

JUDICIAL REVIEW AND THE TAX ASSESSMENT-MAKING PROCESS

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Noting the ‘deep concern’ of taxpayers and stakeholders with how the assessment power is sometimes used, this article demonstrates that notwithstanding the statutory process for overturning an assessment in part IVC of the Taxation Administration Act 1953 (Cth) and recent judicial comments constraining the scope of judicial review for jurisdictional error, judicial review is nevertheless available to invalidate a default assessment or one made at any time where the Commissioner merely suspects the taxpayer engaged in fraud or evasion without any probative evidence to this effect. As will appear, in either instance the assessment-making process may be challenged in judicial review proceedings for legal unreasonableness, which markedly differs, and is otherwise excluded, from a part IVC challenge but which fundamentally bears on whether there has been abuse of the assessment-making power and thus whether the ensuing assessment satisfies the statutory description of assessment.

I INTRODUCTION

This article aims to show that judicial review is not only available but is the only means by which courts can ensure the Commissioner of Taxation (‘Commissioner’) does not unreasonably suspect there has been fraud or evasion to justify making an assessment upon discovery of a purported discrepancy between the income returned by the taxpayer and the taxpayer’s assets. This highly vexed issue led to a major inquiry in 2014 in response to ‘deep concern’ expressed by taxpayers and stakeholders that the Australian Taxation Office (‘ATO’) ‘does not always use its powers in a judicious manner’.¹

As the law currently stands, where the Commissioner is not satisfied with the return furnished by a taxpayer and makes a default assessment under section 167(b) of the *Income Tax Assessment Act 1936* (Cth) (‘ITA Act’), the taxpayer

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1 House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, *Tax Disputes* (Report, March 2015) vii <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Tax_and_Revenue/Inquiry_into_Tax_Disputes/Report> (‘*Tax Disputes Report*’).

cannot challenge the ‘due making’² of that assessment in administrative review and appeal proceedings under part IVC of the *Taxation Administration Act 1953* (Cth) (*‘TA Act’*). For whilst the correctness of the amount shown on the assessment may be challenged in part IVC proceedings, its due making is conclusively proved by production of the notice of assessment under section 350-10 of schedule 1 to the *TA Act*.³

A default assessment is usually made following an investigation into the taxpayer’s affairs and the discovery of a purported discrepancy between income returned by the taxpayer in a particular year and that which the Commissioner considered represented the taxpayer’s assets for the same period.⁴ However, if, as occurred in *Nguyen v Federal Commissioner of Taxation* (*‘Nguyen’*),⁵ the Commissioner then also decides to amend an assessment issued to the same taxpayer in relation to income years for which the amendment period has expired, the taxpayer must ‘affirmatively’⁶ prove that ‘full and true disclosure’⁷ of all material facts has been made to successfully challenge the assessment. Under section 170(1) item 5 of the *ITA Act*, the Commissioner may amend an assessment ‘at any time if he or she is of the opinion there has been fraud or evasion’. In this regard, the amended assessment is placed ‘in the same position for the purpose of [section 350-10 of schedule 1 to the *TA Act*] as notice of an original assessment’⁸ by virtue of section 173 of the *ITA Act*.

As the Victorian Court of Appeal in *Deputy Commissioner of Taxation v Buzadzic* (*‘Buzadzic’*) recently explained:

First, the Commissioner’s function under s 167(b) of deciding whether he or she is satisfied with a return is a procedural step, and therefore part of the ‘making’ of the assessment rather than its correctness. As such, by virtue of s 355-10 [sic], it is conclusively proved by the production of the notice of assessment and is not open to challenge, including in Pt IVC proceedings.

Secondly, the formation of the opinion as to fraud or evasion is a condition precedent governing the power to make an amended assessment under s 170[(1) item 5]. As such, it is not part of the ‘making’ of the assessment but it does bear upon the correctness of the assessment. It follows that it falls within the exception within s

2 ‘Due making’ is an expression that ‘covers all procedural steps, other than those (if any) which go to substantive liability and so contribute to the excessiveness of the assessment’: *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 274–5 (Kitto J) (*‘McAndrew’*).

3 See *Gashi v Federal Commissioner of Taxation* (2013) 209 FCR 301, 310 [43] (Bennett, Edmonds and Gordon JJ) (*‘Gashi’*). An ‘assessment’ is relevantly defined in section 6(1) of the *Income Tax Assessment Act 1936* (Cth) (*‘ITA Act’*) as the ‘ascertainment ... of the amount of taxable income ... and ... the tax payable on that taxable income’.

4 See, eg, *Krew v Federal Commissioner of Taxation* (1971) 45 ALJR 324.

5 (2018) 265 FCR 355 (*‘Nguyen’*). In *Nguyen*, the Commissioner made default assessments under section 167(b) and issued amended assessments under section 170(1) item 5 for the 2008–12 income years to include in taxable income amounts representing unexplained deposits into bank accounts controlled by the taxpayer that were discovered upon an audit of the taxpayer’s affairs in 2012.

6 *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284, 303 (Gibbs J, Stephen, J agreeing at 306) (*‘McCormack’*). See also *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, 201 (*‘George’*).

7 *McAndrew* (1956) 98 CLR 263, 269 (Dixon CJ, McTiernan and Webb JJ).

8 *Ibid.*

355-10 [sic] and a taxpayer can challenge the formation of the opinion in Pt IVC proceedings.⁹

Their Honours further held that, given section 175 of the *ITA Act* and what the Full Federal Court held in *Chhua v Federal Commissioner of Taxation* ('*Chhua*') about 'simple non-compliance' errors not constituting either of the two 'jurisdictional errors' identified at [25] of *Futuris*,¹⁰ it was in the 'interests of justice'¹¹ to summarily dismiss the taxpayers' judicial review application as it was doomed to fail. According to their Honours in *Buzadzie*, an assessment issued in circumstances of non-compliance with section 170(1) item 5 'none the less constitutes an assessment for the purposes of s 175'.¹² Section 175 is a 'short but important provision'¹³ that provides '[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'.¹⁴

The taxpayers in *Buzadzie* had alleged that it was not open to the Commissioner not to be satisfied with the returns lodged and that exercise of the amendment power was unauthorised because 'there was no fraud or evasion and no evidence to sustain the formation of ... opinion that there was fraud or evasion'.¹⁵ The taxpayer in *Nguyen* similarly alleged 'she has appropriately declared all of her assessable income as evidenced in the tax returns she lodged for the relevant years'.¹⁶ As did the taxpayer in *Chhua*, albeit not as clearly or if at all.¹⁷

Noting the Commissioner's regular practice of amending an assessment at any time upon discovery of a purported discrepancy between the income returned in a particular income year and the taxpayer's assets for the same period,¹⁸ this article argues that their Honours in *Buzadzie*, respectfully, erred in suggesting an assessment issued without evidence of fraud or evasion is nonetheless an assessment as statutorily defined. It also argues that the Full Court in *Chhua*, respectfully, erred when observing, in obiter:

If it were the case that no authorised officer of the Commissioner had formed the requisite opinion about fraud or evasion, that of itself is unlikely to ground sufficiently an allegation of tentativeness or bad faith in the sense required by *Futuris*. It could,

9 (2019) 348 FLR 213, 237 [104]–[105] (Kyrou, McLeish and Niall JJA) (citations omitted) ('*Buzadzie*').

10 (2018) 262 FCR 228, 240 [32] (Logan, Moshinsky and Steward JJ) ('*Chhua*').

11 *Buzadzie* (2019) 348 FLR 213, 240 [118] (Kyrou, McLeish and Niall JJA).

12 Ibid 237 [106], citing *Chhua* (2018) 262 FCR 228, 239–40 [32] (Logan, Moshinsky and Steward JJ).

13 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 156 [22] (Gummow, Hayne, Heydon and Crennan JJ) ('*Futuris*').

14 *ITA Act 1936* (Cth) s 175.

15 *Buzadzie* (2019) 348 FLR 213, 218 [16] (Kyrou, McLeish and Niall JJA).

16 *Nguyen* (2018) 265 FCR 355, 359 [9] (Kenny J).

17 In *Chhua* (2018) 262 FCR 228, the Court agreed 'for the sake of completeness' to consider a 'no formation of opinion' allegation despite that it was not pleaded in the taxpayer's proposed notice of appeal but was instead inferred from the taxpayer's written submissions which, curiously, 'positively pleaded that the Commissioner had in fact formed an opinion': at 240–1 [35]–[37] (Logan, Moshinsky and Steward JJ).

18 In its *Tax Disputes Report*, the Standing Committee expressed concern about a 'consistent theme' throughout the inquiry that findings or allegations of fraud or evasion are often made without an ATO officer turning their mind to the question of whether fraud or evasion actually exists: *Tax Disputes Report* (n 1) 34 [3.63].

however, be a matter which might be raised in a tax appeal instituted under Pt IVC of the *[TA Act]*.¹⁹

As will appear, a no evidence allegation is available and ‘clearly potent’²⁰ in judicial review, which is ‘entrenched’²¹ in the *Constitution* and is ‘driven’²² by the concept of jurisdictional error. Such an allegation has to do with the limits of the power of the Commissioner to amend an assessment at any time, specifically whether the Commissioner acted ‘arbitrarily or capriciously’²³ in inferring a tax avoidance purpose necessary to invoke the amendment power in section 170(1) item 5. In the words of Gordon J, ‘a decision will be set aside where a decision maker has ... drawn an inference which was not open on the primary facts’.²⁴

This article further demonstrates that an allegation that there was no evidence to sustain the requisite opinion about fraud or evasion is not unlike the allegation that the precondition governing the power to make a default assessment has not been fulfilled, which may not be challenged in part IVC proceedings.²⁵ In each case, the allegation is directed to the process or manner in which the Commissioner ascertained the character of the discrepancy and, to that extent, is but a procedural step forming part of the due making of the assessment. Nevertheless, this is the ‘concern of judicial review’²⁶ pertaining, as it does, to the ‘due formation’²⁷ of the Commissioner’s opinion preconditioning the making of the assessment. To this end, it is well-established that notwithstanding the jurisdiction-defining provisions of section 175 and section 350-10, ‘it is not open to the Commissioner either to pluck a figure out of the air or to make an uninformed guess’²⁸ when making a default assessment.

By parity of reasoning, there must likewise be some ‘genuine attempt’²⁹ to ascertain the character of a subsequently discovered discrepancy before invoking the amendment power in section 170(1) item 5. To be genuine, given the serious financial and reputational implications as well as legislative intention to promote certainty and taxpayer confidence (see below), there must at least be some

19 *Chhua* (2018) 262 FCR 228, 241 [38] (Logan, Moshinsky and Steward JJ).

20 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (LawBook, 6th ed, 2017) 373.

21 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

22 James Stellios, ‘Federal Jurisdiction’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 879, 889.

23 *Buck v Bavone* (1976) 135 CLR 110, 118 (Gibbs J) (*‘Buck’*).

24 *Bell v Federal Commissioner of Taxation* (2012) 88 ATR 923, 943 [84] (citations omitted).

25 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, 622 (Brennan J, Mason CJ agreeing at 617, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634) (*‘Dalco’*).

26 The Hon Justice R Derrington, ‘Migrating towards a Principled Approach to Reviewing Jurisdictional Facts’ (2020) 27(2) *Australian Journal of Administrative Law* 70, 71.

27 John Azzi, ‘The Binding Rulings Regime and the Assessment Process’ (2018) 45(2) *Australian Bar Review* 163, 166 (*‘Binding Rules Regime’*).

28 *R v Deputy Commissioner of Taxation (WA); Ex parte Briggs* (1987) 14 FCR 249, 269 (Sheppard J) (*‘Briggs [No 2]’*).

29 *R v Commissioner of Taxation (WA); Ex parte Briggs* (1986) 12 FCR 301, 308 (Bowen CJ, Sheppard and Beaumont JJ).

‘rationally probative’³⁰ evidence from which it may be inferred the taxpayer was involved in ‘blameworthy’³¹ or ‘unlawful’³² conduct directed at concealing from the Commissioner what would otherwise have been assessable amounts.

