NEW FOUNDATIONS OF THE AUSTRALIAN TAX SYSTEM

YURI GRBICH*
ROBIN WOELLNER**

I. THE CHANGES IN PERSPECTIVE

The Summit Tax Reform process, still rolling through 1988, initiated the most fundamental changes in the Australian tax system in half a century. This is not limited to the addition of a few new taxes. Cumulatively, the changes are of such fundamental and far-reaching importance as to justify the characterisation "a new paradigm". From the "tax avoidance Dunkirk" of the late 1970s, in which the tax system was extricated from the mire of the Bottom of the Harbour and the paper tax avoidance high farce, the focus has moved decisively. Tax analysis increasingly evaluates the total performance of the tax system in terms of efficiency, economic responsiveness and fairness. The ripple effects are already shaking the foundations of the older parts of the tax system.

An educated lay person who kept up with the debates in the newspaper might suppose she was familiar with the main threads of the reforms. They include a so-called "capital gains tax" (a useful label which can seriously mislead), introduction of an imputation system of corporate tax, a series of measures targeted against tax avoidance and evasion (the most notorious of which is a tax on fringe benefits), a foreign tax credit system and a selective roll back and progressive tightening of tax expenditures. But these substantive measures are just the tip of a much more interesting iceberg. A more fundamental set of changes operated on the conceptual underpinnings, the institutional framework and the operational assumptions of decision-makers. This was largely missed by the facile media analysis of the

* Professor of Law University of NSW: LL.M. (VUW) Ph.D (LSE), Barrister of New Zealand Supreme Court.
** Chairman of Department of Legal Studies, Kuring-gai CAE; BA, LL.M. (Syd). Grad. Dip. Tax Law (RMIHE).

tax reform process. These critical changes are just starting to surface into public consciousness. There has been a large realignment of bureaucratic responses to the erosion of voluntary compliance and mass decision-making imperatives, fundamental changes to dispute resolution structures and much more emphasis on quality, policy responsive rule-making in the tax system.

It is to these fundamental institutional changes and assumptions, submerged beneath a mass of procedural detail and obscured by more spectacular battles, on which this article focuses. Our objective is to sort the wood from a thick forest of trees by setting out the main elements of a radically reformed decision-making structure and to critically evaluate the new structure and its operational assumptions. We will then use this as a base to project future evolution of the Australian tax system. The article pulls together work both authors have been doing for some years.[1] It does not hesitate to reassert important ideas which can help strengthen the foundations of the new tax system. In particular, the model we describe assumes more active participation and much greater responsibility for maintenance and gradual adaptation of the tax system by the bureaucrats and judges and tribunal members who run it.

To many brought up in the old closed common law universe or simplistic panacaes proposed in pure economic models, the changes outlined are bewildering. Many specific compromises make no sense within that old conceptual framework. They signal the decline and ruin of the tax system, certainly the death throws of income tax, perhaps of law and judicial rectitude itself. What many critics fail to appreciate is that the Australian tax system is now driven by a new logic. This is the logic of very explicit national economic priorities, the untidy choice of evils imposed by political constraints and by administrative realities. The life of the tax system (to mobilise the ideas of Holmes) is not logic but the practical policy and administrative imperatives of a mass decision-making system.

These are forcing large-scale conceptual adjustments. Income tax design predicates a choice of evils, an attempt to satisfice a number of competing economic, distributional and more specific policies. It is a response to the

1 The more important are: Y. Grbich, Institutional Renewal in the Australian Tax System (Monash Univ. 1984); Y. Grbich, "Directions in Reform of Decision-Making in the Australian Tax System" in G. Cooper & R. Vann, (eds) *Decision-Making in the Australian Tax System* (1986) 75; R. Woellner, "An Analysis of the New Taxation Appeal Process" (1987) 4 *A T Forum* 241; Y. Grbich "Tax Reform as a Management Problem" (National Tax Summit Proceedings, 1985), 203 (and accompanying paper); Y. Grbich "Anti-Avoidance Discretions" (1981) 4 *UNSWLJ* 17; Y. Grbich, *New Clarity of Purpose in the Australian Tax System* (Inaugural Lecture UNSW, 1984) 17; Y. Grbich, "Problems of Tax Avoidance in Australia" in Head, *Taxation Issues of the 1980s* (1983) 413, 416, 418, 422; Y. Grbich, "Is Economics Any Use to Tax Lawyers? Towards a More Substantial Jurisprudence to Replace Legalism" (1980) 12 *Monash U L R* 340, 349-350; Y. Grbich, "The Duke of Westminster's Graven Idol" (1978) 9 *F L Rev* 185; Wallace & Y. Grbich "A Judge's Guide to Legal Change in Property" (1979) 3 *UNSWLJ* 175; R. Woellner, "An Overview of Assessment and Review — The New Realities of the Mass Decision-Making Process in Taxation", paper presented at University of New South Wales, Practical Business Tax Series, Sydney, 1987.

erosion of substantial voluntary compliance and the retreat from the commitment to national goals which occurred during the 1970s. It is only by fully assimilating these new realities that the Australian tax expert of the future will be capable of competent analysis and effective advice. It is only by properly trading-off these competing policy objectives that the tax system will contribute intelligently to solving the daunting problems which face the nation and make helpful contributions to the intractable distributional problems thrown up by this decentralised, untidy, pluralist, democratic, capitalist society which it must serve.

II. FRAMEWORK OF THE NEW DECISION-MAKING SYSTEM

1. Australia now has an essentially self-assessing income tax system. Taxpayers must lodge an annual return in accordance with section 161 of the Act. Taxpayers calculate their own tax using the Act and a growing volume of Taxation Rulings issued by the Commissioner to guide them. Near 10 million returns are filed each year and tax collections will reach $100 billion annually before too long. Simplification of these procedures and less paper is a major objective.
2. In most cases these returns are subject only to pro forma scrutiny by the Commissioner and demands for tax or refunds can under section 160A be issued largely in reliance on the information provided. Assessment under section 166 is a mass decision-making and increasingly computerised process. With increasing sophistication in computers, more checking and weeding will be done automatically before assessments are issued. The Commissioner has power to issue default assessments under section 167 (procedure also used for asset betterment assessments).
3. The main deployment of the Commissioner's resources goes to selective (and often carefully targeted) audit of a proportion of returns. Where the Commissioner disputes the return he has power to amend it under section 170. As a result of the self-assessment system there has been substantial liberalisation of the rules which permit the Commissioner to amend assessments. Where there has been full and true disclosure of all material facts there is three years to amend. Where there has not, and there is tax avoidance, it is six years. Where there is fraud or evasion the Commissioner has unlimited time to amend. The major objective is, with earlier warning of evasion, with effective on-line access to information, with high integrity taxpayer identifiers and credible deterrence, to bring substantial voluntary compliance back to critical mass.
4. The taxpayer may object to assessments within sixty days (new section 185). There is now discretion to grant extensions (sections 188 and 188A). The objection is first considered internally by the Commissioner's bureaucracy (section 186). The obvious should be underscored. The objection is an important document because the

taxpayer is, in the normal case, limited to the grounds stated in the objection (section 190(a)). The Commissioner, as the law was normally stated, had no power to allow grounds of appeal not in the objection.[2] There is now a discretion in section 190(a) given to Tribunals and Courts to vary this requirement, but taxpayers should not assume they can rely on it. About 5% of taxpayers object and ask for an amended assessment. It is intended to get this below 2%.

5. The objection is processed by the Appeals and Review Group of the bureaucracy under section 186. The Tax Office is working towards developing operational autonomy and increased quality in decisions in this section of the bureaucracy. A notice of decision is forwarded to the taxpayer.
6. The "judicial" review structure has changed fundamentally in the last few years. From the determination of the objection by the Commissioner's bureaucracy the taxpayer has two options (new section 187):
   (a) To go to the Administrative Appeals Tribunal for a rehearing (the 'tribunal fork').
   (b) To go directly to the Federal Court (the 'court fork').

   The taxpayer must make a written request to exercise his option within sixty days (new section 187). There is now a discretion to grant extensions (section 188(2) and section 188B). About 0.17% of taxpayers proceed beyond the review by the bureaucracy. But only a small proportion of these disputes ever get to the Tribunal or Federal Courts.
7. In practice, there is another layer of consultation, investigation and decision-making before matters get to the Tribunal and very few cases go on to full hearing. This procedure might be viewed as the pyramid of the bureaucracy's internal dispute resolution procedure. In the United States, negotiation mode dispute resolution is used earlier, before polarisation, is more systematic and more formalised. This trend is coming to Australia and the centre of gravity will move to mediation modes of dispute resolution.
8. The Administrative Appeals Tribunal replaced the Boards of Review in 1986 as the administrative venue for tax appeals. A special Taxation Appeals Division was established. The procedures otherwise follow the normal pattern, including procedures for extensive access to reasons for decisions from bureaucrats in sections 37 and 38 Administrative Appeals Tribunal Act 1975 (full implementation postponed until 1 July 1988) and provision for single member hearings. Private hearings are, however, maintained. There are differences in the procedures for bringing references to the Tribunal and appeals to Tribunal do not stay

2 *Rowdell Pty Ltd* v. *FCT* (1963) 13 ATD 242, 249.

the operation of assessments. For this purpose the Administrative Appeals Tribunal Act 1975 is modified by section 14ZB-ZK of the Taxation Administration Act 1953. While the full impact of the changes have yet to emerge, the new models and procedures offer potential for fundamental changes.

9. The Tribunal has power to stand in the shoes of the bureaucrat under section 43 Administrative Appeals Tribunal Act 1975. The Federal Court's powers were modified considerably in the 1986 package to prefer the *Avon Down's* supervisory model (see new sections 187(1)(b) and new section 199).
10. Appeals from the Tribunal lie to the Federal Court as of right on questions of law only (section 44 Administrative Appeals Tribunal Act) and, ultimately, with special leave, the High Court. The Administrative Appeals Tribunal can refer questions of law to the Federal Court if the parties request it or on its own motion (section 45 Administrative Appeals Tribunal Act).
11. If the matter goes directly to the Federal Court under the court fork, there is (after September 1987) an appeal against the bureaucracy's decision on the objection under section 189(3). An appeal against this decision lies as a matter of right to the Full Federal Court under section 24 Federal Court of Australia Act 1976. There is a right of appeal to the Full High Court by special leave or the High Court can give special leave to circumvent the Federal Court in its appellate mode and allow an appeal directly from the lower court (section 33(3)). With the establishment of the Federal Court it was contemplated that very few tax appeals would go beyond the Federal Court and few now do. In appeals using the court fork, the lower Court can state a case for the Full Court (section 26).
12. Courts will not allow parties to use administrative law judicial review remedies where adequate procedures exist within the statutory framework. Under section 177, the legislature has made stringent attempts to ensure that the parties use the statutory framework exclusively. This was strengthened with 1986 amendments to the Administrative Decisions (Judicial Review) Act 1977. Decisions in *F. J. Bloeman Pty Ltd* v. *FCT*[3] and *Dorney* v. *FCT*[4] and *Robinson* v. *FCT*[5] did nothing to encourage expectations about the use of this administrative law detour from the statutory path in section 177 in challenging the substance of assessments. Nevertheless, where some unusual circumstance exists, turning on the administration of the Act, the full range of administrative law remedies may be available. Such a possibility should always lurk in the back of an advisor's mind.

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3 81 ATC 4280.
4 80 ATC 4206.
5 84 ATC 4277.

13. While all the changes have been taking place in mass decision-making, in modes of dispute resolution and in the structures for review of this process, the rule-making structure has kept pace. Systematic procedures for Tax Office Rulings have been put in place and, after a 1987 Senate Review and the bolstering of resources, are getting into full stride. Treasury policy mechanisms have been upgraded considerably and linked to structural economic analysis. The Tax Office has developed its mechanisms for consultation with interest groups (including other parts of Government), is developing corporate management structures and the technology for computerised dissemination of rulings to its newly decentralised decision-makers at the coal face. It is also in the process of improving information flows to the vast bulk of self-assessing taxpayers. The Courts are developing new doctrines to provide a jumping off point for a more self-conscious input to the rule-making process.

III. NEW REALITIES

The new tax system in Australia can only be understood by fully assimilating the realities and new demands on that system. These form the operative assumptions in day to day decision-making by bureaucrats and increasingly by judges and members of the Administrative Appeals Tribunal. The following threads may be drawn out of the wider inter-woven canvas. At the foundation is is a new emphasis on the operation of the tax system in the real world. The main decision-makers now fully understand now that tax is a mass decision-making process and this reality is increasingly informing institutional design, rule making, resource management and the work of the Administrative Appeals Tribunal in its new tax jurisdiction. The decision-making changes, new assumptions and new substantive framework are the inextricably integrated foundations of the new Australian tax system.

The intimate linkage between the tax system and the central and critical economic objectives of the nation has been established. Abstracted analysis based on a comprehensive tax base is giving way to a sharper appreciation of the limited and imperfect choice of evils involved in practical policy-making and of tax as a functional policy tool. In particular, tax expenditures (and other tax design anomalies which generate tax based preferences) will be justified increasingly by overriding economic or other national policy priorities. Tax decision-making (by bureaucrats and judges) and tax decision-making structures are increasingly emphasising this critical imperative. Tax rulings will increasingly be evaluated in terms of wider economic and social criteria. But they must still take proper account of individual rights and whether these rights are unnecessary or disproportionately sacrificed to public purposes.

Implicit in pre-Summit tax strategies was the unexamined assumption that tax reform and day-to-day administration of the tax system were different universes. This assumption inhibited the generation of practical and pro-active responses to emerging pressure points in the Australian tax system

and meant that reform was driven by excessively idealised visions of a neutral tax system, a Camelot arising from the ashes of the vile political process. Key policy priorities are bolstering bureaucratic rule-making capacity, increasing taxpayer compliance in vulnerable areas, drastically stream-lining the mass decision-making process and increasing the effectiveness of institutions monitoring that process. Institutional constraints, new technology, improved job design, training and resource deployment have now moved centre stage in tax reform analysis. Management focus is on key strategic outcomes and critical priorities. Increasingly, decision-makers are seeing themselves as part of a continuing process of maintenance, adaptation and strategic change.

The reality of the tax system is that the bureaucrats do wield enormous power, and de facto make most of the operative decisions. The new reality is that the flow of power to bureaucrats has increased significantly in recent years, including the bolstering of rule-making structures. The courts exercise supervision over the actions of bureaucrats. They lack the resources and expertise to attempt detailed control over bureaucratic decisions. They must therefore develop effective strategies to provide indirect clout through the articulation of broad guidelines and sensible deployment of their limited fire power, in accordance with their comparative expertise. Given that the ultimate aim of the whole system should be to produce good decisions in the mass of routine cases, it is therefore necessary to develop a system which meshes the roles of bureaucrats and monitoring mechanisms effectively and efficiently, a system which permits bureaucrats to carry on with their normal and essential activities, but adequately supervises and channels these activities. Given the large amounts of revenue at stake and the large economic issues, we are seeing increasing involvement by Finance, Treasury and Cabinet in the monitoring process.

