DAVID JONES FINANCE AND THE INCOME TAX REVIEW AND APPEAL PROCESS

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INTRODUCTION

The exclusion of judicial review of assessment decisions by the Federal Commissioner of Taxation (the Commissioner) through the privative clause in s 177 of the Income Tax Assessment Act 1936 (Cth) (the Assessment Act) was challenged and found wanting in *David Jones Finance Investments Pty Ltd and Adsteam Finance & Investments Pty Ltd* v *Federal Commissioner of Taxation*[1] (*David Jones Finance*). The decision has affected the interpretation of the effectiveness of the privative clause and has potentially opened up a new mechanism for appealing against decisions of the Commissioner.

Privative, or ouster, clauses are legislative provisions which attempt to exclude judicial review of administrative decisions. There are two broad categories of privative clauses:

> Firstly there is the approach which in general aims at giving the subordinate legislation or administrative discretionary decision such qualities of paramountcy and unchallengability so as to place it on a pinnacle above the possibility of vulnerability to judicial onslaught. Secondly there is the exclusionary approach which proceeds by prohibiting recourse to the courts by one or more of the typical and traditional techniques for judicial control, for instance by the prerogative writs of certiorari or prohibition.[2]

Section 177 of the Assessment Act contains elements of both types of ouster of jurisdiction. The provision was designed to limit review of assessments to those mechanisms outlined in the section and also to foreclose any opportunity for a taxpayer to delay the assessment process through appeals attacking the process, where there may be no dispute about the actual amount assessed as owing. It reads:

> 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 Part IVC of the Taxation Administration

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1 (1991) 21 ATR 1506 (Full Federal Court).

2 E I Sykes, D J Lanham and R S S Tracey, *General Principles of Administrative Law* (2nd ed 1984) at 328.

Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.[3]

This paper will examine *David Jones Finance* and then consider whether the Full Federal Court was correct in law in reaching the conclusion it did. The paper also looks at the implications of the decision for general tax administration and administrative law in the tax law context.

DAVID JONES FINANCE — WHAT DID THE FEDERAL COURT HOLD?

The case arose out of the Australian Tax Office audit of the 100 largest Australian companies.[4] In the course of the audit, it was discovered that the taxpayers, David Jones Finance and Adelaide Steamship, were claiming dividend rebates under s 46(2) of the Assessment Act[5] when they did not have legal title to the shares. It had been the practice of the Australian Tax Office for over thirty years,[6] up to the time of the audit, to grant the rebate so long as beneficial title to the shares was held by the taxpayer. This practice continued notwithstanding the fact that in 1977, thirteen years before the audit, the High Court in *FCT v Patcorp Investments Ltd*[7] held that the rebate was only available in relation to shares for which a taxpayer had legal title. [8]

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3 In *David Jones Finance* the version of s 177 was slightly different. The reference to the Taxation Administration Act 1953 (Cth) was instead a reference to Part V of the Income Tax Assessment Act, a provision which has since been repealed and replaced by Part IVC of the Taxation Administration Act. Nothing turns on the change for the purposes of this paper.

4 As part of an audit strategy, the Australian Taxation Office engaged in an audit of the 100 largest companies in Australia. The legality of such a targeting of audits was unsuccessfully challenged by the taxpayer in *Industrial Equity Ltd* v *FCT* (1990) 170 CLR 649.

5 Section 46(2) provides:
Subject to this section, a shareholder, being a company that is a resident, is entitled to a rebate in its assessment in respect of income of the year of income of the amount obtained by applying the average rate of tax payable by the shareholder —
(a) if the shareholder is a private company in relation to the year of income, to the sum of —
(i) one-half of the part of any private company dividends that is included in its taxable income; and
(ii) the part of any other dividends that is included in its taxable income;
and
(b) if the shareholder is not a private company in relation to the year of income, to the part of any dividends that is included in its taxable income.

6 *David Jones Finance & Investments Pty Ltd and Adsteam Finance & Investments Pty Ltd v FCT* (1990) 21 ATR 718 at 721 per O'Loughlin J.

7 (1977) 140 CLR 247.

