

JUDICIAL REVIEW IN TAX MATTERS: THE IMPACT OF THE FUTURIS DECISION

*James Meli**

In *Federal Commissioner of Taxation v Futuris Corporation Ltd* ('Futuris'),¹ the High Court effectively overturned its decision in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* ('Richard Walter')² as to the application of the *Hickman* principles in tax matters. In hindsight, this outcome was inevitable given the significant changes to the administrative law landscape over the interim. This paper examines the major decisions in this space and through them, the history as to the construction of privative clauses generally. It concludes that although *Futuris* simplified the law in rejecting the cumbersome reconciliation process in tax matters in favour of a more direct approach to statutory construction more broadly, it will rarely, if ever, result in substantive changes in outcome, at least since the decision in *Plaintiff S157 v The Commonwealth* ('Plaintiff S157').³

The legislative framework

As far as substantive liability to tax is concerned, a taxpayer may challenge an assessment under Pt IVC of the *Taxation Administration Act 1953* ('TAA 1953'). Here, the taxpayer must prove, on review or appeal,⁴ that the assessment was 'excessive'.⁵ This requires the taxpayer to prove, on the balance of probabilities,⁶ that not only is the assessment incorrect, but in addition, what the correct assessment should be.⁷ Athanasiou argues that the Pt IVC process is onerous and clearly biased towards the revenue.⁸ In the writer's experience, where in the taxpayer's opinion, there has been an excessive assessment, unsuccessful objections or appeals are more often the result of poor record-keeping and inadequate substantiation than any inherent bias in the system, at least at the individual level. However, the criticism is not without merit. Given the time and expense of tax litigation, it is not difficult to imagine pragmatic taxpayers, even with strongly arguable positions, settling disputes with the Commissioner rather than pursuing a pyrrhic victory in the courts. No doubt, this stifles the development of the law; however, this is beyond the immediate scope of this paper. In relation to provisions said to oust judicial review, s 175 of the *Income Tax Assessment Act 1936* ('ITAA 1936') states:

The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with

In addition, s 177(1) of the ITAA 1936 states:

The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Pt IVC of the Tax Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct

Together, these provisions were said to operate with privative effect.

Pursuant to s 75(v) of the Constitution, the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the

* *Master of Laws student at the University of Sydney.*

Commonwealth. Section 39B of the *Judiciary Act 1903* ('Judiciary Act') is drafted in almost identical terms, giving it the same jurisdiction in similar matters.⁹

As a preliminary matter, it is important to note that there has been some suggestion that s 177 of the ITAA 1936 is evidentiary only and does not operate with jurisdictional effect. Jones argues that:¹⁰

s177 is not a privative clause of the nature considered by the High Court in *Hickman* and subsequent cases . . . [as it] does not seek to exclude or restrict a court's jurisdiction of judicial review

It is true that there are a variety of privative clauses, from 'finality clauses'¹¹ and 'shall not be questioned clauses'¹² to the comprehensive privative clause the subject of *Plaintiff S157*, outlined below. However, 'conclusive evidence' clauses have a long and successful history of ousting judicial review in particular circumstances, evidencing that they do in fact have jurisdictional effect.¹³

The *Hickman* principles and Dixon J's 'second step'

In *R v Hickman; Ex parte Fox and Clinton* ('*Hickman*'),¹⁴ the High Court was called upon to interpret a privative clause under an industrial relations statute. Up until this point, the High Court had always unambiguously affirmed that s 75(v) of the Constitution could not be curtailed by legislative action.¹⁵ Although the High Court did not technically depart from this line of authority, Dixon J held:¹⁶

a [privative] clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, *provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body* [emphasis added]

These became known as the *Hickman* principles, which legislators have subsequently misinterpreted as authority for the proposition that satisfaction of this three-pronged test provides a safe harbour from judicial review. However, almost immediately after *Hickman*, Dixon J himself set about expanding, or at least clarifying, his judgment in that case by adding that where there is an inconsistency between individual provisions within a legislative document, it should be resolved by interpreting the document as a whole by first applying the three-pronged test in *Hickman*, followed by an assessment as to whether:¹⁷

[any] particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action

This process became known as 'reconciliation,' while the subject of this second (or fourth?) step has been described as the identification of 'inviolable limitations'.¹⁸ This has caused much confusion as to what constitutes an inviolable limitation in a particular legislative context. Spigelman CJ has argued that this is linked to the doctrine of jurisdictional error.¹⁹ No doubt this is true; however, while the decision in *Craig v South Australia*²⁰ (*Craig*) may be an appropriate reference point in this regard, the very contextual nature of the reconciliation process means that there can be no hard and fast rules.²¹ To quote Jordan CJ in *Hall v Jones*,²² everything depends on the subject matter and the context.

