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# Rights and remedies of a taxpayer in the sights of the Commissioner of Taxation: Part 1

**This article considers whether anything can be done to preserve a taxpayer's rights long enough for the taxpayer to contest an assessment in the appropriate forum. It outlines the impediments facing the taxpayer to conclude that without reaching an accommodation with the Commissioner, the taxpayer will be in a race to prosecute the Part IVC TAA53 proceedings before the Commissioner seeks to recover the tax debt.**

In one paragraph, with typical perspicuity, Hill J in *McCallum v Commissioner of Taxation*[1] encapsulated the plight of many a taxpayer:

> "The Commissioner issues an assessment. The taxpayer objects to it. The assessment may be recovered as a debt. The Commissioner proceeds to do so. The taxpayer seeks a stay, but on the principles enunciated by the Court of Appeal in Deputy Commissioner of Taxation (Cth) v Mackey (1982) 64 FLR 432 the stay is refused. The Commissioner proceeds to judgment and then issues a bankruptcy notice. That notice can not be challenged because if one sought to go behind the judgment debt one is met by an assessment unchallengeable under s 177: Clyne v Deputy Commissioner of Taxation (Cth) (1982) 82 ATC 4510; Clyne v Deputy Commissioner of Taxation (Cth) (1983) 83 ATC 4532. On the same basis, the taxpayer is made bankrupt. He is insolvent as a result of the tax debt. There may or may not be other creditors. The Commissioner appoints a trustee in bankruptcy or perhaps the Official Receiver becomes trustee. In either case the trustee has no interest in fighting the objection in the Administrative Appeals Tribunal. It is immaterial to the trustee. And the trustee has no funds to do so. Hence the taxpayer loses the right to appeal and is made bankrupt without ever having a right to challenge the assessment. It could not happen, could it?"

And as Gummow ACJ, Heydon, Crennan and Kiefel JJ noted in the High Court in *DCT v Broadbeach Properties Pty Ltd,*[2] "harsh though the operation of these provisions may be, they implement a long-standing legislative policy to protect the interests of the revenue".[3]

For a bankrupt individual or corporate taxpayer in the process of being wound up,[4] the result is usually the same, unless the trustee in bankruptcy or the liquidator prosecutes the Part IVC TAA53 proceedings, those rights will be lost[5] and an excessive assessment may stand.

In earlier times, seeking to recover before Part IVC proceedings were determined was thought necessary only in egregious cases. Bowen CJ in Equity said in *Re Roma Industries Pty Ltd*:[6]

> "It must be appreciated that from the point of view of the revenue it is a protection against that class of taxpayer who might withhold payment and use the money as the sinews of war to conduct appeals against the Commissioner and who, being finally unsuccessful, was found to be unable to meet his tax liability, having spent his money on the litigation."

In *Clyne v DCT*[7] Mason A-CJ said:

> "I was informed that it is a somewhat unusual course for the Deputy Commissioner to commence proceedings for recovery in a court relying on a notice of assessment which is under challenge in proceedings under the [Assessment Act]. It is to be hoped that this is so."

While basic notions of justice would suggest that pursuing as a debt moneys owed under an assessment that has been challenged should be a rare event, today such conduct is commonplace.[8]

## WHO PROTECTS THE TAXPAYER?

This article considers whether anything can be done to preserve a taxpayer's rights long enough to enable the taxpayer to contest an assessment in the appropriate forum. The following will be considered:

(a) proceedings to quash the assessment;

(b) the Commissioner's discretion to defer recovery and extend the due date of tax related liabilities and avenues of judicial review;

(c) stay of recovery proceedings or execution of judgment;

(d) funding the liquidator or the trustee in bankruptcy; and

(e) negotiation.

## WHETHER SECTION 39B PROCEEDINGS ARE AVAILABLE

To the extent that there was any doubt, the recent High Court decision in *Commissioner of Taxation v Futuris Corporation Limited*[9] has answered definitively the question of when proceedings under s 39B of the *Judiciary Act* (Cth) (**39B proceedings**) might be relied upon to quash an assessment. The High Court has clearly enunciated the position that dissatisfied taxpayers do not have the right to challenge assessments in 39B proceedings, but may raise the issues in Part IVC proceedings.

