷ the High Court unanimously held that the independent process had to be procedurally fair.¹⁷⁸ Their Honours saw no merit in drawing a distinction between destruction, defeat or prejudice of a right on the one hand and a discretionary power to confer a right on the other. Referring to Justice Mason's judgment in *FAI Insurances Ltd v*

174 Cf *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 413 (Gummow J).

175 (2010) 243 CLR 319.

176 *Ibid* 336–7 [16] (The Court).

177 *Ibid* 351 [73] (The Court).

178 *Ibid* 353 [77] (The Court).

Winneke,¹⁷⁹ their Honours held it to be enough that exercise of power affects an interest or privilege.¹⁸⁰

The power to revise a private ruling directly affects a taxpayer's entitlement to rely on a favourable ruling. It defeats the taxpayer's expectation to be assessed for tax in accordance with the original ruling under section 357-60. Indeed, whilst a proviso of entering the private ruling system is that a ruling may be withdrawn in the event of a relevant change in the taxpayer's circumstances, nevertheless, this must not obscure the fact that withdrawal has the consequence of visiting substantial tax liability on the affected party.¹⁸¹ In this way, the presumption of procedural fairness appropriately conditions exercise of a power that is apt to affect the taxpayer's interests or reasonable expectations to be assessed for tax according to law.

This differs from the process considered in *Plaintiff S10/2011*, which concerned construction of directions in the form of guidelines that were given to departmental officers about the circumstances in which requests for consideration of exercise of the Minister's dispensing powers may be referred to the Minister. Those dispensing powers allowed the Minister to remove a statutory bar upon a further application for a protection visa by a non-citizen who had already been refused. In those circumstances, it was held that no procedural fairness requirement was implied in either the processes followed under the guidelines¹⁸² or in the refusal by the Minister to consider exercise of the Minister's powers.¹⁸³

In *Plaintiff S10/2011*, Heydon J explained that the relevant dispensing powers 'create[d] only powers to soften the rigours an adverse outcome of the former regime might create – powers depending on much vaguer and more impressionistic criteria, which are to be invoked when all else has failed'.¹⁸⁴ This is to be contrasted with the revision power under section 359-55, which, as mentioned, destroys the capacity to be taxed in accordance with the leading provision in section 357-60, yet depends on specific criteria concerning whether or not there has been a material change in the taxpayer's circumstances that must be invoked *before* the Commissioner can revise the original ruling. These criteria inhere from the private rulings scheme. Consequently, a decision to revise an extant ruling must be procedurally fair.

Having established that an obligation of procedural fairness governs exercise of power under section 359-55, it is now necessary to consider whether discretionary relief for jurisdictional error, which includes failure to provide procedural fairness, is available to an adversely affected taxpayer. In this regard, it is not possible to 'attempt to mark the metes and bounds of jurisdictional error'.¹⁸⁵

179 (1982) 151 CLR 342, 360 (Mason J).

180 *Offshore Processing Case* (2010) 243 CLR 319, 353 [75] (The Court).

181 Cf *ibid* 353 [76]–[77] (The Court).

182 *Plaintiff S10/2011* (2012) 246 CLR 636, 655 [52] (French CJ and Kiefel J).

183 *Ibid* 654–5 [50] (French CJ and Kiefel J), 668 [100] (Gummow, Hayne, Crennan and Bell JJ), 672–3 [118] (Heydon J).

184 *Ibid* 672–3 [118] (Heydon J).

185 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

B Relief for Lack of Fair Notice

Whether implied or coloured by the existence of reasonable expectation, the obligation of procedural fairness dictates that a person be given a fair opportunity to respond to adverse, credible and relevant information. Importantly, this ensures that the person affected by exercise of the power is given an explanation in respect to any adverse inferences drawn by the decision-maker.¹⁸⁶ Stated differently, it requires a person whose interests are affected by an administrative decision be given a real and meaningful opportunity to respond to adverse information that is significant to the decision to be made.¹⁸⁷

Whilst judicial review ‘is not to be lightly exercised’¹⁸⁸ against public officials, an administrative decision-maker exceeds its jurisdiction or power if it ‘identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material’.¹⁸⁹ In each case, an error of law is committed.¹⁹⁰ This covers any administrative decision, including conduct that is preparatory to a decision required to be made.¹⁹¹

As a criterion of liability, formation of opinion about the taxpayer’s activities, in the words of the High Court in *WR Carpenter Holdings*, ‘is “guided and controlled by the policy and purpose of the enactment” and ... examinable in the way explained by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*’.¹⁹² Based on Justice Dixon’s lengthy and oft-quoted passage, a determination of material change is reviewable where the Commissioner, inter alia, ‘does not address himself to the question which the sub-section formulates ... or excludes from consideration some factor which should affect his determination’.¹⁹³