The Australian tax system is, and must inevitably be, dominated by design defects. These design defects have critical economic repercussions. We are building a freeway through Sydney, not designing Canberra from scratch. Many problems are irremediable or not fully remediable for political or practical reasons, or because other policy priorities compete with economic neutrality for pre-eminence. The transition costs or revenue foregone in getting to the ideal (the even playing field) are often prohibitive and competing political priorities (for example, the desire not to tax profits on owner occupier houses or to deliver cash to the poor) often prevent full realisation of economic ideals. Ideals must inform action. But they should not close out feedback from the real world. Where we cannot attain utopia, we often achieve better results deploying scarce resources to deal with the most urgent and important problems caused by design defects in the existing tax system and in asserting overriding national priorities. Policy makers must assess the marginal costs and benefits of change. They must develop more powerful and coherent visions of tax reform, visions which are generated by wider economic and policy imperatives. More penetrating, and even less obvious, particularly to ideologues who throw round utopias of conceptual

coherence at a very high level of generality, is the insight that substantive outcomes are typically controlled by bread-and-butter institutional, resource deployment and political issues. A pure form of tax on fringe benefits (for example, one imposed on employees which laboriously sorts out business and domestic purposes from composite entertainment expenditures), one which is too cumbersome, too intrusive or too expensive to administer is soon ineffective. Excessive fine tuning, unrealistic ideals or closed professional paradigms can easily become a charter for the well-informed and powerful to flaunt the tax and create far worse injustices. Hard, and essentially arbitrary, choices of evils, informed by mass-decision making imperatives, move to the very core of practical decision-making. With the demise of the illusion that Australia is the "lucky country", policy makers will become more accustomed to the hard graft and the thanklessness of such "tragic" choices.

These new realities are being reflected in our decision-making institutions at all levels. As decision-makers elaborate the content of an open-ended concept like "income" or construct tests for controlling the deductibility of expenditure with the open-ended control test in section 51 of the Income Tax Assessment Act, these decision-makers are creating law. The precise content of this delegated law-making is being elaborated increasingly with a view to accommodating wider economic and distributional perspectives and with a very firm eye on revenue cost and mass decision-making realities. An integrated tax and welfare strategy is being developed to improve targeting of expenditures and tax expenditures to the real poor.

IV. BUREAUCRATIC DECISION-MAKING IN THE SELF-ASSESSMENT SYSTEM

Australia now has a self-assessing tax system. Self-assessment was introduced following a 1984 Review Group study, which showed that traditional assessing procedures involved an inefficient use of human resources. The Tax Office announced in 1985 the introduction of a system of "self-assessment" of tax returns. Under the self-assessment system the Tax Office does not scrutinise most classes of returns as closely as in the past before proceeding to issue a notice of assessment. Returns are still examined to correct arithmetical and other "common" errors and to disallow claims which are "obviously" incorrect, and certain categories of return are still referred to Specialist Examiners. In the main, however, returns are accepted at face value.

While there will be less intense pre-assessment checking of returns, there is significantly increased post-assessment investigation of taxpayers' affairs. The Tax Office:

1. Has increased its computer cross-checking, and continued existing correspondence reviews;
2. Has expanded the use of desk audits; and

3. Is progressively expanding the use and sophistication of field audits toward the new 1992 target figure of annual audit coverage of an average of 3.0% of non-PAYE taxpayers. This field audit coverage will be selective, with greatest coverage in areas of identified high risk (for example, companies with annual turnovers above $100 million might expect to be audited at least every second year). It is being backed up by highly qualified teams to handle sophisticated audits of large taxpayers.

The purpose of the self-assessment system is to redeploy government resources to more efficient uses. Self-assessment has freed around 1000 assessors, who were transferred (in the main) to various compliance duties. The self-assessment system expedites the process of determining tax liability and avoiding minor disputes. Under the self-assessment system, the basic fairness of the tax imposition for the vast majority of taxpayers will depend on the effectiveness and fairness of the auditing functions in a bureaucratic mass decision-making process. Supervision by higher level officers and cross-checking is built in.

In tandem with the introduction of self-assessment, in 1986 the Government introduced changes to the general amendment provisions in section 170. Prior to 1986, section 170 permitted the Commissioner only to amend in order to correct an error of calculation or a mistake of fact or, where section 170(2) applied, to "prevent an avoidance of tax". The provisions did not empower the Commissioner to amend an assessment in order to correct a mistake of law. However, under the self-assessment system, the Commissioner accepts most returns at face value and issues an assessment on the basis of the information contained in the return. Section 169A(1) permits the Commissioner to rely upon the accuracy of statements in returns and attachments. Many returns, and thus the resultant assessment, will contain errors of law. Since the Commissioner will typically not have "checked" the legal accuracy of the return before issuing the assessment, the wording of section 170 has been altered to permit the Commissioner henceforth to "correct the assessment" in whatever way is necessary. Thus the Commissioner will now have power to correct mistakes of law contained in an assessment. The time-limits and other pre-requisites limiting the Commissioner's powers of amendment under section 170 remain unaltered. Note the triple tax sanctions for mis-statement which, by virtue of section 223(7), extended to information omitted.

Significantly, the 1986 legislation also inserted section 170AA, which provides that where an amendment of an assessment increases the taxpayer's liability, the taxpayer is liable to pay interest at prescribed rates to the Commissioner on the amount by which the tax payable has been increased. Interest runs from the date on which tax became due and payable under the original assessment. Section 170AA thus operates to "compensate" the Commissioner for not having received the correct amount of tax under the original assessment. Such interest is not deductible to the taxpayer, though in the converse situation, where the Commissioner refunds tax overpaid plus compensatory interest, the interest is expressly made assessable to the

taxpayer recipient.

The 1986 amendments to section 170 greatly expand the Commissioner's general powers to amend assessments, and in effect give the Commissioner carte blanche to correct errors in an assessment (whether errors of fact or law) in the prescribed circumstances. It is unclear whether the Commissioner's powers under section 170 extend to correcting aspects of the assessment other than the item whose non-disclosure triggered the power of amendment. The wording of subsections 170(1) and (2) suggests the Commissioner does have such power, though considerations of fairness indicate that the provisions should be read narrowly to avoid such a conclusion.

Under the self-assessment system, questions of whether the taxpayer had made "full and true disclosure" of all material matters necessary for the assessment will become even more critical because, if the taxpayer has done so, the Commissioner will have only three years within which to amend the assessment. If not, the time within which the Commissioner may amend will be significantly increased.

This program is being backed up with considerable bolstering of rule-making capacity, improvements in forms and materials going to self-assessing taxpayers and a devolution of responsibility down the hierarchy. It includes a new emphasis on negotiated settlement and considerable attention to clearing backlogs of disputes on hand.

V. REVIEW OF BUREAUCRATIC DECISION-MAKING: KEY ISSUES

Some points need to be stressed at the outset. The Income Tax Assessment Act attempts to lay down an exhaustive statutory scheme for review of assessments, with a carefully mapped route for taxpayers to follow and fixed (though now more flexible) time limits for various steps. In practical terms, the vast majority of disputes will flow this statutory route. The courts have adequate powers to monitor the bureaucratic decision-making process through the test cases which ultimately reach the courts.

However, only a small percentage of disputes ever reach the courts. In 1986-1987, 9 568 000 returns were processed by bureaucrats. While 255 000 objections were lodged in 1985-1986, only a tiny fraction (far less than 1% of these) ended up before the equivalent of the Administrative Appeals Tribunal or Federal Court. Thus in the overwhelming majority of cases, dispute resolution is determined by bureaucrats, checking is dominated by bureaucrats, and most rules are made by bureaucrats. It follows that if the process is to win mass support, it must operate effectively, and build in balanced review.

It is clear that, given these mass decision-making realities, the expense and comparative expertise of the judiciary, the role of the courts is:

1. Monitoring and steering the bureaucracy to ensure broad adherence to statutory purposes;
2. Assertion of the traditional protections of due process; and that bureaucrats comply with their own rulings without fear or favour;
3. Ensuring that individual liberties are not disproportionately infringed in the pursuit of public purposes.

In contrast with the old Boards of Review, the Administrative Appeals Tribunal and Federal Court now have the function of reviewing the Commissioner's decision on the objection against an assessment, rather than the assessment itself. As a consequence, the Administrative Appeals Tribunal or Court has no power itself to amend the actual assessment. Amendment of the assessment consequent upon the reviewing body's decision is now left to the Commissioner under section 200B(1). Control by the Tribunal and Court over the initial assessment process is therefore now indirect.

These changes, foreshadowed by earlier judicial authorities, predicate an acceptance of the proposition that the judiciary will optimise its clout in a mass decision-making process by carefully targeting its limited resources and by giving full weight to its comparative expertise and its institutional limitations. In some respects the momentum to keep judicial hands off the assessment process may have gone too far. While the judiciary should be sparing in its intervention in areas where it has limited practical experience of the imperatives of a mass decision-making process, it is important that it maintain the option to monitor administration of the assessment process sufficiently closely to ensure even-handedness.

Most important of all is the retreat from formalist doctrines. In a series of recent decisions the Australian courts have abandoned legal formalism at two levels. First, in the familiar move to remove the strict, constructionalist and restrictive approach to tax legislation and to move to a more purposive, contextual, even remedial, approach to the whole job.[6] This approach, is mirrored in the approach to tax schemes, in which a step by step dissecting approach, which accepts carefully constructed schemes at face value, has been abandoned in favour of a broader, more active and balanced appreciation of the practicalities of the arrangements in a particular case. Second, there have been fundamental shifts in conceptual foundations in the mainstream areas of income definition and deductions.[7] In both areas, older doctrines based on the formal characteristics of gains or expenditure (whether causal tests or fixed/circulating capital criteria) have taken a back seat to concerns with the overall purpose of the realisation activity or expenditure.[8] These shifts in the underlying ground rules and the

6 *Cooper Brookes (Wollongong) Pty Ltd* v. *FCT* (1981) 11 ATR 949, s.15AA Acts Interpretation Act 1901.

7 *FCT* v. *Myer* 87 ATC 4363; *FCT* v. *Just Jeans Pty Ltd* 87 ATC 4373; *FCT* v. *Forsyth* (1981) 11 ATR 657; *Ure* v. *FCT* (1981) 11 ATR 48.

8 See further Y. Grbich "Business Deductions" in R. Krever (ed.), *Australian Taxation* (1987) 145 and *Myer, ibid.*

development of new doctrine in the central tax areas will give the judiciary a much sounder basis on which to monitor and engage in selective intervention in the mass decision-making process.

1. Objections: Tax Office Review of its own Decisions

The Tax Office first reviews objections against its own decisions. The taxpayer is given sixty days to object. Much of the thrust of recent reform activity has focussed on identifying and removing the causes of common tax disputes, the vast majority of which still turn on communication shortfalls, intransigence, minor sums, delay or gamesmanship rather than genuine substantive differences of law or fact involving substantial amounts. Part of the strategy involves increasing the professionalism, the image of functional autonomy and the power to settle disputes by bureaucratic decision-makers at the coal face. Part of it is to cut back drastically on backlogs and to give 'fast-track' treatment to important test cases and large revenue items. There is a renewed emphasis on negotiated settlement and some movement towards the proposition (still to trickle fully down to the bureaucracy) that, provided elements of artificial tax avoidance or gamesmanship are not present, settlement will be on a basis which reflects transaction costs and the hazards of litigation. It is still early days, but it is expected these initiatives will gain momentum as sanity returns to the tax system and the professionalism of the bureaucracy is bolstered. The Commissioner's stated position is that the Tax Office will "strive to make quality decisions on objections, with reasons being well communicated to a taxpayer [and those reasons representing] the Australian Tax Office's final view". Indeed, it was stated recently by the Tax Office that the aim of the newly created and (internally) independent Appeals and Review Group is "to achieve a position where there is a general acceptance by the community as to the fairness, impartiality, soundness and efficiency of the decision-making process in respect of disputes".[9]

Under section 185, objections must be lodged within sixty days after service of the assessment. But some limited flexibility is now built in. The 1986 amendments introduced a new section 188(1) which permits a taxpayer, after the expiration of the sixty day period for lodgment of objections allowed by section 185, to forward the objection to the Commissioner together with a request that the Commissioner treat the objection as having been duly lodged (that is, in effect requesting the Commissioner to extend the time for lodgment of the objection). On the downside it should be noted that section 185 has been amended to require that objections be actually "lodged with" the Commissioner within the primary sixty day period. The reference to posting the objection within the sixty day period has been deleted from section 185. The taxpayer can no

9 See T. Boucher, "Taxation Disputes and the Appeal Process", Paper to the 1986 Qld Divn of the ASA, 29 May 1986.

longer simply post the objection at 11.55pm on the sixtieth day, and satisfy the section 185 time limit (assuming, of course, that the taxpayer could prove the posting). The request for this "extension" must be in writing (section 188(1)), and must state "fully and in detail" the "circumstances concerning, and the reasons for" the failure by the taxpayer to lodge the objection within the statutory time limit (section 188(3)). The phrase "fully and in detail" echoes the wording of section 170, and the implication of this phrase is presumably that, while the request need not be couched in legal language, it must be sufficiently explicit and particular to direct the Commissioner's attention to, and to explain adequately, the reasons for the circumstances concerning the delay in lodgment of the objection.[10]

The Commissioner must consider the taxpayer's request but has a discretion under section 188A(1) on whether or not to agree to treat the objection as validly lodged. The Commissioner must give the taxpayer notice in writing of the decision and it would seem that the taxpayer could obtain a statement of the Commissioner's reasons for that extension decision under section 38 of the Administrative Appeals Tribunal Act. A taxpayer dissatisfied with that decision may apply direct to the Administrative Appeals Tribunal for review of the decision under section 188A(3). Where the Commissioner or the Tribunal upholds a taxpayer's application for an extension, the objection is deemed under section 188A(4) to have been duly lodged.

The Explanatory Memorandum states that it is intended that, in determining whether to extend time under section 188A, the Commissioner or Tribunal will apply the "accepted principles applied by judicial or quasi-judicial bodies in extending time". The situations where the Explanatory Memorandum suggested that the Commissioner would grant an extension of time included:

1. Delay in lodgment of the objection caused by the illness of the taxpayer or of the taxpayer's agent;
2. The absence of the taxpayer overseas at the time of the issue of the notice of assessment (an obvious reference to the situation which arose in (1986) 25 CTBR (NS) Case 69); and
3. "Other factors that the taxpayer could demonstrate were outside his or her control...[including delays in the post]".

