

PRESERVING THE CONSTITUTIONAL FUNCTION OF COURTS AND INCREASING CONFIDENCE IN THE TAX SYSTEM: TIME TO RECONSIDER *FUTURIS*

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Focusing on the discretionary power to amend an assessment at any time where the Commissioner is ‘of the opinion there has been fraud or evasion’, this article argues that the increasingly prevalent practice in the Federal Court of summarily dismissing judicial review applications not alleging either of the two jurisdictional errors identified by the plurality in Federal Commissioner of Taxation v Futuris Corporation Ltd is both apocryphal and repugnant to the rule of law. As will be shown, the current practice, together with the serious limitations inhering in the statutory scheme for overturning an excessive assessment, combine to render the tax practically incontestable, in turn reducing confidence in the tax system and striking an unfair balance between preserving the capacity of the Australian Taxation Office to collect legitimate income tax liabilities and taxpayers’ right to petition courts to overturn an assessment purportedly made beyond power.

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I INTRODUCTION

Notwithstanding substantive reforms in 2006¹ to both the assessment and binding rulings regimes designed, primarily, to improve taxpayer confidence in the self-assessment tax system and ensure ‘the right balance has been struck between protecting the rights of individual taxpayers and protecting the revenue for the benefit of the whole Australian community’,² my article published in 2016 found that this has not occurred, at least in relation to rulings.³

It was shown that the way the plurality’s decision in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (*‘Futuris’*)⁴ has subsequently been applied by the Federal Court, in conformity with Besanko J’s reasons in *Roberts v Deputy Commissioner of Taxation* (*‘Roberts’*),⁵ causes irremediable detriment⁶ for taxpayers adversely affected by a decision of the Commissioner to revise an earlier favourable private ruling or issue an inconsistent assessment without procedural fairness.⁷ It was further foreshadowed that this may not be ‘ultimately sustainable’,⁸ particularly given the focus of pt IVC of the *Taxation Administration Act 1953* (Cth) (*‘Administration Act’*) on outcomes rather than procedure.⁹

¹ The reforms were foreshadowed in Treasury (Cth), *Report on Aspects of Income Tax Self-Assessment* (August 2004) (*‘2004 Report’*).

² Peter Costello, ‘Review of Aspects of Income Tax Self-Assessment’ (Media Release No 098, Treasury (Cth), 24 November 2003).

³ John Azzi, ‘Practical Injustice in the Context of Private Tax Rulings’ (2016) 39(3) *University of New South Wales Law Journal* 1096 (*‘Practical Injustice’*).

⁴ (2008) 237 CLR 146 (*‘Futuris’*).

⁵ (2013) 228 FCR 280, 289 [36]–[40] (Besanko J) (*‘Roberts’*), cited in *Chhua v Federal Commissioner of Taxation* [2018] FCAFC 86, [14] (Logan, Moshinsky and Steward JJ) (*‘Chhua’*).

⁶ See John Azzi, ‘Avoiding Unfairness: A Case for Estopping the Commissioner of Taxation’ (2017) 46(4) *Australian Taxation Review* 242.

⁷ See Azzi, ‘Practical Injustice’ (n 3).

⁸ *Ibid* 1121.

⁹ *Ibid* 1107.

Since then, the Full Federal Court has handed down its decision in *Chhua v Federal Commissioner of Taxation* ('*Chhua*') which, inter alia, purports to once and for all settle any lingering doubts that the earlier cases were right to construe *Futuris* as exhaustively defining the two jurisdictional errors against which s 175 of the *Income Tax Assessment Act 1936* (Cth) ('1936 Act') offers no protection.¹⁰ In the process, their Honours disagreed¹¹ with Porter J in *Woods v Deputy Commissioner of Taxation* ('*Woods*')¹² for suggesting otherwise.¹³

Focusing on the Commissioner's power under item 5 of s 170(1) of the *1936 Act* to amend an assessment at any time if the Commissioner is 'of the opinion there has been fraud or evasion', this article argues that intermediate courts are, respectfully, wrong to continue to suggest the plurality's decision in *Futuris* has conclusively shut the gate on jurisdictional error relief. As will appear, construing *Futuris* in the manner suggested by the Federal Court fails to fully recognise the 'rights-protective [effects]'¹⁴ of the *Constitution*, in particular s 75(v) (and its replicant in s 39B of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*')), as well as subsequent High Court authority suggesting it 'is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error'.¹⁵

Kirby J expressed similar concerns in his dissenting judgment in *Futuris*, remarking that expansion of the protective ambit of s 175 of the *1936 Act* in the manner suggested by the plurality would not only 'breathe validity into a purported "assessment" that was not in law an "assessment" as contemplated by the Act',¹⁶ but would also diminish the 'ambit of the remedies' provided by s 75(v) and s 39B.¹⁷

In this article, it will be shown that the growing tendency of the Federal Court to summarily dismiss judicial review applications which do not assert

¹⁰ *Chhua* (n 5) [14] (Logan, Moshinsky and Steward JJ).

¹¹ *Ibid* [39].

¹² (2011) 86 ATR 620 (Federal Court) ('*Woods*').

¹³ *Ibid* 637 [50].

¹⁴ See Scott Stephenson, 'Rights Protection in Australia' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905, 905.

¹⁵ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

¹⁶ *Futuris* (n 4) 183 [126]. Kirby J agreed with the result reached by the plurality, but not their reasons for doing so.

¹⁷ *Ibid* 187 [138].

either of the two jurisdictional errors identified by the plurality in *Futuris* is, respectfully, apocryphal, particularly as the issue in *Futuris* concerned the validity of an assessment rather than whether the Commissioner had power to make the assessment. The current practice is equally apocryphal because it proceeds on the questionable premise that pt IVC provides an adequate alternative to judicial review in all cases.

It will be shown that current jurisprudence expansively expounding the privative ambit of s 175 (in accordance with the plurality's reasons in *Futuris*) renders the legislative criteria of fraud and evasion nugatory in most cases. As s 175 is presently construed, courts are impotent to safeguard against the arbitrary application by the Commissioner of these criteria for liability, thus making the tax practically incontestable because the validity of the assessment will depend on the opinion of the Commissioner.¹⁸

As will appear, the judicial process in pt IVC is a poor substitute for that available under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act*, whereby the taxpayer can petition either the High Court or the Federal Court respectively in their original jurisdictions to invalidate an exercise of the amendment power on the ground that there was 'no evidence' to justify the opinion of fraud or evasion, or that the requisite opinion was not reasonably reached.¹⁹ By contrast, the taxpayer cannot succeed in discharging the statutory onus of proof in the absence of evidence 'affirmatively' proving that the preconditions of fraud or evasion did not exist.²⁰

Both s 75(v) and s 39B introduce an 'entrenched minimum provision of judicial review'²¹ that provides the 'mechanism by which the Executive is subjected to the rule of law'²² (on the assumption of which the *Constitution* is framed).²³ In the words of Brennan J:

¹⁸ Cf *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) ('*Communist Party Case*'), quoted in *McCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).

¹⁹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356–7 (Mason CJ) ('*Bond*'). See also *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 418 [90]–[91] (Hayne, Heydon, Crennan and Kiefel JJ) ('*Kostas*').

²⁰ *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284, 303 (Gibbs J, Stephen J agreeing at 306, Jacobs J agreeing at 313, Murphy J agreeing at 323) ('*McCormack*').

²¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'). Their Honours were referring to s 75(v).

²² *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 415 (Gaudron J). Her Honour was referring to s 75(v).

²³ *Communist Party Case* (n 18) 193 (Dixon J).

Judicial review 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.²⁴

Toward this end, courts

should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.²⁵

And they must intervene ‘where it is obvious that the public body, *consciously or unconsciously*, are acting perversely.’²⁶

To expound the preceding proposition that a dangerous and unsound precedent is developing in Australia where, despite previous historical practice, intermediate courts are now summarily dismissing judicial review applications which do not allege either a tentative assessment or one tainted with ‘conscious maladministration’ — the two errors identified by the plurality in *Futuris*²⁷ — the paper is organised as follows:

- Part II (The Constructional Argument): bearing in mind that ‘whether an issue is jurisdictional is ultimately a matter of statutory construction’,²⁸ this part examines the amendment power in item 5 of s 170(1) of the *1936 Act* and argues that a failure to form the requisite opinion constitutes jurisdictional error, albeit not of the kind identified in *Futuris*. To this end, it is argued that the decision of the plurality in that case does not foreclose all instances whereby an assessment will answer the statutory description of

²⁴ *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70, quoted in *Plaintiff S157* (n 21) 492 [31] (Gleeson CJ).

²⁵ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J) (*‘City of Enfield’*), quoted in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 108–9 [55] (Gaudron and Gummow JJ) (*‘Aala’*).

²⁶ *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484, 518 (Lord Brightman) (emphasis added) (House of Lords), quoted in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 626–7 [41] (Gleeson CJ and McHugh J) (emphasis added) (*‘Eshetu’*).

²⁷ *Futuris* (n 4) 157 [25], 164–5 [55]–[56] (Gummow, Hayne, Heydon and Crennan JJ).

²⁸ See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 942 [17.40], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390 (McHugh, Gummow, Kirby and Hayne JJ) (*‘Project Blue Sky’*).

assessment in s 175, given the particular and fairly unique circumstances arising in *Futuris*.

- Part III (The Constitutional Argument): this part demonstrates that confining judicial review to the two jurisdictional errors identified by the plurality in *Futuris* is repugnant to the rule of law. In addition, it is argued that construing s 175 so as to render all errors, save the two identified in *Futuris*, non-jurisdictional, stultifies the exercise of federal judicial power to conclusively determine a matter in respect to which original jurisdiction has been conferred on the court.

II THE CONSTRUCTIONAL ARGUMENT

A *The Power to Amend an Assessment*

The power and duty of the Commissioner to make an assessment resides in s 166 of the *1936 Act*. Relevantly, the Commissioner ‘must make an assessment’ of the amount of taxable income of any taxpayer and the amount of tax payable thereon, from the returns and any other information in his possession, or based on other sources.²⁹

The expression ‘assessment’ is relevantly defined in s 6(1)(a) of the Act as ‘the ascertainment ... of the amount of taxable income ... and ... of the tax payable on that taxable income’. This definition ‘takes up’³⁰ the description of assessment articulated by Isaacs J in *R v Federal Commissioner of Taxation; Ex parte Hooper*³¹ where his Honour relevantly said an assessment ‘is the Commissioner’s *ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion*, of the amount of tax chargeable to a given taxpayer.’³²

The Commissioner may amend an assessment either ‘within 2 years after the day on which the Commissioner gives notice of the assessment’ (for individuals and small business entities)³³ or ‘within 4 years’ of that date (for

²⁹ *Income Tax Assessment Act 1936* (Cth) s 166 (‘1936 Act’).

³⁰ *Gould v Deputy Commissioner of Taxation* (2017) 343 ALR 275, 281 [26] (Logan J) (Federal Court).

³¹ (1926) 37 CLR 368.

³² *Ibid* 373 (emphasis added).

³³ *1936 Act* (n 29) s 170(1) items 1–2.

large taxpayers).³⁴ The period for amendment was shortened, for the vast majority of taxpayers, from a period of four years either from the day on which the tax become due or from the day payment was made in an effort to reduce taxpayer uncertainty:

Another way to reduce uncertainty is to give earlier finality to taxpayers who have tried to comply by shortening the period in which their assessment can be amended to increase their liability. Once the Tax Office can no longer amend a particular year's assessment, *taxpayers can stop worrying about whether they 'got it right'*.³⁵

As mentioned, however, the Commissioner may amend an assessment at any time if of the opinion there has been fraud or evasion. This is because taxpayers 'who engage in *calculated behaviour* to evade tax should remain permanently at risk'.³⁶

The term 'fraud' is not statutorily defined. However, it is well established that fraud exists where a person makes a false statement or representation knowing it is false, or is recklessly careless of whether it is true or false.³⁷ In the context of taxation, Dixon J (with whom McTiernan, Williams and Webb JJ agreed) remarked in *Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* ('*Denver Chemical*')³⁸ that 'evasion' contemplates

some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible ... An intention to withhold information lest the [C]ommissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion.³⁹

In *Denver Chemical*, the High Court was required to consider the validity of an exercise of the discretion to amend an assessment under s 210(2)(a) of the *Income Tax (Management) Act 1928* (NSW), which was expressed in substantially similar terms to item 5 of s 170(1) of the *1936 Act*,⁴⁰ and formed part of

³⁴ Ibid s 170(1) item 4. Large taxpayers are those who are not individuals, small business entities, or trustees for small business entities, ie all those not covered by items 1–3 of s 170(1).

³⁵ *2004 Report* (n 1) 4 (emphasis added). See also at 27–8.

³⁶ Ibid 31 (emphasis added).

³⁷ *Derry v Peek* (1889) 14 App Cas 337, 374 (Lord Herschell).

³⁸ (1949) 79 CLR 296 ('*Denver Chemical*').

³⁹ Ibid 313.