Richard Walter

In *Richard Walter*, the High Court was asked whether, upon production of a notice of assessment, s 177 of the ITAA 1936 operated so as to preclude any challenge or review under s 39B of the Judiciary Act.

Deane and Gaudron JJ for the majority held that, in its application to proceedings against the Commissioner from acting on the basis that an invalid assessment is valid or enforceable, s 177 of the ITAA 1936 is more than merely procedural and goes to jurisdiction.²³ Their Honours argued this point on the basis that s 177 of the ITAA 1936 purported to diminish the jurisdiction of the court under s 75(v) of the Constitution.²⁴

Their Honours added that s 177 of the ITAA 1936 is to be read with s 175 of the ITAA 1936 and the definition of an 'assessment' under s 6 of the ITAA 1936.²⁵ It was held that the minimum requirements to be satisfied before there will be an 'assessment' to which s 175 of the ITAA 1936 can attach were the three-fold Hickman principles outlined above.²⁶ Failing this, the protection afforded by s 175 of the ITAA 1936 will not be available to the Commissioner.²⁷

Specifically in relation to the interplay between the ITAA 1936 and s 39B of the Judiciary Act, their Honours held that based on the ordinary rules of statutory construction under *Goodwin v Phillips*,²⁸ the latter overrode or amended s 177 of the ITAA 1936 to the extent that it purported to operate in circumstances where one of the *Hickman* principles was argued to apply.²⁹

Brennan J stated similarly in relation to application of the three-fold *Hickman* principles to the purported assessment.³⁰

Curiously, Mason CJ, while agreeing with Deane, Gaudron and Brennan JJ as to the outcome, held that despite the authorities outlined above in relation to the jurisdictional encroachment of 'conclusive evidence' privative clauses:³¹

[i]t is scarcely accurate to describe the effect of the subsection as purely jurisdictional. The subsection leaves the jurisdiction of the relevant court intact but requires the court in the exercise of its jurisdiction to treat the notices of assessment as having been duly made

With respect, if the validity of a notice of assessment was absolute and the court was unable to determine, based on the *Hickman* principles, its validity according to law, was this not abrogating the jurisdiction of the court, at least in part? Further, if a notice of assessment was to be treated as having been duly made, what else was left for the court to do in a judicial review context as distinct from the substantive tax arguments dealt with separately under Pt IVC of the TAA 1953?

It is clear that the rule of law forms a necessary assumption under the Australian Constitution.³² The rule of law is a common law construct encapsulating the separation of powers doctrine and judicial review.³³ No doubt, the High Court has adopted a rather conservative approach to the interpretation of privative clauses and judicial review generally, resulting in a broader application of such clauses vis-à-vis their English counterparts. This is clear from the rejection of the *Anisminic* doctrine³⁴ in *Craig* where the jurisdictional/non-jurisdictional error distinction was maintained in Australia. However, with respect, Mason CJ (and the minority judges on this point) could not simply assume the validity of a notice of assessment as this ignored Dixon J's crucial second step. Though involving little practical difference, applying the second step to arrive at a conclusion that there were no inviolable limitations and therefore, holding a privative clause effective, is quite different to the slavish acceptance of validity per se. Note, even Brennan, Deane and Gaudron JJ assumed a three-pronged version of the *Hickman* principles which was rejected in *Plaintiff S157*.

Project Blue Sky v Australian Broadcasting Authority

In *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* ('Project Blue Sky'),³⁵ the issue was whether a program standard made by the Australian Broadcasting Association ('ABA') was invalid for failing to comply with relevant provisions of the *Broadcasting Services Act 1992* ('BSA 1992'). The legislation permitted the respondent to determine standards for commercial and community television provided they were consistent with Australia's obligations under international conventions to which it was a party.

The joint judgment for the majority³⁶ held that the impugned clause of the relevant program standard was not in accordance with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement and the Trade in Services Protocol to the Trade Agreement and therefore, the ABA had breached the BSA 1992. The question then became whether such a breach invalidated the impugned clause, in relation which, the High Court found:³⁷

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

Their Honours added that there were no decisive rules in this regard³⁸ and, after highlighting the traditional mandatory/directory dichotomy,³⁹ concluded:⁴⁰

A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid . . . [i]n determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute

Applying this test to the particular legislative framework under the BSA 1992, the majority held that although the impugned clause was made in breach of the relevant section, it was not a purpose of the statute that such a breach was intended to invalidate any act done in breach of that section. It was, however, unlawful and a declaration was made to that effect.