On the other hand, it seems likely that the Commissioner will be unsympathetic to requests for extensions resulting from the taxpayer's fault (for example, where a taxpayer simply put an assessment aside and forgot about it).

If the Tribunal and courts adopt similar principles to those applied in other contexts, the Australian Tax Office may find that the scope of section 188A is

10 Compare *H R Lancey Shipping Co Pty Ltd* v. *FCT* (1951) 9 ATD 267, *per* Williams J.; *A Campbell & Co Pty Ltd* v. *FCT* (1951) 82 CLR 452, 461.

somewhat more generous than its examples seem to contemplate. It is true that, in other contexts, the courts and tribunals have often started from the proposition that the period prescribed under the Act is not to be ignored. Prima facie, proceedings commenced outside the statutory period will not be entertained. It is for the applicant seeking an indulgence to show a persuasive basis for the grant of an extension. But in the result, courts and tribunals have taken the view that the question of whether or not to grant an extension depends on the "balance of fairness [taking] into account the various factors impinging upon both sides...".[11] The sort of factors which have been taken into account in applying these principles to particular cases have included:

1. Is there a live issue to be determined (that is, is there a genuine issue which ought to be litigated)?[12] How likely is the applicant to succeed if the extension is granted and the underlying matter heard?[13]
2. Has the applicant given an "acceptable explanation of the delay"? For example, has the delay resulted from relevant matters only becoming known after the prescribed date for filing, with the applicant acting promptly once those matters became available?[14]
3. What is the likely comparative prejudice to the respective parties of granting or not granting the extension?[15] Note that the mere absence of prejudice will not per se guarantee an extension.[16]
4. Does the "public interest" point towards granting of the application?[17]

While it will be some time before the boundaries of the new provisions relaxing the various time limits are clarified, it is at least clear that the new provisions introduce an element of flexibility into the requirements of section 185, though at the cost of creating another head of litigation and another job for the bureaucracy. Experience in other jurisdictions suggests we may well see a fairly generous approach to genuine applications for extensions of time under section 188A. Nevertheless, it should be noted that the Commissioner envisages that extensions under section 188A would be made only for comparatively short periods.[18]

Section 190(a) has been amended to provide that: "the taxpayer shall, *unless the Tribunal or Court otherwise orders,* be limited to the grounds stated in

11 *Re Bell and Australian Telecommunications Commission* (1983) 5 ALN 186, 187 *per* Mr Todd, quoting Reynolds, Hutley and Bowen JJ.A. in *Outboard Marine Australia Pty Ltd* v. *Byrnes; Bauknecht (Third Party)* [1974] 1 NSWLR 27, 30; see also *Devereaux* v. *DCT* (WA) (1986) 17 ATR 706.

12 *Devereaux, ibid; Re Bell, ibid.*

13 *Re Hewitt and Secretary, Department of Transport* (1982) 4 ALD 547, 551 *per* Davies J.

14 *Re Bell* note 11 *supra.* See also *Intervest Corporation Pty Ltd* v. *FCT* (1984) 15 ATR 1204, *per* Smithers J. at 1210-1212.

15 *Devereaux, Bell,* note 11 *supra.*

16 *Intervest* note 14 *supra,* 1211 *per* Smithers J. citing *Hickey* v. *Australian Telecommunications Commission* (1983) 47 ALR 517 and *Lucic* v. *Nolan* (1982) 45 ALR 411, 416-417 *per* Fitzgerald J.

17 As to the public interest generally, see *Raccuia* v. *Deputy Commissioner of Taxation (W.A.)* (1984) 15 ATR 1291, 1294.

18 See Tax Liaison Group, Canberra 11 June 1986 (1986) 21 *Taxation in Australia* 111, 113; Explanatory Memorandum, *supra,* 22; *Re Levena Pty Ltd and Minister for the Capital Territory* (1982) 4 ALN No.74.

his objection" (emphasis added). Thus the Tribunal or Court now has a discretion to permit a taxpayer to raise new grounds not contained in the original objection and perhaps to alter grounds contained in that objection. This power will enable the reviewing tribunal to ensure that justice is done in appropriate cases by overcoming the problems which arose under the old section 190(a) when taxpayers were limited strictly to the grounds originally stated in their objections and precluded from adding grounds which reconsideration or subsequent events might show to be relevant.

If the Tribunal and Courts apply similar principles to those which apply to amendment of civil pleadings in most jurisdictions, then the situations where their section 190(a) power could be exercised are potentially very wide-ranging. For example, one commentator has observed that under the NSW District Court Rules, "leave to amend is almost always given unless the party applying was acting mala fide, or has prejudiced the other party in a way which cannot be compensated by costs or the amendment is so obviously futile that it would be struck out if it had appeared in the original pleading".[19] If this approach were followed (and it seems likely that the Tribunal at least, intends to follow these "well trodden paths"),[20] it would seem likely that the reviewing tribunal would grant leave to amend grounds of objection in the following types of situation (inter alia):

1. Where after the expiration of the sixty day period, the Commissioner changes the grounds upon which he proposes to rely in support of the assessment; or
2. Where subsequent developments render the objection as originally drafted defective: for example, the introduction of retrospective legislation altering the law as at the date when the objection was drafted to raise new issues which the taxpayer needs to address.

In *Case U47*,[21] Mr H Stevens gave little general guidance on how the Tribunal will approach such questions, commenting simply that:

> [a]s the Commissioner's representative advised that the Commissioner was not taken by surprise and would not be inhibited in the presentation of his case; and as I considered the amendment necessary to enable justice to be done, I have allowed the amendment....

Mr Stevens did not indicate what his attitude would have been if one or more of these elements had been missing. However, the Administrative Appeals Tribunal would probably be fairly liberal in granting amendments (in the interests of enabling "justice to be done"). Some liberalism here may help curtail enormously long objections which cover every potential eventuality.

Despite these developments, the objection remains a crucial document

19 J. Chippindall and R. Sharp, *District Court Act and Rules, New South Wales*, 3032.2; *cf.* the analogous situation applying under the Supreme Court Rules: B. C. Cairns, *Australian Civil Procedure* (1985) 238 ff.

20 *Per* Mr. R. K. Todd (Deputy President, AAT) as reported in (1987) 71 *Taxation in Australia* 718, 719.

21 87 ATC 326, 331.

because the taxpayer is prima facie limited to the grounds stated in the objection and it cannot be automatically assumed that leave to amend will be granted. Under the wording of section 190(a) the Commissioner has no formal power to consider grounds not in the objection. It may be that in appropriate cases the Commissioner will take the pragmatic course and (informally) take account of the existence of the reviewing Tribunal's section 190(a) power when negotiating with a taxpayer.

In addition to these statutory changes, there are other structural changes which give cause for cautious optimism. One example is the recent amendment to section 185. It will be recalled that it was held in *Federal Commissioner of Taxation* v. *Offshore Oil N.L.*[22] that under section 185 a taxpayer could object against an amended assessment on any ground, including a ground which could have been raised against the original assessment. The proviso to the section merely set a monetary ceiling on the amount which could be challenged. This result was seen as contrary to the legislative intention, and to correct this situation, a new section 185(2) was inserted, limiting a taxpayer's rights to object against an amended assessment to "a right to object against alterations or additions in respect of, or matters relating to, that particular". The wording of section 185(2) clearly now imposes a subject-matter rather than monetary limit on the taxpayer.

VI. PRIMARY REVIEW IN THE ADMINISTRATIVE APPEALS TRIBUNAL

The primary review of bureaucratic decision-making is now reposed in the Administrative Appeals Tribunal. This replaced the old Boards of Review from 1 July 1986. The Administrative Appeals Tribunal stands in the shoes of the bureaucrat and can re-exercise bureaucratic discretions. It offers more procedural flexibility, some useful innovations over the old Boards and will become part of a more general initiative to improve the quality and coherence of the contribution by judges/adjudicators to public decision-making. In particular, the quality of information flows will, when the system is fully operational, improve considerably.

The Administrative Appeals Tribunal is constituted under the Administrative Appeals Tribunal Act 1975, and Taxation Appeals are, under section 19(2)(b), heard in the Taxation Appeals Division of the Administrative Appeals Tribunal. Members of the Special Division are appointed by the Governor-General under section 6 of the Administrative Appeals Tribunal Act, and may be drawn from within other Divisions of the Tribunal and from the ranks of other "eligible persons", as defined in section 71. Members of the old Boards of Review were entitled to transfer across to the Administrative Appeals Tribunal under section 214 of the Taxation Boards of Review (Transfer of Jurisdiction) Act, and several of the nine Board members did so. Thus the reforms, despite the appearance of radical change, are evolutionary rather than revolutionary.

22 (1980) 11 ATR 189.

1. Powers and Mission of the Tribunal

The Administrative Appeals Tribunal cannot act unless there is a decision to be reviewed.[23] In the context of tax appeals it needs to be reiterated that "decision" now under review is the Commissioner's decision determining the objection, not as pre-1986, the original assessment. All aspects of the decision appealed against are reviewable, though the Tribunal cannot review matters not within the ambit of the original decision.

The Administrative Appeals Tribunal reviews on the merits rather than the legality of a decision. It can substitute its own decision for that of the original decision-maker. In reviewing[24] the Commissioner's decision the Tribunal is obliged to satisfy itself[25] whether the decision appealed against was the right one. The Tribunal's jurisdiction is not limited to determining whether the original decision-maker made an error in law.[26] The Tribunal is able to re-exercise discretions granted to the Commissioner and substitute its view on how the discretion should have been exercised. Bearing in mind the proscribed powers of courts in this context and the number and nature of discretions granted to the Commissioner under the income tax legislation, this means that the Administrative Appeals Tribunal may be the only realistic choice as the appeal venue in many tax cases. The Tribunal then exercises all the powers and discretions conferred on the decision-maker (the Commissioner). Having reviewed the decision, the Administrative Appeals Tribunal may affirm, vary or set aside that decision and, where it has set aside a decision, may either substitute its own decision for that of the decision-maker, or remit the matter to the decision-maker for reconsideration with or without accompanying directions or recommendations; section 43(1)(a)-(c) Administrative Appeals Tribunal Act (see also section 43(2)-(6)).

The power to remit a matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal under section 43(1)(c) could prove to be a very useful power in the income tax context.[27] Recommendations made under section 43(1)(c)(ii) are not binding, but constitute a useful complement to the Tribunal's formal coercive power, and one which the Tribunal has made some use of in other

23 *Re Hare & Commissioner for Superannuation* (1979) 2 ALD 233, 236, citing Brennan J. in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167: "The Tribunal is not a primary administrator. It is not the original repository of powers and discretions under an enactment."

24 As to the concept of "review", see *Colpitts* v. *Australian Telecommunications Commission* (1986) 9 ALN 82, 84.

25 See *Collins* v. *Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 198, 202.

26 *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No.2)* (1981) 3 ALD 88, 91-92.

27 See for example *Re Bloomfield and sub-Collector of Customs, ACT* (1981) 4 ALD 204, 215-216 *per* Deputy President Todd; *Re Hare* note 23 *supra*, 237; *Re Grant and Secretary, Department of Transport* (1978) 1 ALN 202, 203-204.

jurisdictions in order to recommend such things as the making of ex gratia payments and review of bureaucratic policies and practices.[28]

The potential scope and impact of the Administrative Appeals Tribunal's power is considerable. Some idea of its importance is set out in the observations of Brennan J. in *Re Becker*.[29] He indicated that the powers of the Administrative Appeals Tribunal would go beyond the normal function of deciding whether a particular action was within power, and whether a bureaucratic policy was consistent with authorising legislation. It can decide the case on the facts, having regard to Tax Office policy and guidelines. But it can also review the merits of governmental policy and structure guidelines within the boundaries of the Commissioner's power or discretion in order to ensure that discretions conferred in general terms are exercised, according to law, reason and justice.

In their traditional role, the judges purported not to make rules. Of course, rule making did take place and the common law did have some flexibility to modify rules.[30] But the rate of change was slow enough, and the traditional devices of manipulating precedent or shifting the connotation of statutory words were effective enough to sustain the myth that the judiciary did not make law (read 'create rules'). The advantage of the method was its high stress on legitimacy and consistency. Because change relied on manipulation of the very tools, namely, words and concepts, by which the community might perceive and measure that change, it was not obvious. The disadvantage was that these tools of analysis tended systematically to obscure policy choice and to inhibit orderly policy development amongst the decision-makers themselves. In other words, stable evolution was bought at the price of clarity and hence critical analysis of policy development was inhibited.

The more mature decision-making structure now evolving is based on a model where each element of the structure explicitly compensates for observed weaknesses in other parts of the structure. The model is permeated by the powerful insights of open-systems theory.[31] It recognises the need for each part of the decision-making structure to be aware of its place in the wider mosaic, of the need for mutual restraint and the importance of maintaining a creative tension. It does not rely wholly on bodies like the Tribunal or Court for rule-making, nor is it predicated on an excessively rigid theory of legalism. It sees the importance of cooperative efforts to evolve strategy, where economic and other policy input is systematically developed and injected into decisions and where a major job is to structure ambiguity and to

28 *Re Grant id.*, 203, 204; *Re Sibrava and Acting Commissioner for Superannuation* (1978) 1 ALD 233.
29 (1977) 15 ALR 696.
30 The argument is expanded in Wallace & Grbich, "A Judge's Guide to Legal Change", note 1 *supra*.
31 see Katz & Kahn, *The Social Psychology of Organisations* (1966).

communicate systematically with the really important decision-makers, the body of self-assessing taxpayers. Under the model it is the Tax Office which will in the first instance structure discretion and develop rulings. The Tribunal will monitor this process and check the application of rules in particular cases. The model, it is clear, is one of adherence to broader economic and other policy guidelines of the executive in the normal case, with a distinct mission to balance individual rights against articulated public objectives and a clear role to monitor, structure actively and to contribute to rule evolution within the limits of delegated powers. It also ensures, consistent with resource constraints, that fair procedures are followed. It sees the adjudicative process as an inductive development of guidelines, a monitoring of administrative action in accordance with internal bureaucratic guidelines and a critical analysis of those guidelines to ensure consistency with basic parliamentary and ministerial policy directives, as articulated. In the process it will generate articulations which will structure and guide the process.