Accordingly, the Commissioner’s determination of material change should be reviewable notwithstanding that it is not a taxation decision and that the Commissioner has not made known reasons why he was satisfied that the taxpayer’s factual position has materially changed. To this end, the taxpayer is generally required to adduce evidence showing the Commissioner’s decision to revise was unreasonable in the sense that the ‘dominating, actuating reason for

186 See *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 592 (The Court). See also *WZARB v Minister for Immigration and Citizenship* (2013) 302 ALR 657, 669 [35] (Logan J).

187 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 175 [29] (The Court); *Offshore Processing Case* (2010) 243 CLR 319, 352–3 [74]–[75], 356–7 [91] (The Court); *Saeed* (2010) 241 CLR 252, 256 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kioa* (1985) 159 CLR 550, 569 (Gibbs CJ), 582 (Mason J), 602 (Wilson J), 629 (Brennan J), 633 (Deane J).

188 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 107–8 [55] (Gaudron and Gummow JJ).

189 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351–2 [83] (McHugh, Gummow and Hayne JJ).

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

191 See *SZSSJ v Minister for Immigration and Border Protection* (2014) 231 FCR 285, 295–6 [40] (The Court). This decision was overturned recently by the High Court in *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29. Nevertheless, the general principles espoused by the Full Federal Court were affirmed on appeal, albeit the High Court reached a different conclusion about whether, in the circumstances, procedural fairness had in fact been afforded to the applicant.

192 *WR Carpenter Holdings* (2008) 237 CLR 198, 205 [10] (The Court) (citations omitted), citing *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (Dixon J) (*‘Avon Downs’*).

193 *Avon Downs* (1949) 78 CLR 353, 360 (Dixon J).

the decision is outside the scope of the purpose of the enactment'.¹⁹⁴ Justice Dixon's famous formulation in *Avon Downs* is helpful in this regard as it obviates the need for precision: 'It is not necessary that you be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way [the Commissioner] must have failed in the discharge of his exact function according to law'.¹⁹⁵

According to *Futuris*, however, errors in the assessment making process, whether precisely particularised or otherwise, do not go to jurisdiction and so do not attract the remedy of a constitutional writ under section 75(v) of the *Commonwealth Constitution* or under section 39B of the *Judiciary Act 1903* (Cth) unless attended by bad faith or conscious maladministration.¹⁹⁶ It is said that as a matter of 'practical reality', provisions preserving the validity of a tax assessment in sections 175 and 177 of the *1936 Act* are 'necessary' and do not infringe the constitutional protection of a minimum requirement of judicial review for jurisdictional error.¹⁹⁷ Rather than diminish the High Court's original jurisdiction under section 75(v) of the *Commonwealth Constitution*, they merely alter the substantive or procedural law to be applied in resolving challenges to tax assessments.¹⁹⁸

As a consequence, judicial review is limited to instances where what purports to be an assessment does not in fact answer the statutory definition of assessment.¹⁹⁹ This will be so in the case of tentative or provisional assessments²⁰⁰ or where, as mentioned, the assessment-making process is tainted by bad faith or conscious maladministration. Subsequent Federal Court decisions affirm that *Futuris* has significantly narrowed the class of tax decisions susceptible to judicial review.²⁰¹ Whether this is ultimately sustainable in light of *W R Carpenter Holdings* is beyond the ambit of this article, which adopts the conventional view that judicial review is not available in respect to a taxation decision made or assessment issued in good faith.

Therefore, without evidence from which actual bad faith or deliberate intention to breach the provisions of the private ruling regime may be inferred, judicial review of the Commissioner's determination of material change, which governs exercise of power under section 359-55, is unavailable.²⁰² Allegations of bad faith or conscious maladministration are 'not lightly to be made or upheld'

194 *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 (Dixon CJ), 473–4 (McTiernan J agreeing), 474 (Windeyer J agreeing), quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1178 [69] (McHugh and Gummow JJ).

195 *Avon Downs* (1949) 78 CLR 353, 360 (Dixon J).

196 See *Futuris* (2008) 237 CLR 146, 157 [24]–[25], 164 [55] (Gummow, Hayne, Crennan and Heydon JJ).

197 Justice James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 91.

198 See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

199 See *Gashi v Federal Commissioner of Taxation* (2013) 209 FCR 301, 310 [3] (The Court).

200 Provisional or tentative assessments do not answer the statutory definition of 'assessment' by reason of a failure to specify 'what is the amount of taxable income which has been assessed and what is the tax payable thereon': *Stokes v Federal Commissioner of Taxation* (1996) 32 ATR 500, 506 (Davies J), cited with approval in *Futuris* (2008) 237 CLR 146, 163 [50] (Gummow, Hayne, Crennan and Heydon JJ).