Yet, irrespective of whether there is relevant evidence capable ‘directly or indirectly of rationally affecting assessment of the probability’³³ of the existence of a tax avoidance purpose, an allegation that there has been full and true disclosure, or that there was no evidence the undisclosed amount was assessable, will be insufficient to invalidate the assessment for excessiveness under part IVC. ‘[T]he issue would still be whether or not from any source the [taxpayer] derived as much taxable income as the assessment treats him as having derived.’³⁴

Rather, the taxpayer must demonstrate on the balance of probabilities there was no omission of income and therefore no avoidance of tax. This requires ‘evidence as to the source of the unexplained funds’.³⁵ However, this may be impossible to discharge where the assessment is amended outside the five-year statutory period for retaining records³⁶ and, as a result, the taxpayer no longer has material affirmatively demonstrating that taxable income from all sources in a particular income year was less than that subsequently assessed by the Commissioner. The injustice of having to pay the additional tax (and penalties) in such circumstances is manifest.

By contrast, in judicial review it is for the court to be satisfied whether information in the possession of the Commissioner is rationally probative of a suspected tax avoidance purpose.³⁷ To this end, this article demonstrates that judicial review is the only appropriate process available to ensure the Commissioner acts within the limits of their power to amend an assessment at any time.³⁸

To develop the preceding theme of judicial review of the assessment-making process, Part II briefly examines the power and duty of the Commissioner to make an assessment and the judicial processes available to the taxpayer to challenge the assessment. Part III considers recent decisions expounding the process for making assessments and explains why an allegation that it was not open for the Commissioner to make a default assessment or amend an assessment at any time

30 *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220, 226 [19] (Logan J) (‘*Sun*’), citing *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 62 (Deane J, Evatt J agreeing at 57) (‘*Pochi*’).

31 *Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* (1949) 79 CLR 296, 313 (Dixon J).

32 *R v Meares* (1997) 37 ATR 321, 323 (Gleeson CJ, Sully J agreeing at 325, Bruce J agreeing at 325).

33 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, 83 [6] (Kiefel CJ and Gageler J).

34 *George* (1952) 86 CLR 183, 189 (Kitto J).

35 *Nguyen* (2018) 265 FCR 355, 395–6 [154] (Kenny J).

36 See *ITA Act 1936* (Cth).

37 Cf *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 418 [91] (Hayne, Heydon, Crennan and Kiefel JJ) (‘*Kostas*’).

38 The availability of a statutory judicial process does not provide a basis for implying an intention to oust judicial review despite that both may commonly overlap: *Community Housing Ltd v Clarence Valley Council* (2015) 90 NSWLR 292, 300 (Leeming JA, Basten JA agreeing at 294 [1], Gleeson JA agreeing at 296 [12]). Notwithstanding, judicial review proceedings should ordinarily be stayed pending the outcome of part IVC proceedings: *Futuris* (2008) 237 CLR 146, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ).

is a procedural irregularity that is excluded from challenge under part IVC of the *TA Act*. Part IV discusses the preconditions governing exercise of the power to make default and amended assessments and demonstrates that a mere suspicion an undisclosed discrepancy ought to be taxed is amenable to judicial review for jurisdictional error. Part V demonstrates that the relatively more onerous burden of proof applying under part IVC of the *TA Act*, compared with judicial review, impedes the ability of courts to discern whether the implied obligation of reasonableness governing formation of the Commissioner's state of mind when making an assessment has been observed. Part VI summarises the preceding discussion and adds some concluding observations.

II THE LEGAL FRAMEWORK FOR MAKING AND REVIEWING AN ASSESSMENT

Every person must lodge a tax return 'if required by the Commissioner by legislative instrument'.³⁹ The power and duty to make an assessment is found in section 166 of the *ITA Act*, which relevantly provides that from the returns and any other information in their possession (even if illegally obtained or otherwise privileged)⁴⁰ 'the Commissioner must make an assessment of (a) the amount of the taxable income ... of any taxpayer; and (b) the amount of tax payable thereon'.

Where, as mentioned, the Commissioner is not satisfied with the return furnished, then they may make a default assessment under section 167(b) 'of the amount upon which in his or her judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166'. This provision is supportive of the Commissioner's power to make an assessment under section 166. It operates 'by means of s 166'⁴¹ and 'is epxegetical to s 166'.⁴²

Once due, the assessment becomes a debt owing to the Commonwealth and is payable to the Commissioner⁴³ irrespective of any 'practical difficulty' this presents for challenging the assessment in the event recovery proceedings result in the taxpayer's bankruptcy and the trustee in bankruptcy abandoning the part IVC proceedings.⁴⁴ This is distinguishable from a practical difficulty in the constitutional sense, whereby the person upon whom the tax liability is imposed is denied the opportunity to challenge through 'some judicial process'⁴⁵ the liability, including the formation of opinion that bears on the liability. As the High Court recently explained, to satisfy the description of taxation in section 51(ii) of the *Constitution*, the tax must be distinguishable from an arbitrary exaction. To this end:

39 *ITA Act 1936* (Cth) s 161(1).

40 See *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412, 433–4 [81] (Keane CJ, Dowsett and Reeves JJ).

41 *George* (1952) 86 CLR 183, 202 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

42 *Ibid* 204.

43 *Taxation Administration Act 1953* (Cth) sch 1 s 255-5(1) ('*TA Act*').

44 See *Buzadzic* (2019) 348 FLR 213, 231 [73]–[75] (Kyrou, McLeish and Niall JJA).

45 *Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32, 40 (Dixon CJ).

[I]t 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. ... [And] 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'.⁴⁶

A related but less well-recognised principle of 'elementary constitutional law'⁴⁷ is that the judicial process for challenging an assessment must prevent the validity of a tax depending on the opinion of the Commissioner. Otherwise, the Commissioner could, potentially, exercise the assessment power arbitrarily or capriciously.

By virtue of section 175A(1) of the *ITA Act*, a taxpayer who is dissatisfied with an assessment 'may object against it in the manner set out in [part IVC of the *TA Act*]'. The objection is to be lodged within a specified time approximating the period of time the Commissioner has to amend an assessment under either items 1, 2, 3 or 4 of section 170(1) of the *ITA Act*.⁴⁸ With effect from 1 January 2006, the period for amending an assessment was shortened to provide taxpayers with more certainty, and thus confidence in the self-assessment regime.⁴⁹ However, the unlimited period for amending an assessment where there has been fraud or evasion was unchanged because it was felt taxpayers 'who engage in calculated behaviour to evade tax should remain permanently at risk'.⁵⁰

Once an objection is lodged, section 14ZY of the *TA Act* requires the Commissioner to give the taxpayer an 'objection decision'. A taxpayer who is dissatisfied with the 'objection decision' may apply for a review in the Administrative Appeals Tribunal ('AAT') or lodge an appeal in the Federal Court against that decision. In either a review (section 14ZZK(b)(i) of the *TA Act*) or appeal (section 14ZZO(b)(i) of the *TA Act*), the taxpayer bears the burden of proving the assessment is 'excessive or otherwise incorrect and what the assessment should have been'. It does not matter that on review the AAT must decide for itself whether the Commissioner's decision is the 'correct or preferable' decision under section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*').⁵¹ Unless the taxpayer can affirmatively prove there was no factual basis supporting the assessment made, the AAT must affirm it.⁵²

46 *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted) ('*WR Carpenter*').

47 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639–40 (Gibbs CJ, Wilson, Deane and Dawson JJ), citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

48 See *TA Act 1953* (Cth) s 14ZW(1)(aa). For individuals (*ITA Act 1936* (Cth) s 170(1) item 1), small business entities (*ITA Act 1936* (Cth) s 170(1) item 2) and trust estates (*ITA Act 1936* (Cth) s 170(1) item 3), the time period is two years. For other taxpayers (eg, large companies) the period is four years (*ITA Act 1936* (Cth) s 170(1) item 4).

49 See Commonwealth Treasury, *Report on Aspects of Income Tax Self Assessment* (Report, August 2004) 4, 27–8.

50 Ibid 31.

51 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 591 (Bowen CJ and Deane J).

52 *Binetter v Federal Commissioner of Taxation* (2016) 249 FCR 534, 552 [93] (Perram and Davies JJ, Siopis J agreeing at 537 [1]) ('*Binetter*'). See also *Nguyen* (2018) 265 FCR 355, 388–9 [130] (Kennedy J).

Alternatively, the taxpayer may seek judicial review in the High Court's original jurisdiction under section 75(v) of the *Constitution*, or in the Federal Court under section 39B of the *Judiciary Act 1903* (Cth) or in a state supreme court under section 39(2) of the *Judiciary Act*. However, because jurisdictional error remedies of prohibition, mandamus and certiorari, known collectively as 'constitutional writs',⁵³ 'do not lie as of right',⁵⁴ courts are directed to refuse discretionary relief pending the outcome of part IVC proceedings.⁵⁵ To this end, jurisdictional error relief will not be available where a document matching the statutory description of 'assessment' is produced so that it is shielded by section 175 of the *ITA Act* from attack. 'Where s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the *Constitution* or under s 39B of the *Judiciary Act*.'⁵⁶

Section 350-10 of schedule 1 to the *TA Act*, which replaces and is 'almost identical'⁵⁷ to the former section 177(1) of the *ITA Act*, gives 'evidentiary effect'⁵⁸ to section 175 of the *ITA Act*. It relevantly provides that production of a notice of assessment is conclusive evidence the assessment was 'properly made' and, except in proceedings under part IVC, 'the amounts and particulars of the assessment are correct.' Notwithstanding, section 350-10 is not considered a privative provision as it 'does not purport to place an assessment beyond review. ... [It] operates only where an "assessment" is produced'.⁵⁹ An assessment is not produced, in terms of either section 175 or section 350-10, where it is infected with jurisdictional error such that it cannot be challenged under part IVC 'because the subject matter of an appeal under Pt IVC is absent – an assessment'.⁶⁰

It follows that where a notice is produced that answers the statutory description of assessment, the effect of section 350-10 is to 'remove the Commissioner's procedural irregularity from challenge in Pt IVC proceedings and ... ensure that the taxpayer's challenge to an assessment is directed to those substantive integers upon which liability depends'.⁶¹ Whilst the distinction between 'procedural steps going to substantive liability (or excessiveness of the assessment) ... and other procedural steps ... is itself a difficult one',⁶² nevertheless:

53 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 666 [37] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

54 *Glennan v Federal Commissioner of Taxation* (2003) 77 ALJR 1195, 1198 [17] (Gummow, Hayne and Callinan JJ).

55 *Futuris* (2008) 237 CLR 146, 162 [48] (Gummow, Hayne, Heydon and Crennan JJ). See also *Mount Pritchard & District Community Club Ltd v Federal Commissioner of Taxation* (2011) 196 FCR 549, 559 [63] (Edmonds, Middleton and Jagot JJ).

56 *Futuris* (2008) 237 CLR 146, 157 [24] (Gummow, Hayne, Heydon and Crennan JJ).

57 *Buzadzic* (2019) 348 FLR 213, 217 [11] (Kyrrou, McLeish and Niall JJA).

58 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 223 (Dawson J) ('*Richard Walter*'), quoted with approval in *Futuris* (2008) 237 CLR 146, 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

59 *Buzadzic* (2019) 348 FLR 213, 230 [69] (Kyrrou, McLeish and Niall JJA).

60 *Gashi* (2013) 209 FCR 301, 310 [43] (Bennett, Edmonds and Gordon JJ).

61 *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation* (2017) 251 FCR 40, 68 [109] (Pagone J, Allsop CJ agreeing at 43 [1], Perram J agreeing at 63 [98]).

62 See *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2007) 161 FCR 1, 7 [23] (Heerey, Stone and Edmonds JJ) ('*WR Carpenter FFC*'), quoting *WR Carpenter Holdings Pty Ltd v*

The clear policy of [section 350-10 of schedule 1 to the *TA Act*] is to distinguish between the procedure or mechanism by which the taxable income and tax is ascertained or assessed on the one hand and on the other hand the substantive liability of the taxpayer. The former involves the due making of the assessment.⁶³

A clear example of a complaint bearing on the due making of an assessment is whether the right officer exercised the relevant discretion under section 167(b). As the High Court in *George v Federal Commissioner of Taxation* ('*George*') explained, the discretion or judgment involved in section 167(b) 'forms a practically inseparable part' of the assessment process so that the question of 'whether the right officer has applied his mind to the question whether the taxpayer's returns are satisfactory within s 167(b) is not a question left open by [section 350-10]'.⁶⁴ Given this, it is difficult to understand how the Full Court in *Chhua* held that if no authorised officer formed the requisite opinion about fraud or evasion then that might be raised in a tax appeal under part IVC. If anything, bearing in mind what the High Court said in *George*, such a complaint is specifically excluded from a part IVC challenge as it has to do with whether the assessment was properly made.