In *Re Drake and Minister for Immigration and Ethnic Affairs (No.2)* [32] Brennan J. elaborated the Tribunal's role. The Administrative Appeals Tribunal may take account of government policy, and is free to apply or not to apply the Minister's (or Commissioner's) policy, though it has an overriding duty to make the correct or preferable decision in each case on the basis of the material before it. While the Tribunal cannot and ought not to deprive itself of the freedom to give no weight to Ministerial policy, departure should be 'cautious and sparing' and based on cogent reasons. Given the increasing role of rulings in the tax area, the Administrative Appeals Tribunal will obviously play a key role in the new regime.[33] The Administrative Appeals Tribunal is subject to the same legal constraints as the original decision-maker and has only the same powers as the original decision-maker. In exercising its powers, the Tribunal must strike a balance between achieving objects of public significance and the interests of the individual. The traditional administrative lawyer's concern about 'fairness' to the individual merely indicates that in our society, we believe that social engineering by government cannot totally disregard the individual. But that important principle, which requires constant vigilance in the face of big government, should not deflect attention from the primary concern. Does the program, as designed and operated, pursue acceptable goals and, if so, does it do so successfully?[34]

In giving reasons for its decisions, the Tribunal will inevitably "spin out threads of policy from the facts of individual cases".[35] The Tribunal will not

32 (1979) 2 ALD 634, 642.

33 *Re Callaghan & Defence Force Retirement & Death Benefits Authority* (1978) 1 ALD 227, 230.

34 Note 32 *supra*, 644.

35 See J. D. Davies J. "The Federal Administrative Law Package", paper delivered at a Seminar for the Law Society of South Australia, 9 May 1986, 30; see R. Layton, "The Administrative Appeals Tribunal: a nuts and bolts account" (1986) 24 *Law Socy J* 38.

preclude itself from "making appropriate observations on ministerial policy and thus contributing the benefit of its experience to the growth or modification of general policy", but the Tribunal should aim for a constructive contribution, rather than pedantic analysis of bureaucratic decision-making. In particular, the Tribunal will need to get much more systematic in collecting, reconciling and integrating individual decisions in mass decision-making areas. The introduction of computer based information management will assist. In some other jurisdictions, inconsistency and confusion has been a problem. It will need to put much more effort into generating systematic, policy-based models for decision-making in problem cases.

2. Pre-Hearing Procedures

The Tribunal will continue, at least for the time being, the practice introduced by the Boards in recent years of running 'call-overs'. The aim of the call-over procedure is to check that both parties wish to proceed with the matter, and if so to ascertain how long it is estimated that the matter will run, who will be representing the parties, and generally attend to preliminary procedural matters.

The President of the Tribunal is empowered by section 34(1) of the Administrative Appeals Tribunal Act to order the holding of a preliminary conference. A preliminary conference is presided over by a member or officer of the Tribunal and is attended by a Tribunal member or officer, the taxpayer and his agent, and the Commissioner's representative. Conferences are designed to help resolve disputes without the need for a formal hearing. There will normally be at least one, often two but rarely more, preliminary conferences held in each matter before it reaches the hearing stage. At the preliminary conference, the matters discussed may include:

1. The possibility of resolving the matter without a hearing;
2. The number and availability of witnesses expected to be called at the hearing;
3. The expected length of the hearing;
4. "Discovery" of documents relevant to the proceedings;
5. Whether the parties will be represented, and if so by whom;
6. Lists of authorities to be relied on at the hearing;
7. The accuracy and adequacy of the Commissioner's section 37 statement and documents; and
8. Various others matters.[36]

The Sydney registry of the Administrative Appeals Tribunal allocates between fifteen minutes and an hour for a preliminary conference, depending upon the nature and complexity of the case. The sanction

36 See Administrative Review Council, Sixth Annual Report (1981-1982) AGPS, (1982), Appendix 4, 60.

encouraging attendance at a preliminary conference is that if a party fails to appear at such a conference, under section 42A(2)(a), the Tribunal may dismiss the application without proceeding to review the decision. It often conducts preliminary conferences by telephone ("teleconferences") where the parties cannot attend in person. This procedure will not be appropriate where the conference involves production of documents or the like (though facsimile machines may soon impact here). Where at or after a preliminary conference the parties agree in writing as to the proper decision in the matter, and the Tribunal is satisfied that the proposed decision is within its powers, the Tribunal may make a decision in accordance with the parties' agreement without holding a hearing. However, the Tribunal is not bound by the parties' agreement and must make up its own mind on what is the correct decision on the facts.

Initial reaction to the preliminary conference in some other Administrative Appeals Tribunal jurisdictions was unfavourable, but they have subsequently proved to be of considerable utility.[37] There were 2 783 conferences held in the various jurisdictions of the Tribunal in 1984-1985.[38] The conferences bring the parties face-to-face in private and encourage them to talk about the facts and disputed issues. Especially as the presiding officer may play a fairly active role in obtaining a resolution of the dispute by drawing the parties' attention to relevant decisions on analogous cases, and perhaps giving some opinion as to how the Tribunal might be expected to view the present case.[39] One factor which helps to encourage a full and frank exchange of views within a preliminary conference is section 34(3) of the Administrative Appeals Tribunal Act, which provides that no evidence may be given or statements made at the subsequent Tribunal hearing (if there is one) about any words spoken or acts done at the preliminary conference, unless the parties agree. Preliminary conferences have proved particularly useful in other jurisdictions in cases involving broad discretionary powers.[40] Bearing in mind the large number of such discretionary powers in the income tax legislation, it might be expected that the conferences could prove extremely valuable in the Taxation Appeals Division.

Some indication of the success of these procedures as filtering devices can be obtained from the fact that in 1984-1985, some 57% of Administrative Appeals Tribunal appeals (over all jurisdictions) were finalised without a hearing, either by the primary decision-maker altering his decision (32.8%), or the applicant withdrawing (24.2%), and it has been said that in the general jurisdiction of the Tribunal about 70% of cases are settled at preliminary

37 See further A. N. Hall, "Administrative Review Before the Administrative Appeals Tribunal — A Fresh Approach to Dispute Resolution? (Part 1)" (1981) 12 *F L Rev* 71, 86-87.

38 Administrative Review Council, Ninth Annual Report, (1984-1985) AGPS, (1985), Appendix 5, 112. See also G. Osborne "Inquisitorial Procedure in the Administrative Appeals Tribunal — Comparative Perspective" (1982) 13 *F L Rev* 150, 152, Hall, *id.*, 86-87, Layton, note 35 *supra,* 45-46.

39 Hall, note 37 *supra,* 86.

40 ARC, note 38 *supra,* 108.

conferences.[41] While tax possesses some unique features, there is no real reason to assume that broadly similar results will not be obtained in the Taxation Appeals Division, and preliminary indications, at least in Sydney, are that preliminary conferences are proving an equally valuable filter in the tax jurisdiction.

A directions hearing is designed to promote efficient use of hearing time by clarifying or resolving procedural matters (such as identifying the issues to be resolved on the review; giving of directions as to exchange of affidavits, documents, or agreed facts to be relied on at the hearing), or the hearing of preliminary procedural applications (such as statements of further particulars or additional documents from the decision-maker). It would seem that directions hearings are now "relatively commonplace" in the Tax Division.[42]

Call-overs, preliminary conferences other pre-hearing procedures represent a significant streamlining and filtering mechanism which by helping to identify and clarify the issues in the case, will help to expedite matters, and thus improve the speed of appeal procedures by minimising the amount of time involved in the actual hearing. Of course, they will only perform this function if both parties enter them with a constructive, rather than intransigent, attitude. The initial reactions from those practitioners and registry officials we interviewed suggest that the preliminary conferences in which they were involved generally proved quite effective, with the respective representatives generally proving to be less implacable than might have been feared. This view is supported by informal reports that to date well over 50% of matters are finally resolved at preliminary conferences held by the Sydney registry. Initial indications would therefore seem to suggest that these pre-hearing procedures are indeed performing a significant 'culling' role, and thus making a substantial contribution towards more efficient use of scarce decision-making resources.

3. *Hearings*

The flexibility of the Administrative Appeals Tribunal's structure, and particularly the availability of one-person Tribunals represents a significant saving in resources, as compared to the traditional three person Boards of Review. It is designed to significantly streamline the tax appeal process, cut hearing delays[43] and thus increase the efficiency of the tax system overall. One-person tribunals are used fairly frequently in other Divisions of the

41 Layton, note 35 *supra*.

42 ARC, note 38 *supra* and *per* Mr R. K. Todd, note 20 supra, 718, 719.

43 In the past delays in matters reaching the Boards sometimes involved several years. The "usual" delay in obtaining a hearing in other Divisions of the Administrative Appeals Tribunal is 4-6 months, and a date for a preliminary conference (to be held within sixty days) is set within one month of listing. In the tax context, the Tax Office indicated that it hoped that in future there would be a delay of 12 to 15 months, comprising six months for internal processing within the Australian Tax Office, and a delay of six-nine months within the Tribunal.

Administrative Appeals Tribunal.[44] Similarly in the context of the Taxation Appeals Division, of the first 128 reported cases heard by that Division:

- 103 (79.7%) were heard by one-person Tribunals (in all but seventeen cases being heard by a single Senior Member);
- ten (8.1%) by two-person Tribunals (in all cases being constituted by two Senior Members); and
- fifteen (12.2%) by full three-person Tribunals (being constituted once by a Presidential member plus a Deputy President and a Senior Member, on four occasions by a Deputy President and two Senior Members, on three occasions by a Deputy President and two Members, on four occasions by a Deputy President plus a Senior Member and a Member, and on three occasions by two Senior Members and a Member).

One-person tribunals have not received unanimous acclaim throughout the world: the Gallic counterpart of the Administrative Appeals Tribunal one-person hearing has been roundly condemned as being likely to jeopardise seriously the quality and impartiality of judgments, and to necessitate some other form of safeguard which can be equally time-consuming. But, as always, the interests of perfect justice must be weighed against cost and timeliness.

Members of the Tribunal fall into four categories: Presidential Member, being a Judge of the Federal Court, Deputy President, Senior Member, or Member. The Tribunal structures its constitution to suit the case to be heard in accordance with section 21(1) Administrative Appeals Tribunal Act. The constitution of the Tribunal is determined by the President, under section 20(1) Administrative Appeals Tribunal Act. Thus, while cases involving complex legal points may be heard by a full three-person tribunal, including perhaps a Presidential member, the Tribunal may sit one-person Tribunals where appropriate, as for example where straightforward factual issues are raised. Parties are protected by the terms of section 21A of the Administrative Appeals Tribunal Act, which provides that at any time during a hearing, a party may request that the Tribunal be reconstituted in a manner permitted by the Act.

Notwithstanding these efficiency improvements, the Tribunal will only operate effectively in its role of monitoring the bureaucracy and developing the rule-making structure if adequate resources are deployed to allow thorough consideration of important issues. Rule-making, particularly in mass decision-making areas, must remain a central priority of on-going tax reform. The issue is whether the output in dispute resolution, the quality of

44 In 1984-1985 of the 1343 Tribunal Hearings, 264 (20%) were heard by a Presidential member alone; 410 (30%) by a senior member alone, 100 (7%) by a member alone, 223 (17%) by a 3-person Tribunal comprising a Presidential member and two other members, and 346 (26%) by a 3-person Tribunal comprising a Senior member and two others. Thus some 58% of all Administrative Appeals Tribunal hearings in that period involved single-person Tribunals (Administrative Review Council 9th Report note 38 *Supra,* Appendix 5,108).

input to rule-making and the structuring of ambiguity or in monitoring the mass decision-making process is cost-effective in terms of competing demands on scarce resources.

4. Procedural Powers[45]

The Administrative Appeals Tribunal has power under sections 60-63 Administrative Appeals Tribunal Act to require persons to attend hearings, take evidence on oath and punish for contempt. These powers are backed up by heavy sanctions for breach, including maximum fines of $1000 and imprisonment for three months. The Tribunal also has power under section 40 to adjourn a hearing from time to time, and under section 42A to dismiss the application in prescribed circumstances. These sanction provisions give the Administrative Appeals Tribunal more effective powers than those possessed by the former Boards of Review, and could prove to be of considerable significance in the tax context.

The Tribunal's normal power under section 41(2) to stay the operation of a decision subject to review does not, under section 14ZD(1) Tax Administration Act, apply to objection decisions. The existence of such a power in the tax context was said in the Explanatory Memorandum to be inconsistent with the thrust of provisions such as section 201 Income Tax Assessment Act.

The procedure in an Administrative Appeals Tribunals hearing is within the discretion of the Tribunal (subject to the Act and regulations).[46] This flexibility is reflected in the fact that the Administrative Appeals Tribunal Act specifically provides in section 33(1)(c) that the Tribunal is not bound by the technical rules of evidence and may inform itself on any matter in such manner as it thinks appropriate.[47] This does not mean that the Tribunal ignores all rules of evidence.[48] The Tribunal will apply normal evidentiary rules in appropriate circumstances and it has developed its own evidentiary rules to suit its own mission. However, the Tribunal will not necessarily receive into evidence all material which a party may wish to put before it.[49]

Under section 33(1)(b) of its Act, the Tribunal is required to conduct its proceedings with as little formality and technicality as the requirements of

45 On procedures in the Tribunal, see Layton note 35 *supra*, and cf. (as to Board proceedings): P. Hunt, *Presenting a Case before the Board of Review* (ASA, COP; 1983); G. Thompson, "Synopsis of the Practice and Conduct of Reviews before a Board of Review and Appeals to a Court" in *Taxation in Australia, Appearances by Accountants,* 1979 *Australian Accountant,* 119.

46 S.33(1)(a).

47 *Re Waterford and Director-General of Social Services* (1980) 3 ALD 63.

48 *Re Pochi and the Minister for Immigration and Ethnic Affairs* (1972) 2 ALD 33; *per* Brennan J. though for example, it may attach more weight to oral evidence tested by cross-examination, than to written submissions not tested in this way.

49 See *Re Pochi, ibid; Re Saverio Barbaro and the Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1; compare *Kavanagh* v. *Chief Constable of Devon & Cornwall* [1984] 1 QB 624, 633 *per* Lord Denning M.R.; R.K. Todd, "Administrative Review before the Administrative Appeals Tribunal — A Fresh Approach to Dispute Resolution? (Part II)" (1981) 12 *F L Rev* 95, 96.

relevant legislation and a proper consideration of the matters before the Tribunal permits. In meeting this requirement, the Tribunal is directed to adapt the nature of its hearing procedures and the nature of the evidence received by the Tribunal to the administrative function it performs.[50] Such ideals of justice with a minimum of fuss and pomp are not always easy to attain, particularly where judges and lawyers are involved. The legislative direction in section 33(1)(b) is a qualified one, which recognises that in many matters which come before the Tribunal, "the adoption of too great a degree of informality may positively inhibit the orderly conduct of a strongly contested case and may impede the proper presentation by the parties and consideration by the Tribunal of the issues involved." [51] The Tribunal therefore seeks to adapt its procedures to take account of the nature of the particular case, and such factors as whether the parties are represented (and if so at what level). Proceedings where parties are represented by counsel will usually be conducted on more formal lines in relation to procedure and evidence than might otherwise be the case.[52] In general, it seems from observation and anecdotal evidence that in Sydney at least the Administrative Appeals Tribunal hearings to date, while following the same general procedural format as the old Boards, have been somewhat more formal than comparable Board hearings.