Plaintiff S157

The circumstances giving rise to the introduction of the comprehensive privative clause in s 474 of the *Migration Act 1958* (Cth) are well known. The facts of *Plaintiff S157* are not particularly relevant here. What is important, however, is that the High Court, particularly Gleeson CJ, finally settled the confusion surrounding the *Hickman* principles and the process of reconciliation between a privative clause provision and the statute at large.

Gleeson CJ held that the matter was to be decided as an exercise of statutory construction looking at the Act as a whole,⁴¹ and offered the following guiding principles:⁴²

- (1) Where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations, in cases of ambiguity a court should favour a construction which accords Australia's obligations.

Gleeson CJ gave *Minister for Immigration and Ethnic Affairs v Teoh*⁴³ as authority, however, this principle is of a much older vintage. As early as 1908, O'Connor J held:⁴⁴

every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law

- (2) Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such intention is clearly manifested by unmistakable and unambiguous language. In this regard, general words are rarely sufficient, the court must be satisfied that the legislature had turned its attention to the rights and freedoms in question and consciously decided to abrogate or curtail.

Gleeson CJ cited *Coco v The Queen*⁴⁵ as authority. Pearce and Geddes⁴⁶ highlight that in interpreting statutes generally, various presumptions exist in favour of fundamental rights, including common law rights and access to the courts. Gleeson CJ in fact noted that the Migration Act, in so far as it relates to protection visas, affects fundamental human rights and necessarily involves Australia's international obligations.⁴⁷ Apart from the obvious relationship to the separation of powers doctrine and judicial review, such presumptions have long formed part of the common law of Australia. Again, it was O'Connor J who, this time in *Potter v Minahan*,⁴⁸ held:⁴⁹

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

More recently, the High Court held:⁵⁰

it is in the least degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness

Bennett has argued that in adopting s 474 of the Migration Act in identical terms to the relevant provision judicially considered in *Hickman*, that one would be hard pressed to think of a case in which the existence legislative approval was clearer.⁵¹ Similarly, the Commonwealth in *Plaintiff S157* argued that s 474 of the Migration Act was enacted with principles of judicial interpretation in mind. With respect, Bennett's argument appears to ignore the need for the legislature to show that it turned its attention to the particular rights and freedoms in question. If everything depends upon the subject matter and the context, without more, the wholesale adoption of a privative clause judicially considered in an industrial relations context cannot evidence that the legislature considered its particular implications in the migration area. Perhaps it is the political ramifications of complying with such an interpretative principle which prevents various governments from introducing legislation of the requisite clarity. However, this is of no concern to the courts. Further, the common law principles of statutory construction are so well known that legislative draftsmen could not be in any doubt they would be applied.⁵²

- (3) The Australian Constitution is framed upon the assumption of the rule of law.

Gleeson CJ based this finding on the decision of Dixon J in *Australian Communist Party v The Commonwealth*,⁵³ and Brennan J in *Church of Scientology v Woodward*,⁵⁴ where it was held:⁵⁵

Judicial review [entrenched under section 75(v) of the Constitution] is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

- (4) Privative clauses are construed 'by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts.'

This presumption in favour of judicial review forms part of the rule of law and arose in the decision in *Public Service Association (SA) v Federated Clerk's Union*.⁵⁶ Equally relevant under this head however is Dixon J's judgment in *Magrath v Goldsbrough, Mort & Co Ltd*,⁵⁷ where, specifically in relation to privative clauses, it was held that statutes are not to be interpreted as depriving superior courts of the power to prevent an unauthorised assumption of jurisdiction without clear and unmistakable words.⁵⁸ The arguments under Gleeson CJ's second principle are apposite.

- (5) A consideration of the whole Act is required and an attempt to achieve a reconciliation between the privative clause and the Act at large.

This principle derives from the Dixon J's judgment in *Hickman* and its progeny.⁵⁹ Clearly, like the rule of law principles they enshrine, there is much overlap.