8 The fact that the Tax Office was able to act in a manner contrary to the law in their application of s 46 raises serious questions about the accountability of administrative decision-makers to the rule of law. The associated problem is that the legal system is often deficient in providing adequate redress when the law is not being followed by the administrative branch. For example, it would be very difficult for someone who was unhappy with the fact that the Tax Office was not following the law to seek judicial redress because if they were not a taxpayer directly affected, they would be likely not to have

In relation to the taxpayers the Commissioner decided to change the practice. In effect, the Commissioner was going to begin following the law as stated by the High Court in *Patcorp*. This change resulted in the taxpayers owing a great deal more in tax than they had previously calculated — $52 million for David Jones Finance and $37 million for Adsteam.[9] The taxpayers alleged that the Commissioner was discriminating against them by changing his practice in relation to s 46(2). They also asserted that this change of interpretation, imposed without any prior notice, amounted to an abuse of power. The aggrieved taxpayers brought an application for a writ of prohibition against the Commissioner of Taxation to restrain him from collecting the additional taxes resulting from his "new" interpretation of s 46(2).

The Commissioner sought to have the taxpayers' statement of claim struck out as having disclosed no cause of action because seeking a writ of prohibition was not a permitted remedy under s 177. The Commissioner argued that the taxpayers could not bring the application because s 177 of the Assessment Act provided that the only way in which an assessment could be reviewed was through the procedures permitted by the section — those outlined in Part V of the Act, as it then was.[10]

The issue in this case was whether the taxpayer could obtain a prerogative writ to restrain the Commissioner, given the existence of s 177(1) of the Assessment Act. This involved an examination of s 39B of the Judiciary Act 1903 (Cth). Subsection (1) provides:

> The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

The Federal Court, being a court created by statute, has no inherent powers. Section 39B of the Judiciary Act gives the Federal Court the power to grant prerogative writs against Commonwealth officers. The taxpayers, because they were seeking redress through the Federal Court, relied on s 39B as the source of the prerogative writ power. The question to be answered was whether the ability to obtain a prerogative writ under s 39B overrode the exclusion provision in s 177.

In the first instance, O'Loughlin J in the Federal Court[11] found that the taxpayers were foreclosed from seeking a writ of prohibition via s 39B of the Judiciary Act because of the operation of s 177 of the Assessment Act. Since s 177 does not list the prerogative writs as one of the permitted review methods, it was not legally possible for the taxpayer to obtain a writ. As such, the taxpayers' statement of claim did not reveal a cause of action and therefore O'Loughlin J ordered that the statement of claim and application for prohibition be dismissed.

The case was appealed by the taxpayers to the Full Bench of the Federal Court.[12] The central question before the court on appeal was whether the taxpayers were forbidden by the operation of s 177 from seeking relief (in this case injunctive relief in

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standing to bring an application for a writ of mandamus or other remedy to compel the Commissioner to apply the correct law.

9 (1991) 21 ATR 1506 at 1525 per Pincus J.

10 Section 177 has since been amended, as indicated in n 3, to provide that appeal and review of an assessment is made through Part IVC of the Taxation Administration Act (1953) (Cth).

11 (1990) 21 ATR 718.

12 (1991) 21 ATR 1506.

the form of the writ of prohibition) from an assessment using legislative mechanisms other than those permitted under s 177.[13] To answer this, the Full Federal Court looked at the power to grant prerogative writs and the scope of that power.

The Federal Court has jurisdiction to issue writs of prohibition under s 39B(1) of the Judiciary Act. Subsection 39B(1) mirrors the power to grant prerogative writs conferred on the High Court in s 75(v) of the Commonwealth of Australia Constitution. That provision reads:

> In all matters-
>
> (v) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth,
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> the High Court shall have original jurisdiction.

The majority was of the view that since s 75(v) was the legislative basis for s 39B(1) then the effect of s 75(v) on privative clauses in the existing case law was important. The majority in *David Jones Finance* considered the scope and meaning of s 75(v) as the basis for determining the relationship between s 39B(1) of the Judiciary Act and s 177 of the Income Tax Assessment Act.