To reiterate, section 350-10 prevents examination of the due making of a determination of the taxpayer's taxable income, which is defined in section 4-15 of the *Income Tax Assessment Act 1997* (Cth) as assessable income less allowable deductions. However, section 350-10 has 'never denied'⁶⁵ the ability of the taxpayer to challenge in judicial review proceedings the 'due formation' of the Commissioner's state of mind or satisfaction. To this end, it bears recalling that the Commissioner's discretion under section 167(b) to make a default assessment is not at large. The Commissioner cannot act purely on mere suspicion and is required to make a 'genuine estimate'⁶⁶ of the taxpayer's taxable income.

By parity of reasoning, the Commissioner should not be able to amend an assessment at any time where they suspect a tax avoidance purpose by reason of discovery of a discrepancy without first attempting to ascertain whether the discrepancy is taxable.

In *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* ('*WR Carpenter FFC*'),⁶⁷ the taxpayer lodged a judicial review application under section 39B of the *Judiciary Act* complaining about use of the Commissioner's power under section 136AD(4) of the *ITA Act* to specify an amount of arm's length consideration. Specifically, the determination made by the Commissioner under section 136AD(1) (d) was that section 136AD(4) should apply, as the Commissioner was satisfied the taxpayer supplied property to a related entity for less than the arm's length consideration. Dismissing the taxpayer's application,⁶⁸ the Full Court explained:

Where Parliament intended that the criteria for liability should include the due formation by the Commissioner of his state of mind, opinion or judgment, either in

Federal Commissioner of Taxation (2006) 234 ALR 451, 481 [155] (Lindgren J).

63 *George* (1952) 86 CLR 183, 206–7 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

64 *Ibid* 206.

65 *WR Carpenter FFC* (2007) 161 FCR 1, 11 [43] (Heerey, Stone and Edmonds JJ).

66 *Briggs [No 2]* (1987) 14 FCR 249, 270 (Sheppard J).

67 (2007) 161 FCR 1.

68 *WR Carpenter FFC* (2007) 161 FCR 1, 18 [56] (Heerey, Stone and Edmonds JJ).

lieu of objective criteria, or as an addition to incomplete objective criteria, [section 350-10 of schedule 1 to the *TA Act*] has never denied the ability of a taxpayer to examine the due formation of that state of mind on judicial review grounds. But where Parliament has exhaustively set out the criteria for liability by reference to objective matters, *but has made the application of those criteria dependent upon a step being taken by the Commissioner*, the step is procedural in the sense that it is not a step which forms part of the criteria for liability. The due making of such a determination is not subject to examination on judicial review grounds.⁶⁹

The Commissioner's section 136AD(1) determination was described by the High Court (on appeal) as 'an essential step'⁷⁰ in the making of the relevant assessment, albeit one which concerned the due making of the assessment and was thus excluded from challenge under part IVC. Notwithstanding, the taxpayer's unsuccessful appeal to the High Court left untouched the Full Federal Court's above analysis of the procedural/substantive distinction. This is because the principal issue arising on appeal in *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* ('*WR Carpenter*')⁷¹ was whether the taxpayer was entitled to particulars 'which may provide them with an issue to be pursued in the Pt IVC appeals'.⁷² It was not.

Given the preceding, the immediately following discussion demonstrates that a complaint about the formation of the Commissioner's opinion that section 167 and/or section 170(1) item 5 apply notwithstanding the returns furnished by the taxpayer is not unlike the complaint in *WR Carpenter* regarding the Commissioner's determination that section 136AD applies. As will appear, each bears on the assessment-making process rather than the validity of the assessment and thus is only examinable in judicial review proceedings, albeit the Court in *Buzadzic* suggested otherwise.

III THE ASSESSMENT-MAKING PROCESS

Drawing on Kitto J's statement in *Batagol v Federal Commissioner of Taxation* ('*Batagol*'),⁷³ the plurality in *Federal Commissioner of Taxation v Futuris Corporation Ltd* ('*Futuris*') observed the expression 'assessment' equates to 'a process with the consequence that a specified amount will become due and payable as the proper tax in the case in question'.⁷⁴ In *Batagol*, Kitto J said:

[N]othing done in the Commissioner's office can amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by the service of a notice of assessment.⁷⁵

⁶⁹ Ibid 11 [43] (emphasis added).

⁷⁰ *WR Carpenter* (2008) 237 CLR 198, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

⁷¹ (2008) 237 CLR 198.

⁷² Ibid 210 [30].

⁷³ (1963) 109 CLR 243.

⁷⁴ *Futuris* (2008) 237 CLR 146, 163 [49] (Gummow, Hayne, Heydon and Crennan JJ).

⁷⁵ (1963) 109 CLR 243, 252 (Menzies J agreeing at 254).

In *Deputy Commissioner of Taxation v Anglo American Investments Pty Ltd*, Button J went on to add that the ‘process of assessment’ is not, prima facie, merely ‘the final arithmetical exercise that leads to the computation of the assessment. Rather ... one can look to the acts of officers of the [Commissioner] in the process leading up to the issuing of the notice of assessment’.⁷⁶ And it can ‘extend to the process of investigation that preceded the provision of the notice of assessment, and informed its preparation’.⁷⁷

The process of investigation ordinarily includes information gathering by the Commissioner’s officers that leads to discovery of a discrepancy and, ultimately, the issuing of a default or amended assessment. And irrespective of whether the information was procured by the Commissioner or otherwise given to the Commissioner by, for example, a disgruntled person, as occurred in *Federal Commissioner of Taxation v Donoghue*,⁷⁸ the Commissioner is ‘obliged’⁷⁹ to use such information to make an assessment even if it is subject to a claim for breach of confidence or is otherwise privileged.

Apart from the returns furnished by the taxpayer, the information in the Commissioner’s possession would help explain why the Commissioner is not satisfied with the return furnished sufficient to justify the making of a default or an amended assessment. It bears on whether the taxpayer made full and true disclosure of all taxable amounts in relation to previously lodged returns. It is thus an essential prerequisite informing whether the discovery of a purported discrepancy between the amount of income returned and the taxpayer’s assets is taxable and thus whether a default assessment can be made or otherwise amended despite expiry of the amendment period.

An assertion like that raised by the taxpayers in *Buzadzic* and *Nguyen*, that there is no evidence warranting the making of a default or an amended assessment, necessarily and directly pertains to the process for ascertaining taxable income from which tax payable may be computed. It involves consideration of whether the information in the Commissioner’s possession is rationally probative of the factual conclusion that an undisclosed amount constitutes taxable income. To that extent, it is part of the assessment-making process not open to challenge in part IVC proceedings.

In *George*, the taxpayer alleged the assessment was excessive because, as mentioned, the opinion preconditioning the assessment power in section 167(b) of the *ITA Act* had not been formed by the right person, and that in any case it had been ‘formed on no material’.⁸⁰ Dismissing the taxpayer’s complaint, the High Court observed that formation of opinion about ‘what is the amount of the income that ought to be taxed is ... part of the very process of assessment itself’.⁸¹ Finding no

76 (2016) 103 ATR 649, 656 [50] (emphasis in original) (*‘Anglo American’*). Button J’s judgment was upheld on appeal: *Anglo American Investments Pty Ltd v Deputy Commissioner of Taxation* (2017) 347 ALR 134.

77 *Anglo American* (2016) 103 ATR 649, 657 [51] (Button J) (emphasis in original).

78 (2015) 237 FCR 316.

79 Ibid 335 [74] (Kenny and Perram JJ, Davies J agreeing at 344 [111]).

80 *George* (1952) 86 CLR 183, 200 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

81 Ibid 203.

discernible difference between the function performed under section 166 or section 167 and that '[t]he discretion or judgment involved in s 167 forms a practically inseparable part of that function',⁸² their Honours in the High Court said:

It is an error to treat the formation by the commissioner of a judgment as to the amount of the taxable income as if it were not the ascertainment of the taxable income which constitutes assessment or a necessary part of that process and as if it were but the fulfilment of a condition precedent to the power or authority to assess. If, however, it were a condition precedent the question would at once arise whether the fulfilment of the condition was not part of 'the due making of the assessment' of which [section 350-10] makes the production of a notice of assessment conclusive evidence.⁸³

It follows that whether the Commissioner is satisfied with the return furnished is 'a procedural step'⁸⁴ notwithstanding that it may also constitute a condition precedent governing the power to make an assessment. As Brennan J explained in *Federal Commissioner of Taxation v Dalco*, 'the fulfilment of the condition precedent is part of the due making of the assessment not going to substantive liability so that ... [it] is not open to challenge in [part IVC] proceedings ...'.⁸⁵

Not dissimilarly, amending an assessment at any time following discovery of a purported discrepancy between the income returned by the taxpayer in a later income year and their assets for that year involves two procedural steps. First, it involves consideration of the character of the discrepancy – viz, whether it is taxable. Secondly, whether the tax liability originally assessed in relation to an earlier income year should be increased by reason of discovery of a purported discrepancy in relation to a different income year. Both steps are procedural, albeit essential, in amending an assessment under section 170(1) item 5 of the *ITA Act*. Commonly, both are fundamentally informed by a determination that the undisclosed discrepancy is taxable. In which case, it is not unlike the determination made by the Commissioner in *WR Carpenter* about whether section 136AD(4) applies, which the High Court said was merely procedural.

Given the preceding, the Court's decision in *Buzadzic* does not appear to separately and additionally consider an allegation that an undisclosed discrepancy is not taxable so that it was not open to the Commissioner to amend an assessment at any time or make a default assessment. Instead, the Court concluded, as mentioned, the due making of a default assessment is 'not open to challenge' in any proceedings and, consistently with *Chhua*, that non-compliance with section 170(1) item 5 can only be challenged under part IVC as the assessment produced would nonetheless constitute an assessment for the purposes of section 175.⁸⁶

As shown, however, a complaint about the lack of information in the Commissioner's possession bearing on the assessability of an undisclosed amount

82 Ibid 206.

83 Ibid 204.

84 *Dalco* (1990) 168 CLR 614, 620 (Brennan J, Mason CJ agreeing at 617, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634).

85 Ibid 622 (Brennan J, Mason CJ agreeing at 617, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634).

86 *Buzadzic* (2019) 348 FLR 213, 237 [104]–[105] (Kyrour, McLeish and Niall JJA).

is excluded from challenge under part IVC because it concerns the ‘due making’⁸⁷ of the assessment. That such a determination also necessarily bears on whether the Commissioner formed the requisite opinion about fraud or evasion should not obfuscate the similarity with the procedural determination in *WR Carpenter* about which provision applies. This latter, more nuanced, argument does not appear to have been raised by the taxpayers in *Buzadzic*. And is not affected by the Full Court’s observation in *Chhua* that ‘the lawful existence of the conditions in s 170 is not part of the ‘procedure or mechanism by which the taxable income and tax is ascertained or assessed’ for the purposes of s 350-10 of Sch 1 to the *TA Act*’.⁸⁸

Respectfully, it is unclear how or why their Honours in *Chhua* drew on *George* in support of the immediately preceding proposition. If anything, the appropriate authority for this proposition is *McAndrew v Federal Commissioner of Taxation* (*McAndrew*).⁸⁹ This case considered the operation of an analogue to section 170(1) item 5 with the majority finding that fulfilment of the conditions of fraud or evasion is not part of the due making of the assessment but rather is a matter ‘governed by the words of exception in [section 350-10]’.⁹⁰ The Court’s finding in *McAndrew*, however, is distinguishable from the procedural question considered in this article about whether discovery of purported discrepancy is taxable.

As discussed, formation of opinion that an undisclosed discrepancy ought to be taxed and the decision to amend an assessment at any time to reflect that opinion is an integral part of the assessment process. Notwithstanding that an allegation it was not open for the Commissioner to treat an undisclosed discrepancy as taxable might also bear on whether there has been fraud or evasion, nevertheless, this is a separate and additional complaint that has to do with the due making of the assessment.