⁴⁰ See ibid 296.

a scheme which conferred powers ‘not materially different’⁴¹ from those conferred on the Administrative Appeals Tribunal (‘AAT’) by the current scheme in pt IVC of the *Administration Act*.⁴² Noting that the former Taxation Board of Review, and not the High Court, was the tribunal to review opinions formed by the Commissioner, Dixon J importantly held that, even where the precise reasons for amending an assessment are not known, judicial review would lie where the decision-maker

has not addressed itself to the question which sub-s (2)(a) of s 210 formulates or if [its] conclusion ... is affected by some mistake of law, or if [it] takes some extraneous consideration or if it excludes from consideration some factor which should affect the determination ...⁴³

The above-mentioned errors of law are jurisdictional errors in that they can render an administrative decision invalid for exceeding its authority or power.⁴⁴ Involving errors bearing on the due formation of the Commissioner’s state of mind, jurisdictional errors are ordinarily unsusceptible to examination within the statutory review and appeal mechanism provided for in pt IVC, given former s 177(1) of the *1936 Act* (now item 2 of s 350-10 of the *Administration Act*). This latter provision gives ‘evidentiary effect’⁴⁵ to s 175 of the *1936 Act* and treats production of the notice of assessment as ‘conclusive evidence of the due making of the assessment.’⁴⁶

Referring to the distinction between ‘state of mind’ and ‘determination’ cases (where courts have not always made an ‘entirely satisfactory’ distinction),⁴⁷ the Full Federal Court in *WR Carpenter Holdings Pty Ltd v Federal*

⁴¹ *Binetter v Federal Commissioner of Taxation* (2016) 249 FCR 534, 553 [94] (Perram and Davies JJ) (‘*Binetter*’).

⁴² See below Part II(D) for further discussion of this scheme.

⁴³ *Denver Chemical* (n 38) 312–13 (McTiernan J agreeing at 316, Williams J agreeing at 316, Webb J agreeing at 318).

⁴⁴ See, eg, *Craig v South Australia* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), quoted in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ) (‘*Yusuf*’).

⁴⁵ *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 223 (Dawson J) (‘*Richard Walter*’), quoted in *Futuris* (n 4) 167 [67] (Gummow, Hayne, Heydon and Crennan JJ). Dawson J was referring to the relationship between former s 177(1) and s 175 of the *1936 Act* (n 29).

⁴⁶ *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, 207 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ) (‘*George*’).

⁴⁷ *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2006) 234 ALR 451, 481 [155] (Lindgren J) (Federal Court).

Commissioner of Taxation ('*WR Carpenter (Full Federal Court)*')⁴⁸ said that judicial review is nevertheless available in relation to matters concerning due formation of opinion about legislative criteria that go to substantive liability:

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 lieu of objective criteria, or as an addition to incomplete objective criteria, s 177(1) *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.⁴⁹

The taxpayer's appeal to the High Court was unanimously dismissed in circumstances where the Court was satisfied that the power to make a determination under s 136AD⁵⁰ was not subject to judicial intervention as it did not affect the taxable income but rather the consideration for a supply.⁵¹ It would be a different matter, however, if the Commissioner, as here, were required to be satisfied of matters specified in the statute as a precondition to the liability to pay tax:

But where the formation of an opinion by the Commissioner is a criterion of liability, the area of the authority of the Commissioner is 'guided and controlled by the policy and purpose of the enactment' and *the exercise of that authority is examinable in the way explained by Dixon J in Avon Downs Pty Ltd v Federal Commissioner of Taxation*.⁵²

⁴⁸ (2007) 161 FCR 1 ('*WR Carpenter (Full Federal Court)*').

⁴⁹ *Ibid* 11 [43] (Heerey, Stone and Edmonds JJ) (emphasis added), quoted in *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation* (2017) 251 FCR 40, 69 [110] (Pagone J) ('*Chevron*').

⁵⁰ Forming part of the now repealed div 13 of the *1936 Act* (n 29), s 136AD(4) authorised the Commissioner to make a determination of what constitutes 'arm's length consideration' in relation to property supplied or acquired under an international agreement where they are satisfied the related parties are not dealing with each other at arm's length.

⁵¹ *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 213 [41], 214 [44] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) ('*WR Carpenter (High Court)*').

⁵² *Ibid* 205 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (emphasis added) (citations omitted).

In *Avon Downs Pty Ltd v Federal Commissioner of Taxation* ('*Avon Downs*'),⁵³ Dixon J referred to the general principle propounded by Lord Halsbury in *Sharp v Wakefield*,⁵⁴ where his Lordship said that a discretion conferred on a public official must be exercised 'according to the rules of reason and justice, not according to private opinion ... according to law, and not humour'.⁵⁵ Dixon J went on to explain in *Avon Downs* that the Commissioner's decision is examinable

[i]f he does not address himself to the question which the sub-section 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 ... If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition.⁵⁶

What follows demonstrates that the formation of an opinion about fraud or evasion is itself a substantive criterion of liability and thus amenable to judicial review. As will appear, failure to form the requisite opinion is more than a mere 'procedural defect' which may be expressly excluded from judicial review,⁵⁷ but an essential step enlivening the amendment power.

B *When Is Formation of Opinion a Jurisdictional Fact?*

In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* ('*Connell*'),⁵⁸ Latham CJ recognised that the exercise of statutory power is unauthorised and thus beyond power where the forming of an opinion is the basis for the exercise of the power, and it is shown that the opinion formed is not an opinion which could reasonably be formed:

[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opin-

⁵³ (1949) 78 CLR 353 ('*Avon Downs*').

⁵⁴ [1891] AC 173 (House of Lords).

⁵⁵ *Ibid* 179 (citations omitted), quoted in *The Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621, 632 (Gavan Duffy CJ and Starke J).

⁵⁶ *Avon Downs* (n 53) 360.

⁵⁷ See *Richard Walter* (n 45) 206–7 (Deane and Gaudron JJ).

⁵⁸ (1944) 69 CLR 407 ('*Connell*').

ion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

...

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. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.⁵⁹

In *Connell*, the High Court (by majority) found that the Local Industrial Authority appointed under s 33 of the *Coal Production (Wartime) Act 1944* (Cth) had no authority to award increased remuneration to workers at certain collieries because it could not have been 'satisfied' that the condition for the award existed, having misconstrued the meaning of the regulation expounding the condition.⁶⁰

By parity of reasoning, the formation of an opinion about fraud or evasion when exercising the amendment power in item 5 of s 170(1) of the *1936 Act* is, likewise, susceptible to judicial review to see if it was formed and, if formed, whether it was reasonably formed. Indeed, the formation of an opinion about fraud or evasion is a jurisdictional fact or 'criterion for liability' in that failure to form it can 'produce an error in the amount of the substantive liability of the taxpayer.'⁶¹ As the Full Federal Court explained in *Anvill Hill Project Watch Association Inc v Minister for Environment and Water Resources*:⁶²

The starting point for ascertaining whether a fact or circumstance is a jurisdictional fact must be the words of the statute, read in their context. Although there is no strict verbal formula, the existence of a jurisdictional fact is frequently signalled by the use of expressions such as 'where "x" exists' ... then a

⁵⁹ Ibid 430, 432.

⁶⁰ Ibid 434 (Latham CJ), 456 (Williams J).

⁶¹ Cf *WR Carpenter (High Court)* (n 51) 203–4 [6] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ), citing *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, 623 (Brennan J, Mason CJ agreeing at 617, Deane J agreeing at 626, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634) ('*Dalco*').

⁶² (2008) 166 FCR 54.

person is empowered or obliged to act or refrain from action. ... Examples of this include 'where in the opinion of the Minister "x" exists' ... Such language often indicates that the Minister *must form the necessary opinion as a condition precedent to the power or duty, although the correctness of this opinion, once formed, is not a matter for review by the Court.*⁶³

Unlike ordinary facts, satisfaction about fraud or evasion is essential to the validity of the exercise of power to make an amended assessment out of time. The Commissioner's task in this regard is not unlike the administrative task under ss 36 and 65 of the *Migration Act 1958* (Cth) ('*Migration Act*'), which requires the decision-maker to be 'satisfied' that a person meets the criteria of eligibility for a protection visa before the visa can be granted. This determination goes to the jurisdiction of the decision-maker and is reviewable under s 75(v). As Gummow J explained in *Minister for Immigration and Multicultural Affairs v Eshetu*:

A determination that the decision-maker is not 'satisfied' that an applicant answers a statutory criterion which must be met before the decision-maker is *empowered or obliged* to confer a statutory privilege or immunity *goes to the jurisdiction of the decision-maker* and is reviewable under s 75(v) of the *Constitution*. This is established by a long line of authority in this Court which proceeds upon the footing that *s 75 is a constitutional grant of jurisdiction to the Court.*⁶⁴

Correspondingly, the 'opinion there has been fraud or evasion' goes to jurisdiction to amend an assessment beyond the two-year statutory amendment period. It is tantamount to a determination by the Commissioner that they are satisfied the taxpayer had the requisite tax avoidance purpose to warrant exercise of the amendment power in item 5 of s 170(1) and is ordinarily susceptible to judicial review within the constitutional jurisdiction of Chapter III courts.

Formation of an opinion by the Commissioner that there has been fraud or evasion is akin to an 'essential factum of liability',⁶⁵ or an 'essential preliminary',⁶⁶ to the exercise of the power to amend an assessment outside the statutory period. It is an integral part of the assessment process on which the

⁶³ Ibid 59 [21] (Tamberlin, Finn and Mansfield JJ) (emphasis added).

⁶⁴ *Eshetu* (n 26) 651 [131] (emphasis added) (citations omitted).

⁶⁵ See *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246, 277 (Isaacs ACJ).

⁶⁶ See *Project Blue Sky* (n 28) 389 [92] (McHugh, Gummow, Kirby and Hayne JJ).

incidence of tax depends.⁶⁷ As Brennan J explained in *Federal Commissioner of Taxation v Dalco*, it ‘creates a condition precedent governing the power to make an amended assessment and ... is not merely part of the due making of the assessment which does not affect substantive liability’.⁶⁸

Since the formation of an opinion is a ‘jurisdictional fact’ which ‘enlivens the power of a decision-maker to exercise a discretion’⁶⁹ — or the Commissioner to make an amended assessment — a court ‘may enter upon and consider the existence of the [jurisdictional] fact itself’⁷⁰ and whether it was reasonably reached.⁷¹ This is why Porter J in *Woods* refused to grant the Commissioner’s application for summary dismissal of the taxpayer’s s 39B application alleging jurisdictional error for failure to form an opinion about fraud or evasion as mandated by item 5 of s 170(1).

Noting both that the existence of an opinion ‘is a pre-condition to an assessment [the absence of which] can be raised in appropriate proceedings as a matter of jurisdiction’,⁷² and extant authorities supporting the taxpayer’s submission that absence of an opinion about the existence of substantive legislative criteria is itself a jurisdictional fact,⁷³ Porter J was satisfied that the taxpayer’s ‘point [was] at least arguable’⁷⁴ and directed the proceedings to be transferred to the Federal Court.

As mentioned, however, the Full Court in *Chhua* disagreed with Porter J, notwithstanding that their Honours found that the conditions of fraud and evasion ‘are matters going to the criteria for substantive liability’.⁷⁵ In the

⁶⁷ See John Azzi, ‘The Binding Rulings Regime and the Assessment Process’ (2018) 45(2) *Australian Bar Review* 163, 174–5 for discussion of a similar discretion conferred on the Commissioner to revise a ruling if satisfied there has been a material change in the taxpayer’s circumstances since the original ruling was issued.

⁶⁸ *Dalco* (n 61) 622 (Mason CJ agreeing at 617, Deane J agreeing at 626, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634). Discussing the assessment power then provided under s 170(2) as the predecessor provision to s 170(1), Brennan J was expounding what was established in the seminal case of *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263 (‘*McAndrew*’).

⁶⁹ See *City of Enfield* (n 25) 148 [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

⁷⁰ Neil Williams and Alan Shearer, ‘Evidence in Public Law Cases’ in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 131, 152, citing *ibid* 146 [22].

⁷¹ See *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1, 10 [34] (Kiefel CJ, Gageler and Keane JJ) (citations omitted) (High Court) (‘*Hossain*’).

⁷² *Woods* (n 12) 13 [48].

⁷³ *Ibid* 15 [56]–[57].

⁷⁴ *Ibid* 15 [59].

⁷⁵ *Chhua* (n 5) [29] (Logan, Moshinsky and Steward JJ). See also *Binetter* (n 41) 551 [91] (Perram and Davies JJ).

seminal case *McAndrew v Federal Commissioner of Taxation* ('*McAndrew*'), the High Court similarly said that, 'the fulfilment of those conditions goes to the power of the [C]ommissioner to impose the liability by amendment'.⁷⁶

Finding that '*Futuris* had exhaustively defined the two jurisdictional errors against which s 175 offers no protection',⁷⁷ their Honours in *Chhua* were satisfied that the alleged failure to form the requisite opinion is 'unlikely to ground sufficiently an allegation of tentativeness or bad faith in the sense required by *Futuris*'.⁷⁸ In this case, the only recourse available to the taxpayer was to seek redress under pt IVC, which together with s 175 of the *1936 Act* and s 350-10 of the *Administration Act*, as mentioned, was said to 'form part of a scheme, one feature of which is to create this constitutionally necessary alternative of recourse to judicial power'.⁷⁹

According to the plurality in *Futuris*, tentative assessments (which '[fail] to specify what is the amount of the taxable income ... and ... the tax payable thereon')⁸⁰ or assessments made in consequence of 'conscious maladministration' 'do not answer the statutory description [of assessment] in s 175'⁸¹ of the *1936 Act*. All other errors in the assessment-making process were found to be insusceptible to judicial review: '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 s 39B of the *Judiciary Act*'.⁸² As a result, there are now at least 12 Federal Court (single judge and Full Court) decisions supporting the proposition that a dissatisfied taxpayer is definitively disabled from challenging the power to make an assessment by alleging jurisdictional error for failure to form the requisite opinion.⁸³

What follows demonstrates that s 175 and s 350-10 do not operate to render failures to comply with the legislative requirements in item 5 of s 170(1) non-jurisdictional errors, notwithstanding the plurality's reasons in *Futuris*.