Assuming that there is an assessment in form,[10] the effect of s 175[11] is that in the absence of conscious maladministration a dissatisfied taxpayer's only remedy lies in Part IVC TAA53.[12] In such proceedings, and in such proceedings only, is it possible to challenge the amount and all the particulars of the assessment.[13]

Where there has been conscious maladministration it cannot be said that the Commissioner's process has produced an assessment to which s 175 applies.[14] In order to make out conscious maladministration it is necessary to demonstrate that the statutory powers have been exercised corruptly or with deliberate disregard for the scope of those powers. Such allegations are not to be made lightly in proceedings and are not lightly upheld.[15] In a proper case, there may also be a cause

of action for the taxpayer against the Commissioner for misfeasance in public office.[16]

Where the purported notice of assessment, in form, does not answer the statutory description of an assessment as defined in s 6 of the ITAA36,[17] then the remedies for jurisdictional error may be pursued in 39B proceedings.

Similarly where there is no assessment, s 175 ITAA 36 will not protect the purported assessment, for instance, where the purported assessment is tentative or provisional. In such a case there is no definitive ascertainment of the amount of taxable income or the tax payable.[18] This may be difficult to demonstrate where there is an assessment that is conclusive on its face. In *Bloemen*, Mason and Wilson JJ said,[19] "In our opinion, it must follow that a notice in proper form of an assessment necessarily compels the conclusion that there was an assessment made in fact".[20]

Where there is no rational or logical process of ascertainment of the taxable income there is also no assessment. For instance, where the Commissioner plucks a figure out of the air or knows the assessment to be wrong.[21]

Discretionary considerations arise and relief in 39B proceedings will be refused where alternate remedies are available.[22] Also, a taxpayer having **elected** to pursue Part IVC TAA53 rights to their conclusion will be precluded from obtaining relief in 39B proceedings.[23]

In summary, whether ultimately the Commissioner's position may be demonstrated to be flawed in logic, or contain errors of the kind referred to by Dixon CJ in *Avon Downs,*[24] is not relevant for the purposes of a consideration of whether the assessment manifests jurisdictional error of the kind that attracts the constitutional writs. Since *Futuris*, such error may only be demonstrated by showing that an assessment is tentative, that there was no process of assessment or that there has been conscious maladministration.

## JUDICIAL REVIEW

The Commissioner has an obligation to pursue the recovery of tax related liabilities.[25] However, this is subject to the exercise of discretion. For instance, in cases of serious hardship affecting certain taxpayers, the Commissioner may release the taxpayer, in whole or in part, from a liability.[26] Furthermore, the Commissioner has wide powers to defer recovery proceedings, or to defer the due date for liability under an assessment.

Section 8 of ITAA states that "[t]he Commissioner shall have the general administration of this Act".

Section 255-5 of Schedule 1 TAA 53 states:

> "255-5 Recovering a tax-related liability that is due and payable
>
> (1) An amount of a *tax-related liability that is due and payable:
>
> (a) is a debt due to the Commonwealth; and
>
> (b) is payable to the Commissioner.
>
> (2) The Commissioner, a Second Commissioner or a Deputy Commissioner may sue in his or her official name in a court of competent jurisdiction to recover an amount of a *tax-related liability that remains unpaid after it has become due and payable.
>
> Note: The tables in section 250-10 set out each provision that specifies when an amount of a tax-related liability becomes due and payable. The Commissioner may vary that time under Subdivision 255-B."

Section 255-10 of Schedule 1 TAA53 states:

> "255-10 To defer the payment time
>
> (1) The Commissioner may, having regard to the circumstances of your particular case, defer the time at which an amount of a *tax-related liability is, or would become, due and payable by you (whether or not the liability has already arisen). If the Commissioner does so, that time is varied accordingly.
>
> Note: General interest charge or any other relevant penalty, if applicable for any unpaid amount of the liability, will begin to accrue from the time as varied. See, for example, paragraph 204(3)(a) of the Income Tax Assessment Act 1936.
>
> (2) The Commissioner must do so by written notice given to you.
>
> (3) A deferral under subsection (1) does not defer the time for giving an approved form to the Commissioner.
>
> Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form."