A number of High Court decisions were cited for the proposition that privative clauses were ineffective in the face of s 75(v).[14] The Full Federal Court also considered the High Court decision in *R* v *Hickman; Ex parte Fox and Clinton*[15] where Dixon J, on behalf of the Court, concluded that it was possible for a privative clause to survive notwithstanding s 75(v) of the Constitution. The majority in *David Jones Finance*, Morling and French JJ, came to the conclusion that s 75(v) of the Australian Constitution could not be qualified by any statute.[16]

The conclusion that s 75(v) could not be affected by privative clauses formed the premise for their analysis of whether s 39B could be affected by a privative clause. The majority considered the second reading speech of the then Attorney-General, Lionel Bowen, in relation to the amendment of the Judiciary Act which introduced s 39B. From this second reading speech, the majority concluded that s 39B was designed to confer upon the Federal Court all powers granted to the High Court under s 75(v).[17] As such, since s 75(v) jurisdiction could not be displaced by any legislation, the majority concluded that the jurisdiction of the Federal Court, conferred by s 39B of the Judiciary Act, could not be displaced by the privative clause in s 177 of the Income Tax Assessment Act.[18]

Mr Justice Pincus dissented from the decision of the majority. He considered the High Court decisions in *Hickman*[19] and *F J Bloemen Pty Ltd* v *FCT*[20] and concluded that s 39B of the Judiciary Act was not intended to limit the operation of s 177 of the Assessment Act. Further, he was of the view that to read s 39B as broadly as it had

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13 Ibid at 1508 per Morling and French JJ.

14 For example: *Ah Yick v Lehmert* (1905) 2 CLR 593; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54; *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482.

15 (1945) 70 CLR 598.

16 (1991) 21 ATR 1508 at 1517 per Morling and French JJ.

17 Ibid at 1518.

18 Ibid at 1524.

19 (1945) 70 CLR 598.

20 (1981) 147 CLR 360.

been read by the majority was unwarranted in law and would have a serious negative impact on tax collection in Australia.[21]

Leave to appeal the case to the High Court was sought by the Commissioner. The High Court concluded that the case was of sufficient importance to warrant leave. However the parties settled the dispute so there was no justiciable issue to be considered by the High Court.[22]

WAS THE MAJORITY CORRECT?

Application of *Hickman*

The decision of the High Court in *Hickman*, is law in Australia.[23] In *Hickman*, Dixon J considered the effect of s 75(v) on legislative privative clauses. Despite the seeming breadth of s 75(v), Dixon J was prepared to concede that in certain circumstances privative clauses could be effective in limiting High Court actions. To do this he established a three-part test. If all three conditions were met, the privative clause of federal legislation would be upheld notwithstanding its apparent conflict with s 75(v) of the Constitution. The conditions to be met were that the administrative decision must:

(1) represent a *bona fide* attempt by the administrative decision-maker to exercise his or her powers,

(2) relate to the subject matter of the legislation, and

(3) be reasonably capable of reference to the power granted to the administrative decision maker.[24]

The legislation at issue in *Hickman*, the National Security (Coal Mining Industry Employment) Regulations, provided that Local Reference Boards could settle local industrial disputes. Regulation 17 provided that the decision of the Local Reference Board could not be "challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any count whatever." The High Court, arguably in *obiter*,[25] concluded that in certain circumstances such a privative clause could stand, notwithstanding the unequivocal wording of s 75(v) regarding the jurisdiction of the High Court. The High Court held that the powers in regulation 17 must be read as only applying to the Local Reference Board exercising powers in relation to the coal industry. Anything more expansive would be contrary to the intention of the regulations and thus be *ultra vires*. The High

21 (1991) 21 ATR 1506 at 1530 per Pincus J.

22 (1991) 22 ATR 397 (Mason CJ, Deane and McHugh JJ).

23 *Hickman* is still good law in Australia. It has been considered and followed in numerous cases in recent years. See: *O'Toole* v *Charles David Pty Ltd (No 2)* (1990) 171 CLR 232; *R* v *Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415; *R* v *Central Sugar Cane Prices Board; Ex parte Maryborough* (1959) 101 CLR 246; *Re Cram; Ex parte NSW Colliery Proprietors Assoc Ltd.* (1987) 163 CLR 117.

24 *O'Toole* v *Charles David Pty Ltd* (1990) 171 CLR 232 at 236 per Deane, Gaudron and McHugh JJ, referring to Dixon J's judgment in *R* v *Hickman*.

25 The High Court concluded that the Local Reference Board had applied their ruling in relation to an employer not operating in the coal industry. Since the Board did not have legislative jurisdiction outside the coal industry the ruling was *ultra vires* and therefore the privative clause was of no effect.

Court essentially concluded that administrative decisions made within the scope of the legislation empowering it would be protected by the legislation's privative clause notwithstanding s 75(v) of the Commonwealth Constitution.