The Tribunal will normally be "guided by the parties in identifying the issues and...permit the parties to present their respective cases in the manner which they think appropriate." However, the Tribunal will intervene actively where appropriate, for example, to raise issues which the parties do not wish contested,[53] or to take a far more active role in eliciting evidence than would usually be the case in judicial proceedings.[54] The Tribunal can conduct a hearing in the absence of the applicant, at least where the applicant has been notified and does not give an adequate explanation of his absence.[55]

One innovative method of trying to alleviate problems arising from parties or witnesses encountering difficulty in attending hearings, is the teleconference.[56] Telephone link-ups between the parties and the Tribunal in situations where because of distance, infirmity or other acceptable reasons a party cannot attend the Administrative Appeals Tribunal hearing room, have been found to be of considerable use in other Divisions of the Tribunal for pre-hearing procedures such as preliminary conferences and on

50 *Re Saverio Barbaro, id.*, 5 *per* Davies J. see also *Re Zanicotti and Australian Telecommunications Commission* (1986) 9 ALN 72.

51 Layton, note 35 *supra*, 93.

52 Hall, note 37 *supra*, 88, 93-94; Todd, note 49 *supra*, 96-8; Mr S. Skehill, Commentary on Hall and Todd, (1981) 12 *F L Rev* 11.

53 *Sullivan* v. *Department of Transport* (1978) 1 ALD 383, 402-403, *per* Deane J.

54 Osborne, note 38 *supra*, 152; Hall, note 37 *supra*, 89.

55 *Re Wedgewood and Australian Postal Commission* (1978) 1 ALN 204, 205.

56 See further *Re S B & Director-General of Social Services* (1981) 3 ALN 153, 154 about the factors which will influence the determination of when a teleconference will be appropriate; Hall, note 37 *supra*, 91.

comparatively rare occasions, for the determination of the substantive merits of the case.[57] Teleconference hearings on the merits may not be suitable for cases involving strongly disputed issues of fact or complex legal issues, but are used in appropriate cases within the taxation jurisdiction for pre-hearing procedures though not yet, so far as we are aware, for final hearings. This is not an isolated development. The High Court itself is starting to mobilise this new technology.

The freedom otherwise available under section 33 is limited to some extent by the fact that the Tribunal is obliged to observe the principles of natural justice, that is, to act with judicial fairness and detachment.[58] The obligation to comply with the principles of natural justice is reflected in section 39 Administrative Appeals Tribunal Act, which requires the Tribunal to give all parties the opportunity to present their case. It is to be noted that the Tribunal is only obliged to give parties the opportunity to present their case, and is not obliged to take steps to ensure that their case is presented in the most persuasive way.

Contrary to the usual rules, the Tribunal is directed by section 35 Administrative Appeals Tribunal Act (as amended by section 14ZF Tax Administration Act) to hear taxation matters in private unless the taxpayer requests a public hearing. Public hearings are most uncommon. Our researches could find only ten public hearings out of 600 Board cases reported since 1982. Unreported cases would, in their nature, be unlikely to increase this figure significantly. Where a hearing is conducted in private, the Administrative Appeals Tribunal is required to ensure that, so far as practicable, the Tribunal's reasons for its decision are framed so as not to disclose the identity of any party (or enable the identity of such persons readily to be ascertained): section 14ZK(2C),(2D).

As with the former Boards, a party may under section 32 appear personally before the Administrative Appeals Tribunal, or be represented by some other person (for example a tax agent, accountant or lawyer). Taxpayers appeared personally in the vast majority of Board cases, as they apparently do in some other Divisions of the Administrative Appeals Tribunal,[59] and there was no obvious reason to expect a significantly different trend in the Tax Appeals Division. However, a perusal of the first forty-nine reported cases heard by the Taxation Division suggests that taxpayers appeared unrepresented in roughly 55% and were represented in 45%. This is a somewhat higher percentage of represented cases than might have been

57 See further Hall, note 37 *supra*, 91-93.

58 *Sullivan*, note 53 *supra*, 402 *per* Deane J.; *Re Saverio Barbaro*, note 49 *supra*, 5, 9, *per* Davies J.; *Barbaro* v. *Minister for Immigration and Ethnic Affairs* (1981) 44 ALR, 692, 694; *Re Pochi*, note 48 *supra*; and *Zanicotti*, note 50 *supra*; and see generally G. Osborne, note 38 *supra*, 166-175. For recent comments on the requirements of natural justice, see the decision of the Full High Court in *Kioa* v. *Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, and of the Federal Court in *Colpitts*, note 24 *supra*; see also *Smith* v. *Minister of State for the Department of Immmigration and Ethnic Affairs and the Commonwealth of Australia* (1983) 5 ALN 573.

59 *Taxation in Australia*, note 20 *supra*.

expected and it will be interesting to monitor future trends. The parties to an Administrative Appeals Tribunal hearing normally may include "any person whose interests are affected by the decision". However, in the tax context, the joining of such parties would be inconsistent with the basic idea that a taxpayer's affairs in the administrative forum should be confidential unless the taxpayer desires otherwise. Accordingly, section 14ZE of the Tax Administration Act modifies the effect of section 30 of the Administrative Appeals Tribunal Act so that an "outsider" (other than the Attorney-General) can under section 30(2) only be joined as a party to an Administrative Appeals Tribunal tax review with the taxpayer's consent. Under section 30A the Attorney-General can intervene in proceedings, but (according to the Explanatory Memorandum) will only do so in cases where the interpretation of the Administrative Appeals Tribunal Act is in issue, rather than a substantive tax question.

The Tribunal currently holds no power to award costs. Mr R. K. Todd, a Deputy President of the Administrative Appeals Tribunal, indicated that he opposed the Administrative Appeals Tribunal being given a power to award costs. Procedures such as costs and pre-hearing procedures perform a filtering role. So too does the boosting of the filing fee from $2 to $240. The fee will be refunded

> where the objection decision is subsequently varied to any extent in favour of the taxpayer by the Commissioner, or as a result of consideration by the Tribunal or Court...[or]...if the taxpayer decides to withdraw the request, provided that written notification of withdrawal is lodged with the Commissioner before the decision is actually referred to Tribunal or Court.[60]

While the much heftier fee is contrary to the original idea of the Board and Tribunal as a cheap forum for all taxpayer's complaints, and may effectively prevent some bona fide aggrieved taxpayers from pursuing their complaints beyond the objection stage, it needs to be balanced against decisional delays of the magnitude of those in the Boards over recent years which significantly erode the utility and effectiveness of the whole decision-making system. Hard choices have to be made. It is necessary to produce practical means of filtering out less important issues in full and brutal realisation that if we seek perfect justice in every individual case, we may well be decisively compromising the quality of justice delivered by the tax system as a whole.

5. Information Powers

The information gathering powers of the Administrative Appeals Tribunal are a central element in improvements to the dispute resolution process. They are part of a larger package of reforms to procedures for obtaining information (both from the Commissioner and taxpayer) and the culmination of a series of more general developments. They are treated separately below.

60 Commissioner's Press Release, 27 February 1987.

VII. APPEALS TO FEDERAL COURT AND HIGH COURT

The Australian courts have in the past enjoyed unusually wide powers in tax matters, but these judicial powers have been wound back under the 1986 amendments and by judicial doctrine. After September 1987 the courts exercise jurisdiction in three situations:

1. A direct reference under the court fork to the Federal Court from the Commissioner's disallowance of an objection.[61]
2. An appeal under the tribunal fork to the Federal Court from a decision of the Administrative Appeals Tribunal on a question of law.[62]
3. An appeal to the Full Federal or High Court from a Federal Court decision under the court fork.[63]

The new provisions effect a fundamental change in the court role in the assessment process. The 1986 amendments represent a statutory retreat from the activist approach advocated in *Krew* v. *FCT*[64] and a move back towards the more circumscribed view of the judicial supervisory function advocated by Dixon C.J. in *Avon Downs Pty Ltd* v. *FCT*.[65]

1. Court Fork

In the past, under the former section 187(1)(b), a taxpayer dissatisfied with the Commissioner's decision on an objection could require the Commissioner to "treat his objection as an appeal and forward it to a specified Supreme Court". This "appeal" under the court fork in fact involved a full rehearing and direct reconsideration by the Supreme Court of the Commissioner's assessment. Having heard the matter, the Supreme Court was then empowered by the former section 199 to "make such order as it thinks fit, and...by such order confirm, reduce or vary the assessment". This power was a very broad one, being wide enough, for example, to permit the Supreme Court to set aside an assessment and remit it to the Commissioner for reconsideration. Indeed, the section 199 power was at times asserted to be almost plenary, enabling the Court to override the express provisions of other sections of the Act, such as section 190(a).

In contrast, under the 1986 amendments, the dissatisfied taxpayer may require the Commissioner to refer to the Court only the Commissioner's "decision" on the objection. Under section 189(3), the referral of the objection decision to the Court "constitutes the instituting by the taxpayer...of an appeal against the [objection] decision". The Court is then empowered under the new section 199 to make "such order in relation to the

61 S.187(1)(b) and s.199. Under the Jurisdiction of Courts (Miscellaneous Provisions) Act 1986 (Cth) ss2,3 and Sch. 4 (operational from July 1987) the Supreme Court's jurisdiction is transferred to the Federal Court (subject to certain transitional provisions dealing with existing actions).

62 S.44(1),(4),(5) Administrative Appeals Tribunal Act.

63 S.200, and note the restrictions in s.200A.

64 71 ATC 4213.

65 (1949) 78 CLR 353, 360.

[objection] decision to which the appeal relates as [the Court] thinks fit, including an order confirming or varying the decision" (emphasis and interpolations added). The amendment to section 199 was designed specifically to overcome the effect of the decision in *Just Jeans Pty Ltd* v. *FCT*.[66]

These provisions make it clear that the Court is now limited to reviewing the Commissioner's objection decision, and has no direct power to make or vary assessments. The Federal Court thus returns to the traditional supervisory role, rather than the interventionist role previously occupied by the Supreme Court.

2. Tribunal Fork

The former section 196(1) provided for an appeal under "the tribunal fork" from the decision of a Board of Review to the Supreme Court from "any decision of the Board that *involves* a question of law" (emphasis added). The wording of the former section 196 created a low threshold to court appeals, since it was only necessary to show that the Board's decision "involved" a question of law,[67] and provided this requirement was met, it did not matter, according to *Krew*,[68] whether the Board had decided the question of law correctly or incorrectly.[69] It was comparatively rare for the Supreme Court to refuse jurisdiction, though even so there were occasions when the courts would deny jurisdiction on the basis that the Board's decision had not involved a question of law.[70]

Not only was the threshold low, but the scope of the section 196 appeal was very broad. This flowed from the fact that the section 196 proceedings, although termed an "appeal", actually involved the Court in the exercise of original jurisdiction (in reviewing the decision of an administrative tribunal). Accordingly, the Court reviewed all aspects of the Board's decision and not merely the particular point of law "involved" in that decision. Indeed, in *Krew* v. *FCT*,[71] Walsh J. asserted that:

> I am of opinion that I am not restricted in hearing this appeal to the question whether the Board's decision was open to it on the evidence which it heard. I have to consider whether or not its decision was right...I am not restricted in hearing this appeal in the way in which appellate courts are restricted, according to established principles, when hearing appeals (by way of rehearing) from a lower court.

This meant that the Supreme Court was able to exercise an extensive direct control over the decision.

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66 *FCT* v. *Just Jeans Pty Ltd* 87 ATC 4373.

67 See *Boyded (Holdings) Pty Ltd* v. *FCT* (1982) 13 ATR 127, 130-131 *per* Mahoney J.A.

68 Note 64 *supra*, see also *McCormack* v. *FCT* 79 ATC 4111.

69 See for example *New York Properties Pty Ltd* v. *FCT* 85 ATC 4503 and more recently *Thorpe Nominees Pty Ltd* v. *FCT* (1987) 18 ATR 489.

70 *Blackwood Hodge (Australia) Pty Ltd* v. *Collector of Customs, NSW (No.2)* (1980) 3 ALD 38, 48, 49; *Tang* v. *Hurford* (1985) 9 ALN 53, where the Court observed that while the case may have seemed a "particularly sad case", no error of law was shown; *FCT* v. *Mantle Traders Pty Ltd* 80 ATC 4588, *cf. Brambles Holdings Ltd* v. *FCT* 77 ATC 467, (1977) 138 CLR 467, 476, *per* Gibbs J.

71 Note 64 *supra*, 4216.

It is clear that under section 44, the Federal Court under the tribunal fork is limited to determining whether the Administrative Appeals Tribunal has decided the particular impugned question of law correctly. The Federal Court reviews only the *legality,* not the *merits* of the decision.[72] Thus the new appeal rules not only narrow the appeal path leading from the Administrative Appeals Tribunal to the appeal Court (by raising the entry/threshold requirements for appeal), but also narrow the range of issues which can be canvassed even where a taxpayer passes the entry requirements (because the Federal Court is now limited to determining the legal correctness of the particular question of law upon which the appeal is founded). This proposition was affirmed in the Full Court in *FCT* v. *Brixius,*[73] where the Court refused to intervene because only questions of fact and degree were involved. These factors seem likely to markedly reduce the flow of appeals from the Administrative Appeals Tribunal to the Federal Court.

3. Further Appeals

The Administrative Appeals Tribunal may of its own motion, or at the request of a party, refer a question of law to the Federal Court.[74] The problem of identifying a question of law is thus a crucial threshold condition in the new appeal procedure. Indeed, its importance is heightened. In approaching the question of identifying a question of law, at the extremes, the distinction is clear. Thus for example:

- Construction of a statutory provision involves a question of law and where facts are fully determined, the question whether they fall within the terms of a statutory provision, properly construed, is also a question of law,[75] as is the question of whether there is any evidence to support a conclusion,[76] though (semble) not the question of whether the Tribunal's decision was against the weight of the evidence.[77]
- Failure by the tribunal to consider an essential statutory precondition, or a fundamental misconception[78] or exclusion of a significant consideration[79] is a question of law.
- On the other hand, determination of the chain of events is a question of

72 S.45(1) Administrative Appeals Tribunal Act.
73 87 ATC 4963.
74 *McDonald* v. *Director-General of Social Security* (1984) 6 ALD 6; *Re Craft Warehouse Pty Ltd and Collector of Customs (NSW)* (1986) 9 ALN 62.
75 *Asim* v. *Minister for Immigration and Ethnic Affairs* (1985) 9 ALN 113; *Collector of Customs (Tas.)* v. *Flinders Island Community Association* (1985) 60 ALR 717, 725; *Blackwood Hodge* note 70 *supra,* 47; *Neal* v. *Secretary, Department of Transport* (1980) 3 ALD 97, 100, 107; *Minister for Immigration and Ethnic Affairs* v. *Gungor* (1982) 4 ALD 575; *Tabag* v. *Minister for Immigration and Ethnic Affairs* (1982) 5 ALN 10; *McMullen* v. *Commissioner for Superannuation* (1985) 8 ALN 236; *Commissioner for Superannuation* v. *Miller* (1986) 9 ALN 59.
76 *Collins* note 25 *supra,* 201.
77 *Kuswardana* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186, 199.
78 *Laremont* v. *Minister for Immigration and Ethnic Affairs* (1985) 9 ALN 13; *Sullivan* note 53 *supra.*
79 *McMullen* note 75 *supra.*

> fact. Similarly, it has been held that the issue of whether or not a mental condition is substantially connected with a retirement disability is "essentially" a question of fact, as is the meaning of an ordinary English word or phrase.[80]

While the distinction between questions of law and fact is often clear at the extremes, it can be one of considerable difficulty at the margins, a fact which led Scrutton L.J. in *Rees Roturbo Development Syndicate Ltd* v. *Bucker,*[81] to comment that it was quite impossible to reconcile the various judicial statements on the point. It may well be difficult to reconcile all the authorities. But if the fact/law dichotomy is seen as a threshold policy issue about whether courts should assume jurisdiction in a particular case, a conceptual device by which the courts can filter out and refuse to hear certain categories of cases, the reasons for the lack of internal consistency becomes obvious.