⁷⁶ *McAndrew* (n 68) 271 (Dixon CJ, McTiernan and Webb JJ).

⁷⁷ *Chhua* (n 5) [14] (Logan, Moshinsky and Steward JJ).

⁷⁸ *Ibid* [38].

⁷⁹ *Ibid* [22].

⁸⁰ *Futuris* (n 4) 163 [50] (Gummow, Hayne, Heydon and Crennan JJ), quoting *Stokes v Federal Commissioner of Taxation* (1996) 32 ATR 500, 506 (Davies J) (Federal Court).

⁸¹ *Futuris* (n 4) 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

⁸² *Ibid* 157 [24].

⁸³ Eleven of these decisions are listed in *Chhua* (n 5) [13] (Logan, Moshinsky and Steward JJ), with the 12th being the decision of Kenny J in *Nguyen v Federal Commissioner of Taxation* (2018) 364 ALR 1 ('*Nguyen*'), which principally concerned the role of the reviewing tribunal in a merits review under pt IVC.

C The Statutory Scheme for Overturning an ‘Excessive’ Assessment

Reading s 175 with s 175A and former s 177(1) of the *1936 Act* (now s 350-10 of the *Administration Act*), the plurality in *Futuris* found that all errors of fact or law in the bona fide exercise of the assessment process do not attract a remedy for jurisdictional error, being errors that ‘occurred within, not beyond, the exercise of the powers of assessment’.⁸⁴

Turning specifically to each provision, it is noted that s 175A(1) of the *1936 Act* provides that ‘[a] taxpayer who is dissatisfied with an assessment made in relation to the taxpayer *may* object against it in the manner set out in pt IVC of the [*Administration Act*].’⁸⁵ Use of the expression ‘may’ in s 175A strongly indicates that the dissatisfied taxpayer is not precluded from also separately and concurrently seeking constitutional writs of relief, a process generally controlled by principles of jurisdictional error. Traditionally, this is what taxpayers tended to do and, it seems, continue to do, albeit the Federal Court is now increasingly dismissing such applications summarily.

Section 175 of the *1936 Act* has been termed a ‘no-invalidity’ clause — said to be ‘at least as threatening to the entrenched minimum provision of judicial review and the rule of law as traditional privative clauses’.⁸⁶ It provides that ‘[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.’

Meanwhile, item 2 of s 350-10 of sch 1 to the *Administration Act* provides that

production of a notice of assessment under a taxation law is conclusive evidence that

- (a) the assessment was properly made; and
- (b) except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment — the amounts and particulars of the assessment are correct.

⁸⁴ *Futuris* (n 4) 161–2 [45] (Gummow, Hayne, Heydon and Crennan JJ).

⁸⁵ *1936 Act* (n 29) s 175A(1) (emphasis added).

⁸⁶ Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21(1) *Public Law Review* 14, 24. See also *Futuris* (n 4) 187–8 [139]–[140] (Kirby J).

According to the High Court in *Richard Walter*, this provision does not purport to oust the jurisdiction of courts to examine the validity of the assessment.⁸⁷ In *Futuris*, the plurality confirmed that

[s 350-10] does not purport to oust the (necessarily federal) jurisdiction conferred upon any other court in matters arising under the Act. To the contrary, it recognises that there may be Pt IVC proceedings and in those proceedings the ‘conclusive evidence’ provision does not apply.⁸⁸

As mentioned however, a dissatisfied taxpayer is unable to complain in pt IVC proceedings about ‘all procedural steps, other than those if any going to substantive liability.’⁸⁹ As Pagone J recently explained in *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation*:

The object of the provisions found in ss 175, 177, and now s 350-10, is to remove the Commissioner’s procedural irregularity from challenge in Pt IVC proceedings and to ensure that the taxpayer’s challenge to an assessment is directed to those substantive integers upon which liability depends. A taxpayer is entitled to establish the absence of facts the existence of which may be necessary for the substantive liability to arise under an assessment.⁹⁰

How the taxpayer establishes the absence of substantive criteria under pt IVC has been the subject of much discourse in both the High Court and intermediate courts. The following discusses the judicial process within pt IVC as it relates to the preconditions of fraud or evasion enlivening the amendment power in item 5 of s 170(1).

D Part IVC: *The Mechanics*

Part IVC operates once the Commissioner has made a decision rejecting the taxpayer’s objection (ie ‘the objection decision’).⁹¹ It allows the Federal Court on appeal to examine whether the conditions for amending the assessment are met.⁹² Alternatively, pt IVC allows for a review on the merits of an objection

⁸⁷ *Richard Walter* (n 45) 184 (Mason CJ), 198 (Brennan J), 223 (Dawson J), 232 (Toohey J). Deane and Gaudron JJ agreed, but only ‘where it is not alleged that the assessment is not bona fide’: at 211. McHugh J was silent on this issue.

⁸⁸ *Futuris* (n 4) 166 [64] (Gummow, Hayne, Heydon and Crennan JJ).

⁸⁹ *George* (n 46) 207 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

⁹⁰ *Chevron* (n 49) 68 [109] (Allsop CJ agreeing at 43 [1], Perram J agreeing at 63 [98]).

⁹¹ *Taxation Administration Act 1953* (Cth) s 14ZZ(1) (*‘Administration Act’*).

⁹² *Ibid* ss 14ZZ(1)(a)(ii), (b).

decision by the AAT to determine whether the relevant conditions did in fact exist.⁹³

In either review or appeal, the taxpayer bears the onus of proving that the assessment is excessive.⁹⁴ And this remains the case irrespective of the position that might otherwise exist under the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act'),⁹⁵ whereby, in a merits review, the Tribunal is obliged to decide whether the Commissioner's decision is the 'correct or preferable' decision.⁹⁶

Specifically, where the amendment power depends on the formation of an opinion by the Commissioner of fraud or evasion, as here, the taxpayer carries the burden of 'disproving fraud or evasion' in a merits review, with the AAT 'able to substitute its opinion for that of the Commissioner'.⁹⁷ Before reconsidering whether, on the evidence before it, there was an avoidance of tax due to fraud or evasion:

[T]he Tribunal must determine whether the taxpayer has discharged the onus of showing that the opinion that there was fraud or evasion should not have been formed ... [and, if] it determines the taxpayer has not discharged the taxpayer's onus, then the taxpayer will not succeed since the taxpayer will not have shown that the assessment is excessive.⁹⁸

In an appeal, on the other hand, '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 ... is vitiated by some error of law'.⁹⁹ As with merits review, however, the taxpayer will not succeed unless the Court is satisfied, on the evidence before it, that the taxpayer has discharged the onus of proof showing there was no avoidance of tax due to fraud or evasion.

⁹³ Ibid s 14ZZ(1)(a)(i).

⁹⁴ Ibid ss 14ZZK(b)(i), 14ZZO(b)(i).

⁹⁵ *Nguyen* (n 83) 30 [126] (Kenny J). Kenny J based this reading of the modifying effect of s 14ZZK on, inter alia, *Rawson Finances Pty Ltd v Federal Commissioner of Taxation* (2013) 296 ALR 307, 337 [90], 344–5 [115]–[116] (Jagot J, Nicholas J agreeing at 351 [142]) (Federal Court).

⁹⁶ *Nguyen* (n 83) 31 [128] (Kenny J).

⁹⁷ *Binetter* (n 41) 552 [93] (Perram and Davies JJ, Siopis J agreeing at 537 [2]).

⁹⁸ *Nguyen* (n 83) 31–2 [130] (Kenny J) (citations omitted).

⁹⁹ *Binetter* (n 41) 552 [93] (Perram and Davies JJ, Siopis J agreeing at 537 [2]), citing *Administrative Appeals Tribunal Act 1975* (Cth) s 43 ('AAT Act').

In *McAndrew*, the High Court relevantly said that ‘the *onus probandi* lies on the taxpayer’ to prove to the reasonable satisfaction of the Court that the taxpayer made ‘full and true disclosure of all material facts’ to refute the implication that the taxpayer had the requisite tax avoidance purpose.¹⁰⁰ By so doing, the taxpayer will be able to show the assessment is invalid for excessiveness:

But bearing in mind that the word ‘excessive’ relates to the amount of the substantive liability it is not difficult to see that it will extend over the area in which the conditions mentioned in s 170(2) find a place ... If [the Commissioner] cannot amend consistently with s 170(2) and so increase the amount of the assessment then it must be excessive.¹⁰¹

Demonstrating the assessment is wrong, or that the Commissioner made a ‘mere error’ in assessing the amount of taxable income on which the assessment is based, or that there was no material upon which the Commissioner could properly conclude the taxpayer was engaged in fraud or evasion, is insufficient to discharge the onus of proof.¹⁰² Rather, the taxpayer must demonstrate on the balance of probabilities ‘what the actual amount should be’.¹⁰³

It is not enough for the taxpayer to simply assert that there is no evidence to establish that the assessment is excessive for want of a tax avoidance purpose:

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. That in my respectful opinion would be to invert the onus of proof.¹⁰⁴

It follows that the taxpayer must positively prove they did not engage in fraud or evasion by, as mentioned, showing they made full and true disclosure of all the material facts. However, this may prove an impossible task where, for example, the assessment is issued after the expiry of the five-year statutory

¹⁰⁰ *McAndrew* (n 68) 269 (Dixon CJ, McTiernan and Webb JJ).

¹⁰¹ *Ibid* 271. Section 170(2) was the predecessor provision to s 170(1) item 5: see above n 68.

¹⁰² *Dalco* (n 61) 625 (Brennan J, Mason CJ agreeing at 617, Deane J agreeing at 626, Dawson J agreeing at 627, Gaudron J agreeing at 634, McHugh J agreeing at 634).

¹⁰³ *Rigoli v Federal Commissioner of Taxation* (2014) 96 ATR 19, 26 [14] (Edmonds, Jessup and McKerracher JJ) (Federal Court) (*‘Rigoli’*).

¹⁰⁴ *McCormack* (n 20) 303 (Gibbs J, Stephen J agreeing at 306, Jacobs J agreeing at 313, Murphy J agreeing at 323) (emphasis added).

period for retaining records,¹⁰⁵ such that the taxpayer no longer holds the necessary evidence ‘to prove the elements of his challenge’.¹⁰⁶

While ordinary principles require an affected person to establish facts which raise a prima facie entitlement to the relief sought, pt IVC requires ‘more than that’.¹⁰⁷ As mentioned, it expressly demands that the taxpayer affirmatively show the assessment is excessive by disproving fraud or evasion. In this regard, it is not enough that the amount of the assessment may not be the true taxable income and tax payable by application of the relevant taxing provisions or that the taxpayer may have given an honest account about the absence of a tax avoidance purpose:

Provided the Commissioner has formed the requisite opinion ... 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.¹⁰⁸

The comparatively more onerous burden of proof makes it practically impossible to resist an assessment for error of law where the Commissioner has taken an extraneous factor into account or has failed to consider a material factor, either of which would ordinarily warrant judicial intervention to set aside the assessment.¹⁰⁹

On the other hand, a complaint of no evidence may be raised in judicial review proceedings to invalidate an exercise of administrative power or support an assertion that the fact-finding process was seriously irrational or illogical, particularly where it concerns jurisdictional facts bearing directly on the authority to exercise power.¹¹⁰ And it is up to courts to decide whether the material supports the no evidence claim: ‘A tribunal that decides a question of fact when there is “no evidence” in support of the finding makes an error of law. What amounts to material that *could* support a factual finding is ultimately a question for judicial decision.’¹¹¹

¹⁰⁵ 1936 Act (n 29) s 262A.

¹⁰⁶ *Rigoli* (n 103) 27 [20] (Edmonds, Jessup and McKerracher JJ).

¹⁰⁷ *McAndrew* (n 68) 271 (Dixon CJ, McTiernan and Webb JJ).

¹⁰⁸ *Nguyen v Federal Commissioner of Taxation* [2016] AATA 1041, 15 [34] (Senior Member O’Loughlin). This finding of the AAT at first instance was upheld on appeal in *Nguyen* (n 83).

¹⁰⁹ *Avon Downs* (n 53) 360 (Dixon J).

¹¹⁰ *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 625 [40] (Gummow ACJ and Kiefel J), 648 [131]–[132] (Crennan and Bell JJ) (‘SZMDS’).

¹¹¹ *Kostas* (n 19) 418 [91] (Hayne, Heydon, Crennan and Kiefel JJ) (emphasis in original) (citations omitted). See also *Bond* (n 19) 355–6 (Mason CJ).