However subtle the distinction may be, an assertion that there is no evidence that a purported discrepancy discovered following an investigation of the taxpayer is taxable differs from an assertion that the taxpayer has made true and full disclosure of all taxable amounts. The former concerns the manner in which the Commissioner reached the state of satisfaction that a prerequisite governing the assessment-making power (viz, taxability of the purported discrepancy) was met, whilst the latter is directed to whether there has been blameworthy or unlawful conduct. A ‘no evidence’ assertion necessarily bears on the process of investigation that led to discovery of the discrepancy in the first place and, ultimately, to the making of default and amended assessments. It involves a procedural, albeit essential, step not going to substantive liability. So, if the Commissioner does not follow proper procedure, this will not necessarily affect substantive liability.⁹¹

87 Azzi, ‘Binding Rules Regime’ (n 27) 166, referring to *WR Carpenter FFC* (2007) 161 FCR 1, 11.

88 *Chhua* (2018) 262 FCR 228, 239 [31] (Logan, Moshinsky and Steward JJ) citing *George* (1952) 86 CLR 183, 206.

89 (1956) 98 CLR 263.

90 *McAndrew* (1956) 98 CLR 263, 271 (Dixon CJ, McTiernan and Webb JJ).

91 *WR Carpenter* (2008) 237 CLR 198, 203–4 [6] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

Indeed, an allegation that it was not open to the Commissioner to make either a default or amended assessment by reason of a subsequently discovered discrepancy has to do with fulfilment of the condition precedent for making either assessment (viz, taxability of the purported discrepancy) which forms part of the assessment process. It bears fundamentally on the character of the undisclosed amount, albeit that it may also bear on whether the additional criteria for liability (viz, fraud or evasion) have been fulfilled.

As the immediately following discussion demonstrates, an assertion that there is no evidence to warrant the Commissioner not being satisfied with the return originally furnished is not conclusively proved by production of the notice of assessment. As will appear, this assertion bears directly on whether exercise of the assessment power was in fact authorised.

IV JUDICIAL REVIEW OF THE POWER TO MAKE DEFAULT AND AMENDED ASSESSMENTS

In judicial review proceedings, courts are tasked with examining whether formation of opinion on which exercise of administrative power depends was reasonably reached. That is, whether the decision is based on a correct understanding and application of the applicable law.⁹²

What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed.⁹³

Irrespectively, whether non-compliance with a statutory provision is reviewable depends on whether the purported breach goes to jurisdiction.⁹⁴ In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*,⁹⁵ Latham CJ was satisfied that the question of ‘whether or not there was evidence upon which the [decision-maker] could be satisfied’⁹⁶ about objective criteria preconditioning a statutory power went to jurisdiction. Likewise, whether or not there was evidence upon which the Commissioner could be satisfied that a discrepancy discovered in relation to the taxpayer’s assets for an income year and the return lodged for that year was in fact assessable goes to jurisdiction. It is a ‘subjective jurisdictional fact’⁹⁷ that

92 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 132 [23], 136 [34] (Kiefel CJ, Gageler and Keane JJ) (*‘Hossain’*).

93 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432 (Latham CJ), approved in *Foley v Padley* (1984) 154 CLR 349, 353 (Gibbs CJ), 370 (Brennan J), 375 (Dawson J).

94 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [131] (Gummow J) (*‘Eshetu’*).

95 (1944) 69 CLR 407.

96 (1944) 69 CLR 407, 435. See also *Eshetu* (1999) 197 CLR 611, 653 [135] (Gummow J).

97 Derrington (n 26) 72.

‘enlivens’⁹⁸ the assessment-making power and is thus amenable to judicial review.⁹⁹ In which case, the reviewing court is required to determine for itself whether information exists to support the necessary inference without ‘deference’¹⁰⁰ to the Commissioner’s opinion.

Towards the immediately preceding end, the task of the reviewing court will be ‘guided and controlled’¹⁰¹ by the statutory context conditioning the making of the Commissioner’s opinion.

Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously.¹⁰²

As gleaned, the statutory framework under consideration presently is that governing the making of a default assessment under section 167(b) in which the Commissioner determines ‘the amount upon which ... income tax ought to be levied’, and the amending of an assessment at any time under s 170(1) item 5 where ‘there has been fraud or evasion’. In each case, as discussed, the Commissioner is required to make a genuine attempt to discern the amount of the discrepancy that ought to be taxed. For unless the Commissioner is reasonably satisfied the undisclosed discrepancy is taxable, there could be no basis for not being satisfied with the return furnished or otherwise inferring a tax avoidance purpose. To this end, mere suspicion does not constitute rationally probative evidence.¹⁰³

The mere discovery of a purported discrepancy is insufficient by itself to conclusively and rationally establish that the taxpayer has not disclosed all relevant income amounts for a particular year or has otherwise engaged in unlawful or blameworthy conduct in relation to a different income year. Without additional evidence bearing on the assessable nature of the discrepancy, the Commissioner would simply be acting on a mere suspicion or speculation about its taxability and the taxpayer’s conduct. Nevertheless, the state of satisfaction required to make a default assessment under section 167 differs from that required to amend an assessment after expiry of the relevant amendment period under section 170(1) item 5.

In relation to default assessments, it has been said that the ‘process of calculating taxable income as assessable income minus deductions is not possible’.¹⁰⁴ Bearing in mind the Commissioner can make an assessment under section 167 where a

98 *Gideon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, 139 [43] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

99 See also *Anvill Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54, 59 [21] (Tamberlin, Finn and Mansfield JJ).

100 James Hutton, ‘Satisfaction as a Jurisdictional Fact – A Consideration of the Implications of SZMDS’ in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014), 57.

101 *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 687 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ), cited with approval in *WR Carpenter* (2008) 237 CLR 198, 205 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

102 *Buck* (1976) 135 CLR 110, 118 (Gibbs J).

103 See *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492 (Brennan J); *Pochi* (1980) 44 FLR 41, 63 (Deane J, Evatt J agreeing at 57).

104 *Gashi* (2013) 209 FCR 301, 312 [53] (Bennett, Edmonds and Gordon JJ).

person fails to lodge a tax return, the tax return is deficient or the Commissioner 'has reason to believe' that a person who has not lodged a tax return has derived taxable income, and recognising that taxpayers are likely to be uncooperative or else not provide accurate information, courts accept 'the Commissioner is entitled to exercise his judgment to arrive at the figure upon which income tax ought to be levied even though he is not in possession of all relevant information and he is aware the figure may well be incorrect'.¹⁰⁵

Towards the immediately preceding end, the Commissioner regularly relies on the 'asset betterment' method, whereby understated income is quantified by identifying the amount required to fund the increase in assets and the identified expenditure over a relevant period which is unable to be funded by the amounts disclosed.¹⁰⁶

In contrast, however, the judgment the Commissioner must exercise before making an amended assessment is more demanding given section 170(1) item 5 of the *ITA Act* is directed to whether 'there has been' calculated behaviour by the taxpayer designed to conceal taxable income. It follows that a higher information threshold applies. The words 'there has been' contemplate a 'causal connection'¹⁰⁷ between the taxpayer's purported failure to disclose taxable income and the consequence of fraud or evasion. This, in turn, has a limiting effect on the operation of section 170(1) item 5, requiring evidence rationally probative of the probability of a tax avoidance purpose by reason of an undisclosed amount. After all, the power to amend an assessment after expiry of the relevant amendment period should not be exercised lightly given the legislative intention to promote certainty and thus increase taxpayer confidence in the tax system, and the lack of any obligation to retain documents beyond a certain period.

Indeed, unless there is 'some evidence or other factual material'¹⁰⁸ in the Commissioner's possession from which it may be inferred that an undisclosed amount should have been disclosed because it is taxable, then it is strongly arguable the Commissioner acted arbitrarily in exercising discretion to invoke the amendment power in section 170(1) item 5 of the *ITA Act*. If an undisclosed amount is not taxable, then it is not possible for the Commissioner to be satisfied that 'there has been fraud or evasion'. This consideration is distinguishable from, albeit bearing on, whether the taxpayer has made full and true disclosure.

It follows that courts would be justified in intervening to invalidate an amended assessment where the Commissioner merely suspects the purported discrepancy ought to be taxed without any rationally probative evidence bearing on the character of the undisclosed amount. In these circumstances, it would not be 'reasonably open'¹⁰⁹ for the Commissioner to draw the requisite inference that there has been

105 *Marijancevic v Mann* (2008) 73 ATR 709, 720 [20] (Ryan, Kenny and Stone JJ).

106 See *Gashi* (2013) 209 FCR 301, 304–5 [9]–[11] (Bennett, Edmonds and Gordon JJ).

107 Dennis Pearce and Ross Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 2014) 463 [12.9].

108 Aronson, Groves and Weeks (n 20) 257, relying on *Bruce v Cole* (1998) 45 NSWLR 163, 189 (Spigelman CJ).

109 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356 (Mason CJ).

fraud or evasion. In which case, exercise of the assessment power would have been made without jurisdiction and is thus likely to constitute jurisdictional error.¹¹⁰

[A]n administrative decision-maker ... must act on material which is rationally probative of its factual conclusion and, unless the statutory touchstone for that conclusion admits of it, material which rises no higher than raising a suspicion supporting that factual conclusion is no foundation for such a conclusion. That would accord with observations, albeit each made in the context of review for jurisdictional error, in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 and, on review of a decision for unreasonableness, in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.¹¹¹

In *Minister for Immigration and Citizenship v SZMDS*, Crennan and Bell JJ said an allegation that it was not open to the decision-maker to engage in the process of reasoning it did is of

the same order as a complaint that a decision is ‘clearly unjust’ or ‘arbitrary’ or ‘capricious’ or ‘unreasonable’ in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person.¹¹²

It follows that a decision would be illogical or irrational if, for example, ‘the decision ... was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn’.¹¹³

Towards the immediately preceding end, more than ‘mere advertence’¹¹⁴ to the taxpayer’s evidence about the nature of the purported discrepancy is necessary to overcome illogicality in the reasoning process. Rather, the Commissioner must ‘engage actively with the relevant issues’.¹¹⁵ Ordinarily, this would require an investigation by the Commissioner into the character of the discrepancy and for the Commissioner not to make unwarranted assumptions about the nature of the discrepancy. ‘Unwarranted assumptions may also establish that a finding is illogical, irrational or not founded on any probative evidence’.¹¹⁶

Meanwhile, in *Minister for Immigration and Citizenship v Li* (‘*Li*’), Hayne, Kiefel and Bell JJ said that a decision that ‘lacks an evident and intelligible justification’¹¹⁷ would be vitiated for unreasonableness. All members of the High Court in *Li* agreed that the decision of the administrative decision-maker refusing an application by a visa applicant for an adjournment to permit a re-consideration of her qualifications was unreasonable, notwithstanding the decision-maker recording the ‘applicant has been provided with enough opportunities to present

110 See *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595, 624–5 [104] (Mortimer J, Moshinsky J agreeing at 626 [113]–[114], Wheelahan J agreeing at 626 [115]).

111 *Sun* (2016) 243 FCR 220, 226 [19] (Logan J). See also at 246–7 [85]–[86] (Flick and Rangiah JJ).

112 (2010) 240 CLR 611, 648 [130] (‘*SZMDS*’).

113 *Ibid* 650 [135] (Crennan and Bell JJ).

114 *Islam v Cash* (2015) 148 ALD 132, 135 [14] (Flick J), quoted with approval in *BZD17 v Minister for Immigration and Border Protection* (2018) 263 FCR 292, 302 [35] (Perram, Perry and O’Callaghan JJ) (‘*BZD17*’).

115 *BZD17* (2018) 263 FCR 292, 302 [35] (Perram, Perry and O’Callaghan JJ).

116 *Ibid* 303 [36], citing *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175, 188 [45] (Kenny, Kerr and Perry JJ).