201 *Roberts v Deputy Commissioner of Taxation* (2013) 228 FCR 280; *Hii v Federal Commissioner of Taxation* (2015) 230 FCR 385.

202 See, eg, *Mount Pritchard* (2011) 196 FCR 549, 556 [47] (The Court).

and will rarely, if ever, succeed.²⁰³ The former implies an exercise of power for an unlawful or improper purpose;²⁰⁴ for instance, where the act done was either done for personal gain, for non-legitimate reasons, or was beyond the power conferred.²⁰⁵

An exercise of power will be invalid where there is evidence of ‘deliberate failures to administer the law according to its terms’.²⁰⁶ Indeed, issuing two assessments to the same taxpayer in respect to the same amount, even where that may constitute double counting, as occurred in *Futuris*, or issuing assessments on an alternative basis to different taxpayers in respect to the same amount,²⁰⁷ does not amount to evidence of either bad faith or maladministration.

As courts generally permit the Commissioner considerable latitude, a taxpayer must establish ‘extreme circumstances’²⁰⁸ to succeed in an application for judicial review. In *Daihatsu Pty Ltd v Commissioner of Taxation*,²⁰⁹ Finn J upheld the bona fides of tax assessments issued in haste and secrecy, without release of a position paper and based on unreliable data contrary to extant ATO policy, thereby robbing the taxpayer an opportunity to make representations about the reliability of data and process. Justice Finn explained that complaint of data unreliability is ‘a Part IVC matter’,²¹⁰ while the complaint concerning haste and secrecy ‘cannot conceivably be said to support an inference of lack of good faith in the attempt to exercise the power to assess’.²¹¹ His Honour went on to express frustration with the slightness of allegations of bad faith generally asserted in an attempt to set aside tax assessments:

I would have to say that, as formulated, the applicant’s no bona fide attempt claim can only be characterised as adventurous... [It] illustrates why judges of this Court have become restive with the slightness of allegations, now commonly made, directed at setting assessments on the basis of absence of good faith.²¹²

203 *Futuris* (2008) 237 CLR 146, 165–6 [60] (Gummow, Hayne, Crennan and Heydon JJ), quoting *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) 46 ATR 191, 193 (The Court).

204 See *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 195 [13] (The Court), quoting with approval Christopher Forsyth and William Wade, *Administrative Law* (Oxford University Press, 9th ed, 2004) 416.

205 See *Futuris* (2008) 237 CLR 146, 154 [12]–[13] (Gummow, Hayne, Crennan and Heydon JJ). In *Donoghue v Federal Commissioner of Taxation* (2015) 323 ALR 337, Logan J relied on *Futuris* to set aside tax assessments issued by the Commissioner of Taxation as a result of the ‘mistaken and reckless’ conclusion made by the relevant tax officer about the privileged nature of documents provided by a third party. Describing the officer’s conduct as sufficient for the tort of misfeasance in public office, his Honour was satisfied the entire process of assessment was affected by conscious maladministration: at 371 [145].

206 *Futuris* (2008) 237 CLR 146, 165 [55] (Gummow, Hayne, Crennan and Heydon JJ).

207 As occurred in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

208 See John Azzi, ‘Challenging Transfer Pricing Determination in Light of Daihatsu’ (2003) 7(2) *The Tax Specialist* 69, 69, citing *Dan v Federal Commissioner of Taxation* (2000) 44 ATR 338, 345 [34] (Lindgren J).

209 (2001) 184 ALR 576.

210 *Ibid* 590 [52] (Finn J).

211 *Ibid* 590 [53] (Finn J).

212 *Ibid* 590 [55]–[56] (Finn J).

Equally, there is no scope²¹³ to invalidate an assessment by application of the ‘Hickman principle’²¹⁴ or by reference to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘ADJR Act’). Decisions leading up to or forming part of the process of making assessments or calculations of tax are specifically excluded from review under schedule 1 paragraph (e) of the *ADJR Act* because the making of an assessment ‘followed or will follow’²¹⁵ from the decision to revise.²¹⁶

Notwithstanding these legal obstacles, taxpayers continue to simultaneously initiate judicial review and part IVC proceedings. In *Futuris*, for example, the taxpayer sought to set aside an amended assessment by lodging an application under section 39B of the *Judiciary Act 1903* (Cth) while also persisting with part IVC proceedings in an attempt to set aside an amended assessment on the basis that it included an amount previously included in the original assessment. The taxpayer in *Mount Pritchard* similarly pursued dual attacks on the same assessment. In both instances the availability of alternate statutory review rights was a ‘powerful factor’²¹⁷ militating against exercise of the Court’s jurisdiction to entertain judicial review proceedings.