As shown above, however, notwithstanding that there may be no evidence in support of the Commissioner's opinion of fraud or evasion, the Court or the Tribunal will be unable to set aside the assessment for excessiveness where the taxpayer has not discharged the onus of showing the opinion should not have been formed. Upholding an exercise of the amendment power in these circumstances not only undermines legislative changes designed to reduce taxpayer uncertainty by shortening the usual period for amending an assessment and emphasising the need for '*calculated behaviour to evade tax*',¹¹² it also implies the taxpayer engaged in '*unlawful*',¹¹³ blameworthy, or dishonest conduct to conceal its affairs from the Commissioner.

In view of the preceding discussion, it will be shown that precluding judicial review, save for the two jurisdictional errors identified in *Futuris*, renders courts impotent to invalidate an assessment issued out of time that is based on an opinion of fraud or evasion lacking an 'evident and intelligible justification' (which would ordinarily render the decision invalid for legal unreasonableness in judicial review proceedings).¹¹⁴

Citing a number of leading High Court and Federal Court authorities, Edelman J observed in *Hossain v Minister for Immigration and Border Protection* that 'it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power'.¹¹⁵ The plurality, similarly, suggested that formation of the state of satisfaction about jurisdictional facts 'must proceed reasonably and on a correct understanding and application of the applicable law'.¹¹⁶

However, based on the conclusive application of the plurality's decision in *Futuris* by intermediate courts, only tentative assessments, or those made in consequence of an exercise of statutory powers corruptly or with deliberate disregard to the scope of those powers, are not protected by s 175. Understandably, the latter allegations 'are not lightly to be made or upheld'.¹¹⁷

Yet, as will appear from the immediately following discussion, it is unclear why only conscious failure to administer the Act properly falls outside the purview of s 175 of the *1936 Act* when the exercise of any statutory power,

¹¹² *2004 Report* (n 1) 31 (emphasis added).

¹¹³ *R v Meares* (1997) 37 ATR 321, 323 (Gleeson CJ, Sully J agreeing at 325, Bruce J agreeing at 325) (New South Wales Court of Appeal).

¹¹⁴ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

¹¹⁵ *Hossain* (n 71) 18 [67] (Nettle J agreeing at 11 [39]).

¹¹⁶ *Ibid* 10 [34] (Kiefel CJ, Gageler and Keane JJ) (citations omitted).

¹¹⁷ *Futuris* (n 4) 165 [60] (Gummow, Hayne, Heydon and Crennan JJ).

including one encompassing the formation of an opinion, must be carried out 'in good faith and within the scope and for the purposes of the statute'.¹¹⁸

E *Discerning the Privative Scope of s 175*

A conflict appears to arise between the language of ss 170(1) and 175 of the *1936 Act*. On the one hand, the Commissioner is vested with limited power to amend an assessment beyond the prescribed time whilst, by reason of s 175, the assessment is deemed valid notwithstanding that the preconditions to exercise of the amendment power were not satisfied.

That an internal inconsistency arises between s 175 and the general requirements of the Act for the making of an assessment was recognised by some members of the High Court in *Richard Walter*. In that case, the High Court held that assessing more than one taxpayer in relation to the same income did not show that the assessments were not made bona fide.¹¹⁹ Relevantly, Brennan J found that the 'apparent conflict' between the general assessment provisions and s 175 was 'indistinguishable'¹²⁰ from the privative clause considered by the High Court in *R v Hickman; Ex parte Fox* ('*Hickman*').¹²¹

In both cases the legislature manifests an intention that the purported exercise of the power should have the effect of a valid exercise of power notwithstanding non-compliance with the conditions governing that exercise. Thus, when s 175 declares the validity of an assessment to be unaffected by non-compliance with the general provisions of the Act ... that provision is to be given an operation according to its tenor provided the elements of the *Hickman* principle are satisfied.¹²²

In *Hickman*, Dixon J said that Parliament can proscribe judicial review provided the decision given by the public authority was 'a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and

¹¹⁸ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 523 [59] (French CJ) (citations omitted).

¹¹⁹ *Richard Walter* (n 45) 214 (Deane and Gaudron JJ), 217 (Dawson J), 238 (McHugh J).

¹²⁰ *Ibid* 193–4.

¹²¹ (1945) 70 CLR 598 ('*Hickman*').

¹²² *Richard Walter* (n 45) 194–5. See also at 179–80 (Mason CJ), 210–11 (Deane and Gaudron JJ).

that it is reasonably capable of reference to the power given.¹²³ It follows that the protection afforded by a privative clause would be

inapplicable unless there has been ‘an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province.’¹²⁴

Another member of the Court in *Richard Walter*, Dawson J, could not discern any internal inconsistency, ‘apparent or otherwise’,¹²⁵ and was thus ‘unable to discover in [that] case anything which would warrant the application of the *Hickman* formula.’¹²⁶ Examination of his Honour’s reasons, however, reveals that, like Toohey J,¹²⁷ Dawson J was concerned primarily with the privative scope of s 177 rather than s 175, finding the former does not operate to render an assessment ‘conclusive for all purposes’,¹²⁸ but without expounding what those other purposes may be.

Given the preceding discussion, it is strongly arguable that an internal inconsistency exists between s 175 and item 5 of s 170(1) considering the preconditions of fraud or evasion enlivening the amendment power. Construing the interrelation of the provisions in this way recognises that a failure to form the requisite opinion is of ‘sufficient gravity’¹²⁹ to constitute a fundamental failure to address the basal statutory regime.

It follows that the court’s task is to adjust the meaning of the conflicting provisions to preserve the unity of the entire statutory scheme:

Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the

¹²³ *Hickman* (n 121) 615.

¹²⁴ *Plaintiff S157* (n 21) 488 [20] (Gleeson CJ), quoting *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399–400 (Dixon J) (*‘Murray’*). See also *Plaintiff S157* (n 21) 502 [63] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹²⁵ *Richard Walter* (n 45) 223.

¹²⁶ *Ibid* 222.

¹²⁷ *Ibid* 227. According to Toohey J, s 175 ‘[played] no significant part in the disposition of the matter before the Court’.

¹²⁸ *Ibid* 221.

¹²⁹ *Plaintiff S157* (n 21) 516 [110] (Callinan J).

purpose and language of those provisions while maintaining the unity of all the statutory provisions.¹³⁰

Bearing in mind that pt IVC is unconcerned with the due formation of an assessment, it would be a simple matter to adjust the meaning of s 175 by stipulating that it does not apply to validate an assessment made without the requisite state of satisfaction about fraud or evasion. This would appear to accord with Toohey J's construction of s 175 in *Richard Walter*, where his Honour said it 'does not operate where the power of the Commissioner to make an assessment is at issue'.¹³¹ Such a step also draws support from Dawson J's observation that s 177(1) does not render the assessment conclusive for all purposes,¹³² as well as from the comments of Keane CJ and Gordon J in *Federal Commissioner of Taxation v Administrative Appeals Tribunal*,¹³³ to the effect that a decision 'infected with jurisdictional error' (which could include a decision to issue an assessment without formation of the requisite opinion) 'is not a decision at all'.¹³⁴

It is, respectfully, right that s 175 cannot withdraw the court's jurisdiction to review the validity of an assessment in all cases, for otherwise, the tax assessed would be rendered incontestable in view of the 'manifest policy' of pt IVC, whereby the 'taxpayer will be concluded by the assessment and will not be entitled to go behind it for any purpose'.¹³⁵ Given this, there is much force in Toohey J's suggestion that s 175 does not operate where issues of power are concerned.

Reading down s 175 in the manner suggested above enables it and s 170(1) to operate concurrently so as to 'give effect to harmonious goals',¹³⁶ and to protect and uphold the separate but important roles played by pt IVC and judicial review, which are encapsulated in s 175A of the *1936 Act* by use of the word 'may'.¹³⁷ It recognises that the limitations on the exercise of the amend-

¹³⁰ *Project Blue Sky* (n 28) 382 [70] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

¹³¹ *Richard Walter* (n 45) 233 (Toohey J).

¹³² See above n 128 and accompanying text.

¹³³ (2011) 191 FCR 400.

¹³⁴ *Ibid* 405 [22] (Keane CJ and Gordon J).

¹³⁵ *McAndrew* (n 68) 270 (Dixon CJ, McTiernan and Webb JJ), quoted in *Richard Walter* (n 45) 196–7 (Brennan J), 226 (Toohey J), 241 (McHugh J).

¹³⁶ *Project Blue Sky* (n 28) 382 [70] (McHugh, Gummow, Kirby and Hayne JJ).

¹³⁷ Reading down internally inconsistent provisions accords with 'broader principles of statutory interpretation' and the approach taken by English courts: Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 108, citing *Hickman* (n 121)

ment power in item 5 of s 170(1) are an ‘indispensable’¹³⁸ condition to the Commissioner’s jurisdiction to amend the assessment, notwithstanding s 175. It also reflects the well-established proposition that satisfaction of the requirement of fraud or evasion is ‘a matter going to substantive liability’,¹³⁹ where courts, historically, have been willing to ‘examine the due formation of that state of mind on judicial review grounds.’¹⁴⁰

However, agreeing with Dawson J in *Richard Walter* that ‘no reconciliation is called for’,¹⁴¹ the plurality in *Futuris* instead drew on Aickin J’s exposition of the notion of bad faith in *R v Toohey; Ex parte Northern Land Council* (*R v Toohey*)¹⁴² to discern the limits beyond which s 175 affords no protection.¹⁴³ The latter case concerned whether bad faith may be imputed to the Aboriginal Land Commissioner as representative of the Crown in an application under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

What follows explains why *Futuris* ‘should be understood in the context of the case advanced’,¹⁴⁴ and not as conclusive authority for when s 175 will not operate to protect against invalidity, or for the general proposition that pt IVC meets the requirement of the *Constitution* in relation to attacks on the manner in which the power to amend an assessment is exercised.

614–17 (Dixon J), *R v Shoreditch Assessment Committee; Ex parte Morgan* [1910] 2 KB 859, 880 (Lord Farwell), *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 208 (Lord Wilberforce).

¹³⁸ Cf *Plaintiff S157* (n 21) 488 [20] (Gleeson CJ), quoting *Murray* (n 124) 399 (Dixon J).

¹³⁹ *Binetter* (n 41) 551 [91] (Perram and Davies JJ, Siopis J agreeing at 537 [2]). See also *WR Carpenter (Full Federal Court)* (n 48) 11 [43] (Heerey, Stone and Edmonds JJ); *Richard Walter* (n 45) 184 (Mason CJ).

¹⁴⁰ *WR Carpenter (Full Federal Court)* (n 48) 11 [43] (Heerey, Stone and Edmonds JJ).

¹⁴¹ *Richard Walter* (n 45) 223, quoted in *Futuris* (n 4) 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁴² (1981) 151 CLR 170, 232–3 (*R v Toohey*), cited in *Futuris* (n 4) 154 [12] (Gummow, Hayne, Heydon and Crennan JJ). The plurality in *Futuris* ultimately held the Commissioner’s amended assessment valid partly on the basis that ‘there was no absence of bona fides attending [it]’: at 154 [15].

¹⁴³ *R v Toohey* (n 142) 175 (Gibbs CJ).

¹⁴⁴ Chris Peadon, ‘Scope for Future Development of Constitutional and Administrative Law Aspects of Tax Appeals’ (Research Paper, New South Wales Bar Association Constitutional and Administrative Law Section, 27 February 2014) 11 [40].

F *Futuris* and Why Intermediate Courts Should Reconsider
Their Application of It

In *Futuris*, the High Court was concerned with whether the Commissioner ‘acted knowingly in excess of his or her power’.¹⁴⁵ In the Court below, it was found that issuing two assessments to the same taxpayer in respect of the same amount was tantamount to an exercise of the assessment power in bad faith.¹⁴⁶ In upholding the Commissioner’s High Court appeal, the plurality, uncontroversially, acknowledged that ‘in a legal system such as that maintained by the *Constitution* executive or administrative power is not to be exercised for ulterior or improper purposes’.¹⁴⁷

Noting difficulties with ascertaining the meaning intended to be conveyed by the expressions ‘good faith’ and ‘bad faith’, the plurality, as mentioned, turned to Aickin J’s formulation in *R v Toohey*, where his Honour discerned three distinct grounds upon which an exercise of an administrative power may be attacked for want of good faith:

[T]hey are first the existence of a corrupt purpose, second the existence of an improper purpose and third ultra vires in the narrow sense of the act done being beyond the power of the body concerned, *irrespective of the motive or intention of the person or body exercising the power*.¹⁴⁸

According to Aickin J, *Television Corporation Ltd v Commonwealth* (‘*Television Corporation*’)¹⁴⁹ ‘was a case of ultra vires in the narrow sense’.¹⁵⁰ In that case, Kitto J held that the power of the Postmaster-General to impose further conditions upon the plaintiff, which held a license as a commercial television station, was invalidly exercised because the proposed conditions were too uncertain to allow for consideration as to whether they had been complied with.¹⁵¹ *Television Corporation* provides one example, but it is generally agreed that ‘it is not possible to give a comprehensive definition’ of the ‘many ways’

¹⁴⁵ *Futuris* (n 4) 153 [11] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁴⁶ *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257, 273 [53] (Heerey, Stone and Edwards JJ) (‘*Futuris* (Full Federal Court)’).