Callinan J concurred though highlighted, without ultimately deciding, that it may be that.⁶⁰

to attract the remedies found in s75(v) of the Constitution when jurisdictional error is alleged, no less than a grave, or serious breach of the rules of natural justice will suffice

Bennett argues that Callinan J's dictum suggests that s 75(v) of the Constitution may only apply to a limited form of natural justice.⁶¹ This relates back to arguments surrounding jurisdictional error. If Bennett's interpretation is correct, the particular statutory provision must comply with Gleeson CJ's second principle in any event, and even then, would only operate to the extent that it does not purport to oust the jurisdiction of the High Court under s 75(v) of the Constitution.

The joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ held that the *Hickman* principles were not substantive rules but simply rules of construction.⁶² This meant there could be no general rules as to the meaning or effect of a privative clause as it will take its meaning from its particular statutory context.⁶³ Their Honours did acknowledge, however, that a breach of the requirements of natural justice may result in a finding of jurisdictional error under s 75(v) of the Constitution in a particular legislative context.⁶⁴ This accords with Gleeson CJ's pronouncement that visa applications within the migration area involve fundamental common law rights entitling applicants to more than good faith.⁶⁵

This decision affirmed the 'Darling Casino' theory as to the operation or effect of privative clauses.⁶⁶ This theory is based on the decision of Gaudron and Gummow JJ in *Darling Casino v New South Wales Casino Authority*,⁶⁷ where their Honours concluded that unless a relevant authority satisfies any necessary conditions to the exercise of its power, the decision cannot be protected by the relevant privative clause for it will not have made a decision 'under the Act'.⁶⁸ Clearly, such a principle may logically extend to whether a purported assessment is an 'assessment' for the purposes of the ITAA 1936.

Plaintiff S157 authoritatively clarified the position first outlined in *Hickman* as to the process of reconciliation. Despite the fact that the majority in *Richard Walter* appeared to apply the three-pronged *Hickman* test rejected in *Plaintiff S157*, there was little practical difference between the two in tax matters, as outlined below.

***Futuris*: The end of *Hickman*?**

In *Futuris*, the High Court was called upon to assess the bona fides of the Commissioner in a judicial review context. The facts surrounded the issue of a second amended assessment involving, in the taxpayer's opinion, a deliberate 'double counting' of a particular amount by the Commissioner. The High Court ultimately found that there was no failure of due

administration on the evidence and that even if there were such an error as argued by the taxpayer, it was within, rather than beyond jurisdiction with the matter more appropriately dealt with under Pt IVC of the TAA 1953.

The matter was decided on the basis of the proper construction of s 175 of the ITAA 1936 rather than whether or not s 177 of the ITAA 1936 had determinative effect.⁶⁹ In reaching its decision, the majority held that in *Richard Walter*.⁷⁰

Reference was made to the then accepted distinction between mandatory and directory provisions, and to what seems to have been some doctrinal status afforded to *Hickman*. As to the first matter, *Project Blue Sky* has changed the landscape [that is, the relevant test is now whether a purpose of the legislation is that an act done in breach of a provision is invalid] and as to the second, Plaintiff S157/2002 has placed 'the *Hickman* principle' in perspective [that is, simply a rule of construction]. Hence, this appeal [*Futuris*] should be decided by the path taken in these reasons and not by any course assumed to be mandated by what was said in any one or more of several sets of reasons in *Richard Walter*.

That is, the authority of *Richard Walter* had been impacted by changes to the assumptions upon which, or the context within which, it was made.

The High Court reiterated that s 175 of the ITAA 1936 must still be read together with s 177 of the ITAA 1936, however, as part of the process of statutory construction under *Project Blue Sky* rather than *Hickman*. While there is obvious overlap between the two, specifically as to 'inviolable limitations' and jurisdictional errors, the High Court adopted the former as:⁷¹

not only [was section 177 of the ITAA 1936] not a privative clause, but there [was] not the conflict or inconsistency between s177(1), s175 and the requirements of the Act governing assessment which [called] for the reconciliation of the nature identified in Plaintiff S157/2002 v The Commonwealth.

With respect, while this appears to ignore a long line of authority treating 'conclusive evidence' clauses as a subset of privative clauses more broadly,⁷² the *Hickman* principles are no longer relevant in tax matters, at least where the relevant decision is not impacted by jurisdictional error. Therefore, to the extent of any inconsistency, the authority of *Richard Walter* has now been superseded.

Will the decision in *Futuris* lead to substantive changes in outcomes?