117 (2013) 249 CLR 332, 367 [76] (‘*Li*’).

her case and is not prepared to delay any further'.¹¹⁸ According to their Honours in the High Court, it was not obvious why the decision-maker could not have granted the adjournment.¹¹⁹

The principles flowing from *Li* were summarised in *Minister for Immigration and Border Protection v Stretton*¹²⁰ and *Minister for Immigration and Border Protection v Eden*¹²¹. Suffice to note the 'concept of legal unreasonableness is not amenable to minute and rigidly defined categorisation or precise textual formulary'.¹²² Importantly, it encompasses 'the requirement that the satisfaction or opinion of a decision-maker about the existence of a matter, in particular a jurisdictional fact, be reasonably formed'.¹²³

It follows that an opinion that the taxpayer has not made full and true disclosure by reason of a purported discrepancy, permitting the Commissioner to amend an assessment at any time, must have been made upon some 'intelligible basis'.¹²⁴ To this end, exercise of the assessment power would be legally unreasonable unless there is some evidence in the Commissioner's possession bearing on the assessability of an undisclosed discrepancy.¹²⁵

A court would thus be justified in inquiring whether probative evidence exists establishing it was open for the Commissioner to be satisfied the taxpayer failed to make full and true disclosure. And if there is no probative evidence rationally bearing on the probability a purported discrepancy is assessable, then the court would be justified in quashing the amended assessment and prohibiting the Commissioner from instituting proceedings to recover the amount assessed.

In *Buzadzie*, however, the Court of Appeal summarily dismissed the taxpayers' judicial review application to set aside tax recovery proceedings. The taxpayers alleged the assessments on which recovery proceedings were based were unauthorised because it was not open for the Commissioner to be satisfied they failed to make full and true disclosure when they had furnished income tax returns in which they returned all taxable income for each year of the relevant period. Given this, the taxpayers submitted 'the production of the notices of assessment did not conclusively prove ... the formation of the opinion that there was fraud or evasion'.¹²⁶

118 Ibid 355 [40] (French CJ).

119 Ibid 352 [31] (French CJ), 369 [85]–[86] (Hayne, Kiefel and Bell JJ).

120 (2016) 237 FCR 1 ('*Stretton*').

121 (2016) 240 FCR 158 ('*Eden*').

122 *Stretton* (2016) 237 FCR 1, 5 [10] (Allsop CJ).

123 *Stretton* (2016) 237 FCR 1, 4 [5] (Allsop CJ, Griffiths J agreeing at 23 [68], Wigney J agreeing at 29 [90]). See also *Eden* (2016) 240 FCR 158, 171 [62], 172 [64]–[65] (Allsop CJ, Griffiths and Wigney JJ); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 572–3 [80] (Nettle and Gordon JJ, Kiefel CJ agreeing at 548–9 [1]) ('*SZVFW*').

124 *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63, 88 (Latham CJ), quoted with approval in *Dalco* (1990) 168 CLR 614, 624 (Brennan J, Mason CJ agreeing at 617, Deane J agreeing at 626, Dawson J agreeing at 627) ('*Trautwein*').

125 See *SZVFW* (2018) 264 CLR 541, 573 [81] (Nettle and Gordon JJ, Kiefel CJ agreeing at 548–9 [1]).

126 *Buzadzie* (2019) 348 FLR 213, 226 [53] (Kyrou, McLeish and Niall JJA).

Relying on the High Court decision in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*¹²⁷ and noting the ‘manifest policy’¹²⁸ of section 350-10 of schedule 1 to the *TA Act* preventing taxpayers from going behind an assessment in recovery proceedings, their Honours in *Buzadzić* were satisfied the Commissioner could proceed to recover tax despite the pendency of part IVC proceedings and the risk of ‘harsh’¹²⁹ consequences for the taxpayer. Consistently with *Chhua*, their Honours in *Buzadzić* further held that an assessment made without compliance with section 170(1) item 5 nevertheless answers the statutory description of assessment and can only be challenged in part IVC proceedings.¹³⁰ It will be recalled, the Full Court in *Chhua* held that simple non-compliance with a provision of the Act is unexaminable in judicial review because it would be unlikely to constitute either of the two jurisdictional errors identified in *Futuris*, so that ‘the validity of the resulting assessment would remain protected’¹³¹ by section 175 of the *ITA Act* and section 350-10 of schedule 1 to the *TA Act*.

Notwithstanding, in my article published around the time of *Buzadzić* I argued that the ‘increasingly prevalent practice ... of summarily dismissing judicial review applications not alleging either of the two jurisdictional errors identified ... in [*Futuris*] is both apocryphal and repugnant to the rule of law’.¹³² As explained, it is apocryphal to conclusively limit jurisdictional error relief in the manner suggested in *Chhua* given the ‘uncertainty surrounding the privative scope of s 175 and whether it protects against bad faith in the narrow sense’.¹³³ To this end, it was noted that the Court in *Futuris* was only concerned with whether the Commissioner ‘acted knowingly in excess of his or her power’¹³⁴ and not with any softer sense of bad faith.

Accordingly, there was no need for the plurality [in *Futuris*] to consider the interrelation of s 175 and s 350-10, and the softer sense of bad faith, which arises where an administrative act is done beyond power, regardless of the motive or intention of the decision-maker. It follows that intermediate courts should, respectfully, be more circumspect when applying the plurality’s reasons in *Futuris*...¹³⁵

It was further observed that foreclosing the categories of jurisdictional error in the manner identified in *Futuris* operates to impermissibly

stultify judicial power [which reflects and serves the rule of law] by putting an ‘artificial gloss’ on the text of s 175, restricting the circumstances where courts can

127 (2008) 237 CLR 473.

128 *McAndrew* (1956) 98 CLR 263, 270 (Dixon CJ, McTiernan and Webb JJ).

129 *Buzadzić* (2019) 348 FLR 213, 231 [73] (Kyrou, McLeish and Niall JJA), citing *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473, 491–3 [41]–[45] (Gummow ACJ, Heydon, Crennan and Kiefel JJ).

130 *Buzadzić* (2019) 348 FLR 213, 237 [106] (Kyrou, McLeish and Niall JJA).

131 *Chhua* (2018) 262 FCR 228, 238 [29] (Logan, Moshinsky and Steward JJ).

132 John Azzi, ‘Preserving the Constitutional Function of Courts and Increasing Confidence in the Tax System: Time to Reconsider *Futuris*’ (2019) 43(1) *Melbourne University Law Review* 44, 44 (‘Time to Reconsider *Futuris*’).

133 *Ibid* 74.

134 *Futuris* (2008) 237 CLR 146, 153 [11] (Gummow, Hayne, Heydon and Crennan JJ), discussing *Sanders v Snell* (1998) 196 CLR 329, 346–7 [42] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

135 Azzi, ‘Time to Reconsider *Futuris*’ (n 132) 69.

discern the implied limits of a law and declare an administrative action or decision invalid on grounds of jurisdictional error.¹³⁶

Despite *Futuris*, there have been two decisions of state supreme courts refusing to definitively limit jurisdictional error relief to the two errors identified in *Futuris*. In *Futuris*, the plurality said section 175 would not operate to protect a tentative assessment¹³⁷ or an assessment issued as a result of ‘conscious maladministration’, which requires the taxpayer to ‘demonstrate the equivalent of a corrupt exercise of statutory power or the exercise of that power with *deliberate disregard* to the scope of the power’.¹³⁸

In *Woods v Deputy Commissioner of Taxation* (‘*Woods*’)¹³⁹, whose reasons the taxpayer in *Chhua* adopted to (unsuccessfully) resist summary dismissal of their section 39B application, Porter J refused to grant the Commissioner’s summary dismissal application, fearing that doing so would stifle the development of the law, particularly where ‘a point is a novel one’.¹⁴⁰ In any case, his Honour was satisfied the plurality in *Futuris* did not intend to exhaustively limit to ‘2 instances’¹⁴¹ when an assessment for the purposes of section 175 of the *ITA Act* will not be produced. Porter J also considered important the fact that the taxpayer was alleging a ‘narrow historical sense’ of jurisdictional error for want or lack of jurisdiction and not the ‘more recent broader sense of acting in “excess of jurisdiction”’.¹⁴²

Likewise, the primary judge in *Buzadzic*, Croft J, refused to grant the Commissioner’s application for summary dismissal of the taxpayer’s jurisdictional error defences on the ground that doing so would impair the institutional integrity of a state court exercising federal judicial power.¹⁴³ As gleaned, however, the Court of Appeal overturned Croft J’s decision, finding his Honour made a ‘*House v The King* error’ in circumstances where the proceedings had no real prospect of success because ‘the impugned provisions stood in the way of the defences relied upon by the [taxpayers] under the description of jurisdictional error’.¹⁴⁴

Meanwhile, the Full Court in *Chhua* held that *Woods* has not been followed in the Federal Court and that, in any case, distinction between want of jurisdiction and the manner of its exercise mentioned by Porter J was ‘misconceived’.

The reference ... to want of jurisdiction and the manner of its exercise is a reference to the distinction between jurisdictional error (want of jurisdiction) and error within jurisdiction (manner of its exercise). The observations of the High Court in *Futuris* ... concerned the interaction and operation of the relevant provisions of the [*ITA Act*]

136 Ibid 88 (citations omitted).

137 A tentative assessment is one which ‘fails to specify what is the amount of the taxable income which has been assessed and what is the tax payable thereon’: *Stokes v Federal Commissioner of Taxation* (1996) 136 ALR 632, 638 (Davies J).

138 *Federal Commissioner of Taxation v Bosanac* (2016) 103 ATR 51, 56 [25] (McKerracher J) (emphasis added), citing *Futuris* (2008) 237 CLR 146, 164–5 [55], 165 [57], 165–6 [60] (Gummow, Hayne, Heydon and Crennan JJ).

139 (2011) 86 ATR 620.

140 Ibid 637 [49].

141 Ibid 637 [50].

142 Ibid 638 [53].

143 *Deputy Commissioner of Taxation v Buzadzic* [2019] VSC 141. See especially at [37].

144 *Buzadzic* (2019) 348 FLR 213, 240 [119] (Kyrou, McLeish and Niall JJA).

and the [TA Act]. Those observations were not confined to matters pertaining to the manner of exercise of jurisdiction, but were expressed more generally.¹⁴⁵

As discussed, however, *Futuris* did not consider the interrelation between section 175, section 350-10 and the ‘narrow and technical sense’ of bad faith, which, unlike ‘conscious maladministration’, arises where ‘the act done was beyond the power conferred’.¹⁴⁶ And neither does it deny that the manner in which the assessment power was exercised directly informs whether the opinion on which the incidence of tax depends was reasonably formed. To this end, Toohey J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, who spoke in ‘somewhat similar terms’¹⁴⁷ to Dawson J (with whose reasons concerning former section 177 of the *ITA Act* the plurality in *Futuris* agreed), said that section 175 ‘does not operate where the power of the Commissioner to make an assessment is at issue’.¹⁴⁸

Equally, it is of no moment that many of the cases cited above expounding legal unreasonableness arose in the context of the *Migration Act 1958* (Cth) where, as the Court in *Chhua* noted, there is no equivalent to section 175 of the *ITA Act* which ‘makes clear that compliance with the provisions of those Acts is not a “condition precedent” to the making of an efficacious assessment of tax’.¹⁴⁹ As remarked elsewhere, the principles identified in migration cases concerning jurisdictional error have ‘universal application’,¹⁵⁰ providing ‘important guiding principles expounding the limits of administrative power generally’.¹⁵¹ To this end, a rebuttable legal presumption is that a statutory discretion must be exercised reasonably and on a correct understanding of the law.¹⁵² This implied obligation applies in respect of ‘any ... source of legislative power’¹⁵³ and prevails absent statutory indication to the contrary.¹⁵⁴

It follows, therefore, that the ‘no-invalidity’ provision in section 175,¹⁵⁵ which expands the decision-making power of the Commissioner, or the conclusive evidence provision in section 350-10, which identifies the limits of the Commissioner’s decision-making power, would be invalid if either or both operated to deny the High Court when exercising jurisdiction under section 75(v) of the *Constitution* or

145 *Chhua* (2018) 262 FCR 228, 235–6 [19] (Logan, Moshinsky and Steward JJ).

146 *Futuris* (2008) 237 CLR 146, 154 [13] (Gummow, Hayne, Heydon and Crennan JJ).