Accordingly, it is open to a taxpayer to request that the Commissioner defer recovery proceedings or to defer the due date of the liability. Plainly, in exercising his discretion, the Commissioner may have regard to the policy of the Act as reflected by ss 14ZZM[27] and 14ZZR[28] TAA53 to proceed to recover the tax notwithstanding that an appeal or review is pending, so the mere fact that review or appeal proceedings are on foot is not sufficient grounds to ensure the Commissioner defers recovery. Also, in the case of deferral of the due date, the Commissioner will suffer the loss of the General Interest Charge for the period of the deferral and this may be taken into consideration by the Commissioner in making the decision concerning deferral.[29]

In the event that the Commissioner refuses the request, s 5(1) of the *Administrative Decisions (Judicial Review) Act* 1976 (Cth) (**the ADJR Act**) gives a person "aggrieved by a decision to which this Act applies" the right to apply to the Federal Court for an Order of Review. Whether the decision is a decision to which the ADJR Act applies turns on whether it has the requisite attributes to fall within the ambit of a "decision of an administrative character made, proposed to be made, or required to be made … under an enactment". This expression comes from the definition of "*decision to which the* [ADJR Act] *applies*".[30] The expression "decision of an administrative character made … under an enactment"[31] must be read together as an entirety rather than as a series of individual words.[32]

The term "decision" is not defined in the ADJR Act.[33] However, a decision as contemplated by s 5 of the ADJR Act must, generally,[34] be a substantive determination[35] (as contrasted with a procedural determination)[36] which is final or operative and determinative, at least in a practical sense.[37] It requires a deliberative process (a determination of an application, inquiry or dispute)[38] and it must have practical legal effect.[39]

A decision is made under an enactment in the relevant sense if it is expressly or impliedly required or authorised by an enactment and the decision itself confers, alters or otherwise affects legal rights or obligations or has the capacity to do so.[40] A decision of an administrative character is one which arises in the course of administration and has significance which merits the right to judicial review.

Where an act specifically authorises the making of a decision (whether expressly or impliedly), the decision may have the requisite character of a reviewable decision notwithstanding that it does not ordinarily have the hallmarks of a substantive or determinative decision.[41]

In other cases, due to its serious consequences, an otherwise procedural decision, which resolves an issue, may be a reviewable decision.[42]

Specific decisions or classes of decisions are expressly excluded by Schedule 1 of the ADJR Act.[43] Schedule 1 paragraph (e) excludes from the definition of decisions to which the ADJR Act applies:

> "Decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts."

In the taxation context, the following decisions have been held to be reviewable:

(a) decision by the Commissioner to issue a notice requiring information from offshore pursuant to s 264A of the ITAA36;[44]

(b) decisions under ss 264 and 263 of the ITAA36 to make available documents for inspection and to enter premises;[45]

(c) decisions to refuse a request for an extension of the due date for payment;[46]

(d) a decision not to vary tax instalment deductions;[47]

(e) a decision to exempt a taxpayer from requirement to file tax return and the withdrawal of that decision;[48] and

(f) A decision to issue garnishee proceedings.[49]

On the other hand the following decisions have been held not to be reviewable:

(a) the decision to pursue recovery of a director's penalty notice;[50]

(b) a decision to issue a demand for payment;[51]

(c) a decision to apply to wind up the taxpayer and a decision to reject an offer of compromise;[52]

(d) a decision to institute recovery proceedings for an income tax liability;[53]

(e) a decision to issue a director's penalty notice;[54]

(f) the decision to vote at a creditor's meeting.[55]

On the basis of recent authority, if a request to defer legal recovery is denied, judicial review pursuant to the ADJR Act is unavailable to a taxpayer, for the reason that such a decision is not a decision under an enactment as discussed above. However, on the authority of *Rawson Finances*[56] a taxpayer may bring 39B proceedings instead of proceedings under the ADJR Act. The disadvantage of such a course is that there is no imperative for the decision maker to give reasons and it may therefore be difficult for the taxpayer to make out its case of jurisdictional error.[57] With respect to 39B proceedings concerning review of decisions under an enactment, the usual classes of jurisdictional error apply. For instance failure to take into account a mandatory consideration, taking into account an irrelevant consideration, or failing to exercise the power such as applying policy without regard to the merits of the particular case.[58] In 39B proceedings for a review of a decision to defer the recovery process or the due date, the Court is not limited by ss 175 and 177 of the ITAA36 to only certain kinds of jurisdictional error (such as *mala fides*). Those sections do not affect a decision to defer (or not defer) recovery proceedings.