In the writer's opinion, once it was accepted that recourse must be made to Dixon J's second step after *Plaintiff S157*, it was extremely unlikely that 'inviolable limitations' existed in tax matters in any event. The reason for this is two-fold:

- unlike the migration context, tax matters will rarely, if ever, involve fundamental rights; and
- Part IVC of the TAA 1953 provides a comprehensive merits review procedure

Fisher argues, in opposition to the first proposition above, that tax matters may indeed involve fundamental rights.⁷³ Citing the facts in *Darrell Lea Chocolate v Federal Commissioner of Taxation*,⁷⁴ he argues that some tax statutes carry criminal sanctions and custodial sentences and this necessarily involves fundamental rights.⁷⁵

In response to Fisher on this point, it is necessary to canvass the decided cases in jurisdictions where fundamental rights have been raised in tax matters and argue by way of analogy. Although not authoritative in Australia, these cases give valuable insight into whether, and if so, to what extent, fundamental rights are relevant in tax matters generally.

In continental Europe, there are broad-based presumptions in favour of fundamental rights under the European Convention on Human Rights (Civil) ('ECHR'). In the recent decision in *Ferrazzini v Italy*,⁷⁶ dealing with Article 6 of the ECHR involving the right to a fair trial, the majority concluded:⁷⁷

The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant . . . It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effect which they necessarily produce for the taxpayer

Ferrazzini is now authority for the proposition that disputes over the liability or quantum of a tax assessment generally fall outside the scope of Article 6 of the ECHR.⁷⁸ There are, however, a number of European cases involving penalty provisions in tax legislation that have been held to constitute a 'criminal charge' and enliven the protections of Article 6 of the ECHR.⁷⁹

The scope and application of Article 6 of the ECHR has also been considered in England. In *Cartz v Commissioners of Customs and Excise*,⁸⁰ the relevant tribunal heard an appeal against a disputed assessment for VAT. The taxpayer did not appear and the issue was whether his fundamental rights would be impinged if it were to continue in his absence. It was decided that as it was a civil rather than a criminal matter, there would be no such breach of the appellant's fundamental rights. In addition, there is English authority for the proposition that assessments of tax for individuals⁸¹ and corporations⁸² do not involve fundamental rights.⁸³

Admittedly, there has been some suggestion that tax matters may involve fundamental rights importing the protections afforded under Article 6 of the ECHR, at least in a VAT context.⁸⁴ However, in a direct tax context, specifically fraudulent or negligent self-assessment by a taxpayer, Jacob J in *King v Walden (Inspector of Taxes)*⁸⁵ held that this does not involve fundamental rights despite the criminal nature of the offence.⁸⁶

Clearly, based on the abovementioned authorities, even in jurisdictions layered with various glosses and presumptions in favour of fundamental rights, courts have largely refused to accept that they apply in tax matters, especially in relation to liability and quantum. In this regard, if Australia was to follow that path after *Plaintiff S157*, it would have been a very slow process.

Fisher also pointed to the reference to jurisdictional error in *Plaintiff S157* as an aid for taxpayers seeking judicial review.⁸⁷ He noted that jurisdictional error is broadly interpreted under the High Court decision in *Craig*, that is, that a jurisdictional error will arise where a tribunal identifies the wrong issue, asks itself the wrong question, ignores relevant material or relies on irrelevant material.⁸⁸ However, with respect, this argument wholly failed to appreciate that after *Plaintiff S157* there was a critical distinction between jurisdictional errors or 'inviolable limitations' in a particular statutory context. The writer agrees with Spigelman CJ who, speaking extra-judicially, declared that the overall process of interpretation will determine the element of essentiality in the particular circumstances.⁸⁹ His Honour's views implicitly acknowledged that different legislative provisions involve or touch upon different rights and in this manner, an error which may be considered jurisdictional in one context, may not necessarily be so in another. A corollary of this is that the decided cases outside the tax context could provide little guidance other than as to process.

In relation to the second proposition outlined above, the Administrative Review Council commented, in the wake of the decision in *Plaintiff S157*:⁹⁰

It is difficult to predict the effect the decision in *Plaintiff S157* will have in other areas currently subject to privative clauses. For example, use of such clauses in the industrial relations context has been

relatively uncontroversial and therefore effective. It may be significant that this is a context in which there have often been extensive alternative review and appeal rights to which the courts have paid regard when considering the scope and effect of privative clauses applying to industrial disputes

The Council continued:

the Income Tax Assessment Act provides a comprehensive scheme of review and appeal rights in which a taxpayer can have their tax liability finally determined by a court. This makes it relatively easy for a court to give wide-ranging effect to section 175

This indicated that the existence of comprehensive merits review and appeal processes went to the decision as to whether fundamental rights are at stake in a particular context.