¹⁴⁷ *Futuris* (n 4) 153–4 [11] (Gummow, Hayne, Heydon and Crennan JJ) (citations omitted).

¹⁴⁸ *R v Toohey* (n 142) 232–3 (emphasis added). Nowadays, ‘most judgments ... use ultra vires and jurisdictional error interchangeably’: Aronson and Groves (n 28) 15 [1.100].

¹⁴⁹ (1963) 109 CLR 59 (‘*Television Corporation*’).

¹⁵⁰ *R v Toohey* (n 142) 234.

¹⁵¹ *Television Corporation* (n 149) 70.

in which an administrative decision may be made in bad faith.¹⁵² Suffice to note that mere ‘procedural blunders along the way will usually not be sufficient to base a finding of bad faith’.¹⁵³

Regardless of the foregoing, a softer sense of bad faith did not arise in *Futuris*. As the plurality noted:

[I]t is apparent from the terms in which the Full Court expressed its reasons that the failure attributed to the Commissioner to exercise bona fide the power of assessment was not designed to identify ‘good faith’ in any such softer sense.¹⁵⁴

Rather, the plurality was concerned with the first two senses of bad faith discerned by Aickin J. These equate the absence of good faith with, respectively, ‘the existence of a corrupt purpose ... identified [with] the doing of an act for personal gain ... [or] to indicate the presence of an improper purpose outside the scope of the power but without any endeavour to obtain personal gain’.¹⁵⁵ Commonly, this requires establishment of deliberate error in the assessment-making process, whereby ‘deliberate failures to administer the law according to its terms ... manifest jurisdictional error and attract the jurisdiction to issue the constitutional writs’.¹⁵⁶

Accordingly, there was no need for the plurality 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*, especially considering that *Futuris* concerned the validity of an assessment and not, as here, whether the power to issue an amended assessment outside the amendment period was validly exercised. The difference can be significant, as Toohey J suggested in *Richard Walter*.¹⁵⁷

¹⁵² *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749, 756 [43] (Tamberlin, Mansfield and Jacobson JJ) (Federal Court), quoted in *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* [2018] NSWCA 276, [26] (Basten JA, Leeming JA agreeing at [55], White JA agreeing at [56]) (‘*Goodwin Street Developments*’).

¹⁵³ *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8] (Heerey and Kiefel JJ), quoted in *Goodwin Street Developments* (n 152) [27] (Basten JA, Leeming JA agreeing at [55], White JA agreeing at [56]).

¹⁵⁴ *Futuris* (n 4) 154 [13] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁵⁵ *Ibid* 154 [12].

¹⁵⁶ *Ibid* 165 [55]–[56].

¹⁵⁷ *Richard Walter* (n 45) 226–7.

Yet, without ascribing any importance to the different facts and circumstances considered in *Futuris*, or attempting to resolve the internal inconsistency identified above, the Full Federal Court in *Chhua* summarily dismissed the taxpayer's judicial review application.¹⁵⁸ There was also no attempt by their Honours in that case to reconcile the statement from the High Court decision in *WR Carpenter (High Court)* confirming judicial review in the *Avon Downs* sense where formation of an opinion is a 'criterion of liability'.¹⁵⁹

In *Binetter v Federal Commissioner of Taxation* ('*Binetter*'), assessments were issued out of time on the basis that the Commissioner was of the opinion that there had been an avoidance of tax due to fraud or evasion.¹⁶⁰ In dismissing the taxpayer's appeal, the Full Federal Court confirmed, as mentioned, that the taxpayer bore the onus of proving the absence of fraud or evasion but that the Court would nevertheless intervene where the Commissioner's opinion of fraud or evasion is vitiated by some error of law.¹⁶¹ Amongst other things, the Court drew on Dixon J's famous dicta in *Avon Downs*,¹⁶² which courts have relied on in defining the scope of judicial review for jurisdictional error where 'statutory provisions which operate upon the state of satisfaction, or lack of satisfaction, of an administrative decision-maker' are concerned.¹⁶³

Curiously, the Full Court in *Chhua* relied on *Binetter*, albeit for the authority that 'if it were the case that no authorised officer of the Commissioner had formed the requisite opinion of fraud or evasion, ... [this] could be a matter which might be raised in a tax appeal instituted under Pt IVC'.¹⁶⁴ It is unclear how their Honours in *Chhua* could reach such a conclusion when the High Court in *George v Federal Commissioner of Taxation* had earlier held that a similar complaint about the right person not forming the necessary opinion was merely a procedural irregularity and thus unsusceptible to attack in pt IVC proceedings.¹⁶⁵

Regardless, if the Full Court in *Chhua* was right to proscribe judicial review for all but the two errors identified in *Futuris*, then there would be no

¹⁵⁸ *Chhua* (n 5) [41] (Logan, Moshinsky and Steward JJ).

¹⁵⁹ *WR Carpenter (High Court)* (n 51) 205 [10] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

¹⁶⁰ *Binetter* (n 41) 548 [73]–[74] (Perram and Davies JJ).

¹⁶¹ *Ibid* 552 [93] (Siopis J agreeing at 537 [2]).

¹⁶² *Ibid*, citing *Avon Downs* (n 53) 360 (Dixon J).

¹⁶³ See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1168 [8] (Gleeson CJ) (High Court).

¹⁶⁴ See *Chhua* (n 5) [38] (Logan, Moshinsky and Steward JJ).

¹⁶⁵ *George* (n 46) 203–4, 206–7 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ).

scope to overturn an assessment for failure to reasonably reach the requisite opinion or for exercising the amendment power for an ulterior purpose (eg to get the assessed party to divulge information about a related third party in defence of its pt IVC proceedings). Both instances could, arguably, amount to bad faith in the narrow and technical sense but not ‘actual bad faith’, which is required to establish conscious maladministration.¹⁶⁶

Ultimately, that positive proof is required to show an assessment is excessive, and the lack of any obligation to retain documents beyond a defined period, means that — unless a taxpayer is exceptionally asserting an assessment is vitiated by one of the two jurisdictional errors identified in *Futuris* — they will be unable to resist the assessment by alleging the criteria of liability were not satisfied in their case. Of course, there may be some who can produce evidence showing they did not engage in fraud or evasion, but this would be highly unlikely and/or unusual, as gleaned from the outcome in decisions such as *Binetter*,¹⁶⁷ *Nguyen*,¹⁶⁸ *Chhua*,¹⁶⁹ and *Hii v Federal Commissioner of Taxation*.¹⁷⁰

In the majority of cases where taxpayers will not have the necessary evidence to show an assessment is excessive for want of fraud or evasion, the high evidentiary burden in pt IVC operates to render the jurisdictional fact of fraud or evasion ‘otiose’¹⁷¹ or ‘nugatory’¹⁷² and the Commissioner’s discretionary power to amend an assessment virtually unbounded given the definitive narrowing of jurisdictional error by reference to the two errors identified in *Futuris*. This approach effectively denies the taxpayer the right to resist an assessment by asserting the criteria of liability were not satisfied in its case. Such an unsatisfactory outcome explains why I suggested elsewhere that the way the Federal Court has applied *Futuris* may not be ‘ultimately sustainable’.¹⁷³ As explained in *WR Carpenter (High Court)*:

¹⁶⁶ See *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412, 433 [76] (Keane CJ, Dowsett and Reeves JJ).

¹⁶⁷ *Binetter* (n 41).

¹⁶⁸ *Nguyen* (n 83).

¹⁶⁹ *Chhua* (n 5).

¹⁷⁰ (2015) 230 FCR 385.

¹⁷¹ Cf *Roads and Maritime Services v Desane Properties Pty Ltd* (2018) 358 ALR 758, 829–30 [211]–[212] (Bathurst CJ, Ward and Payne JJA) (New South Wales Court of Appeal).

¹⁷² Cf *Ross v The Queen* (1979) 141 CLR 432, 440 (Gibbs J, Barwick CJ agreeing at 433, Stephen J agreeing at 442, Mason J agreeing at 442, Aickin J agreeing at 442).

¹⁷³ *Azzi*, ‘Practical Injustice’ (n 3) 1121.

[T]he application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny the taxpayer ‘all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case.’¹⁷⁴

As shown, in most cases courts will be unable to safeguard against the arbitrary application of the criteria for liability. This, in turn, casts serious doubt on whether recourse to judicial process under pt IVC does in fact meet ‘the requirement of the *Constitution* that a tax may not be made incontestable’¹⁷⁵ or whether it is a ‘constitutionally necessary alternative of recourse to judicial power’ in all cases, as suggested by the Full Court in *Chhua*.¹⁷⁶

According to their Honours in *Chhua*, there are two reasons why the taxpayer’s ‘grossly prolix’¹⁷⁷ application asserting jurisdictional error on the basis that the Commissioner could not have formed the requisite opinion in circumstances where he did not ‘take into account certain relevant matters and had also taken into account irrelevant considerations’¹⁷⁸ failed:

First, even if ss 175 and 350-10 did not extend to the formation of an opinion about fraud or evasion, that would be of no moment, as the validity of the resulting assessment would remain protected by those provisions, save for the two jurisdictional errors identified in *Futuris*. Secondly, and more importantly, the conditions upon which s 170 of the 1936 *Act* turns, are matters going to the criteria for substantive liability which are capable of being challenged in a tax appeal under Pt IVC of the [*Administration Act*].¹⁷⁹

The fact that the preconditions of fraud or evasion are matters capable of being challenged in pt IVC proceedings should not preclude the taxpayer from also seeking discretionary relief for a lack of bona fides. In these circumstances, the pendency of pt IVC proceedings ‘would normally mean no declaratory relief should be made in relation to the ... [a]ssessment’.¹⁸⁰ Arguably, therefore, the Full Court in *Chhua* should have merely stayed the

¹⁷⁴ *WR Carpenter (High Court)* (n 51) 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted).

¹⁷⁵ *Futuris* (n 4) 153 [9] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁷⁶ *Chhua* (n 5) [22] (Logan, Moshinsky and Steward JJ).

¹⁷⁷ *Ibid* [7].

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid* [29].

¹⁸⁰ *Mount Pritchard & District Community Club Ltd v Federal Commissioner of Taxation* (2011) 196 FCR 549, 559 [63] (Edmonds, Middleton and Jagot JJ), citing *Futuris* (n 4) 162 [48] (Gummow, Hayne, Heydon and Crennan JJ).

judicial review proceedings pending the outcome of the pt IVC proceedings. This would be a preferable course of action considering the impossibly high evidentiary burden imposed by pt IVC.

As will become clearer, suggestions that the plurality in *Futuris* was ‘surely right ... because the tax laws give very generous appeal rights in lieu of judicial review’,¹⁸¹ or that pt IVC provides ‘a comprehensive appeals mechanism, which include[s] both merits and judicial review’,¹⁸² or that it is ‘capable of correcting ... jurisdictional error’¹⁸³ or addresses ‘residual concerns about accountability’,¹⁸⁴ respectfully, fail to appreciate the rights-protective effect of s 75(v) and the minimum provision of judicial review it entrenches, which enables courts to discern and declare the express and implied limits of the law without the need for evidence affirmatively showing the assessment was ‘excessive’ for want of criteria for liability.¹⁸⁵

Precluding judicial review in the manner suggested by the Federal Court, following *Futuris*, is also particularly harsh considering there is no scope to invalidate an exercise of the amendment power under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘ADJR Act’) in view of para (e) of sch 1, which expressly excludes from review decisions in administration of assessment provisions. Despite suggestions to the contrary in *Richard Walter*,¹⁸⁶ according to the plurality in *Futuris*, there is also ‘no scope ... for the operation of the so-called *Hickman* principle.’¹⁸⁷ It is curious that the plurality in *Futuris* drew support for this latter proposition from Dawson J’s comments in *Richard Walter* without advertent to or seeking to resolve their apparent inconsistency with the reasons of other members of the Court in that case.

Rejecting the ‘doctrinal status’ conferred by Brennan J in *Richard Walter* on the *Hickman* principle, the plurality in *Futuris* simply stated that ‘*Plaintiff S157/2002* has placed [it] in perspective.’¹⁸⁸ Without more, however, it is

¹⁸¹ Mark Aronson, ‘Commentary on “The Entrenched Minimum Provision of Judicial Review and the Rule of Law” by Leighton McDonald’ (2010) 21(1) *Public Law Review* 35, 38–9.

¹⁸² Janina Boughey and Greg Weeks, ‘Government Accountability as a “Constitutional Value”’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 115.

¹⁸³ Chief Justice JJ Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21(2) *Public Law Review* 77, 91.

¹⁸⁴ James Stellios, ‘Federal Jurisdiction’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 879, 891.

¹⁸⁵ See Stephenson (n 14) 905.

¹⁸⁶ See above nn 120–2 and accompanying text.

¹⁸⁷ *Futuris* (n 4) 167 [68] (Gummow, Hayne, Heydon and Crennan JJ) (citations omitted).