Were the three conditions set by Dixon J in *Hickman* met by the decision of the Commissioner of Taxation in *David Jones Finance*? The Commissioner was engaged in making an income tax assessment, therefore the two requirements that the decision be related to the legislation and the power being exercised be referrable to the legislative powers granted the decision-maker are easily met. The remaining condition is whether the decision was a "*bona fide* attempt by the administrative decision-maker to exercise its powers". The taxpayer alleged that the Commissioner applied the letter of the law in s 46(2) of the Assessment Act as expressed in the High Court judgment in *Patcorp* against them, but did not do so in relation to other taxpayers. This, the taxpayers argued, was an abuse of power on the part of the Commissioner and therefore not a *bona fide* attempt by the Commissioner to exercise his powers. The contrary argument was that there could be no more *bona fide* exercise of power than to apply what is the correct meaning of the statutory provision and reject the previous incorrect interpretation.

If the three conditions were met by the Commissioner's assessment in *David Jones Finance*, then the decision of the High Court in *Hickman* should govern the decision of the Full Federal Court. This conclusion must follow because the powers of the Federal Court can only be as strong as those of the High Court since it is a subsidiary court.[26] Furthermore, if the High Court holds that privative clauses are able to survive conflict with the Commonwealth Constitution, surely they must also be able to survive conflict with ordinary legislation.

Correctness of the s 75(v)/s 39B analogy

Even if, as the majority of the Federal Court in *David Jones Finance* concluded, the Commissioner's actions did not meet the three conditions of Dixon J's test, it does not necessarily mean that the privative clause was ineffective. *Hickman* discussed the scope of s 75(v) and the effect of privative clauses on the High Court. Its relevance was by analogising that situation to the Federal Court and s 39B of the Judiciary Act.

The Full Federal Court enthusiastically embraced this analogy. They established that if s 75(v) of the Constitution prevented the operation of privative clauses in relation to the High Court, then s 39B of the Judiciary Act also barred privative clauses from adversely affecting the same powers conferred on the Federal Court. Was it correct for the Federal Court to conclude that the analysis applicable to s 75(v) must also apply to its equivalent provision in the Judiciary Act?

The analogy that s 39B automatically follows s 75(v) is not necessarily correct. In *Hickman*, the issue was the jurisdiction of the High Court which is determined by Chapter III of the Commonwealth Constitution. Any ordinary legislation which is inconsistent with Chapter III or any other part of the Commonwealth Constitution will be of no force or effect. *David Jones Finance* only concerned the jurisdiction of the Federal Court which is not constitutionally entrenched. Its powers are conferred by the Judiciary Act. The status of ordinary legislation (s 177 of the Income Tax Assessment Act) when in conflict with another piece of ordinary legislation (s 39B of the Judiciary

26 See Chapter III Commonwealth Constitution.

Act) is not as unequivocal as when ordinary legislation is inconsistent with the Constitution.

High Court precedents

Another High Court decision which was relevant to the consideration of the effectiveness of the privative provisions in s 177 was *Bloeman*.[27] The relevant facts before the High Court in *Bloemen* were arguably identical in all important respects to those in *David Jones Finance*. The High Court had to decide whether s 177 of the Assessment Act could prevent a taxpayer from seeking declaratory relief through the State Supreme Court that an assessment was invalid. The taxpayer argued that the Commissioner had not in fact issued assessments. Instead, what the Commissioner had issued was a tentative or provisional assessment, an item that was not authorised by the legislation.[28] In coming to its finding the High Court quoted the judgment of Taylor J in *McAndrew* v *FCT*[29] that the effect of s 177(1) was "to make it impossible for a taxpayer, in proceedings other than appeal against it, to challenge an assessment on any ground."[30] The only question left for the State Supreme Court to determine was whether the assessment had been duly made, in those cases where the appropriate assessment document had not been produced. If, however, the assessment was produced, the State Supreme Court had to accept the assessment as conclusive evidence of its existence.[31] The majority of the High Court went on to justify this conclusion in light of the policy underpinning the privative clause. The High Court recognised that the effect of s 177(1) was to preclude the taxpayer from questioning the assessment or the procedure by which the assessment was made other than through the review and appeal processes provided for under the Assessment Act. The High Court even considered the effect of s 177 in the case of improper exercise of power by the Commissioner in issuing an assessment. The Court concluded that s 177 did not contemplate abuse of power by the Commissioner and the concern that the Commissioner may act for an improper or collateral purpose was not a basis for not applying s 177.[32]