The question of what might amount to jurisdictional error in making one of the decisions referred to above has no easy answer. It depends upon the circumstances of the taxpayer viewed in light of the purposes for which the discretion has been conferred. Plainly the Commissioner has a wide discretion and the legislative policy which permits recovery of the tax liability notwithstanding that an objection or an appeal or review is outstanding, affects the mix. Nevertheless, the Commissioner must genuinely consider the taxpayer's circumstances and no discretion is entirely unfettered. Where a discretion is conferred by legislation, the relevant decision maker must "exercise that discretion having regard to the nature, scope and purpose of the power and the context in which it is found".[59]

## CONCLUSION

As can be seen from the foregoing, once an assessment has issued, unless the taxpayer can reach an accommodation with the Commissioner, the taxpayer will be in a race to prosecute the Part IVC TAA53 proceedings before the Commissioner seeks to recover the tax debt. The Commissioner holds the upper hand since he must determine the objection before Part IVC proceedings can begin.[60] Proceedings to stay recovery or stave off the winding up process can be costly distractions from the main goal – to demonstrate that the assessment is excessive. Nonetheless, the situations in which a stay of recovery proceedings or execution may be available and the consequences of a winding up or bankruptcy are considered in Part II of this article, in the October of *Taxation in Australia*.

It is important to recall that often it is the taxpayer who has the greater ability to control the speed with which the Part IVC proceedings are prosecuted and where the threat of recovery proceedings is imminent the taxpayer should employ due haste to prepare its case and not wait the statutory 60 day period before lodging appeals or review proceedings. The taxpayer might also seek expedition from the Court or Tribunal.

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***Reference notes***

1 *(1997) 75 FCR 458. His Honour was in dissent, but the matters set out in this passage are not contentions. In McCallum the taxpayer had objected to the assessment, but before the Part IVC proceedings could be heard he was declared bankrupt. It was held that the trustee in bankruptcy had standing to prosecute the Part IVC proceedings (469F-G and 474D-E) but the court sent the matter back to determine whether Mr McCallum, who was unlikely to, had standing also to prosecute these proceedings (474E-475G per Lehane J). The effect of the bankruptcy was that he was no longer affected by the assessment. Lehane J (at 475E-F) noted however that the bankrupt may have standing because "it may be that an objection decision in relation to a particular assessment will have consequences in relation to tax payable, perhaps in years following discharge from bankruptcy, for which Mr McCallum will be personally liable." His Honour did not elaborate further, but, consider whether a director or former trustee, liable to a tax debt under s 254 of the Income Tax Assessment Act 1936 ("***ITAA***") might thereby have standing.*

2 *(2008) 237 CLR 473 at [44].*

3 *Section 175A of the ITAA provides that a dissatisfied taxpayer has the right to object to an assessment in the manner prescribed by Part IVC of the Taxation Administration Act 1953 ("TAA"). Part IVC also provides the mechanism for a dissatisfied taxpayer to appeal the objection decision to the Federal Court of Australia or to apply for review of the objection decision by the Administrative Appeal Tribunal ("Part IVC proceedings"). Prior to Part IVC of the TAA there were similar rights under Part V of the ITAA. The particular provisions considered by the High Court in Broadbeach were ss 14ZZM and 14ZZR of the the TAA. These provide the Commissioner with the statutory mandate to collect the tax notwithstanding that objection decisions are the subject of appeal or review pursuant to Part IVC of the TAA.*