¹⁸⁸ *Ibid* 168 [70].

difficult to accept that Brennan J was wrong to rely on *Hickman*. In *Graham v Minister for Immigration and Border Protection*,¹⁸⁹ Edelman J relevantly observed that ‘this Court in *Plaintiff S157/2002* recognised that the roots of the *Hickman* principle, which gave substantial but not absolute effect to a privative clause, were longstanding and predated Federation’.¹⁹⁰

It is therefore apocryphal for the Federal Court to conclusively apply the plurality’s reasoning in *Futuris* given the uncertainty surrounding the privative scope of s 175 and whether it protects against bad faith in the narrow sense. Until these issues have been resolved, intermediate courts should, respectfully, resist the current practice of summarily dismissing judicial review applications which do not allege either of the two jurisdictional errors identified in *Futuris*.

The following discussion explains why confining the scope for judicial review to the two jurisdictional errors identified in *Futuris* is repugnant to the rule of law and stultifies the exercise of federal judicial power, denying taxpayers the opportunity to set aside an assessment purportedly made beyond power.

III THE CONSTITUTIONAL ARGUMENT

A Judicial Review Is Integral to the Rule of Law

The rule of law is an inviolable feature of the separation of powers doctrine, according to which the powers of the three branches of government ‘are derived from, distributed and limited by’ the *Constitution*.¹⁹¹ In *Australian Communist Party v Commonwealth*, Dixon J famously said the ‘rule of law forms an assumption’ upon which the *Constitution* is framed.¹⁹²

Notwithstanding this, the full implications of the rule of law are ‘complex and contested’.¹⁹³ Some academics advocating a ‘thick’ or substantive notion focus on what is needed to ensure a legal system is ‘morally legitimate’, whilst the proponents of the ‘thin’ version focus upon the requirements to ensure the law is ‘calculable, or capable of guiding human conduct’.¹⁹⁴ It is said that

¹⁸⁹ (2017) 263 CLR 1 (*Graham*).

¹⁹⁰ *Ibid* 54 [120].

¹⁹¹ Lisa Burton Crawford, ‘The Rule of Law’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 77, 88.

¹⁹² *Communist Party Case* (n 18) 193.

¹⁹³ Crawford, ‘The Rule of Law’ (n 191) 81.

¹⁹⁴ *Ibid* 79 (citations omitted).

‘[m]ore precise definition or description of the rule of law, if possible, is neither necessary nor desirable.’¹⁹⁵

For present purposes, it suffices to note that the rule of law conception frequently cited by the High Court

encompass[es] the notions that the executive and legislature are bound by the *Constitution* and that it is the Court’s role to enforce the *Constitution* against other arms of government ... [and that] executive action cannot be completely shielded from judicial review.¹⁹⁶

According to the Administrative Review Council, the rule of law is one of the ‘public law values’ underlying judicial review, the others being the ‘safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation.’¹⁹⁷

Section 75(v) of the *Constitution* (and by corollary s 39B(1) of the *Judiciary Act*) constitutes ‘textual reinforcement’¹⁹⁸ or ‘a basic element’¹⁹⁹ of the rule of law. It serves a ‘double function’²⁰⁰ which: (i) confers power on the Court to grant the constitutional writs of mandamus and prohibition, including the ancillary remedy of certiorari²⁰¹ (which provides two principal grounds of relief for ‘error of law on the face of the record’ and ‘jurisdictional error’) in relation to a ‘matter’;²⁰² and (ii) provides litigants with the means to obtain such a remedy. This, in turn, justifies and sustains judicial review.²⁰³

It follows that judicial review is integral to the rule of law, which the *Constitution* ‘underscores’²⁰⁴ and which ‘derives from the constitutional role of the

¹⁹⁵ Kenneth Hayne, ‘Rule of Law’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 167, 170.

¹⁹⁶ Stephenson (n 14) 926.

¹⁹⁷ Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney-General* (Report No 47, 20 April 2006) vii.

¹⁹⁸ *Plaintiff S157* (n 21) 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁹⁹ *Ibid* 482 [5] (Gleeson CJ).

²⁰⁰ See Lee Aitken, ‘Jurisdiction, Liability and “Double Function” Legislation’ (1990) 19(1) *Federal Law Review* 31.

²⁰¹ *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [64] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (*‘Bodruddaza’*).

²⁰² *Kirk* (n 15) 567 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). These are ‘error of law on the face of the record’ and ‘jurisdictional error’.

²⁰³ Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21(3) *Australian Bar Review* 279, 280.

²⁰⁴ Administrative Review Council, ‘The Scope of Judicial Review’ (Discussion Paper, 2003) 24 [2.4].

judiciary²⁰⁵ to '[declare] and [enforce] the limits of the power conferred by statute upon administrative decision-makers'.²⁰⁶ It is particularly pertinent in relation to a notice of assessment, the service of which crystallises the taxpayer's liability and makes the tax assessed due and payable. In the words of Brennan J:

As the process of assessment in exercise of the Commissioner's statutory power is apt to affect the rights and liabilities of a taxpayer in these ways, an exercise of those powers is amenable to judicial review by this court under s 75 of the *Constitution*. The jurisdiction of this Court [to undertake judicial review] cannot be excluded by any law enacted by the Parliament.²⁰⁷

As a 'constitutional grant of jurisdiction', Parliament cannot oust the jurisdiction conferred on the High Court by s 75(v) by '[withdrawing] any matter from the grant of jurisdiction or ... abrogat[ing] or qualify[ing] the grant'.²⁰⁸ And unless repealed or amended by a later statute, it cannot likewise abrogate or qualify a grant of jurisdiction under s 39B(1) of the *Judiciary Act*, which 'vests in the Federal Court the entirety of the jurisdiction which s 75(v) confers on the High Court'.²⁰⁹ However, Parliament can limit the scope for judicial review by defining the content of the law amenable to the Court's original jurisdiction, which is 'a source of federal jurisdiction rather than of substantive rights'.²¹⁰ 'Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted'.²¹¹

Indeed, 'Parliament can, if it chooses, confer extremely broad ... (though probably not unlimited) powers on the executive'.²¹² This includes the power to make an administrative decision without affording the affected person

²⁰⁵ Gageler (n 203) 291.

²⁰⁶ *Bodruddaza* (n 201) 668 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ), citing *City of Enfield* (n 25) 152–3 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also *Graham* (n 189) 360 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

²⁰⁷ *Richard Walter* (n 45) 192 (citations omitted).

²⁰⁸ *Ibid* 179 (Mason CJ) (citations omitted).

²⁰⁹ *Ibid* 181.

²¹⁰ *Ibid* 232 (Toohey J), citing *Werrin v Commonwealth* (1938) 59 CLR 150, 167 (Dixon J), *Maguire v Simpson* (1977) 139 CLR 362, 404 (Jacobs J).

²¹¹ *Plaintiff S157* (n 21) 483 [5] (Gleeson CJ). See also at 513–14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham* (n 190) 360 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

²¹² Boughey and Weeks (n 182) 107.

natural justice,²¹³ irrespective of whether this is implied at common law or from a presumption of statutory interpretation.²¹⁴ Irrespectively, parliamentary intention must be ‘clearly manifested by unmistakable and unambiguous language.’²¹⁵

In any case, s 350-10 of the *Administration Act* does not deprive the Federal Court of the jurisdiction which s 39B(1) confers but rather ‘constrains the jurisdiction of any court to inquire into the making of an assessment’²¹⁶ unless ‘an appropriate document is not produced.’²¹⁷ A similar conclusion was reached by the plurality in *Futuris* in relation to s 175, where their Honours said: ‘The section operates only where there has been what answers the statutory description of an “assessment”.’²¹⁸

As shown above, however, it is unclear whether and, if so, why the capacity of courts to examine the due making of an assessment should depend on whether there are ‘allegations of corruption and other deliberate maladministration’²¹⁹ rather than by reference to the *Hickman* principle, as suggested by some members of the Court in *Richard Walter*.²²⁰

Arguably, construing s 175 by reference to the *Hickman* principle rather than the deliberateness of the procedural error would prevent the validity of an assessment being impugned for mere defect or procedural irregularity, but without depriving courts of their jurisdiction to examine whether the purported assessment: (i) is a bona fide attempt by the Commissioner to exercise the amendment power (which extends to an examination of subjective motivation);²²¹ (ii) relates to the subject matter of the Act; and (iii) is reasonably capable of reference to those powers.

The immediately preceding observation is consonant with Toohey J’s statement in *Richard Walter* expounding legislative capacity where, as

²¹³ Cf *Abebe v Commonwealth* (1999) 197 CLR 510, 583–4 [208]–[210] (Kirby J) (*‘Abebe’*); *Aala* (n 25) 137 [151] (Kirby J).

²¹⁴ See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 83–4 [90] (Gaudron J).

²¹⁵ *Plaintiff S157* (n 21) 492 [30] (Gleeson CJ).

²¹⁶ *Richard Walter* (n 45) 232 (Toohey J). Dawson J spoke in somewhat similar terms at 222–3: see *Futuris* (n 4) 167 n 94 (Gummow, Hayne, Heydon and Crennan JJ).

²¹⁷ *FJ Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360, 376 (Mason and Wilson JJ).

²¹⁸ *Futuris* (n 4) 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

²¹⁹ *Ibid* 167 [66].

²²⁰ *Richard Walter* (n 45) 194–5 (Brennan J), 179–80 (Mason CJ), 210–11 (Deane and Gaudron JJ). See above nn 120–2 and accompanying text.

²²¹ See *ibid* 211 n 139 (Deane and Gaudron JJ).

mentioned, his Honour found that attacks on the power to make an assessment fall outside the ambit of s 175 and, by corollary, unsuitable for proceedings under pt IVC.²²² As mentioned, however, the Full Court in *Chhua* said that nothing turned on this distinction. As their Honours explained, failure to form the requisite opinion is unlikely to constitute jurisdictional error in the sense contemplated by the plurality in *Futuris*²²³ with pt IVC, in any case, capable of invalidating the assessment where the taxpayer can positively prove the absence of a tax avoidance purpose.

What follows explains further why the judicial process in pt IVC does not meet the requirement of the *Constitution* in relation to attacks on the formation of an opinion, and that it is repugnant to the rule of law for the Federal Court to continue to confine taxpayers to pt IVC proceedings where the power of the Commissioner to amend an assessment is at issue.

B *Judicial Review of the Commissioner's State of Satisfaction about Fraud or Evasion*

The principle governing judicial review where the jurisdictional fact is a state of satisfaction or opinion may be 'traced back' to Latham CJ's decision in *Connell*.²²⁴ As appeared, courts must intervene where an administrative decision-maker has failed to act in good faith, or that satisfaction about the existence of matters on which exercise of power depends was not reasonably reached.²²⁵ In the words of Gibbs J in *Buck v Bavone*:²²⁶

[T]he authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it.²²⁷

²²² Ibid 233.

²²³ *Chhua* (n 5) [38] (Logan, Moshinsky and Steward JJ).

²²⁴ *Commissioner of Police (NSW) v Ryan* (2007) 70 NSWLR 73, 85 [47] (Basten JA, Spigelman CJ agreeing at 75 [1], Santow JA agreeing at 75 [2]).

²²⁵ See above nn 55–6 and accompanying text.

²²⁶ (1976) 135 CLR 110.

²²⁷ Ibid 118.

The above statement that courts will intervene where no reasonable authority could have arrived at the decision is based on the principle from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.²²⁸ Modern law in Australia, however, has now ‘well and truly departed’²²⁹ from this overly stringent test. Legally unreasonable decisions are no longer limited to those which are ‘manifestly unreasonable’.²³⁰

Now, the unreasonableness test can be outcome-focused and has been described as providing a ‘safety net that sets the minimum standard expected of a decision maker’.²³¹ To this end, a legal presumption of reasonableness applies to regulate the exercise of statutory discretion:

[T]here is a legal presumption that a discretionary power, statutorily conferred, must be exercised reasonably in the legal sense of that word. That is, when something is to be done within the discretion of the decision-maker, it is to be done according to the rule of reason and justice; it is to be done according to law.²³²

Legal unreasonableness may be established by the making of ‘[u]nwarranted assumptions’²³³ when the decision-maker forms an opinion about a jurisdictional fact. In these circumstances, the decision-maker is deemed to have failed to exercise jurisdiction, or else their finding is regarded as ‘illogical, irrational or not founded on any probative evidence’.²³⁴ ‘a decision might be said to be illogical or irrational if, for example, a decision was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn’.²³⁵

²²⁸ [1948] 1 KB 223.

²²⁹ *EDK17 v Minister for Immigration and Border Protection* [2018] FCA 1258, [12] (Derrington J).

²³⁰ *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408, 428 [82] (Nettle and Gordon JJ) (High Court) (*‘SZVFW’*).

²³¹ Grant Hooper, ‘*Minister for Immigration and Border Protection v SZVFW*: The High Court on Unreasonableness and the Role of Judicial Review’, *Australian Public Law* (Blog Post, 5 September 2018) <<https://auspublaw.org/2018/09/minister-v-szvw-the-high-court-on-unreasonableness-and-the-role-of-judicial-review/>>, archived at <<https://perma.cc/ZXP3-NDJG>>, citing *SZVFW* (n 230) 421 [52] (Gageler J).

²³² *SZVFW* (n 230) 430 [89] (Nettle and Gordon JJ, Kiefel CJ agreeing at 410 [4], Gageler J agreeing at 422 [53], Edelman J agreeing at 436 [131]).