Yet, despite the rationale for withholding discretionary relief given that statutory review rights are unconfined by considerations of jurisdictional error, dissatisfied taxpayers are, commonly, left without redress for any procedural unfairness tainting revision of a favourable ruling. Having found no evidence the 2006 Assessment was made for illegitimate reasons, their Honours in *Mount Pritchard* said:

It cannot now be concluded that the Commissioner is bound by the [2004] Ruling not to make an assessment under section 166 where the Commissioner in good faith contends the Ruling does not apply because of a relevant change of circumstances.²¹⁸

Arguably, it is contrary to fundamental propositions in *W R Carpenter Holdings* to preclude a person adversely affected by a tax assessment from arguing that a condition governing the exercise of the assessment-making power is tainted by procedural unfairness. It cannot be suggested that this is necessary for operational flexibility, even where the assessment was made in good faith. It would be a rather curious outcome if it was otherwise; particularly considering the legislative intention that the Commissioner conduct a full and fair investigation of the taxpayer’s circumstances before withdrawing an existing ruling or issuing an assessment contrary to it.

213 See *Futuris* (2008) 237 CLR 146, 167 [68] (Gummow, Hayne, Crennan and Heydon JJ).

214 In *R v Hickman, Ex parte Fox & Clinton* (1945) 70 CLR 598, Dixon J stated that an exercise of power will not be invalidated on the ground that it has not conformed to the requirements governing its exercise ‘provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body’: at 615.

215 Cf *Deputy Commissioner of Taxation v Clarke* 1984 1 FCR 322, 325 (The Court).

216 See *Macquarie Bank Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 403, 421 [61] (Edmonds J). See also *Futuris* (2008) 237 CLR 146, 162 [46] (Gummow, Hayne, Heydon and Crennan JJ).

217 *Garrett v Federal Commissioner of Taxation* [2015] FCA 485, [17] (Davies J).

218 (2011) 196 FCR 549, 558–9 [62] (The Court).

Equally, it is unfair to taxpayers that they cannot seek a comparatively cheap²¹⁹ and convenient remedy for the detriment suffered from the loss of opportunity to be heard about why the original favourable ruling should prevail.

V CONCLUSION

This article has demonstrated that despite a presumption of procedural fairness inhering in the legislative scheme and purpose of the private tax rulings regime, neither judicial review nor part IVC proceedings provide taxpayers with the means to resist either revision of a favourable ruling or an assessment based on a revised private ruling tainted with procedural unfairness.

To revise a private tax ruling under section 359-55 of schedule 1 to the *Administration Act*, the Commissioner must be satisfied that the taxpayer's factual position in the relevant income year was materially different from that on which the ruling was originally based. Attainment of this state of satisfaction effectively amounts to an adverse declaration from which an obligation of procedural fairness may be inferred. Aligning the incidence of tax to the formation of an opinion about the taxpayer's circumstances better reflects the description of taxation proffered by the High Court in *W R Carpenter Holdings*.²²⁰ It allows the taxpayer to prove in the courts that the criteria of liability are not satisfied.

Yet, a decision made in good faith to either revise a ruling or issue an amended assessment based on the revised ruling cannot be invalidated for jurisdictional error, which includes a failure to give the adversely affected taxpayer procedural fairness. Instead, a dissatisfied taxpayer must invoke review and appeal procedures under part IVC of the *Administration Act*. As shown however, part IVC proceedings are fraught, cumbersome, costly and unconcerned with arguments about due process. Likewise, the provision of a fair hearing cannot compensate for the want of procedural fairness by the Commissioner in circumstances where the AAT and the Commissioner are not engaged in the one decision-making process.

Significantly, the taxpayer can only raise a complaint under part IVC once the Commissioner has made a taxation decision by either notifying the taxpayer of the intention to withdraw the original ruling or by issuing an assessment contrary to the original ruling. In each case, the taxation decision may only be invalidated if, on the evidence, the reviewing tribunal is satisfied there has not been a relevant change in the taxpayer's activities since the date of the original ruling. However, because of the limited fact-finding role of the AAT and the self-

219 'First, declarations afford a comparatively speedy remedy ... Secondly, and consequentially, declaratory relief is as a rule much more inexpensive than other remedies ... Thirdly, it tends to avoid (or at any rate minimize the possibility of) protracted litigation': R P Meagher, W M C Gummow and J R F Lehane, *Equity Doctrines and Remedies* (Butterworths, 3rd ed, 1992) 490-1.