4 *On winding up a company may be deregistered, in which case, it ceases to exist. See section 601AD(1) of the Corporations Act 2001 (Cth) and decision of Lindgren J in DC of T v James Hardie Australia Finance Pty Ltd (2008) 170 FCR 545.*

5 *Only a person dissatisfied with an assessment has the standing to object against it (s 175A of the ITAA) and only a person dissatisfied with an objection decision has the standing to apply to the Administrative Appeals Tribunal or the Federal Court of Australia for review or appeal (s 14ZZ of the Taxation Administration Act 1953 ("TAA")). The person "dissatisfied" is the person who is directly affected by the decision. The decision must be capable of having legal effect upon that person: Pearson v FCT 2001 ATC 4104; McCallum v FC of T (1997) 75 FCR 458; CTC Resources NL v C of T (1994) 48 FCR 397 per Gummow J at 405E-F and 408E-F and per Hill J at 432 432E-F.*

6 *(1976) 1 ACLR 296 at 299.*

7 *(1982) 56 ALJR 857 at 858-9. This passage is extracted in DCT v Broadbeach (2008) 237 CLR 473 at [43].*

8 *Cases such as Broadbeach (2008) 237 CLR 473 at [41]; FJ Bloemen Pty Ltd v Commissioner of Taxation (1981) 147 CLR 360 at 375 per Mason and Wilson JJ, Clyne v Deputy Commissioner of Taxation (1982) 43 ALR 342 and Hickman v Commissioner of Taxation (1922) 31 CLR 232 at 245 identify the harsh and potentially oppressive consequences for the taxpayer of the power of the Commissioner to recover moneys which are disputed in Part IVC proceedings. The Court has encouraged the Commissioner to take action to recover moneys where the liability is disputed only in unusual circumstances: Clyne at 344 per Mason A-CJ. Despite the Court's criticism, the Commissioner uses his powers to protect the revenue whenever he sees fit.*

9 *(2008) 237 CLR 146.*

10 *Where the assessment appears to reflect a definitive ascertainment of the amount of taxable income and of the tax payable it will answer the description of an assessment in form: s 6 ITAA36; Batagol v FCT (1963) 109 CLR 243 at 251; Futuris at [49] and [50].*

11 *Section 175 of the ITAA36 provides that "The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with."*

12 *Futuris at [23] to [25].*

13 *The particulars of an assessment include only the taxable income of the person assessed and the tax payable thereon: DCT (NSW) v Clyne (1982) 12 ATR 738 at 742 per Hunt J; Commonwealth v Opiel (1986) 18 ATR 374 at 378 per Enderby J; FC of T v Prestige Motors Pty Ltd (1994) 181 CLR 1 at 14; Webb v C of T (No 2) (1993) 47 FCR 394 at 401; Re Thai; Ex parte DC of T (1994) 53 FCR 470 at 473; Energy Resources of Australia Ltd v FC of T [2003] FCA 26 at 137; C of T v Ryan (1998) 82 FCR 345 at 363 per Merkel J.*

14 *Futuris at [25].*

15 *Futuris at [60]. In Futuris the claim of mala fides failed. The taxpayer alleged that the Commissioner had deliberately issued an assessment knowing that it was double counting the tax. The High Court held that the Commissioner did not have that knowledge and that there was an assessment which attracted the protection of s 175 and 177 of the ITAA. In addition to Futuris the following cases are relevant to question of mala fides: ANZ Banking Group v FCT (2003) 137 FCR 1 and the cases referred to by her Honour Kenny J at [36] – [37] and see too Briglia v Commissioner of Taxation [2000] FCA 443. It is important to stress that there must be a proper basis for making any such allegation. In San Remo Macaroni (1999) 99 ATC 5738 and in Daihatsu (2001) ATC 4268 criticisms were made of the inadequate justification for bringing the application. An application improperly brought may attract an order for costs on an indemnity basis. An obstinate or antagonistic approach by the Commissioner does not demonstrate mala fides and would not of itself satisfy the test of conscious mala fides. It is necessary to go further and to identify the power abused (e.g., the assessment power) and point to the impugned conduct that demonstrates this. For example, where the Commissioner forms an opinion that there had been fraud or evasion, without genuinely holding the opinion, so as to bring an amount to tax that would otherwise not be taxable.*