²³³ See *BZD17 v Minister for Immigration and Border Protection* (2018) 161 ALD 441, 450 [36] (Perram, Perry and O’Callaghan JJ) (Federal Court) (*‘BZD17’*).

²³⁴ *Ibid.*

²³⁵ *Ibid* 449 [34], citing *SZMDS* (n 110) 649–50 [135] (Crennan and Bell JJ).

Nevertheless, the safety net of legal unreasonableness could only feasibly be invoked through the court's constitutional jurisdiction given the manifest policy of pt IVC and its focus on outcomes rather than procedure. To this end, the court's task would be to review the process by which the Commissioner reached the requisite opinion to discern an evident and intelligible justification for it. This task differs fundamentally from statutory judicial review, which can only be invoked where the taxpayer can produce evidence purporting to refute a tax avoidance purpose to, in turn, prove the assessment was excessive. No such requirement exists for discretionary relief, and this important fact should not be overlooked, despite the fact that evidence to establish an excessive assessment can also be used to establish jurisdictional error.

Most of the authorities expounding legal unreasonableness and irrationality relate to applications arising under the *Migration Act*. These cases also confirm that the right of a person adversely affected by an administrative decision to petition the court to overturn an unfair decision (in a practical sense)²³⁶ is implied in the *Constitution* and is said to preserve the separation of powers, albeit it is a 'controversial [feature] ... of Australia's constitutional landscape'.²³⁷

Regardless, the Full Court in *Chhua* disapproved of reliance on migration cases because, unlike the *1936 Act*, 'Parliament intended that the rules and procedures set out in the *Migration Act* must be complied with'.²³⁸ True as that may be, it would nevertheless be a mistake to ignore the migration cases. They provide important guiding principles expounding the limits of administrative power generally and what courts must do to give force to the 'animating principle' from *City of Enfield*, against which the discretion with respect to 'all remedies' in s 75(v) of the *Constitution* (and, by inference, s 39B(1) of the *Judiciary Act*) must be exercised²³⁹ to ensure the executive always acts within the limits of the law.

In any case, whether Parliament could validly proscribe judicial review of the amendment power for legal unreasonableness is not currently of relevance. Suffice it to note that there is no clear language in the statute authoris-

²³⁶ In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, Gleeson CJ expounded the concept of 'practical injustice': at 13–14 [37]–[38]. This was said to be a 'concern of the law' by the plurality in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ).

²³⁷ Stephenson (n 14) 915.

²³⁸ *Chhua* (n 5) [20]–[21] (Logan, Moshinsky and Steward JJ).

²³⁹ *Aala* (n 25) 107 [55] (Gaudron and Gummow JJ).

ing the Commissioner to act unreasonably when making an amended assessment under s 170(1) of the *1936 Act*. And if there was, it would surely be struck down as falling foul of the principle expressed by Professor Wade and adopted by Brennan J in *Attorney-General (NSW) v Quin*,²⁴⁰ which recognises that '[w]ithin the bounds of legal reasonableness ... the deciding authority has genuinely free discretion,²⁴¹ or otherwise offending the ability of courts to enforce the legislated limits of the Commissioner's power. To fulfil this constitutional function

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.²⁴²

It follows that by continuing to conclusively interpret the plurality's decision in *Futuris* as foreclosing the grounds for jurisdictional error, courts are impermissibly, if inadvertently, constraining their capacity and duty to discern and declare the limits of the amendment power. This is particularly so given the impracticalities of showing that an assessment is excessive under pt IVC.

Indeed, whilst 'remedies for which s 75(v) provides do not lie as of right'²⁴³ — with courts directed to 'refuse declaratory relief' (including prohibition and certiorari) pending the outcome of pt IVC proceedings²⁴⁴ — this should not preclude taxpayers from accessing remedies within a court's original jurisdiction. After all, it is incumbent on courts to respect and protect the right of affected persons to invoke the original jurisdiction of the court, albeit as a jurisdiction of last resort, to ensure Commonwealth officers are always acting within their authority.

Whilst it may be preferable that dissatisfied taxpayers pursue their statutory rights under pt IVC ahead of discretionary remedies, 'the case for discre-

²⁴⁰ (1990) 170 CLR 1 ('*Quin*').

²⁴¹ *Ibid* 36, quoting William Wade, *Administrative Law* (Oxford University Press, 6th ed, 1988) 407. Professor Wade's principle and Brennan J's adoption of it in *Quin* (n 240) was also adopted by Gageler J in *SZVFW* (n 230) 421 [51]–[52] (Nettle and Gordon JJ agreeing at 431 [97]).

²⁴² *Graham* (n 189) 361 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added).

²⁴³ *Glennan v Federal Commissioner of Taxation* (2003) 77 ALJR 1195, 1198 [17] (Gummow, Hayne and Callinan JJ) (High Court).

²⁴⁴ *Futuris* (n 4) 162 [48] (Gummow, Hayne, Heydon and Crennan JJ). See above n 180 and accompanying text.

tionary refusal is weakened' where the grounds of appeal are 'significantly restricted' and leave is not required to proceed with a judicial review application.²⁴⁵

It follows that courts should not summarily dismiss discretionary relief applications where an adversely affected taxpayer complains that the Commissioner erred in reaching a state of satisfaction about fraud or evasion, but has no evidence to affirmatively prove the assessment was excessive. It is particularly important that adversely affected taxpayers are not prematurely precluded from seeking constitutional writs in relation to an exercise of the amendment power given the constitutional function of courts to 'provide whatever remedies are available and appropriate' to preserve the rule of law.²⁴⁶

Indeed, without judicial review, the taxpayer has no way to overturn an assessment purportedly made beyond power given the impracticalities of the onerous evidentiary burden in pt IVC. In these circumstances, the rule of law would be 'diminished' to the extent the taxpayer would not have access to justice²⁴⁷ as there is no redress under pt IVC where the Commissioner has either not reached the requisite state of satisfaction and/or there is no tangible evidence to justify the opinion that the taxpayer has engaged in fraud or evasion. And unless exceptionally alleging the amendment power was exercised with 'wilful blindness' to the requirements of the law,²⁴⁸ neither can the taxpayer seek to invalidate the assessment for jurisdictional error under s 75(v) or s 39B.

It follows that pt IVC does not provide 'a more convenient and satisfactory remedy'²⁴⁹ than that available under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* in relation to attacks on formation of opinion. If anything, it creates an inferior and restrictive alternative to judicial review, operating with the *Futuris* limitation to make tax practically incontestable. Moreover, the suggestion that pt IVC creates a 'constitutionally necessary alternative of recourse to judicial power'²⁵⁰ ignores the practical operation and effect of the statutory scheme, and the reality that limiting discretionary relief in the

²⁴⁵ Aronson and Groves (n 28) 801–2 [12.270].

²⁴⁶ *City of Enfield* (n 25) 157 [56] (Gaudron J), quoted in *Aala* (n 25) 107–8 [55] (Gaudron and Gummow JJ).

²⁴⁷ Cf Hayne (n 195) 188.

²⁴⁸ See *Roberts* (n 5) 287 [28] (Besanko J).

²⁴⁹ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ).

²⁵⁰ *Chhua* (n 5) [22] (Logan, Moshinsky and Steward JJ). See above n 176 and accompanying text.

manner suggested in *Futuris* incapacitates courts from discharging their constitutional function to uphold the rule of law and ensure accountability in all cases.

The immediately following discussion builds on the preceding discussion by expounding the judicial power of the Commonwealth and why the plurality's decision in *Futuris* stultifies it.

C *Federal Judicial Power*

Section 71 of the *Constitution* relevantly provides: 'The judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates.' This provision speaks of the 'function of a court rather than the law which [it] is to apply in exercise of its function.'²⁵¹ After reviewing a number of relevant authorities, I observed elsewhere that judicial power

centrally involves 'a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy' by 'application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process', including 'exercise, where appropriate, of judicial discretion' and incidental powers.²⁵²

Incidental powers, in turn, include

'[e]verything necessary to the effective exercise of a power'; 'everything that is reasonably necessary to carry [the power] into effect'; a provision that is 'conducive to the success of the legislation'; a 'choice of means to an authorised end [that] was to complement, and *not to supplement*, the power granted' ...²⁵³

However, 'legislative attempts to regulate the way in which a court is to exercise its jurisdiction may amount to ... a usurpation of, or interference with, the exercise of judicial power.'²⁵⁴ In particular, a law which 'attempts to

²⁵¹ *Leeth v Commonwealth* (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ) ('*Leeth*'), cited in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 407 [233] (Gummow J).

²⁵² John Azzi, 'Prosecuting Court-Appointed Liquidators in Non-Appointing Courts: A Case for Overturning Outdated Law' (2011) 37(3) *Monash University Law Review* 97, 125 (citations omitted) ('Prosecuting Court-Appointed Liquidators').

²⁵³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 580 [122] (Gummow and Hayne JJ) (emphasis added) (citations omitted).

²⁵⁴ *Richard Walter* (n 45) 184 (Mason CJ).

preclude the determination by a federal court of facts in controversy,²⁵⁵ or causes the court ‘to act in a manner contrary to natural justice’,²⁵⁶ would ‘[constitute] an impermissible intrusion into the exercise of judicial power.’²⁵⁷ These observations are echoed in Gaudron J’s judgment in *Re Nolan; Ex parte Young*,²⁵⁸ where her Honour said:

[A]n essential feature of judicial power is that it must be exercised in accordance with the judicial process ... [T]he general features of that process ... include ... the application of the rules of natural justice, the ascertainment of the facts ... followed by an application of that law to those facts ...²⁵⁹

Conversely, courts cannot usurp the legislative power of Parliament by striking down a law they consider undesirable or even ‘disproportionately harsh.’²⁶⁰ To the contrary, there must be ‘faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be.’²⁶¹

It follows that, where a person with standing approaches the court complaining about a matter arising under the *1936 Act*,²⁶² the court must exercise the judicial power in s 71 of the *Constitution* to quell the controversy by applying the relevant law to the facts in controversy. ‘[C]ommitting these matters exclusively to the exercise of judicial power of the Commonwealth’ upholds the rule of law, and ‘[ensures] that the rigidity of the *Constitution* can be maintained, and its division of powers ... effected.’²⁶³

Finding that the conclusive evidence rule in former s 177 of the *1936 Act* does not interfere with the judicial power of the Commonwealth in that it does not ‘cut down’ the jurisdiction of the High Court under s 75(v) of the

²⁵⁵ Ibid 185.

²⁵⁶ *Leeth* (n 251) 470 (Mason CJ, Dawson and McHugh JJ).

²⁵⁷ *Richard Walter* (n 45) 185 (Mason CJ). See also *ibid* 470.

²⁵⁸ (1991) 172 CLR 460.

²⁵⁹ *Ibid* 496.

²⁶⁰ *Kuczborski v Queensland* (2014) 254 CLR 51, 116 [217] (Crennan, Kiefel, Gageler and Keane JJ).

²⁶¹ *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

²⁶² A matter arises under the Act ‘if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement’: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ), quoted in *Re McJannet; Ex parte Australian Workers’ Union of Employees (Qld) [No 2]* (1997) 189 CLR 654, 656–7 (Brennan CJ, McHugh and Gummow JJ) (*‘Re McJannet’*).

²⁶³ Hayne (n 195) 167, 173.

Constitution or the Federal Court under s 39B of the *Judiciary Act*,²⁶⁴ McHugh J in *Richard Walter*, nevertheless, added:

If s 177 applies to the Federal Court in s 39B proceedings, it would preclude the taxpayer from challenging their validity even if the assessments of the taxpayer in this case were not made bona fide or were made for an improper purpose ... As a result of s 175 and the first limb of s 177, the procedural acts of the Commissioner in making an assessment do not give rise to any legally enforceable duty that can attract the operation of s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*.²⁶⁵

McHugh J's preceding remarks are, respectfully, incorrect to the extent that they contradict the plurality's judgment in *Futuris*, where it was said that 'administrative power is not to be exercised for ulterior or improper purposes'.²⁶⁶ They are also inconsistent with Dawson J's judgment in *Richard Walter*, where his Honour noted that 'the position would plainly be different' if s 177 operated to render the assessment conclusive for all purposes.²⁶⁷ The remarks also fail to recognise that the due formation by the Commissioner of his state of mind may be examinable on judicial review grounds where this is part of the criteria for liability.²⁶⁸

It follows that a court may go behind the assessment where a taxpayer is complaining that the Commissioner's opinion about fraud or evasion was not duly formed. In those circumstances it is the 'duty and jurisdiction' of courts to discern and declare the limits of the power conferred (including any implied limits) and the legality of its exercise.²⁶⁹

Yet, because of the manner in which the Federal Court has definitively narrowed the categories of jurisdictional error by reference to the two errors identified by the plurality in *Futuris*, the right of taxpayers to petition the Court in relation to non-deliberate, albeit material, errors in the assessment-making process is seriously constrained. This interferes with the capacity of the Court to quell a controversy pertaining to any limitations (express or implied) on the amendment power.

²⁶⁴ *Richard Walter* (n 45) 241.

²⁶⁵ *Ibid* 241–2.

²⁶⁶ *Futuris* (n 4) 154 [11] (Gummow, Hayne, Heydon and Crennan JJ).