147 See *ibid* 167 [67] n 94.

148 *Richard Walter* (1995) 183 CLR 168, 233.

149 *Chhua* (2018) 262 FCR 228, 236 [21] (Logan, Moshinsky and Steward JJ).

150 Derrington (n 26) 72.

151 Azzi, ‘Time to Reconsider *Futuris*’ (n 132) 80.

152 *Li* (2013) 249 CLR 332, 362 [63] (Hayne, Kiefel and Bell JJ), cited with approval in *SZVFW* (2018) 264 CLR 541, 549 [4] (Kiefel CJ).

153 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 27 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (‘*Graham*’).

154 *SZVFW* (2018) 264 CLR 541, 564–5 (Gageler J). See also *Hossain* (2018) 264 CLR 123, 146 [67] where Edelman J (Nettle J agreeing at 136 [39]) observed that absent clear statutory language, ‘it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power’.

155 Section 175 of the *ITA Act 1936* (Cth) is said to be ‘at least as threatening to the entrenched minimum provision of judicial review and the rule of law as traditional privative clauses’: Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21(1) *Public Law Review* 14, 24.

another court when exercising jurisdiction within the limits conferred on or invested in it under s 77(i) or (iii) [of the *Constitution*] by reference to s 75(v), the ability to enforce the legislated limits of an officer's power. ... [This] requires an examination not only of the legal operation of the law but also of the *practical impact* of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case.¹⁵⁶

As the immediately following discussion demonstrates, the 'accommodating'¹⁵⁷ and arguably unsustainable interpretation of section 175 and section 350-10 adopted by the Court in *Chhua*, and the comparatively onerous evidentiary burden imposed on taxpayers under section 14ZZO of the *TA Act* to establish an assessment is excessive, combine to practically impair courts from discerning whether the Commissioner conducted themselves according to law when making an assessment following discovery of an undisclosed discrepancy. As will appear, an appeal under part IVC is not a perfectly adequate alternative to judicial review, notwithstanding the plurality's remark in *Futuris* that part IVC 'meets the requirement of the *Constitution* that a tax may not be made incontestable'.¹⁵⁸

V PROVING INVALIDITY

Neither section 14ZZK nor section 14ZZO of the *TA Act* place any onus on the Commissioner to show an assessment was correctly made. Rather, as mentioned, the burden of proving an assessment is excessive and what the correct amount should have been lies solely on the taxpayer. This is a deliberate policy choice as 'the facts in relation to [the taxpayer's] income are facts peculiarly within the knowledge of the taxpayer'.¹⁵⁹

Indeed, absent agreement with the Commissioner to confine the issues for determination in a Pt IVC proceeding, the Commissioner is entitled to rely upon any deficiency in the taxpayer's proof of the excessiveness of the amount assessed in seeking to uphold the assessment.¹⁶⁰

Finding the asset betterment method of calculating the taxpayer's income for the relevant income periods 'legitimate',¹⁶¹ the Full Federal Court in *Gashi v Federal Commissioner of Taxation* explained that positively proving that one or more of the items listed in an 'Asset Betterment Statement' should not have been included would be insufficient to discharge the onus of proving that 'the unexplained accumulated wealth in each of the relevant years was from non-income sources'.¹⁶² According to the Full Court, the Commissioner is merely

156 *Graham* (2017) 263 CLR 1, 27 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added).

157 *Stellios* (n 22) 891.

158 *Futuris* (2008) 237 CLR 146, 153 [9] (Gummow, Hayne, Heydon and Crennan JJ).

159 *Trautwein* (1936) 56 CLR 63, 87 (Latham CJ). See also *George* (1952) 86 CLR 183, 201 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

160 *Gashi* (2013) 209 FCR 301, 314 [61] (Bennett, Edmonds and Gordon JJ) (citations omitted).

161 *Ibid* 313 [56].

162 *Ibid* 315 [67].

required to make an assessment of the amount upon which income tax ought to be levied without having to establish the grounds for their judgment of the truth of the facts supporting those grounds. In which case, to discharge the onus of proving that a section 167 assessment is excessive under part IVC:

A taxpayer ... must positively prove his or her 'actual taxable income' and, in doing so, must show that the amount of money for which tax is levied by the assessment exceeds the actual substantive liability of the taxpayer ... The taxpayer must show that the unexplained accumulated wealth was from non-income sources. ... Even if [the taxpayer] was able to prove that one or more of the items listed in the Asset Betterment Statement ... was wrong or should not have been included, that of itself would not have been sufficient to discharge the onus he bore ... [The taxpayer] was required to demonstrate the unexplained accumulated wealth in each of the relevant years was from non-income sources.¹⁶³

Yet, notwithstanding the fundamentally different considerations informing the Commissioner's decision to amend an assessment at any time upon discovery of a purported discrepancy, a dissatisfied taxpayer will not succeed in overturning the amended assessment by simply asserting there was no evidence establishing the undisclosed amount is taxable.

The burden which rests on a taxpayer is to prove that the assessment is excessive and that burden is not necessarily discharged by showing an error by the Commissioner in forming a judgment as to the amount of the assessment.¹⁶⁴

It follows that the taxpayer must not only positively prove the unexplained funds were not from income sources in any of the relevant years, but must 'go further and show what the correct position should be'.¹⁶⁵ As the immediately following discussion demonstrates however, the high evidentiary burden for overturning an assessment under part IVC is very difficult to discharge and effectively means the Commissioner can rely on mere suspicion to amend an assessment at any time under section 170(1) item 5.

In *Nguyen*, after auditing the taxpayer's affairs in 2012 for years ended 30 June 2008 to 30 June 2012, the Commissioner determined that Ms Nguyen had 'understated [her] income by almost \$2.5 million over the relevant years'. Rejecting the taxpayer's objection, the Commissioner treated the purported shortfall as taxable income in circumstances where there 'was no obvious explanation for certain deposits in [the taxpayer's] bank accounts ... and certain monetary amounts that [the taxpayer] used to buy chips to gamble at casinos ...'.¹⁶⁶ In her objection application, the taxpayer had asserted, inter alia, that the Commissioner's characterisation of the unexplained amounts as assessable income was 'unfounded' and that 'there is no evidence whatsoever that she could have possessed any identifiable source of undisclosed income'.¹⁶⁷

163 Ibid 315 [63], [67].

164 *Dalco* (1990) 168 CLR 614, 621 (Brennan J, Mason CJ agreeing at 617, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634).

165 *Re Nguyen and Commissioner of Taxation* [2016] AATA 1041, [23] (Senior Member O'Loughlin) ('*Nguyen AAT*').

166 *Nguyen* (2018) 265 FCR 355, 358 [5] (Kenny J).

167 Ibid 359 [9].

In her section 43 of the *AAT Act* review application lodged with the AAT, the taxpayer tendered affidavit evidence explaining that the bank account deposits the Commissioner had earlier relied on to raise the relevant assessments were gifts and therefore not assessable income. The taxpayer further submitted there was no proof of fraud in circumstances where she had lodged tax returns for the relevant period and that none of the positive elements required to establish evasion were present in her case. Yet, despite accepting the taxpayer had established the non-assessability of ‘substantial sums’ deposited in her bank accounts and presented at casinos, nevertheless, the Commissioner submitted that because her evidence fell short

of establishing that she did not derive income in the amount assessed, then it must also fall short of showing that there was no fraud or evasion or intentional disregard of a taxation law. That is because ... there would be no satisfactory evidence explaining the disparity between the applicant’s presumed income and her reported income.¹⁶⁸

The AAT agreed. Finding the taxpayer had ‘limited education and limited command of the English language and either worked as an employee Nail Technician in a nail salon or operated her own nail salon and beauty services business in the Brisbane CBD’,¹⁶⁹ the AAT was not satisfied that the taxpayer had established the amounts treated as assessable by the Commissioner were not in fact assessable or that the amounts, while assessable, were not included in assessable income because of some ‘blameworthy’ shortcoming that evinces an intention to deliberately withhold information from the Commissioner.

Noting that the manner in which a taxpayer might discharge the onus of proof imposed under section 14ZZK of the *TA Act* ‘depends on the particular circumstances’,¹⁷⁰ the AAT concluded:

Where the character of an amount remains unestablished, the taxpayer has not proven the amount is not assessable, it is difficult, if not impossible to:

- (a) form any view as to the level of shortcoming, if there be one;
- (b) form a view as to whether there has been an innocent mistake or a blameworthy act; and
- (c) say that the taxpayer has demonstrated that there was not fraud or evasion.¹⁷¹

The taxpayer’s appeal under section 44 of the *AAT Act* to the Federal Court was dismissed by Kenny J, who held the Tribunal’s preceding observations ‘reflect both a correct understanding of *Binetter* and a correct application of the principles

168 Ibid 396 [155]. See also *MJPV and Commissioner of Taxation* (Taxation) [2020] AATA 1527 (*‘MJPV’*) where, despite accepting there may have been a ‘variety of innocent explanations’ for why the taxpayer did not disclose a purported loan from an acquaintance as assessable income in his tax return, nevertheless, the Tribunal said this was not enough to displace the Commissioner’s suspicion of blameworthy conduct for part IVC purposes: at [35] (Deputy President McCabe) (upheld on appeal: *Federal Commissioner of Taxation v Ross* [2021] FCA 766, [298] (Derrington J)).

169 *Nguyen AAT* [2016] AATA 1041, [10] (Senior Member O’Loughlin).

170 Ibid [33]. See also *Dalco* (1990) 168 CLR 614, 624 (Brennan J, Mason CJ agreeing at 617, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634).

171 *Nguyen AAT* [2016] AATA 1041, [35] (Senior Member O’Loughlin).

set out in that case'.¹⁷² To this end, her Honour rejected the taxpayer's submission that *Binetter v Federal Commissioner of Taxation* ('*Binetter*') was not 'correctly decided'.¹⁷³ Finding she was bound by *Binetter* because of the doctrine of *stare decisis*, Kenny J further noted that given section 14ZZK(b)(i), the AAT could only engage in reviewing the objection decision and not the process of assessment.¹⁷⁴

In *Binetter*, the majority of the Full Federal Court held the taxpayer bears the onus of affirmatively establishing the absence of fraud or evasion with no requirement that the AAT itself form such an opinion in review proceedings under section 14ZZK of the *TA Act*.¹⁷⁵ This is notwithstanding that under section 43 of the *AAT Act* the AAT stands 'in the shoes'¹⁷⁶ of the Commissioner and must make its own findings of fact and its own decision, including whether on the material before it the Commissioner's decision is the 'correct or preferable one'.¹⁷⁷ Relying on *Rawson Finances Pty Ltd v Federal Commissioner of Taxation*,¹⁷⁸ Kenny J held that section 14ZZK modifies the position that might otherwise exist under the *AAT Act*.¹⁷⁹

The Full Court in *Chhua* also relied on *Binetter*, particularly the proposition that in a tax appeal 'the Court will only interfere with the Commissioner's exercise of the amendment power if the Commissioner did not form the requisite opinion or the Commissioner's opinion that there was fraud or evasion is vitiated by some error of law'.¹⁸⁰ In support, the majority in *Binetter* cited the decision of the Privy Council in *Shell Co of Australia v Federal Commissioner of Taxation* ('*Shell*')¹⁸¹ and Dixon J's statement in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* where his Honour held the state of satisfaction reached by the Commissioner in relation to returns lodged by a taxpayer is not 'unexaminable'.¹⁸²

If [the Commissioner] does not address himself to the question which the subsection formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review.¹⁸³

Apart from the fact that *Shell* concerned a statutory review regime that is 'relevantly different'¹⁸⁴ from that in part IVC but which confirms the AAT does not exercise federal judicial power, it is difficult to fathom in what circumstances a court could interfere where a relevant assessment is vitiated by some error of law

172 *Nguyen* (2018) 265 FCR 355, 396 [156] (emphasis in original).

173 *Nguyen* (2018) 265 FCR 355, 365 [28].

174 *Ibid* 384–6 [115]–[121].

175 See *Binetter* (2016) 249 FCR 534, 552 [93] (Perram and Davies JJ, Siopis J agreeing at 537 [1]).

176 *Pochi* (1980) 44 FLR 41, 46 (Smithers J).

177 *Ibid* 60 (Deane J), citing *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J).

178 (2013) 296 ALR 307.