16 *As stated in Futuris (at [55]) a public officer who knowingly acts outside his authority may commit the tort of misfeasance in public office. Pursuant to the Public Service Act 1999 (s 13) a public officer must act with care, diligence, integrity and honesty. In a proper case it is necessary to identify the corrupt conduct and damages must be proved. Damages might be measured by reference to legal and compliance costs unnecessarily occasioned by the Commissioner's unlawful conduct.*

17 *Futuris at [25] and [49] to [52]. This is a purely factual issue. An assessment is "the ascertainment of the amount of taxable income (or that there is no taxable income) and of the tax payable on that taxable income (or that no tax is payable). It is to be noted that in earlier years the definition of assessment in section 6 did not include a reference to a purported assessment where there was no taxable amount: See Commissioner of Taxation v Ryan (2000) 201 CLR 109 at [29], [33] and [34].*

18 *FCT v Hoffnung & Co Ltd (1928) 42 CLR 39; FCT v Stokes (1997) 97 ATC 4001.*

19 *FJ Bloemen Pty Ltd v Commissioner of Taxation (1981) 147 CLR 360 at 378 per Mason and Wilson JJ.*

20 *In Futuris, Gummow, Hayne, Heydon and Crennan JJ disapproved of these comments, to the extent that they indicated that a purported assessment that manifested jurisdictional error was protected from attack by the constitutional writs. Their Honours' comments followed on from a discussion in relation to mala fides. However, it is apparent that a tentative assessment manifests jurisdictional error: Futuris at [25], [48]-[52] and [56].*

21 *R v DCT (WA) Ex parte Briggs (1986) 12 FCR 301; Darrell Lea Chocolate Shops Pty Ltd v FCT (1996) 72 FCR 175 (in that case the Commissioner knew the facts to be wrong; cf Futuris where the Commissioner was held not to have known the facts to be wrong); Giris Pty Ltd v C of T (1969) 119 CLR 365 at 374; Denver Chemical Manufacturing Co v C of T (NSW) (1949) 79 CLR 296.*

22 *Futuris at [10] and [167].*

23 *Seymour v Migration Agents Registration Authority [2006] FCA 965 at [132].*

24 *Avon Downs Pty Ltd v FCT (1949) 78 CLR 353 at 360.*

25 *Rawson Finances Pty Ltd v DCT [2010] FCA 538 at [26]; Piccinin v DCT [2002] FCAFC 282 at [29]; Golden City Car and Truck Centre Pty Ltd v DCT (1999) 56 ALD 177; [1999] FCA 29 at [25]; s 47 Financial Management and Accountability Act 1997 (Cth).*

26 *Section 340-5 of Sch 1 to the TAA; Rawson Finances Pty Ltd v DCT [2010] FCA 538 at [26].*

27 *Section 14ZZM states: "The fact that a review[by the AAT] is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending."*

28 *Section 14ZZR states: "The fact that an appeal [by the FCA] is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending."*

29 *Elias v C of T (2002) 199 ALR 246.*

30 *Section 3(1) of the ADJR Act.*

31 *Section 3 of the ADJR Act, definition of a decision to which this Act applies.*

32 *Griffith University v Tang (2005) 221 CLR 99, where Gummow, Callinan and Heydon JJ at [60] said: "But there are dangers in looking at the definition as other than a whole." Tang concerned the Judicial Review Act 1997 (Qld).*

33 *Section 3(2) provides an inclusive definition of the expression "making of a decision". It includes inter alia: (e) making a declaration, demand or requirement; (g) doing or refusing to do any other act or thing.*

34 *As noted in Bond infra per Mason CJ at 337.4 "A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment."*

35 *Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 337.5.*

36 *Bond at 337.7.*

37 *Bond at 337.3.*

38 *Bond at 337.7; Guss v Deputy Commissioner of Taxation (2006) 152 FCR 88 per Greenwood J at [74].*