Arguably the judgment in *Bloemen* should operate as precedent and should have bound the Federal Court in deciding *David Jones Finance*. The High Court judgment in *Bloemen* addressed all of the issues in *David Jones Finance*. The scope of s 177 was considered in the light of allegations of improper exercise of power by the Commissioner and the scope of the privative clause was considered in relation to actions at the State Supreme Court level and in courts generally. The High Court in *Bloemen* concluded that once the assessment is shown to exist, the only basis upon which it may be challenged is through the procedures outlined in s 177.

Notwithstanding a clear and unequivocal statement by the High Court of the scope and operation of s 177 of the Assessment Act, and the similarities between the cases, the majority of the Full Federal Court in *David Jones Finance* held that the section could not block the issue of a writ of prohibition against the Commissioner's assessment. The

27 (1981) 147 CLR 360.
28 Ibid at 365.
29 (1956) 98 CLR 263.
30 (1981) 147 CLR 360 at 375 per Mason and Wilson JJ, Stephen J concurring.
31 Ibid at 376 per Mason and Wilson JJ, Stephen J concurring.
32 Ibid at 375-376 per Mason and Wilson JJ, Stephen J concurring.

Full Federal Court did not adequately explain why it did not follow the majority judgment of the High Court in *Bloemen*.

Common Law principles — interpretation of privative clauses

Under general law principles, it is questionable whether the Full Federal Court interpreted the law correctly. There is a presumption at common law that a person should have access to the courts. The courts have therefore generally interpreted privative clauses restrictively. However, the privative clause in the Assessment Act does not foreclose review, it only limits in which courts and by which processes review may be undertaken. That being the case, it is questionable whether the restrictive reading of s 177 by the Full Federal Court in *David Jones Finance* was appropriate.

General policy — Administrative Decisions (Judicial Review) Act

The Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) is now the major legislative vehicle setting out judicial review of administrative decisions. As such, the ADJR Act is relevant for its approach to privative clauses. It should be noted that the Act does not apply to decision-making leading up to the making of an assessment under the Assessment Act.[33] However its general policy framework is of interest in this discussion.

The ADJR Act sets minimum standards for procedure by administrative decision-makers, as well as providing rules governing judicial review of administrative decisions. Section 10 specifically deals with privative clauses. Subsection 10(1) establishes limits to the validity of privative clauses. The policy aim of this subsection is to prevent privative clauses from unduly restricting ADJR Act access to review of administrative decisions. However, s 10(2) provides that notwithstanding s 10(1), the Court may in its discretion refuse to grant an application for judicial review where the legislation has a privative clause and there is an alternate forum for review provided in the legislation, as is provided for in s 177.[34]

THE IMPLICATIONS FOR TAX ADMINISTRATION AND ADMINISTRATIVE LAW

So what if the taxpayer can get review under prerogative writs?

The possible implications for tax administration resulting from *David Jones Finance* should be considered. In doing so it is helpful first to reflect on why s 177 exists. The conclusive evidence provision applying to assessments dates back to the original

33 ADJR Act (Cth), Schedule 1(e). Schedule 1(e) excludes decisions related to the process of making assessments under a number of tax laws, including the Income Tax Assessment Act.

34 Section 10(2)(b)(ii) ADJR Act provides: "The Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision for the reason —

(ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure."

version of the Income Tax Assessment Act in 1915.[35] The reason for the existence of the conclusive evidence provision is to streamline the assessment and review process. By stating that the production of a notice of assessment is conclusive evidence of its existence, the legislation avoids the inevitable litigation by taxpayers who would require the Commissioner in each case to prove the validity of the assessment or justify the process under which the assessment was raised. This spurious litigation could be launched even when the taxpayer does not question the final assessment figure reached by the Commissioner. The reason the taxpayer would find this course of action attractive is that it would delay the assessment process. Instead, the taxpayer is limited to the processes outlined in s 177 if they wish to attack the validity of an assessment. These processes were designed with the aim of being able to deal efficiently and fairly with tax disputes by using specialised review processes and expert adjudicators.

The policy of s 177 is to promote efficient tax administration by restricting appeals against assessments to the specialised tax law appeal processes. The Full Federal Court decision in *David Jones Finance* undermines this policy. Alternative avenues to dispute assessments are now open.