179 *Nguyen* (2018) 265 FCR 355, 387 [126].

180 *Binetter* (2016) 249 FCR 534, 552 [93] (Perram and Davies JJ).

181 (1930) 44 CLR 530.

182 (1949) 78 CLR 353, 360.

183 *Ibid*.

184 *Nguyen* (2018) 265 FCR 355, 385 [117] (Kenny J).

without the taxpayer having to positively prove the assessment is also excessive in the manner discussed above. This is because, as discussed, complaints about the lack of rationally probative evidence are excluded from challenge in part IVC proceedings because they concern the due making of an assessment, albeit they may also be tantamount to jurisdictional error of law.

As *Nguyen* illustrates, challenging the due formation of opinion about fraud or evasion in part IVC proceedings is doomed to fail without evidence affirmatively proving that all assessable amounts were disclosed in the taxpayer's return of income. This is evident from Kenny J's dismissal of the taxpayer's contention that the failure of the Commissioner to refer to any evidence to support the requisite opinion about fraud or evasion 'carried "the necessary implication" that there was none'.¹⁸⁵ Citing the High Court decision in *McCormack v Federal Commissioner of Taxation* ('*McCormack*'),¹⁸⁶ Kenny J explained that 'whether there has been fraud or evasion to support the amendment is part of proving that the assessment under review is excessive. It is, therefore, a matter governed by s 14ZZK(b)(i) [of the *TA Act*]'.¹⁸⁷

In *McCormack* the former Board of Review had mistakenly rejected the taxpayer's evidence that she had not acquired property for the purpose of resale at a profit so that former section 26(e) of the *ITA Act* did not apply. On appeal to the Supreme Court of Western Australia, the transcript of the Board proceedings was tendered without the taxpayer giving oral evidence. Finding 'certain aspects of the approach of the Board to her evidence ... to be unsatisfactory',¹⁸⁸ the Supreme Court nevertheless dismissed the taxpayer's appeal. An appeal to the High Court was also dismissed. Delivering the leading judgment for the majority, Gibbs J explained that to discharge the burden of proving an assessment is excessive the taxpayer

must prove affirmatively, on the balance of probabilities, that the property was not acquired for the purpose of profit-making by sale. ... *But it is not enough*, even when all the facts are known, *that there is no material upon which it may be concluded that the property was acquired for the purpose mentioned in s 26(a)*. If a taxpayer can succeed, simply because there is no evidence from which it can be concluded that the relevant purpose existed, that must mean that the burden of proving the existence of that purpose lies on the Commissioner. ... The taxpayer will succeed if the proper inference from the evidence is that the property was not acquired for the relevant purpose, but if there is *no evidence* as to the purpose for which the taxpayer acquired the property the appeal *must fail*.¹⁸⁹

True, as Steward J said in *Federal Commissioner of Taxation v Cassaniti*, 'the tribunal of fact is free to accept the evidence of the taxpayer alone if it finds the taxpayer to be truthful'. However, his Honour added a cautionary note, suggesting 'it would usually be prudent to corroborate the evidence of a taxpayer'.¹⁹⁰ Without

185 Ibid 372 [60].

186 (1979) 143 CLR 284.

187 Ibid 386 [122].

188 *McCormack* (1979) 143 CLR 284, 297 (Gibbs J, Stephen, J agreeing at 306), quoting *McCormack v Federal Commissioner of Taxation* (1977) 7 ATR 368, 371 (Wickham J).

189 *McCormack* (1979) 143 CLR 284, 303 (Gibbs J, Stephen, J agreeing at 306) (emphasis added).

190 *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385, 409 [88] (Steward J, Greenwood J agreeing at 387 [1], Logan J agreeing at 387 [2]).

corroboration, the taxpayer's statement challenging an assessment as excessive would be 'self-serving'¹⁹¹ and 'tested most closely, and received with the greatest caution'.¹⁹² And is thus unlikely to be sufficient to rebut a presumption of validity, albeit the taxpayer may have given an 'honest account'¹⁹³ of the factual matters on which liability depends. This is borne out in *Nguyen*.

As discussed, despite the Commissioner accepting in *Nguyen* that the taxpayer had established the non-income character of a significant portion of the unexplained funds, the AAT nevertheless affirmed the validity of the amended assessments. In so doing, the AAT observed that 'the effect of the *Binetter* decision ... may well be to make a fraud or evasion finding unchallengeable independently of the challenge to the assessability of the relevant amount'.¹⁹⁴

It follows that a taxpayer will not succeed in proving an assessment is excessive under part IVC by showing an error by the Commissioner in forming a judgment as to the amount of the assessment, asserting there is 'no evidence' about a matter on which liability depends, or otherwise complaining about the "due making" or actual making of the assessment'.¹⁹⁵ Significantly, the taxpayer is also not entitled to request particulars from the Commissioner for the purpose of discharging the burden of proof under part IVC.¹⁹⁶

In contrast, it is 'ultimately'¹⁹⁷ a question for judicial decision what amounts to material that could support a factual finding in judicial review. To this end, there appears to be some division in the High Court concerning the question of who bears the onus of proving entitlement to jurisdictional error relief. In *Minister for Immigration and Border Protection v SZMTA*, Bell, Gageler and Keane JJ suggested the onus falls on the adversely affected applicant.¹⁹⁸ However, Gordon J has since suggested that this 'subverts the protective purpose of judicial review'¹⁹⁹ and fails to understand 'the role of judicial power'.²⁰⁰

Suffice to note that judicial review in exercise of the 'constitutional function'²⁰¹ of courts to supervise administrative action is 'justified and sustained by ... the declaration and enforcement of the legal rules which determine the limits and govern

191 *Imperial Bottleshops Pty Ltd v Federal Commissioner of Taxation* (1991) 22 ATR 148, 155 (Hill J).

192 *Pascoe v Federal Commissioner of Taxation* (1956) 30 ALJ 402, 403 (Fullagar J), quoted with approval in *McCormack* (1979) 143 CLR 284, 301–2 (Gibbs J, Stephen J agreeing at 306).

193 Azzi, 'Time to Reconsider *Futuris*' (n 132) 62.

194 *Nguyen AAT* [2016] AATA 1041, [34] (Senior Member O'Loughlin).

195 *Gashi* (2013) 209 FCR 301, 310 [42] (Bennett, Edmonds and Gordon JJ) (citations omitted).

196 *WR Carpenter* (2008) 237 CLR 198, 205–6 [14]–[17] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

197 *Kostas* (2010) 241 CLR 390, 418 [91] (Hayne, Heydon, Crennan and Kiefel JJ).

198 (2019) 264 CLR 421, 433 [4] (Bell, Gageler and Keane JJ) ('*SZMTA*').

199 Lisa Burton Crawford, 'How Should a Court Respond to an Immaterial Error of Law?', *AUSPUBLAW* (Blog Post, 28 October 2020) <<https://auspublaw.org/how-should-a-court-respond-to-an-immaterial-error-of-law>>.

200 *ABT17 v Minister for Immigration and Border Protection* (2020) 94 ALJR 928, 954 [109] (Gordon J, Nettle J agreeing at 948 [72]), quoted with approval in *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, 619 [115] (Gordon and Steward JJ) ('*MZAPC*').

201 Debbie Mortimer, 'The Constitutionalization of Administrative Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 696, 723.

the exercise of a repository's powers'.²⁰² This is reflected in the 'animating principle'²⁰³ from *Corporation of the City of Enfield v Development Assessment Commission* directing courts grant 'available and appropriate'²⁰⁴ remedies to ensure exercise of the assessment-making power remains within the limits imposed by law.

In circumstances where due formation of the Commissioner's opinion is excluded from challenge in part IVC proceedings, courts should not be reluctant to intervene in judicial review proceedings to ensure the Commissioner's suspicion of fraud or evasion was reasonably open. For whilst the Commissioner's requisite state of satisfaction may not have been reasonably reached, this is not the concern of the judicial process under part IVC, which is justified and sustained by whether there is evidence affirmatively showing an assessment is excessive. As I observed in 2019:

[O]nly when courts are exercising judicial power within their constitutional jurisdiction can they totally safeguard against the arbitrary application of the substantive criteria for liability, and thus ensure the tax is not made incontestable given the shortcomings and impracticalities of the alternative mechanism provided for by pt IVC.²⁰⁵

Towards the immediately preceding end, jurisdictional error relief will only be available in relation to an unreasonable or arbitrary exercise of the administrative power where this is material²⁰⁶ to the ultimate decision 'in the sense that it deprived the [affected person] of the realistic possibility of a successful outcome'.²⁰⁷ In *Hossain v Minister for Immigration and Border Protection*, the majority explained that breach of an implied condition would be 'material' where 'compliance with the condition could have resulted in the making of a different decision'.²⁰⁸ More recently, the High Court in *MZAPC v Minister for Immigration and Border Protection* ('MZAPC') had cause to consider whether the onus of establishing materiality of error by an administrative decision-maker lies with the party alleging jurisdictional error.²⁰⁹ The applicant had alleged he was not afforded procedural fairness by reason of the failure of the decision-maker to comply with specific provisions in the *Migration Act 1958* (Cth). The Court was divided on the issue. The majority held the onus of proving materiality lies 'unwaveringly'²¹⁰ on the applicant.

202 Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21(3) *Australian Bar Review* 279, 280.

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

204 (2000) 199 CLR 135, 157 [56] (Gaudron J).

205 Azzi, 'Time to Reconsider *Futuris*' (n 132) 90.

206 'The "threshold of materiality" ... universally qualifies the existing implied limitations on executive decision-making power': Nicholas Carey, 'Presumptions upon Presumptions: Problems with the Threshold of Materiality' (2021) 44(2) *University of New South Wales Law Journal* 548, 548.

207 Refer to authorities cited in *Singh v Minister for Home Affairs* (2019) 166 ALD 486, 500 [58] (Abraham J).

208 (2018) 263 CLR 123, 135 [31] (Kiefel CJ, Gageler and Keane JJ).

209 (2021) 390 ALR 590.

210 *MZAPC* (2021) 390 ALR 590, 605 [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

Two other members of the Court in *MZAPC*, however, disagreed, stating it was a ‘mistake’²¹¹ to describe as an evidentiary onus the need to establish that the identified error could realistically have resulted in a different position.²¹² Rather, their Honours suggested the bar is necessarily low so that ‘a court should hesitate to reject a sensible and reasonable postulation about what the result could have been’.²¹³ Their Honours went further to suggest the decision-maker should bear the onus of proving the alleged error was immaterial.

Fundamental principles – namely, the rule of law ... weigh decisively in favour of a conclusion that it is the respondent (the Executive) in an application for judicial review who should and must bear the onus of establishing immateriality of error.²¹⁴

By parity of reasoning, in a judicial review application alleging jurisdictional error for want of probative evidence establishing blameworthy or unlawful conduct by the taxpayer, the Commissioner should be expected to establish immateriality of any purported non-compliance. And this can easily be done by producing evidence bearing on whether a tax avoidance purpose can reasonably be drawn from the purported non-disclosure of income by the taxpayer. To this end, there can neither be ‘practical injustice’, which the ‘concern of the law is to avoid’,²¹⁵ nor abuse²¹⁶ of the assessment-making power if there is a ‘skerrick of evidence’²¹⁷ tending to show failure by the taxpayer to disclose all assessable amounts in a particular year.

Regardless, given the highly specific statutory context and allegations pleaded in *MZAPC*, it is arguable the judgments in that case have little relevance to the topic under present consideration – viz, entitlement to jurisdictional error relief where legal unreasonableness is alleged. This is because the duty to make an administrative decision within the bounds of legal reasonableness is said to be ‘[o]ne type of statutory condition that will always involve material non-compliance’.²¹⁸

Clearly, the presence (or absence) of relevant evidence bearing on whether there has been full and true disclosure of assessable income would be highly material to the decision to amend an assessment out of time and, thus, whether the exercise of the assessment power was authorised. In this way, judicial review overcomes the evidentiary impracticalities inhering in part IVC that effectively prevent the taxpayer from overturning an assessment made in consequence of unreasonable or unwarranted assumptions by the Commissioner. It reverses the onus so that the

211 Ibid 610 [85] (Gordon and Steward JJ).

212 Likewise, another member of the *MZAPC* Court, Edelman J, found that ‘any conclusion on onus of proof is not capable of universal generalisation’: ibid 629 [156]; and that the assumption from *SZMTA* (2019) 264 CLR 421 that the ‘applicant for judicial review ... bears the onus of proving that a jurisdictional error has occurred’ is ‘incorrect’: at 643 [198].