As Dickinson notes:[82]

> [i]n truth, a distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; for the good reason that there is no fixed distinction. They are not two mutually exclusive kinds of questions based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward without a break into matters of law...It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact'; and when otherwise disposed, they say it is a question of law.

Thus, the real job is to convince a court that it ought to intervene.

If this analysis is correct, then there may be some flexibility to determine what is or is not a question of law. The Federal Court may therefore not be as constrained to intervene under the new appeal rules as might appear at first blush. That is, in many cases, if a sufficiently important point of principle is involved and the Court deems it sufficiently important, the Court may be able to eke out a question of law.[83] Where an error of law is found, the Federal Court will intervene,[84] though the Court has in recent times stressed that the Court should not interfere lightly with the decision of an administrative body.[85]

Once the Federal Court has decided the question of law, it has power under section 44(4) to make "such order as it thinks appropriate by reason of its decision". It is expressly empowered under section 44(5) to make orders:

— affirming or setting aside the Tribunal's decision; or

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80 See *Board of Control of Michigan Technological University* v. *Deputy Commissioner of Patents* (1982) 40 ALR 577. And generally, *The Australian Gas Light Company* v. *The Valuer-General* (1940) 40 SR(NSW) 126, 137-138; *Edwards* v. *Bairstow* [1956] AC 14, 33ff, and *Hope* v. *Bathurst City Council* (1980) 144 CLR 1, 5 ff.

81 (1927) 13 TC 366, 390

82 J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1959), 55.

83 See Woellner, "An Analysis of the New Taxation Appeal Process", note 1 *supra,* 286.

84 *Miller,* note 75 *supra,* 59, *per* Beaumont J.

85 See *Ahern* v. *DCT (Qld)* (1985) 17 ATR 224.

— remitting the matter to the Tribunal for reconsideration (either with or without the hearing of further evidence) in accordance with the directions of the Court. This latter power is likely to prove a particularly useful one in the tax context (compare the discussion above in relation to the analogous Administrative Appeals Tribunal power).

However, the scope of the Federal Court's powers is not unlimited. It has been held that section 44(4) must be read in context, and is not a power to make literally any order which the Court thinks fit, but rather a power to make an order which is "appropriate by reason of its decision": that is, one which is "circumscribed by and necessary to reflect [the Federal Court's] view on the alleged or found error of law....".[86] Having set aside a decision, the Federal Court "has no express power to substitute what it sees as the correct decision unless such is the appropriate order by reason of its decision on the point of law in the context of the particular proceedings...There is certainly no power to supervise the Tribunal in any other way and, in particular, to deal with the merits of the review."[87]

The Federal Court has the usual power to award costs of the appeal. However, the Commissioner has indicated that where he appeals from a decision of the Administrative Appeals Tribunal in favour of the taxpayer, he will undertake to meet the reasonable costs of the taxpayer involved in the Federal Court appeal (except where the taxpayer seeks to obtain a benefit "which the legislature clearly had not intended to grant"). This continues the policy established in relation to appeals against decisions of the former Board of Review.

It should be noted, in relation to reviews by the Federal Court of an Administrative Appeals Tribunal decision, that section 17A of the Tax Administration Act removed the Federal Court's power under sections 15 and 16 of the Administrative Decisions (Judicial Review) Act 1977 to make orders in effect preventing the recovery of unpaid tax (such orders were seen as contrary to the policy underlying provisions such as section 201 Income Tax Assessment Act). Section 17A thus blocks off a tactical ploy which a number of taxpayers had sought to use over recent times. Since both the Administrative Appeals Tribunal and Federal Court are now precluded from blocking recovery of unpaid tax, the only way of blocking such recovery proceedings now would seem to be to invoke the inherent stay power of the Court hearing the Commissioner's recovery action.

On either the tribunal or court fork, there is a further right of appeal to the Full High Court by special leave from the Federal Court.

Under the new appeal rules, the Federal Court will play a key role. The Federal Court will be in a potential position to review all decisions made on either the tribunal or court forks, since all appeals on the administrative fork

86 *Gungor*, note 75 *supra*, 583; and *Miller*, note 75 *supra*, 60-61.
87 *Gungor*, note 75 *supra*, 585; *Miller*, note 75 *supra*, 60-62.

from decisions of the Administrative Appeals Tribunal will lie to the Federal Court. This increasingly centralised position after the 1986-1987 amendment will give the Federal Court a crucial opportunity to exercise a unifying influence by establishing clear general principles to guide appropriate rule-making by the bureaucracy and the Administrative Appeals Tribunal. If the court consciously avails itself of this opportunity, it could significantly improve the quality and consistency of decision-making in the tax appeal process. In this respect, Australia has avoided pitfalls encountered in the United States.

The importance of the Federal Court's role is accentuated by the fact that since the establishment of the Federal Court few tax appeals have progressed beyond it: the High Court heard two income tax and two other reported tax cases in 1985, four in 1986 and as few in 1987. Compare this with the Federal Court's workload of twenty-four tax cases in 1985, thirty-nine in 1986. Thus, for all but a handful of cases, the Federal Court will in future be the de facto final court of appeal in tax matters and the High Court will take the role of extraordinary court of last resort, analogous to the old Privy Council.

VIII. ADMINISTRATIVE LAW REMEDIES OUTSIDE THE PRESCRIBED PATHS

Traditional remedies outside the statutory avenues for review of a decision by the Commissioner are listed. Administrative law remedies generally have been the subject of extensive legislative change in the last decade. This has dramatically altered the face of administrative law. Some of these new Acts apply to tax disputes, but are subject to exceptions relating to certain matters, thus leaving taxpayers and tax lawyers to wade through the old common law. The following are relevant for our purposes:

1. The broad remedies available under the Commonwealth Administrative Decisions (Judicial Review) Act 1977, particularly the important right under section 13 of the Act to obtain the reasons and bases for the Commissioner's decision. However, these rights are subject to a number of exemptions. For example under paragraphs (e) and (g) of Schedule 1 of the Act it does not apply inter alia to "decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty, or decisions disallowing objections to assessments..or..amending..assessments.. under" inter alia the Income Tax Assessment Act 1936. In *Robinson* v. *DFCT*,[88] the Federal Court held that the prerogative writ of mandamus did not lie to obtain reasons from the Commissioner for the disallowance of an objection. However, subsequent cases suggested that the Courts were tending to read the Judicial Review Act exceptions narrowly, thus expanding the operative reach of the Act. Recent decisions indicate that the Act can apply to:

88 84 ATC 4277.

- refusal to issue withholding tax certificate.[89]
- decision to issue a Departure Prohibition Order.[90]
- decision to terminate a tax agent's lodgment programme.[91]
- refusal to extend time for payment of tax.[92]
- decision to commence recovery proceedings.[93]
- whether a search warrant was properly issued.[94]
- decision to reject a notice of objection.[95]

The Freedom of Information Act 1978 (Cth) can usefully operate in tandem with the Judicial Review Act in order to obtain background information which can then be used in the Judicial Review application itself.

2. The traditional prerogative writs issued by the courts:
   - certiorari and prohibition (to quash unlawful actions).
   - mandamus (to enforce the carrying out of duties in accordance with law).
   - habeas corpus (for illegal detention of a taxpayer).

Unfortunately the availability of these remedies often turns on old and technical law, and the decision in *Robinson* v. *DFCT*[96] has cut back this head.

3. Equitable remedies are available:
   - declaration (the most flexible remedy, which merely consists of declaring the law).
   - injunctions (usually to prohibit some contemplated action).
4. Appeals to the Administrative Appeals Tribunal for deregistration of tax agents under Part XIX Administrative Appeals Tribunal Act 1975.
5. Complaints to the Commonwealth Ombudsman. The Commonwealth Ombudsman Act 1976 provides inquisitorial procedures enabling the Ombudsman to investigate complaints about maladministration in Government departments. The Ombudsman enquires informally about complaints and suggests changes to the bureaucrats. His only sanction is publicity and ultimately a report to Parliament but his activities still seem to be reasonably successful.

The availability of administrative law remedies outside the prescribed statutory avenues of review was substantially reduced as a result of decisions in *Bloemen Pty Ltd* v. *FCT*,[97] *Lucas* v. *O'Reilly* [98] and more recently in

89 *Mercantile Credits Ltd* v. *FCT* (No.2) (1985) 16 ATR 855.
90 *Briggs* v. *DCT (W.A.)* (1985) 16 ATR 888.
91 *Balnaves* v. *DCT(S.A.)* (1985) 16 ATR 892;
92 *Gray* v. *DCT (Vic.)* (1985) 16 ATR 1026; *Nestle Australia Ltd* v. *FCT* (1986) 17 ATR 322; *ARM Constructions Pty Ltd* v. *DCT (NSW)* (1986) 17 ATR 459, (1987) 18 ATR 407; *Snow* v. *DCT (W.A.)* (1987) 18 ATR 439, and (No.2) 18 ATR 659; *cf. Constable Holdings Pty Ltd* v. *FCT* (1986) 17 ATR 640;
93 *O'Keefe* v. *DCT (N.S.W.)* (1986) 18 ATR 13; *Mostyn* v. *DCT* (1987) 18 ATR 214; *Snow (No.2), ibid.*
94 *Parker* v. *Churchill* (1986) 17 ATR 442.
95 *Johnson* v. *FCT* (1986) 17 ATR 584.
96 Note 88 *supra.*
97 Note 3 *supra.*
98 79 ATC 4081.

Robinson v. *DFCT*,[99] though the limitation has perhaps been over-stated.

On careful examination, the decision in Bloemen does not shut the door as tightly as some may have assumed from a cursory reading of the headnote in that case. The *Bloemen* decision merely applies the familiar doctrine that the courts will not grant administrative law remedies where an adequate statutory remedy is available. It does this by holding that section 177 read in its context, is designed to encourage use of the statutory avenues of revenue and therefore, where these avenues are adequate, an assessment should be conclusive unless challenged through these statutory avenues, a proposition recently reasserted in *DFCT* v. *Pearson*.[100] However, there may be occasions on which the statutory avenues are manifestly inadequate to protect important values. For example, where the Commissioner acts in bad faith. Such powers would be exceptional but they should be kept in reserve to protect against unreasonable or disproportionate abridgement of individual liberties in pursuit of public purposes. See further *Lemmington Holdings Ltd* v. *CIR* [101] and *Ahern* v. *FCT*.[102] An extensive array of decisions have established that the courts are prepared to contemplate administrative law remedies to supervise the exercise of discretions over tax collection in appropriate cases.[103] But in his 1984-1985 Annual Report, the Commissioner stated that: "There is cause to believe that some actions taken under the Administrative Decisions (Judicial Review) Act are taken to delay the administration of the law rather than because there is a real issue requiring review by the Federal Court". [104] The legislature was quick to react with section 17A of the Taxation Boards of Review (Transfer of Jurisdiction) Act 1986. This provides that "The Federal Court of Australia shall not ... exercise a power conferred on it by section 15, or paragraphs 16(1)(d), (2) (b) or 3(c) or sub-section 16(4) of the Administrative Decisions (Judicial Review) Act 1977 so as to prevent or restrain the recovery...of tax...".

A far reaching application of these administrative law procedures is the Federal Court decision in *Willarra Pty Ltd* v. *Minister for Homes Affairs*.[105] MacGregor J. applied the Administrative Decisions (Judicial Review) Act provisions to overrule a minister's discretion to refuse a certificate for a film qualifying for tax incentives. MacGregor J. based his decision on the grounds that irrelevant considerations were taken into account in the decision, that the decision was so unreasonable that no reasonable person could have made it, and that no chance was given to the taxpayers for a hearing on the issue. The decision was affirmed on the natural justice ground by the Full Federal

99 Note 5 *supra*.
100 84 ATC 4203.
101 82 ATR 6042, 6047.
102 83 ATC 4698.
103 *Dyson* v. *Attorney-General* [1910] All Er Rep 1097; and *cf. Terrule Pty Ltd* v. *FCT* 85 ATC 4173 and contrast, *Balen* v. *IRC* [1977] 2 All ER 406.
104 Federal Commissioner of Taxation, Annual Report, 1984-1985, AGPS, 67.
105 84 ATC 4421.

Court[106] because the Minister, in the words of the joint judgment of Toohey, Wilcox and Spender JJ. "failed to give [the taxpayers] the opportunity to confront and reply to matters ... which clearly played a substantial part in persuading him not to issue a final certificate", and on the basis that the Minister took into account factors which were irrelevant under the legislation and made his decision on a "misunderstanding" of what the authorising legislation involved. Significantly the Full Federal Court, while asserting jurisdiction under the Judicial Review Act for improper exercises of power, reminded judges that they "must not lose sight of the way in which the legislature has vested decision making in the Minister".[107] Though it is for the Minister to determine the weight to be accorded to various factors.

IX. CHALLENGING AND STRUCTURING BUREAUCRATIC DISCRETIONS

Bureaucrats enjoy extensive power in the tax system. In one sense, the vast increase in number, and more significantly the importance, of bureaucratic discretions included in the Act was primarily of symbolic and historic importance. There is not a crucial practical difference in whether bureaucrats exercise rule-making powers under 'objective' statutory provisions or discretions. But by enacting wide-ranging discretions in key areas determining tax liability, the legislature underlines the point that bureaucrats make law and puts more overt emphasis on bureaucrats as decision-makers. In such a mass decision-making process judges act as a discipline because of the potential for supervision and divergent perspectives. Judicial processes are simply too cumbersome and expensive and judicial comparative expertise too narrow to allow judges the luxury of supplanting routine primary bureaucratic decisions.