Therefore, although the reconciliation was rejected by the High Court in tax matters, Dixon J's second step and the more direct process of statutory construction under *Project Blue Sky* each have their genesis in the jurisdictional/non-jurisdictional error dichotomy. Applying the decision in *Plaintiff S157* to tax matters pre-*Futuris*, the *Hickman* principles could rarely apply to protect taxpayers given the lack of fundamental rights involved coupled with the comprehensive review and appeal process. Although *Futuris* changed the process via which these matters are dealt with, the very foundations of the enquiry remain and will yield similar results going forward.

Conclusion

The decision in *Richard Walter* was overturned in *Futuris* and the cumbersome reconciliation process under *Hickman* was rejected in favour of the test in *Project Blue Sky*. However, *Plaintiff S157* had already reduced the *Hickman* principles to a simple rule of construction. Applying the reconciliation process to tax statutes after *Plaintiff S157* would rarely provide taxpayers any comfort for the reasons outlined above, at least, no more than can now be gained from the direct application of the threshold test in *Project Blue Sky*.

Endnotes

- 1 [2008] HCA 32
- 2 (1995) 127 ALR 21
- 3 (2003) 211 CLR 476
- 4 Section 14ZZ, *Tax Administration Act* 1953
- 5 Section 14ZZK(b) and 14ZZP(b), *Taxation Administration Act* 1953
- 6 *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 13 ATR 825
- 7 *Trautwein v FCT* (1936) 56 CLR 87-88; *FCT v Dalco* (1990) 20 ATR 1370
- 8 A Athanasiou, 'Privative Clauses' (2007) 42(1) *Taxation in Australia* 39
- 9 Note 8
- 10 B L Jones, 'Section 39B, Section 177 and the Hickman Principle' (2000) 29 *Australian Tax Review* 231 at 234
- 11 *R v Plowright* (1686) 3 Mod 94; *R v Moreley* (1760) 2 Burr; *R v Medical Appeal Tribunal Ex p Gilmore* [1957] 1 QB 574 cited in PP Craig, *Administrative Law*, 5th ed (2003) at 847
- 12 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 cited in Craig, *above*, at 849
- 13 *Ex p Ringer* (1909) 73 JP 436; *Reddaway v Lancs CC* (1925) 41 TLR 422; *Minister of Health v R Ex p Yaffe* [1931] AC 494; *R v Registrar of Companies Ex p Central Bank of India* [1986] QB 1114 cited in PP Craig, *Administrative Law* 5th ed (2003) at 850
- 14 (1945) 70 CLR 598
- 15 *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161
- 16 Note 14 at 615
- 17 *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 400 per Dixon J
- 18 *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J
- 19 Hon J Spigelman AC, 'Integrity and Privative Clauses' Speech given to the Australian Institute of Administrative Law, September 2004
- 20 (1995) 184 CLR 163
- 21 Note 19