²⁶⁷ *Richard Walter* (n 45) 221.

²⁶⁸ See above n 50 and accompanying text.

²⁶⁹ *Quin* (n 240) 36 (Brennan J).

As shown, the judicial process provided by pt IVC is ineffective in upholding the implied obligation of reasonableness conditioning the amendment power where the taxpayer cannot disprove a tax avoidance purpose by affirmatively showing that the fraud or evasion opinion could not have been formed. In judicial review proceedings, by contrast, the taxpayer can establish legal unreasonableness by showing there was no evidence to justify the requisite opinion. And it is ultimately a question for the court whether the evidence supports such an allegation. In contrast, the discretion of the court or the Tribunal in pt IVC proceedings is severely circumscribed where the taxpayer cannot produce evidence affirmatively showing want of fraud or evasion.

Therefore, to suggest, as courts and many commentators have increasingly done,²⁷⁰ that pt IVC guarantees and protects in all cases, other than the two instances identified in *Futuris*, the constitutional right and duty to invalidate an assessment purportedly made beyond power, respectfully, misunderstands the role and scope of judicial review.

However necessary the reason for limiting the ability to seek judicial review for jurisdictional error under s 75(v) and s 39B may be, this must not obfuscate the reality that pt IVC proceedings are directed to the excessiveness of the assessment and not to whether it was duly and/or reasonably made. That an assessment is not shown to be excessive does not necessarily mean that it was not purportedly made beyond power.

It follows that defining a court's constitutional jurisdiction by reference to the two jurisdictional errors identified by the plurality in *Futuris*, as intermediate courts have increasingly done, impermissibly restricts the right and duty of courts to invalidate an assessment for error of law that affects the exercise of the power to amend under item 5 of s 170(1). Ordinarily, an administrative decision-maker falls into an error of law, which invalidates exercise of statutory power, by

identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power ... [and] results in the decision-maker exceeding the authority or powers given by the relevant statute.²⁷¹

Finding that '[t]he distinction between right and remedy is deeply embedded in the corpus of the law', Gummow and Hayne JJ in *Abebe v Commonwealth*

²⁷⁰ See above nn 181–4 and accompanying text.

²⁷¹ *Yusuf* (n 44) 351 [82] (McHugh, Gummow and Hayne JJ).

said that a law defining the jurisdiction of the Federal Court with respect to a matter arising under a federal law by 'excluding grounds for relief which otherwise would be available has the effect of restricting or denying the right or liability itself. This stultifies the exercise of the judicial power of the Commonwealth.'²⁷²

That Parliament has provided a separate statutory regime for dissatisfied taxpayers is insufficient to pre-empt and preclude taxpayers from also petitioning the court in exercise of its constitutional jurisdiction to invalidate a purportedly unreasonable exercise of the amendment power. The judicial power and function exercised in this latter regard differs from the judicial process under pt IVC, which is principally concerned with whether the taxpayer made full and true disclosure rather than whether the Commissioner's opinion in regard to fraud or evasion lacks an evident and intelligible justification.

Undeniably, there is some correlation between full and true disclosure and whether the requisite opinion is justified. However, any such evidentiary overlap cannot account for other circumstances where courts can inquire into whether the Commissioner has applied the law properly, irrespective of whether or not the taxpayer had adequate proof to show the assessment was excessive.

To reiterate, the evidentiary burden in judicial review proceedings is significantly and comparatively less onerous, allowing courts to invalidate administrative action where the decision-maker fails to take into account relevant considerations, or has taken into account irrelevant considerations, albeit that this would likely be insufficient for pt IVC purposes: 'What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law.'²⁷³

Clearly, the exercise of federal judicial power should be untrammelled by misconceived and impermissible restrictions on courts' constitutional jurisdiction to discern and declare the limits of the power to amend under item 5 of s 170(1) in view of s 175 of the *1936 Act*. In this regard, the notion of jurisdictional error is the bedrock for judicial review in Australia. Embracing 'a number of different kinds of error',²⁷⁴ it is used by courts to determine the lawfulness of executive action whilst remaining faithful to Brennan J's

²⁷² *Abebe* (n 213) 562 [143].

²⁷³ *Yusuf* (n 44) 348 [74] (McHugh, Gummow and Hayne JJ).

²⁷⁴ *Ibid* 351 [82].

‘canonical statement’²⁷⁵ that ‘the court has no jurisdiction simply to cure administrative injustice or error.’²⁷⁶

Broadly, jurisdictional error arises ‘if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do.’²⁷⁷ Yet, following *Futuris*, taxpayers are increasingly being denied relief ‘which otherwise would be available’²⁷⁸ because intermediate courts are misconstruing the protective power of s 175 to cover all jurisdictional errors but the two identified in *Futuris*.

That the limitation from *Futuris* is not contained in an Act of Parliament but rather developed by the judiciary is irrelevant given the fact that statutory interpretation is an important part of the judicial power vested by s 71 of the *Constitution*, which ‘[reflects] and [serves] the rule of law.’²⁷⁹ Accordingly, it can operate to stultify judicial power by putting an ‘artificial gloss’²⁸⁰ on the text of s 175, restricting the circumstances where courts can discern the implied limits of a law and declare an administrative action or decision invalid on grounds of jurisdictional error.

A similar impermissible infringement was observed in relation to the application of a well-established common law principle requiring ‘anyone aggrieved by [the liquidator’s] conduct to apply to [the] Court in the action in which he was appointed.’²⁸¹ In Australia, this principle was famously applied by McLelland J and became known as the *Re Siromath* injunction after the case of the same name in which his Honour raised an injunction proscribing parties from litigating proceedings relating to the duties and obligations of a court-appointed liquidator in a non-appointing court without leave from the appointing court.²⁸²

Having found it is ‘plainly wrong’ for Australian courts to continue to apply this outdated principle in view of the national corporations scheme,²⁸³ I concluded in another article:

²⁷⁵ Crawford, ‘The Rule of Law’ (n 191) 86.

²⁷⁶ *Quin* (n 240) 36 (Brennan J).

²⁷⁷ *Aala* (n 25) 141 [163] (Hayne J).

²⁷⁸ *Abebe* (n 213) 562 [143] (Gummow and Hayne JJ).

²⁷⁹ Crawford, ‘The Rule of Law’ (n 191) 90.

²⁸⁰ *Ibid.*

²⁸¹ *Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283, 286 (Neville J).

²⁸² *Re Siromath Pty Ltd [No 3]* (1991) 25 NSWLR 25, 29.

²⁸³ Azzi, ‘Prosecuting Court-Appointed Liquidators’ (n 252).

[T]he *Re Siromath* injunction effectively ‘stultifies the exercise of judicial power’ by restricting the right to litigate proceedings against a liquidator in a non-appointing court ... This injunction impermissibly ‘supplements’ the [*Corporations Act 2001* (Cth)] and is not conducive to its success. It improperly establishes that only the court appointing the liquidator is capable of regulating the liquidator’s conduct and protecting the court’s processes ... This flies in the face of the national scheme established under the Act and the [inherent] powers of all courts ... to protect against abuse of process ...²⁸⁴

As currently applied, the *Futuris* limitation, similarly, operates to restrict the ambit of judicial power to quell a controversy, abrogating the constitutional function of courts to protect, by means of judicial review, the constitutionally implied rights of citizens to have an unauthorised exercise of executive or administrative power set aside. It impedes the capacity of courts to correct for jurisdictional error not otherwise proscribed by s 175 of the *1936 Act*. Now, attacks on formation of opinion by the Commissioner may only be instituted in pt IVC proceedings, according to the Full Court in *Chhua*.

However, the Full Court’s faith in pt IVC, respectfully, is misconceived to the extent that it fails to appreciate that the protection of rights-related implications in the *Constitution* cannot be fully realised by the exercise of judicial power in pt IVC proceedings. As shown, even if there is no evident or justifiable basis for the formation of an opinion about fraud or evasion, this is insufficient to result in an excessive assessment under pt IVC.

By parity of reasoning, narrowing the grounds for jurisdictional error relief has the effect of impermissibly supplementing or modifying judicial power exercised in furtherance of the court’s constitutional jurisdiction. It threatens the entrenched minimum provision of judicial review, impermissibly constraining the ability of courts to discern and declare exercise of administrative power as legally unreasonable, which is not otherwise possible by the exercise of judicial power under pt IVC. The right to petition a court for discretionary relief in these circumstances, and the concomitant duty of the court to provide appropriate relief, are implied in the *Constitution*.

It follows that by putting a judicial gloss on the text of s 175 in relation to attacks on formation of opinion, when it is not clear from the legislation or *Futuris* that this is warranted, needlessly ‘curtail[s]’²⁸⁵ intermediate courts’ constitutional function of protecting the interests of a person whose tax liability has increased in consequence of the Commissioner’s decision to

²⁸⁴ Ibid 129 (citations omitted).

²⁸⁵ See *Plaintiff S157* (n 21) 483 [6] (Gleeson CJ).

amend an earlier issued assessment. Narrowing the grounds for relief on the basis of jurisdictional error (and thus the scope for judicial review) in this way has the effect of stultifying the exercise of judicial power, excluding grounds for relief which would otherwise have been available and, in turn, hindering the capacity of a court to conclusively determine a matter that has been conferred on it.

IV CONCLUDING OBSERVATIONS

The above demonstrates that the current practice of summarily dismissing judicial review applications not asserting either of the two jurisdictional errors identified by the plurality in *Futuris* is not only apocryphal, given the myriad uncertainties surrounding the plurality's decision, but is repugnant to the rule of law. Reading the text in item 5 of s 170(1) of the *1936 Act* in its context, it was shown that the formation of the requisite opinion of fraud or evasion is a jurisdictional fact enlivening the power to amend an assessment at any time, and that its existence or otherwise is reviewable for jurisdictional error despite the privative ambit of s 175.

As shown, only 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.

Yet, because of the conclusive way in which the Federal Court has been applying *Futuris*, confining complaints about exercise of the amendment power to pt IVC proceedings, the purported assessment cannot be invalidated unless the taxpayer can affirmatively disprove fraud or evasion — regardless of whether the opinion enlivening the amendment power may have lacked an evident and intelligible justification. Whilst evidence of true and full disclosure may establish both excessiveness and legal unreasonableness, this is not always the case where the taxpayer makes an allegation that there was no evidence to justify the opinion. Such an allegation cannot be entertained in pt IVC proceedings.

Indeed, the constitutional function and duty of courts should not have to depend definitively on the existence or otherwise of material disproving a tax avoidance purpose, particularly where the opinion informing the decision to amend was based on 'unwarranted assumptions' or not supported by proba-

tive evidence.²⁸⁶ The sufficiency of material in this latter regard is, ultimately, a question for the judiciary in judicial review proceedings which is not otherwise possible in pt IVC proceedings.

It follows that proscribing judicial review for all but the two jurisdictional errors identified by the plurality in *Futuris* has the potential to breach the central maxim that ‘a stream cannot rise higher than its source’²⁸⁷ by making validity of the assessment depend on the opinion of the Commissioner with no practical means to examine the opinion for legal unreasonableness, despite the fact that this conditions the exercise of any statutory discretion. To reiterate, Parliament cannot prevent courts from discerning and declaring if the Commissioner’s state of satisfaction proceeded reasonably and on a correct understanding and application of the applicable law.

As applied, however, the current practice adopted by intermediate courts means that, unless the taxpayer is, exceptionally, alleging the assessment is either tentative or tainted by conscious maladministration, courts would be unable to discern whether the opinion regarding the legislative criteria enlivening the power to amend was reasonably reached. Such practice not only inappropriately conflates attacks on the power to amend an assessment with attacks on its validity, it also offends against the duty of courts to discern and declare the legislated limits of the law (both express and implied) and could potentially contravene the duty to intervene where the authority is acting perversely, consciously or otherwise.

If anything, the definitive application of the *Futuris* limitations in the manner prescribed by the Full Court in *Chhua* contradicts the historical practice of courts of reviewing administrative action in the manner contemplated in *Avon Downs*, notwithstanding pt IVC. Given this, it cannot be said that the decision of the plurality in *Futuris* rests upon a principle carefully worked out in a significant succession of cases concerning attacks on formation of opinion, or has not caused inconvenience.²⁸⁸

It is therefore unsound, if not dangerous, for intermediate courts to continue to summarily dismiss judicial review applications alleging jurisdictional error for failure to form the requisite opinion, as this effectively incapacitates them from safeguarding against the arbitrary application of criteria for

²⁸⁶ *BZD17* (n 233) 450 [36] (Perram, Perry and O’Callaghan JJ). See also *Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132, [107]–[108] (Mortimer J, Moshinsky J agreeing at [113]), [131]–[132] (Wheelahan J).

²⁸⁷ *Communist Party Case* (n 18) 258 (Fullagar J).

²⁸⁸ See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

liability. Not only does such a practice undermine the rule of law, it also undermines confidence in the tax system by creating more uncertainty for taxpayers affected by exercise of the amendment power. If anything, it defeats legislative efforts to ensure ‘the right balance [is] struck between protecting the rights of individual taxpayers and protecting the revenue for the benefit of the whole Australian community.’²⁸⁹

²⁸⁹ Costello (n 2).