With the gradual evolution of a constructive balance between the judiciary, rule-making bodies in the bureaucracy, and specialised review tribunals, we are seeing a return to more traditional doctrines for judicial supervision. Courts have developed well recognised heads for the exercise of such supervisory power.

In one sense, the well-known administrative law doctrines which control the exercise of discretions are merely an application of a purposive orientation to statutory construction now enshrined in section 15AA of the Acts Interpretation Act 1901. Judicial intervention is justified because the judge purports to infer the governing purpose from the authorising statute. This is then translated and elaborated into a set of guidelines to structure and constrain widely phrased bureaucratic discretions. More specifically, however, the main rules relating to judicial control of bureaucratic discretions are as follows:

106 84 ATC 4947.
107 *Id.*, 4954.

Courts can strike down the exercise of Commissioner's discretions where:

1. The bureaucrat took into account irrelevant considerations (that is, 'irrelevant' according to the judge);
2. The bureaucrat failed to take relevant considerations into account (that is, 'relevant' according to the judge);
3. There was a mistake of law on the fact of the bureaucrat's reasoning (note the fluidity of the notion of a "question of law");
4. The bureaucrat failed to address the question in the legislation, or fettered his discretion with *inflexible* general rules, or made the decision under dictation by an unauthorised person.

Thus in *FCT* v. *Mantle Traders Pty Ltd* [108] Brennan J. said that a party challenging a finding of the Administrative Appeals Tribunal (standing in the shoes of the Commissioner) would need to show that the Tribunal had acted invalidly, not merely incorrectly. He went on to observe that an applicant could show invalidity by showing that the Tribunal

> was affected by a mistake of law, or took into account an extraneous consideration, or failed to take into account some factor which ought to have been considered or formed the opinion or acted on material which could not reasonably support the relevant opinion or state of satisfaction.

Accordingly, the path to effective challenge normally lies in obtaining the reasons for the exercise of a bureaucrat's discretion or the facts relied upon in the exercise of that discretion (see further below).[109]

In exceptional cases, a challenge may be mounted under the substantial evidence rule on the ground that a determination was made or discretion exercised so that it was "capable of explanation only on the ground of some ... misconception".[110]

Bodies exercising quasi-judicial functions must normally comply with rules of natural justice (or procedural fairness), which have two key aspects:

1. Duty to afford a fair hearing. This includes an obligation to give notice, to afford the parties an appropriate hearing (which need not necessarily be oral) and occasionally rights to representation. The content is not fixed and depends on what is required in individual situations to ensure procedural fairness in all the circumstances.
2. Freedom from bias and self-interest by the decision-maker.

The High Court suggested in *Mobil Oil Australia Pty Ltd* v. *FCT*[111] that the former Boards of Review did not have a duty to apply principles of natural justice, because the Board's function was merely to do again the steps which the Commissioner carried out in making the Assessment, not to give a

108 Note 70 *supra*, 4601.

109 Much fuller analysis of this issue and a typology of Commissioner's discretion is contained in Grbich, "Anti-Avoidance Discretions", note 1 *supra*.

110 Dixon C.J. in *Avon Downs* note 65 *supra*, 360. *Cf.* Gibbs J. in *Brambles Holdings*, note 70 *supra*, 4485-4861.

111 (1963) 13 ATD 499, 502, (contrary to the thrust of earlier dicta in *Barripp* v. *FCT* (1958) 11 ATD 449, 502).

decision affecting the taxpayer's legal situation. However, the Courts have held that the Board's successor, the Administrative Appeals Tribunal, is required to observe the rules of natural justice in hearings.[112]

X. CRITICAL EVALUATION OF THE REVIEW AND APPEAL REFORMS

The primary reforms of the review process introduced in 1986-1987 are the entry of the Administrative Appeals Tribunal and the new prominence of the Federal Court. The power of the judiciary to intervene has been trimmed back to a more supervisory role but the judges get a direct role within the Tribunal structure. Many procedural reforms have been introduced. It would be most unwise to dismiss the introduction of the Administrative Appeals Tribunal as nothing more than a change of venue. The Tribunal is a different and, in some ways, more sophisticated body than the old Boards, and it is accordingly likely that in the longer term the introduction of the Tribunal will significantly change the tax appeal process in substantive as well as procedural terms.

A fair and equitable means for review of decisio s affecting the rights of citizens is a basic human right. Article 14 of the International Covenant on Civil and Political Rights includes the following provisions:

> All persons shall be equal before the courts and tribunals. In the determination of ... rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In attempting to determine the extent to which the 1986 tax appeal reforms satisfy the above requirements or at least improve the pre-1986 position, the criteria adopted for the evaluation are:

1. Fairness;
2. Cost;
3. Timeliness; and
4. Efficiency.

We will consider each of these criteria in turn.

The ideal tax review process should be equally fair to taxpayer and Commissioner. In a number of respects, the pre-1986 system was not even-handed. It imposed inflexible time limits on taxpayers (often with draconian consequences); it prohibited taxpayers (but not, in general, the Commissioner) from altering grounds of appeal; and *it was said* that the Boards of Review lacked the essential appearance of impartiality.

Examine each of these points in turn. Before the 1986 amendments, an objection against the assessment had to be lodged within an inflexible time limit of sixty days from the service of the assessment.[113] This arbitrary time constraint could produce anomalous and unfair results.[114] Similar inequities

112 *Sullivan* note 53 *supra.*

113 See *FCT* v. *S Hoffnung & Co Ltd* (1928) 42 CLR 39.

114 One recent example being (1982) 25 CTBR(NS) 535 *Case 69;* see also the similar (though even more bizarre) situation in *Johnson,* note 95 *supra,* 592.

arose in relation to the statutory time limits for the lodgment of a request that the Commissioner refer a case to the Board for review. In *Raccuia* v. *DCT (WA)*,[115] Toohey J. felt constrained to hold that a taxpayer who could not show that he had lodged a request to refer a matter to the Board within the statutory sixty day period under the former section 187(1) irrevocably lost his statutory rights to challenge the decision appealed against. The Commissioner did not suffer such rigid time constraints. The courts made intermittent and ad hoc efforts to alleviate some of the worst aspects of the pre-1986 situation by reading implicit "reasonable time" constraints into such provisions and criticising inordinate delays by the Commissioner in carrying out his statutory functions,[116] but the scale remained unevenly tilted. However understandable this legislative approach may be in terms of the Tax Office's workload and responsibilities, it gave the procedural requirements in the tax legislation an asymmetrical appearance. Procedures to streamline bureaucratic delays are doing a lot to assist and may eventually lead to more symmetry here.

Until 1986, section 190(a) limited taxpayers on subsequent appeal to the grounds stated in their original notice of objection. Though the Boards and Courts struggled on occasions to "bend" the rules by reading objections very broadly,[117] or, in the case of the Supreme Courts, by asserting power under the old section 199 to determine the case on the basis of grounds not raised in the taxpayer's objection,[118] in a number of cases taxpayers with substantive arguments were met with the finding that since their objection as originally drafted did not canvass a particular point, they were precluded from arguing that point on appeal.[119] The position was exacerbated by the fact that at times the section 190(a) barrier was applied in a rather harsh fashion.[120] The impact of all this was to lead to huge standard form objections and a failure to isolate issues in dispute at early stages of the dispute resolution process.

Pape[121] suggests that the appeal process was not perceived by many as being impartial and disinterested because:

1. The Australian Tax Office controlled the case-lists, allowing it (inter alia) to "minimise the exposure of any lack of quality control in the assessing function";
2. The Australian Tax Office influenced the appointment of Board members;

115 Note 17 *supra*, 1294.

116 *Re O'Reilly; ex parte Australena Investments Pty Ltd* 83 ATC 4807, 4809; and *Ahern*, note 102 *supra*, 4706.

117 See among others, *FCT* v. *McClelland* (1967) 118 CLR 353; and 26 CTBR(NS) *Case 31*, 124.

118 See the efforts of Windeyer J. in the series of cases culminating in *Mercantile Credits Ltd* v. *FCT* 71 ATC 4015, 4020.

119 See such cases as *Case B68* 70 ATC 326; *cf.* (1986) 29 CTBR(NS) *Case 26*.

120 See for example: *AL Campbell & Co. Pty Ltd* v. *FCT* (1951) 82 CLR 452; *Archer Bros Pty Ltd* v. *FCT* (1952) 90 CLR 140.

121 B.R. Pape, "The Role of Courts and Boards of Review" in Cooper and Vann (eds), *Decision Making in the Australian Tax System*, note 1 *supra*, 44.

3. The Chairman of each Board of Review (who controlled procedural aspects of the Board's functioning) was a senior ex-tax officer, giving an appeal to the Board the appearance of an appeal from Caesar to Caesar.

There does not seem to have been any argument adduced that the Boards were in fact biased or unfair in their actual operation and few made the obvious point that most tax judges spent most of their time as barristers advising taxpayers against the Commissioner. However, the Administrative Review Council Report[122] argued that "independence is a state of mind", and that since taxpayers could not delve into the Board member's state of mind, "external indicia of independence consequently became important". In these circumstances, the Administrative Review Council saw it as significant that "the primary, if not the sole, reasons for lack of confidence [in the Boards was] the position of former officers of the Tax Office as Chairmen of the Boards".[123]

Before 1986, the only unavoidable monetary cost involved in a reference to the Board of Review was the $2 refundable fee. For the majority of taxpayers who appeared for themselves in simpler cases, the Board could thus be a cheap mode of appeal, (though in more complex or weighty matters the taxpayer might be compelled by practical considerations to brief a legal or other representative). By contrast, a taxpayer electing to appeal to the Supreme Court (or to proceed beyond the Board of Review) faced the inevitable legal costs of representation. The cost of the Tribunal is now $240. The additional cost imposed by multiple layers in the pre-1987 appeal process must also be taken into account.

Any appeal system should be structured so that the steps in the appellate process proceed reasonably promptly, and the matter reaches finality as quickly as is reasonably possible. Justice delayed is justice denied, even when it is not on the epic Dickensian scales of *Jarndyce* v. *Jarndyce*.[124] Before 1986, taxpayers increasingly encountered significant delays having objections determined (however understandable in terms of the Commissioner's overall workload) and in having some matters reach the Board. There were significant variations in the comparative delays as between the various Boards.

If the pre-1986 system did not score highly on deployment of resources, appeal lay from the Board of Review to a Supreme Court in prescribed circumstances, with the appeal in the Supreme Court being a full judicial re-hearing de novo and thus involving an inefficient use of scarce judicial resources. The relatively inflexible three person structure of the Boards also involved an inefficient allocation of scarce resources in simple cases. By contrast, the Administrative Appeals Tribunal's flexible structure, including

122 Administrative Review Council, Report No. 17, para. 89.
123 *Id.*, paras 88-96.
124 C. Dickens, *Bleak House* Ch.. 1. Compare the comments in *Re Youssef and Australian Telecommunications Commission* (1986) 9 ALN 75, 77.

the availability of one-person tribunals, was seen as offering significant potential resource savings and significant expedition in the hearing of cases.

Consistency in decision-making is fundamental to proper administrative review, and a basic requirement for ensuring the status and authority of a review tribunal. While lack of uniformity in substantive decision-making was not seen as a major problem as long as Board decisions were published, the Tribunal is clearly in a better position to increase such uniformity and under the unifying control of the Federal Court we can avoid the serious United States pitfalls of divergent decisions.[125]

Against this background of the perceived defects of the pre-1986 system, several points can be made in relation to the new objection and appeal provisions. The number of objections lodged more than trebled between 1975 and 1985 (to 254 824 in 1984-1985). While 1985-1986 saw a "hiccup" in this trend (with objections lodged falling to just over 214 000), and the Commissioner has indicated his belief that the introduction of self-assessment and substantiation will significantly reduce the number of objections and disputes, it seems reasonable to assume that the number of disputes is unlikely to fall dramatically. The introduction of pre-hearing procedures to clarify issues and thus reduce hearing times, the flexible constitution of the Administrative Appeals Tribunal (particularly the availability of one-person tribunals), and its formalised opportunities for negotiated pre-hearing settlements, offers considerable potential savings of time and effort for the taxpayer, Commissioner and Tribunal. Ironically, perhaps, the trend in other Divisions seems to be away from single person tribunals towards three person tribunals wherever this is convenient and practicable.

On balance, it seems likely that the benefits of these developments will be seen as outweighing the detriments, so that in terms of the Kerr Committee's criterion the "justice of the system at the individual level" will be increased, and consequently so too will the "dispute containment" potential of the system. The main cloud on the horizon is that caseloads will swamp Tribunal resources and lead to a loss of the potential or constructive rule evolution and clean up this new review structure. On balance, the recent changes to the appeal and review system offer the potential for significant improvement to the overall functioning of the tax appeal system, both at the individual and system levels.

XI. ACCESS TO INFORMATION

Access to timely and relevant information is crucial to the Commissioner and taxpayer alike in tax disputes. For the taxpayer, the key to mounting an effective challenge to an objection decision of the Commissioner (particularly

125 Note 122 *supra*, paras 105, 108ff.

where that decision involves the exercise of a discretion vested in the Commissioner) is early access to adequate and pertinent information about the reasons and facts relied on by the Commissioner. Conversely, access to information about the taxpayer's transactions is usually critical for effective assessment by the Commissioner. Information is thus the sinew of effective tax litigation. It is small wonder that procedural battles for such information have, in recent times, been fought hard, and that measures designed to hide information figure so heavily in many tax schemes. The information reforms attendant on the introduction of the Administrative Appeals Tribunal are the culmination of a large range of rolling reforms to remove delay and technical impediments to information sharing from both taxpayer and Commissioner. Early availability of decent information (as opposed to standard form catch-alls) helps considerably in isolating issues and promoting earlier resolution of disputes.

1. Commissioner's Information Gathering Powers

Litigation over recent years has centred on sections 263 and 264 of the Income Tax Assessment Act. Fortunes have fluctuated. The Commissioner first succeeded in establishing wide powers of search for information based on sections 263 and 264 of the Act. Subsequently, his powers were effectively cut back by confirmation that section 263 in its original form did not impose any positive obligation on taxpayers and others to assist tax officers and by a recognition that taxpayers could rely upon traditional doctrines of legal professional privilege in *Baker* v. *Campbell*.[126] More recently, the Commissioner won back valuable judicial ground and has now largely triumphed through the statutory extension of the Commissioner's powers in the new section 263.