The use of prerogative writs is a problem because it is a step back in time to a period where administrative review was the province of courts of general jurisdiction which often had no expertise in the area of law in which the administrative decision had been made nor any feel for the operation of the law in practical terms. The current laws which grant power to administrative decision-makers provide for specialised and streamlined methods of review and appeal and they utilise judicial and quasi-judicial bodies which have this specialised knowledge and experience. This is certainly the case with the appeal and review provisions contained in the Income Tax Assessment Act and the Taxation Administration Act 1953. This is all consistent with the view that the ideal administrative law situation is one where review jurisdiction is exercised by those who have relatively greater expertise and those decision-makers with less expertise voluntarily decline jurisdiction. The voluntary restraint exercised by those who have relatively less expertise leads to a more efficient justice system because those with the expertise are able to use their expertise and those lacking specialised skills in a particular area restrain themselves from exercising power even though they may have legal jurisdiction to do so.[36] The majority in *David Jones Finance*, through their rejection of the paramountcy of s 177, have turned away from the trend toward specialised adjudication of specialised legal issues.

The other policy issue which arises out of the Full Federal Court ignoring the privative provisions in s 177 is that it opens the door for taxpayers resorting to prerogative writs in the courts to seek remedies in relation to their income tax

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35 The equivalent of s 177 in the 1915 Act was s 35(1) of the Income Tax Assessment Act 1915 (Cth). It provided: "The production of any assessment or of any document under the hand of the Commissioner purporting to be a copy of an assessment shall —

(a) be conclusive evidence of the due making of the assessment; and

(b) be conclusive evidence that the amount and all the particulars of the assessment are correct;

except in proceedings on appeal against the assessment when it shall be prima facie evidence only." The provision appeared in a slightly altered form in the 1922 Act as s 39 and the substance of the provision has been little changed since then.

36 These ideas are considered in detail in YFR Grbich, *Institutional Renewal in the Australian Tax System* (1984).

assessments. If access to the courts of general jurisdiction is permitted for the purpose of seeking prerogative writs, there is an additional disadvantage to the administration of justice. Parties will have the burden of meeting the complex technical requirements of the prerogative writs as opposed to the relatively simple review mechanisms found in the Income Tax Assessment Act.

CONCLUSION

The problems related both to the Commissioner's interpretation of the operation of s 46 as being inconsistent with the law as stated in *Patcorp* and the disparate treatment of taxpayers as alleged in *David Jones Finance* were addressed in 1992 amendments to the Assessment Act.[37] Section 45Z established legislative criteria for determining the situations where the dividend rebate would be available.[38] This legislative solution creates a much more acceptable situation. The Commissioner will have his discretion to grant rebates limited by detailed criteria which must be met before the rebate will be available. This is compared with the unacceptable situation which led to the litigation in *David Jones Finance*, where the Commissioner was interpreting the law contrary to the expressed view of the High Court and granting dividend rebates when there was no support in law for that action. Although the action of the Commissioner was unacceptable, it did not, however, justify the Full Federal Court permitting the use of prerogative writs (when the privative clause in s 177 provided otherwise) and thus acting contrary to the law as set out by the High Court in *Hickman* and *Bloemen*.

The Full Federal Court decision in *David Jones Finance* is important because it has opened the door to those taxpayers with the financial and legal resources to slow down the assessment process by attacking the validity of assessments not on the basis of the correctness of the final result, but by impugning the procedures used in reaching that result. The other, and perhaps more profound, effect of *David Jones Finance*, is the negative effect which it may have on progress towards streamlining the objections and appeals processes and on the utilisation of more specialised courts and tribunals.

On May 5 1994 the High Court began hearing *DFCT* v *Richard Walter Pty Ltd*. In this case the taxpayer sought to use s 39B of the Judiciary Act to attack the validity of an assessment. The case was removed from the Federal Court to the High Court. The High Court will hopefully make the correct decision in law and uphold the validity of s 177 as an absolute bar to attacks on the validity of assessments outside the legislative objection and appeals mechanisms outlined in that section. In so doing the High Court would be promoting efficient tax administration and the continued development of administrative law in Australia.

37 Act No 35 of 1992, s 10.
38 Section 45Z applies to all dividends paid after 17 August 1976.