220 (2008) 237 CLR 198.

fulfilling manner in which the Commissioner regularly identifies a prescribed scheme, such an argument is doomed to fail.²²¹

Conversely, the AAT has effectively no jurisdiction to invalidate an error of law committed by the Commissioner for failing to afford the taxpayer procedural fairness because part IVC proceedings are concerned with the outcome rather than the process of making a particular decision. This is also the case where the taxpayer initiates an appeal to the Federal Court in its original jurisdiction. Indeed, an appeal invoking the original jurisdiction of the Federal Court under section 14ZZO of the *Administration Act* is more constrained than a merits review in the AAT, particularly where the dispute involves exercise of the Commissioner's discretion.

On the other hand, to avoid usurpation of the fact-finding function of the AAT, section 44 appeals to the Federal Court can be highly fraught, particularly as credibility issues, which are often at the heart of AAT determinations, are most difficult of all to challenge. The added constraint on the capacity of the AAT to investigate facts underpinning a specified scheme on which a revised ruling is based further limits the utility and effectiveness of appeals. Moreover, although the decision in *Haritos* renounces insistence on a 'pure' question of law in section 44 appeals, judges are nevertheless cautioned to exercise judicial self-restraint when engaging the Federal Court's appellate jurisdiction.

At any rate, smaller businesses and less-wealthy individuals are less likely to appeal an unsatisfactory decision given the increased risks and costs involved. Even though merit-based reviews in the AAT are relatively quick and cheap, taxpayers do not enjoy a high success rate and, unless wealthy, will be unlikely to mount an appeal against an unfavourable determination in the Federal Court, where taxpayers generally tend to enjoy a relatively higher success rate.

Equally, it is rather unsatisfactory to limit, to exceptional and rare instances, the ability of a dissatisfied taxpayer to seek comparatively inexpensive declaratory relief for want of procedural fairness in respect of a determination of material change; particularly as it constitutes a criterion of liability which governs issue of assessment or exercise of revision power in section 359-55 of schedule 1 to the *Administration Act*. In these circumstances, an important function of courts is to preserve the taxpayer's rights to dispute the manner in which the Commissioner conducted an investigation of the taxpayer's activities. This ensures a fairer balance between operational flexibility and protection of individual rights and interests.

Indeed, it is somewhat disconcerting that conventional discretionary remedies are not generally available to ensure the Commissioner affords taxpayers procedural fairness when tax is a special field generating expectations of procedural fairness and there are no effective statutory remedies. Further it cannot be suggested that limiting relief in the vast majority of cases to that available under part IVC is necessary for operational flexibility. After all, the Commissioner must consider the specific circumstances of each applicant before

221 See above n 96 and accompanying text.

issuing a private ruling about how the tax law would apply to the specific arrangement advised.²²²

The ineffectiveness of conventional remedies to address the practical injustice tainting the private tax rulings regime does little to promote and facilitate the aim of the system to reduce the risks of uncertainty for taxpayers. This is a vitally important goal given the self-assessment regime and the highly complex tax laws taxpayers are expected to comply with. In this regard, it bears recalling that concerns about the fairness of the tax system in general and its ability to protect taxpayer rights have prompted the Inspector-General of Taxation to announce terms of reference for a review into the system.²²³

Participation in the private ruling regime should not only require full disclosure by the taxpayer but should also involve the conduct by the Commissioner of a full and fair investigation of the taxpayer's activities at the time of original application and upon any subsequent revisions. Otherwise, the guarantee in section 357-60 that 'the ruling applies to you' will have little meaning or force.

Clearly, 'another remedy'²²⁴ must be sought to give force to the 'animating principle' described by Gaudron J in *City of Enfield v Development Assessment Commission*, where her Honour said that 'courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise'.²²⁵ In a separate article, I argue that the rarely used remedy of administrative estoppel is both available and appropriate to fulfil this important function of courts.²²⁶

222 See *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 401 (Gummow J).

223 See above n 29.

224 *Federal Commissioner of Taxation v Administrative Appeals Tribunal* (2011) 191 FCR 400, 405 [20] (Keane CJ and Gordon J).

225 (2000) 199 CLR 135, 157 [56], cited with approval in *Ex parte Aala* (2000) 204 CLR 82, 108 [54] (Gaudron and Gummow JJ).

226 Azzi, 'Estopping the Commissioner of Taxation', above n 33.