The following propositions in relation to the Commissioner's Income Tax Assessment Act investigative powers can be asserted:

1. Section 263 gives the Commissioner and his authorised officers access (with a right to inspect and copy) to documents held by the taxpayer or on his behalf. This includes access to documents held by a court, provided such access would not constitute contempt.[127]
2. Section 263 implies a power to use all reasonable and appropriate steps to remove physical obstructions to access, including a right to use reasonable force, at least against property, to effectuate access.[128]
3. Prior to the 1987 amendments, section 263 imposed no obligation on taxpayers or others to volunteer information or answer questions. However, the new 1987 version of section 263 requires the occupier of a building or place entered pursuant to the section 263 power to "provide the Commissioner or the officer with *all reasonable facilities and*

126 83 ATC 4606.
127 *Commercial Bureau (Aust) Pty Ltd* v. *Allen* 84 ATC 4198.
128 *Kerrison and Banich Management Pty Ltd* v. *FCT* (1986) 17 ATR 338.

assistance for the effective exercise of powers". It also requires Tax Officers to produce proper authority in writing.

4. A duly authorised officer can issue a section 264 notice to a taxpayer to attend and give evidence. Such an exercise of power is not an invalid sub-delegation.[129] Note a new section 221YAA inserted in 1987 will apply section 264 to the PAYE provisions.
5. Subject to professional privilege, section 264 may be used to gain information before a dispute and may be used for "fishing expeditions" for information, provided they are tied to a particular assessment of a particular taxpayer.[130]
6. For practical purposes in Australia legal professional privilege is no longer merely a rule of *evidence* which can only be claimed in judicial and quasi-judicial proceedings. The doctrine it seems, applies to administrative probes for information under tax legislation. But the doctrine is strictly limited to a narrow range of documents brought into existence solely for tendering professional advice or taking court action.[131]
7. Extensive sanctions (triple tax) are available in sections 222 and 223 (particularly sub-section 223(7)) to require the production of all relevant information by the taxpayer.

The watershed decision in *Bailey* v. *FCT*[132] gave the taxpayer access to the reasons of the Commissioner. In *Bailey,* Aickin J. in the leading judgment relied on the inherent jurisdiction of the High Court to require such particulars from the Commissioner as were necessary to define relevant issues and allow both the taxpayer and the Court to "understand the basis on which the assessment has been made" and properly conduct the litigation. More recently the problem[133] concerned access to this information in the Board and at much earlier stages in the dispute resolution process. With the application of the Administrative Appeals Tribunal Act 1975 in the tax jurisdiction, the extensive range of powers for gathering information and getting reasons from the Tax Office will be available when the system becomes fully operational from 1 July 1988.

The Commissioner will thereafter be required under section 37[134] when referring a matter to the Administrative Appeals Tribunal to routinely forward:

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129 *O'Reilly* v. *State Bank of Victoria (Lawson)* (1982) 13 ATR 706.

130 *Smorgon* v. *FCT* (1979) 9 ATR 483, 504, *per* Murphy J.

131 *Grant* v. *Downs* (1976) 135 CLR 674; in *Packer* v. *DCT* 84 ATC 4666, the Full Queensland Supreme Court held that legal professional privilege did not attach to trust account ledgers of a firm of solicitors, because the ledgers were not brought into existence for obtaining legal advice or for use in litigation.

132 77 ATC 4096

133 Earlier position review in *Robinson* note 88 *supra,* 4280, where Lockhart J., in the Federal Court, refused to apply administrative law remedies to lever out information before a dispute came before the Court.

134 Subject to ss35, 36, 36A of the Administrative Appeals Tribunal Act.

1. A statement setting out the Commissioner's findings on material questions of fact;
2. A reference to the materials upon which those findings were based;
3. The reasons for the Commissioner's decision on the objection; and
4. Copies of every document in the Commissioner's possession or control considered by the Commissioner to be relevant to the review by the Administrative Appeals Tribunal of the Commissioner's decision.

The reasons supplied by the Commissioner under section 37 must deal with the substantial points at issue in plain language intelligible to a layperson, and be sufficiently clear to make apparent to the appellant the real basis for the Commissioner's decision. Vague reasons will not suffice.[135]

To tax advisors accustomed to struggling with the Delphic brevity and opacity of Regulation 35 statements,[136] this should provide the taxpayer and advisers with access to a significantly increased amount of meaningful information.

The Administrative Appeals Tribunal will have power under sections 38 and 37(2) to require the Commissioner to provide "further and better" particulars or additional documents where it considers that the Commissioner's section 37 particulars are inadequate or that additional documents may be relevant to the review.[137] The procedures in the Administrative Decisions (Judicial Review) Act 1977, particularly section 13, and the Freedom of Information Act 1982 provide access to certain internal information held by the Commissioner.[138]

Procedures to gain information are available to the taxpayer under section 28 for the earliest phases of the decision-making process. This process can be activated to get reasons and findings of fact with fourteen days notice under section 14ZD(2) Taxation Administration Act 1953. This does *not* apply to an objection decision. Thus the power is of limited use. There are also powers to gain information in a limited range of matters under section 13 of the Administrative Decisions (Judicial Review) Act 1977.

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135 See *Re Palmer and Minister for Capital Territory* (1978) 1 ALD 183, where it is made clear that it is the reasoning at the time that the relevant decision is made which is subject to s.37; see also *Re Harkins & Minister for the Capital Territory* (1978) 1 ALD 537; and *Re Frohlich & Minister for Capital Territory* (1979) 2 ALD 434, 442. In *ARM Constructions Pty Ltd* v. *DC of T (N.S.W.)* (1986)17 ATR 459, 465 Burchett J. stated that this requires the decision-maker to provide a statement which is "in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement...will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often these factors may suggest a brief statement of one or two pages only".

136 Income Tax Regulations; *Re Cain* (1975) 5 ATR 691; *Dalton* v. *FCT* 86 ATC 4274.

137 The Tribunal's order under s.38 will be framed so as to be effective — for example in *Re Palmer and Minister for the Capital Territory,* note 135 *supra,* the Tribunal spelt out with some particularity the additional items required.

138 See *e.g. Re Arnold Bloch, Leibler & Co* (1984) 15 ATR 705; and *Re AB and the Australian Tax Office* (1987) 18 ATR 45. On the other hand, in *Murtagh* v. *FCT* 84 ATC 4516 the taxpayer was successful in the Administrative Appeals Tribunal in obtaining access to certain Australian Tax Office records relating to an assessment which disallowed a loss in a horse breeding partnership, a significant factor being that there was no matter of special sensitivity (such as investigation of tax evasion) involved; *Re Mann* (1985) 16 ATR 630; *FCT* v. *Swiss Aluminium* 86 ATC 364.

XII. FUTURE TAX REFORM STRATEGIES

The last few years have been a period of root and branch renewal for the Australian Tax System. But there is now evidence that essential institutional re-alignments, new substantive concepts and attitudinal changes are in place. These will act as the foundation for more policy informed development and the focus for more effective mobilisation of resources to pursue the key objectives in the design of fair, efficient and responsive mass decision-making system. The full benefits of these changes will take some time and a steady, incremental, evolutionary strategy to realise. There are very real dangers in hastening too fast. Among the more obvious changes will be these:

1. A steady improvement in mass decision-making techniques. This will obviously include computerisation and associated dramatic changes in work practices, job design and training in the bureaucracy. It will influence the style and agenda of judicial mode supervisory bodies. It will also impact on institutional design, on modalities in the evolution of substantive law and on the strategic focuses of the decision-making structure. In short, it is about getting this critical public bureaucracy lean, efficient and working to clearly understood objectives.
2. With dramatic changes in judicial doctrines in key tax areas (particularly the income concept, deductions and attitudes to tax schemes) and the crucial changes introduced by the so-called "Capital Gains Tax" provisions, the foundation is in place for the rule-making process to develop doctrines and long term focuses which respond more readily to national economic imperatives. When they have bedded down we can expect that rulings (including Tribunal and Federal Court rulings) will evolve to give effect to these objectives and that judicial, quasi-judicial and cabinet (under the new system of super-ministries) monitoring of the mass decision-making process will evolve towards a more satisfying reconciliation of policy objectives in this critical process. International tax avoidance and evasion is moving well up the agenda. When the new Administrative Appeals Tribunal has settled in and cleared hearing backlogs, we can expect a much more substantial input to the process of rationalising and structuring the broad body of tax rules in the mass decision-making process, particularly on critical deduction, capital/income and cash discounting issues.
3. An effective tax system is a critical element in the framework of Australian government. Increased evasion has imposed a serious threat to its effectiveness and legitimacy. Increasing emphasis will be given to bolstering public perceptions of fairness and of substantial voluntary compliance, to closing the "revenue gap",[139] to decrease substantially

139 The "revenue gap" is the difference between the tax which might be expected from national income statistics and the tax actually collected. The Cullen Report, *A Taxing Solution*, Report of Program Management Performance Review AGPS, (1987) recommends the existing gap be reduced by 80% by 1992.

uncertainty and transaction costs to business and to ordinary Australians, to cutting down on excessive fine tuning and on making the system more robust. Simplified drafting and better communication of operative practices, better taxpayer access to responsible decision-makers, reasonable responses by the bureaucracy to practical problems and timely action on disputes are all part of it. But, above all, the voice of reason and balance must be reasserted and a more sophisticated appreciation of the difficult choices of evils involved in a modern tax system must evolve. Simplistic, ideologically driven utopias or pristine economic panaceas, divorced from institutional reality, can no longer act as the framework for serious analysis of a modern tax system in a pluralist political system. The brittle, superficial, shock, horror modes of tax analysis used by many sections of the media and one-dimensional pressure groups and the narrowly based political expediency which has fuelled so much tax debate in Australia is gradually losing credibility and being consigned to the rubbish bin of pre-enlightenment history. This is the last essential impediment to Australia rejoining the mainstream of Western democracies on tax matters.

4. A vastly bolstered Appeals and Review Group, specialist auditing groups and legislative specialists will be the spearhead of a growing elite of trained and sophisticated professionals in the middle executives of the Tax Office. This group will increase quality control at the objection stage, make negotiated dispute resolution into a new art form, will gradually increase the sophistication of rule-making and pro-active response to emerging pressures in the tax system and will provide a larger pool of talent for top level appointments. This will be backed up by a beefed-up research and development effort. The objective is to improve careers in the public domain, a growing culture of excellence and an increased strategic appreciation throughout the decision-making structure and among other opinion leaders. In turn, this will lead to a more mature tax system able to mediate public purposes and legitimate private interests in the chill climate of international economic conditions.

In the short to intermediate term these broad objectives are likely to be manifested by:

1. A self-assessment system giving strong encouragement to taxpayers and other actors to present most information in a form which can be processed directly on line to Tax Office computers. This will be accompanied by vast streamlining of all standardised assessment, audit, tax collection and communication functions. It will also be accompanied by modification of rule making styles and substantive law to reflect the new environment in which they will operate.
2. A rapid beefing-up in the ability to match information and to check it against programmed norms and previous returns to identify suitable files for audit and an increasingly sophisticated audit and investigation function. In particular there will be an integrated, case driven and more

sophisticated approach to large corporate audits. These initiatives are already well in train but are planned to evolve considerably by 1992.

3. A gradual simplification of taxing provisions and automation of collection so that, for the vast bulk of ordinary PAYE taxpayers and the bulk of income of non-PAYE taxpayers, income tax collection more closely approximates a payroll tax withheld at source. The main thrust is to improve information matching and electronic fund transfers generally rather then diverting resources into specific measures to withhold revenue at source. But it does encompass a broad set of long term substantive reforms to collect revenue at source, on the model of the new corporate imputation system, prescribed payments system and PAYE systems. This system could eventually be extended to superannuation funds, trusts, partnerships and interest payments, as well as corporate dividend distributions.
4. A further and gradual dovetailing of welfare expenditures, tax expenditures (particularly superannuation) and tax thresholds is likely so that the granting of government largesse (including the tax threshold) is administratively integrated, less open to abuse and better targeted as part of an increasingly automated system. This is the most promising means of combating income-splitting and a strategy for incorporating minor deductions into universal tax credits or unsubstantiated deductions. There is now cross-party support for this type of broad strategy.
5. The institutional framework for Taxation Rulings is being bolstered systematically. A tripling of output recently took place. Comprehensive rulings will be generated within a reasonable period after the introduction of new legislation. Steadily increasing attention will be given to dissemination of information and presentations to professional groups, and more attention to the packaging of published material. Where necessary, expertise will be drawn together (including inter-departmental input on more important issues) to ensure that economic and other policy implications are rigorously evaluated as part and parcel of the ruling process. There will be more emphasis on large scale rulings, integrating fragmented areas of the law. When the Taxation Ruling program is sufficiently advanced and the expertise is fully in place, the Tax Office should bolster its capacity to issue prior rulings to individual taxpayers. This facilitates certainty, feedback and more rigour in the rulings process.

Increased scrutiny of big ticket tax expenditures was foreshadowed in the 1987 budget. The general strategy (sometimes stalled by political imperatives) is to follow the U.S. pattern and abolish many business shelters in favour of a strong move towards lower tax rates and simplicity in the tax system. Notwithstanding protestations, the main deduction provisions are in for a period of concerted attention and conceptual realignment. This will be followed by further moves to get rid of a cumbersome range of minor deductions. These items are relatively insignificant in distributional terms but

very expensive in terms of transaction and psychic costs and in encouraging a 'lurks and perks' mentality. Under a rolling strategy miscellaneous deductions, exemptions and credits will be diluted or abolished in favour of general falls in tax, higher unsubstantiated deduction limits or more carefully designed cost recovery and other tax expenditure measures. This will dovetail into efforts to gradually simplify and get rid of annual tax returns for many taxpayers and to integrate the tax and welfare systems.

Eventually, we can expect a more fully integrated income base with *all* existing departures from neutrality (including indexation of capital gains) better justified by articulated economic or distributional criteria, better targeted at those objectives and achieving more clout per buck. We can expect extensive moves for derivations and deductions to be time discounted and to be more rigorously matched to prevent avoidance and unfairness. We can expect increased scrutiny of the incoherent and expensive taxes raised by the States and moves to increase accountability by giving the States power to raise more of their own revenue.

Now that rule-making procedures are in place and the main reforms are through the pipeline, the Tax Office is getting serious about a progressive simplification of the Income Tax Assessment Act 1936. This will, at first, involve clear, simple statements in new amending legislation, with emphasis on common definitions and grouping and drafting on the model of section 177D (the general anti-avoidance provision). It can then go on to a *progressive* re-ordering, renumbering and simplification of the Act. We can start with new chapters and sub-chapters for anti-avoidance, tax expenditures and tax administration. Most detail should be moved into Taxation Rulings. Because this is such a vast undertaking it must be conducted in carefully phased stages while preserving existing law. The Act is far more than a technical instrument. It is the public image of the taxation system and the means of communicating central policy directives to delegated decision-makers (whether judges, tribunal members, bureaucrats, professional advisors or self-assessing taxpayers). It is the conceptual foundation on which the vast superstructure of detailed rules generated in a complex, economically-driven, mass decision-making system must be built.