39 *Attorney-General (Cth) v Queensland (1990) 25 FCR 125 at 142.*

40 *Tang at [79]-[80] and [89] per Gummow, Callinan and Heydon JJ. See also Terrule Pty Ltd ; Manners v Deputy Federal Commissioner of Taxation (Vic) (1985) 5 FCR 153 (Federal Court per Jenkinson J).*

41 *This arises from the statement of the then Chief Justice, in Bond and set out at fn 34 above. His Honour gave as an example, the decision of a Magistrate to continue a committal hearing, as the Act made express provision for it. The decision under review in Bond was another example, the decision that the licensee was "unfit" triggered consequences under the Act. See also Otter Goldmines Limited v Forrest (1997) 47 ALD 89 Merkel J considered that the case fell within the principle enunciated in Bond that where a statute provided for the making or finding or ruling, though intermediate, it might be described as a decision under an enactment. However, his Honour did not need to finally determine the point (at 92.4).*

42 *In Clark v Wood (1997) 78 FCR 356 a decision requiring a bankrupt to answer a question by Counsel for the Official Trustee was held to be a substantive and reviewable decision under the ADJR Act. On the other hand, in FCT v Beddoe (1996) 68 FCR 446 an interlocutory order for a party to provide information was held not to be reviewable.*

43 *Refer para (d) of the definition in s 3, of a decision to which this Act applies.*

44 *Federal Commissioner of Taxation v Pilnara Pty Ltd (1999) 96 FCR 82.*

45 *Industrial Equity Ltd v DCT (1990) 170 CLR 649; DCT v Clarke & Kann (1984) 1 FCR 322.*

46 *DCT v Clarke & Kann (1984) 1 FCR 322; Golden City Car and Truck Centre Pty Ltd v DCT (1999) 56 ALD 177.*

47 *Coco v Deputy Commissioner of Taxation (1993) 42 FCR 219.*

48 *Australian Wool Testing Authority Limited v Commissioner of Taxation (1990) 26 FCR 171 Northrop J. Note however, that this decision was disapproved in Hutchins v DCT (1996) 65 FCR 269 on the basis that the power under section 8 of the ITAA is too general to create a decision under an enactment.*

49 *Huston & Anor 83 ATC 4525.*

50 *Ruddy v DCT (1998) 82 FCR 337.*

51 *Parker v Vivian [2009] FCA 933.*

52 *Strictly Stainless Pty Ltd v Deputy Commissioner of Taxation (unreported, Davies J, 5 November 1993).*

53 *Rawson Finances Pty Ltd v FCT [2010] FCA 538 (this case is the subject of an application for leave to appeal to be heard by the Full Court of the Federal Court later this year see Rawson Finances Pty Ltd v DCT [2010] FCA 666 per Buchanan J); Golden City Car and Truck Centre Pty Ltd v DCT (1999) 56 ALD 177; but for the opposite result see the older cases: Snow v DCT (1987) 70 ALR 672 where French J applied Hell's Angels Ltd v DCT (1985) 7 FCR 311 and Terrule Pty Ltd v DCT (1985) 5 FCR 153 to hold that a decision to issue a writ for recovery of tax was amendable to judicial review under the ADJR Act.*

54 *Guss v DCT (2006) 152 FCR 88.*

55 *Hutchins v DCT (1996) 65 FCR 269.*

56 *Rawson Finances Pty Ltd v FCT [2010] FCA 538.*

57 *There is only a difference between ADJR and 39B proceedings where the decision is not excluded by schedule 2 from the requirement to give reasons. A decision to commence recovery proceedings is likely to be excluded from the requirement for reasons under schedule 2 paragraph (f) (the instituting of civil proceedings). However, a decision to not defer recovery may be in a different position: see however Rawson Finances Pty Ltd v DCT [2010] FCA 538 at [29] where the difference between the two decisions was doubted.*

58 *See Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24 at 39 per Mason J and Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [82] per McHugh, Gummow and Hayne.*

59 *Neat Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277 at 298 para [56], citing Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 at 38-40. See too Coal & Allied v AIRC (2000) 203 CLR 194 at 205 para [19].*

60 *After 60 days the taxpayer can give the Commissioner a notice requiring him to make the objection decision: s 14ZYA TAA.*