213 *MZAPC* (2021) 390 ALR 590, 611 [85] (Gordon and Steward JJ).

214 Ibid 615 [103] (Gordon and Steward JJ, Edelman J agreeing at 629 [155]).

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

216 ‘[T]he question to which the standard of reasonableness is addressed is whether the statutory power has been abused’: *Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel and Bell JJ).

217 *Federal Commissioner of Taxation v Pham* (2013) 94 ATR 528, 541 [46] (Katzmann J).

218 *MZAPC* (2021) 390 ALR 590, 637 [181] (Edelman J).

Commissioner would be expected to produce evidence supporting the drawing of a tax avoidance inference.

As discussed above, it is immaterial under part IVC that the decision to exercise the assessment power is based on unwarranted or unreasonable assumptions. To succeed in overturning an assessment, the taxpayer must produce evidence affirmatively establishing the assessment was numerically incorrect and what the correct position should be. So that if the taxpayer cannot produce evidence showing full and true disclosure of all assessable amounts, then the Commissioner succeeds irrespective of any non-compliance with the statutory condition of legal reasonableness that would otherwise render the assessment invalid for jurisdictional error. It follows that without judicial review, the assessment would be incontestable in the 'constitutional sense'²¹⁹ to the extent that the taxpayer would be denied all right to resist an assessment by alleging non-compliance with the statutory condition of legal reasonableness.

Responding to evidence that ATO officers 'sometimes allege fraud without turning their mind to the question of whether fraud or evasion actually exists',²²⁰ the Standing Committee in 2015 recommended that, in part IVC challenges to assessments issued under section 170(1) item 5, the burden of proof 'switch back' to the ATO once the statutory record-keeping period has expired.²²¹ This was rejected by the federal government on the ground that it would encourage sham behaviour by taxpayers.²²²

Notwithstanding, the above demonstrated that the reform recommended by the Standing Committee is not necessary. In circumstances where, as shown, the assessment power is not enlivened by mere suspicion the taxpayer has failed to make full and true disclosure, it is reasonable that the Commissioner be expected to establish in judicial review proceedings that it was open to draw the requisite inference about fraud or evasion, including providing the taxpayer with particulars of information supporting the Commissioner's opinion. In this way, courts can best be satisfied the Commissioner has made a genuine attempt to discern assessability of a subsequently discovered discrepancy, rather than acting on mere suspicion that there has been fraud or evasion. This is not possible under part IVC as it 'would [impermissibly] invert the onus of proof'²²³ to require the Commissioner to prove fraud or evasion.

219 Cf *Buzadzie* (2019) 348 FLR 213, 228 [62] (Kyrrou, McLeish and Niall JJA).

220 *Tax Disputes Report* (n 1) viii.

221 *Ibid.* See also Recommendation 7.

222 See John Azzi, 'Overturning an Assessment Where the ATO Merely Suspects Fraud or Evasion' *Austaxpolicy: Tax and Transfer Policy Blog* (Blog Post, 8 February 2021) <<https://www.austaxpolicy.com/overturning-an-assessment-where-the-ato-merely-suspects-fraud-or-evasion/>>.

223 *McCormack* (1979) 143 CLR 284, 303 (Gibbs J, Stephen J agreeing at 306).

VI CONCLUDING OBSERVATIONS

The preceding showed that an allegation that it was not open to the Commissioner to draw the necessary inference enlivening the power to make an assessment is excluded from challenge under part IVC. Nevertheless, such an allegation could constitute jurisdictional error, albeit not of the kind identified in *Futuris*. This conclusion is contrary to *Buzadzic*, where the Court held the taxpayer is unable to challenge the due making of a default assessment in any proceedings but can challenge the making of an assessment under section 170(1) item 5 in part IVC proceedings.

As shown, a complaint that there was no factual basis upon which the Commissioner could make a default assessment or an amended assessment is procedural in nature, bearing directly on the due making of the assessment. And whilst it is excluded from challenge in part IVC proceedings, nevertheless it can be challenged in judicial review proceedings in circumstances where an implied obligation of legal reasonableness conditions the making of either a default or amended assessment at any time, the Commissioner is required to make a genuine attempt to determine the amount of income that ought to be taxed in each case and there is considerable doubt about whether section 175 operates to protect an assessment made in bad faith encompassing a non-deliberate act done beyond power. This narrower more technical sense of bad faith was not pleaded in *Futuris*.

Although the Commissioner is afforded some latitude when making a default assessment, it was shown above that a higher standard applies when amending an assessment after expiry of the relevant amendment period given the words ‘there has been fraud or evasion’ in section 170(1) item 5 of the *ITA Act*. To this end, there must be some rationally probative evidence in the Commissioner’s possession bearing on the character of an undisclosed amount. Despite that such evidence may also be relevant in establishing the assessment was excessive in part IVC proceedings, as a result of *Chhua*, courts are unable to intervene unless the taxpayer can positively prove the non-taxability of all unexplained funds and that the correct amount of taxable income is that disclosed in the tax return lodged by the taxpayer. No such onus applies in judicial review proceedings notwithstanding the majority decision in *MZAPC*.

As discussed above, non-compliance with the statutory condition of legal reasonableness will always be material. In which case, courts can intervene in judicial review proceedings if satisfied it was not reasonably open to the Commissioner to draw an inference about the requisite tax avoidance purpose necessary to enliven the power to amend an assessment at any time. And the court could not be so satisfied if there is no evidence rationally bearing on the character of an undisclosed amount. This is because, as mentioned, a causal connection between the purported non-disclosure and the assessability of the undisclosed amount is inferred from the words ‘there has been’ in section 170(1) item 5.

Accordingly, if a taxpayer can only seek to invalidate an assessment in part IVC proceedings and not the assessment-making process in judicial review proceedings except for the two jurisdictional errors identified in *Futuris*, as suggested in *Chhua*

and *Buzadzic*, then, as shown, the Commissioner could conceivably act arbitrarily by issuing an assessment where it is merely suspected the taxpayer was engaged in a tax avoidance purpose. This would not only be inconsistent with the fundamental legal maxim of good faith conditioning exercise of any administrative power or discretion, it would also undermine legislative intention to increase certainty and confidence in the tax system, subverting the protective purpose of judicial review and judicial power to guard against jurisdictional error and account for the ability (or otherwise) of the taxpayer to obtain the necessary evidence to prove their case.

Instead of courts intervening if the Commissioner makes an assessment where it was not reasonably open to do so, because of *Chhua* and *Buzadzic*, the onus is now always exclusively on the taxpayer to demonstrate that an assessment made beyond power is excessive. Yet, this outcome is not militated by the majority decisions in either *Futuris* or *MZAPC*. Indeed, as gleaned, the majority in *Futuris* was unconcerned with bad faith manifesting from legal unreasonableness, whilst the majority in *MZAPC* was silent about the fundamental principles identified by Gordon and Steward JJ that ‘decisively’ weigh in favour of the Commissioner having to establish immateriality of error.

Indeed, insistence that the taxpayer exclusively bears the onus of refuting an inference of fraud or evasion for non-disclosure fails to pay due regard to the High Court decisions in *Li* (mandating an ‘apparent connection’ or ‘reasonable basis’ between the purported discrepancy and the drawing of the relevant inference²²⁴) and *Graham v Minister for Immigration and Border Protection* (confirming that the practical impact of the law cannot operate to deny courts the ability to enforce statutory conditions governing the lawful exercise of administrative power).²²⁵ If anything, it undermines ‘the role of the judicial branch in the protection of the individual against incursions of executive power’.²²⁶

It follows, therefore, that in addition to the two categories of jurisdictional error ‘beloved by tax lawyers’,²²⁷ taxpayers should now more seriously consider instituting judicial review proceedings alleging legal unreasonableness in seeking to overturn an assessment made in circumstances where the Commissioner merely suspects the taxpayer has engaged in fraud or evasion without any probative evidence to this effect. This is because, as shown, such an allegation is both available and necessary to enable courts to discern whether the Commissioner’s opinion of fraud or evasion is based on unwarranted assumptions, irrespective that the available information may be insufficient to affirmatively establish the assessment excessive for part IVC purposes.

224 See *ERY19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 170 ALD 83, 97 [71]–[72], where Stewart J invalidated the Minister’s exercise of discretion because the Minister had not established a logical connection between the evidence and the inference drawn (affirmed on appeal in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133).

225 (2017) 263 CLR 1.

226 *MZAPC* (2021) 390 ALR 590, 615 [103] (Gordon and Steward JJ).

227 *Futuris* (2008) 237 CLR 146, 185–6 [134] (Kirby J).

VII POSTSCRIPT

On 17 September 2021 (after this article was accepted for publication), the Commissioner issued Taxpayer Alert 2021/2 titled *Disguising Undeclared Foreign Income as Gifts or Loans from Related Overseas Entities*.²²⁸ In it, the Commissioner explains what evidence a taxpayer is expected to produce to demonstrate an undeclared amount is a genuine gift or loan, and thus not assessable as income.

Depending on the size of the gift, the Commissioner says the donee is expected to produce ‘a contemporaneous Deed of Gift’ and ‘evidence showing the donor’s capacity to make the gift from their own resources as well as financial records reflecting the donor’s transfer.’²²⁹ And for a genuine loan, the taxpayer is expected to produce:

A properly documented loan agreement that evidences the parties to the loan, its terms and relevant conditions. We would expect there to be financial records showing the advance of funds and repayments of principal and interest.²³⁰

Whilst the above may be both justifiable and reasonable, it is nevertheless ‘problematic’ and ‘impractical’, potentially conflating prudent record keeping with the requirements of the law.²³¹ For example, in *Nguyen* the Commissioner ‘accepted’ (as ‘verified’) substantial gifts from the taxpayer’s relatives in Vietnam based on Department of Immigration records without evidence of a Deed of Gift.²³² To this end, it bears recalling that in *Scott v Federal Commissioner of Taxation*²³³ the High Court accepted that a gift from a happy client was not assessable as a product of Mr Scott’s services notwithstanding the absence of a Deed of Gift. Meanwhile, despite corroborative oral evidence from a friend and a written note that the ‘loan is conditional and is to be paid back on demand’, the taxpayer in *Federal Commissioner of Taxation v Ross*²³⁴ failed to convince the Tribunal member that his friend loaned him \$93,000 without a written loan agreement.²³⁵

Given the preceding, the point propounded in this paper that judicial review is available and necessary to ensure the Commissioner does not abuse the assessment-making power by drawing an inference of fraud or evasion based on unwarranted assumptions or mere speculation about the assessability of an undisclosed amount acquires added significance.

As shown, unlike judicial review, the taxpayer in part IVC review and appeal proceedings must do more to discharge the burden of establishing that the assessment for a particular year is excessive. The taxpayer is expected to produce evidence affirmatively establishing an undeclared amount is not assessable. In judicial review

228 Commissioner of Taxation, *Disguising Undeclared Foreign Income as Gifts or Loans from Related Overseas Entities* (TA 2021/2, 17 September 2021).

229 Ibid 3.

230 Ibid.

231 Jonathan Ortner, ‘ATO Targets “Gifts” from Overseas’, *Australian Financial Review* (online, 24 September 2021) < <https://www.afr.com/wealth/tax/ato-targets-gifts-from-overseas-20210923-p58u86>>.

232 *Nguyen AAT* [2016] AATA 1041, [19] (Senior Member O’Loughlin).

233 (1966) 117 CLR 514.

234 [2021] FCA 766.

235 *MJPV* [2020] AATA 1527, [21] (Deputy President McCabe). See also above n 168.

proceedings, however, unless there is rationally probative evidence establishing an undeclared amount is assessable, it would be unreasonable for the Commissioner to assess the taxpayer on the basis they have engaged in blameworthy conduct by not disclosing that amount. Thus, the onus of proof is potentially shifted to the Commissioner (which is impermissible under part IVC) without the necessity for legislative reform as recommended by the Standing Committee.