- 22 (1942) 42 SR(NSW) 203 at 208 cited in Hon J Spigelman, 'Sir Ninian Stephen Lecture: Statutory interpretation – identifying the linguistic' speech delivered at University of Newcastle, 23 March 1999 available at www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf (accessed 22/10/2008)
- 23 (1995) 127 ALR 21 at 49
- 24 Note 23
- 25 Note 23
- 26 Note 23 at 49-50
- 27 Note 26
- 28 (1908) 7 CLR 1 at 7
- 29 (1995) 127 ALR 21 at 52
- 30 Note 29 at 41
- 31 Note 29 at 30
- 32 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193
- 33 J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195 at 200-201
- 34 *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147
- 35 (1998) 194 CLR 355
- 36 McHugh, Gummow, Kirby and Hayne JJ
- 37 Note 35 at 388-389
- 38 Note 35 at 389 citing *Howard v Bodington* (1877) 2 PD 203 at 211
- 39 See *R v Loxdale* (1958_ 1 Burr 445; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *Mark v Australian Broadcasting Tribunal* (1991) FCR 476; *Townsend's Case* (1554) 1 Plowden 111; *Maloney v McEacharn* (1904) 1 CLR 77; *Sandvik Australia Pty Ltd v Commonwealth of Australia* (1989) 89 ALR 213; *Stallwood v Tredger* (1815) 2 Phill Ecc 287; *Clayton v Heffron* (1960) 105 CLR 214; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454; *Woodward v Sarsons* (1875) LR 10 CP 733; *Scurr v Brisbane City Council* (1973) 133 CLR 242; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234
- 40 Note 35 at 390-391
- 41 Note 3 at 491
- 42 Note 3 at 492-493
- 43 (1995) 183 CLR 273
- 44 *Jumbunna Coal Mines NL v Victorian Coal Mines Association* (1908) 6 CLR 309 at 363
- 45 (1994) 179 CLR 427 at 437
- 46 Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006)
- 47 Note 3 at 492
- 48 (1908) 7 CLR 277
- 49 Note 48 at 304 cited in Pearce, *above*, at 183
- 50 *Bropho v Western Australia* (1991) 171 CLR 1 at 20
- 51 D Bennett AO QC, 'Privative clauses – an update on the latest developments' (2003) 37 *AIAL Forum* 20
- 52 Hon J Spigelman AC, *above*
- 53 (1951) 83 CLR 1
- 54 (1982) 154 CLR 25
- 55 Note 54 at 70
- 56 (1991) 173 CLR 132
- 57 (1932) 47 CLR 121 cited in Pearce, *above*, at 191
- 58 Note 57 at 134 cited in Pearce, *above*, at 191
- 59 *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208
- 60 (2003) 211 CLR 476 at 534
- 61 Note 51 at 30
- 62 Note 3 at 501
- 63 Note 62
- 64 Note 3 at 496 citing *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82
- 65 Note 3 at 494
- 66 See Hon D Kerr, 'Privative clauses and the courts: why and how Australian courts have resisted attempts to remove the citizen's right to judicial review of unlawful executive action' (2005) 5 *QUTLJ* 195
- 67 (1997) 191 CLR 602 cited in Hon D Kerr, *above*
- 68 (1997) 191 CLR 602 at 635
- 69 Note 1 at para 62
- 70 Note 1 at para 70
- 71 Note 1 at para 67
- 72 Note 13
- 73 R Fisher, 'The Status of Tax Privative Clauses: Expanding Judicial Review?' (2004) 7(5) *UNSWLJ* 241 at 246
- 74 (1996) 34 ATR 491
- 75 Note 73
- 76 Application No 44759/98 cited in P Baker QC, 'The Decision in Ferrazzini: time to reconsider the application of the European Convention on Human Rights to Tax Matters' available at

- <http://www.taxbar.com/articles.html> (accessed 28/01/2009)
- 77 Note 76
- 78 P Baker QC, 'The 'Determination of a Criminal Charge' and Tax Matters' (2007) December *European Taxation* 587
- 79 See *Vastberga Taxi Aktieföring v Sweden* (2002) 5 ITLR 65; *Jussila v Finland* (2006) 9 ITLR 662; *Bendenoun v France* (1994) 18 EHRR 54
- 80 Case No 16905 (MAN/99/509), decision 24 October 2000 cited in P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at <http://www.taxbar.com/articles.html> (accessed 28/01/2009)
- 81 *Sher Ali (Trading as the Bengal Brasserie) v Commissioners of Customs and Excise* Case No 6952 (MAN/96/699), decision of 20th November 2000 in P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at <http://www.taxbar.com/articles.html> (accessed 28/01/2009)
- 82 *Eagerpath Limited v Edwards (Inspector of Taxes)* [2001] STC 137 cited in P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at <http://www.taxbar.com/articles.html> (accessed 28/01/2009)
- 83 P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at <http://www.taxbar.com/articles.html> (accessed 28/01/2009)
- 84 *Murrell v Commissioners of Customs and Excise* Case No 16878 (LON/99/121), decision of 13th October 2000; *Han & Yao (and others) v Commissioner of Customs and Excise* [2001] EWCA Civ 1040; [2001] STC 1188, decision of 3rd July 2001 cited in Baker, *above*
- 85 [2001] STC 822
- 86 Note 83
- 87 Note 74
- 88 Note 74
- 89 Note 19
- 90 Administrative Review Council (Australia) – 'The scope of judicial review: report to the Attorney-General' Report No.46, April 2006 at 20

Cases

- (1) *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 13 ATR 825
- (2) *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147
- (3) *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161
- (4) *Australian Communist Party v Commonwealth* (1951) 83 CLR 1
- (5) *Cartz v Commissioners of Customs and Excise* Case No 16905 (MAN/99/509), decision 24 October 2000
- (6) *Darling Casino v New South Wales Casino Authority* (1997) 191 CLR 602
- (7) *DCT v Richard Walter Pty Ltd* (1995) 127 ALR 21
- (8) *Eagerpath Limited v Edwards (Inspector of Taxes)* [2001] STC 137
- (9) *Ex p Ringer* (1909) 73 JP 436
- (10) *FCT v Dalco* (1990) 20 ATR 1370
- (11) *Ferrazzini v Italy* Application No. 44759/98
- (12) *Goodwin v Phillips* (1908) 7 CLR 1
- (13) *Han & Yao (and others) v Commissioner of Customs and Excise* [2001] EWCA Civ 1040; [2001] STC 1188

- (14) *Haritopoulos Pty Ltd v DCT* [2007] FCA 394
- (15) *King v Walden (Inspector of Taxes)* [2001] STC 822
- (16) *McAndrew v FCT* (1956) 98 CLR 263
- (17) *Minister of Health v R Ex p Yaffe* [1931] AC 494
- (18) *Murrell v Commissioners of Customs and Excise* Case No 16878 (LON/99/121), decision of 13th October 2000
- (19) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476
- (20) *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598
- (21) *R v Medical Appeal Tribunal Ex p Gilmore* [1957] 1 QB 574
- (22) *R v Moreley* (1760) 2 Burr
- (23) *R v Plowright* (1686) 3 Mod 94
- (24) *R v Registrar of Companies Ex p Central Bank of India* [1986] QB 1114
- (25) *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82
- (26) *Reddaway v Lancs CC* (1925) 41 TLR 422
- (27) *Sher Ali (Trading as the Bengal Brasserie) v Commissioners of Customs and Excise* Case No 16952 (MAN/96/699), decision of 20th November 2000
- (28) *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363
- (29) *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208
- (30) *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387
- (31) *Trautwein v FCT* (1936) 56 CLR 87-88

Articles

- (1) A Athanasiou, 'Privative Clauses' (2007) 42(1) *Taxation in Australia* 39
- (2) D Bennett, 'Privative clauses-an update on the latest developments' (2003) 37 *AIAL Forum* 20
- (3) P Baker QC, 'Taxation and the Human Rights Act 1998' (2001) 1(1) *GITC Review* 1
- (4) P Baker QC, 'The Decision in Ferrazzini: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters' available at www.taxbar.com/documents/Ferrazzini_Phillip_Baker.pdf (accessed 28/01/09)

- (5) P Baker QC, 'The Application of the European Convention on Human Rights to Tax Matters in the United Kingdom' available at www.taxbar.com/documents/App_European_Convention_Phillip_Baker_QC.pdf (accessed 28/01/09)
- (6) R Fisher, 'The Status of Tax Privative Clauses: Expanding Judicial Review?' (2004) 7(5) *UNSWLJ* 241
- (7) P Gerber, 'Privative Clauses! The Last Hurrah?' (2003) 13(1) 5
- (8) B Jones, 'Section 39B, Section 177 and the Hickman Principle' (2000) 29 *Aust Tax Rev* 231
- (9) S Jones, 'Is 'The Hickman Principle' Relevant in Pt IVC Proceedings?' (2007) 42(3) *Taxation in Australia* 174
- (10) Hon D Kerr, 'Privative clauses and the courts: why and how Australian courts have resisted attempts to remove the citizen's right to judicial review of unlawful executive action' (2005) 5 *QUTLJ* 195
- (11) V Morabito and S Barkoczy, 'Restricting the Judicial Review of Income Tax Assessments: The Scope and Purpose of Schedule 1(e) of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*' (1999) 21 *SydLawRev* 36

Textbooks

- (1) M Allars, *Australian Administrative Law: Cases and Materials* (1997)
- (2) Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004)
- (3) PP Craig, *Administrative Law*, 5th ed (2003)
- (4) Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006)

Speeches

- (1) Hon J Spigelman AC, 'Integrity and Privative Clauses' Speech given to the Australian Institute of Administrative Law, September 2004
- (2) Hon J Spigelman AC, 'Sir Ninian Stephen Lecture: Statutory interpretation – identifying the linguistic' speech delivered at University of Newcastle, 23 March 1999 available at www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf (accessed 21/01/09)

Websites

- (1) www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf
- (2) www.lexis.com

- (3) www.austlii.edu.au
- (4) www.taxbar.com

Reports

- (1) Administrative Review Council (Australia) – ‘The scope of judicial review: report to the Attorney-General’ Report No.46, April 2006