Never the twain shall meet? An exploration of the demarcation between the roles of administrative tribunals and the courts where taxpayers have a choice of venue for contesting an assessment decision of a revenue authority

*Reynah Tang AM and Frank O'Loughlin KC**

While tribunals have a long history in the English legal system which Australia inherited, the development of a single tribunal able to review a broad range of governmental decisions was a distinctly Australian innovation, as was the creation of 'super tribunals', with both administrative and civil jurisdictions, at a state and territory level.[1]

It is, of course, well established in Australia that the role of a tribunal, when called on to consider a challenge to a governmental decision, is to engage in merits review: that is, to make the correct or preferable decision having regard to all of the evidence and other material before the tribunal. Generally, a tribunal is not limited to either the same material considered by the original decision-maker when making the decision under review or the rules of evidence in relation to what it can consider. In making a review decision, the tribunal 'steps into the shoes' of the decision-maker and can (within some limits) re-exercise any discretions available to the agency. Among other powers, a tribunal may substitute the decision under review with a new or varied decision or refer the decision back to the decision-maker to be made in accordance with the tribunal's reasons or to be reconsidered based on the additional evidence and other materials available.

By contrast, when courts have been called on to undertake review of administrative decisions which engage matters of discretion and policy, they have traditionally confined themselves to judicial review: that is, determining whether there is error in the manner in which the applicable decision was made and, if so, remitting the matter to the agency to reconsider the decision in accordance with law. Even with legislative reform to address the procedural difficulties associated with the traditional prerogative writs, the problem has always been the potential for a pyrrhic victory for the party seeking review if the agency, upon reconsideration, reaches the same conclusion.

At a Commonwealth level, the High Court has interpreted the *Constitution* to require a strict separation of powers between courts, the Parliament and executive, with the result that federal tribunals cannot exercise judicial powers (for example, to enforce their own decisions) and courts cannot encroach into the areas reserved for the executive (for example, to re-exercise any discretion available to an agency of government). This has served to reinforce the demarcation between courts and tribunals. However, those federal constitutional limits

* Reynah Tang AM is Acting Senior Member and Deputy Head of Legal Practice List, Victorian Civil and Administrative Tribunal. Frank O'Loughlin KC is a Barrister and part-time Deputy President, Commonwealth Administrative Appeals Tribunal. The views expressed in this article are the authors' own views and should not be taken to reflect the views of the AAT.

1 This article was the subject of an Australian Institute of Administrative Law seminar on 24 November 2022. On 16 December 2022, the Commonwealth Attorney-General announced the proposed creation of a new Administrative Review Body and, on 17 February 2023, announced the composition of the Expert Advisory Group to 'provide advice on key policy and legislative issues' in relation to that new body. The extent of the new body's powers remains to be seen. That the new body is forecasted to perform a merits review function, including in a federal tax dispute setting, suggests it is likely to have functions and powers similar to the AAT. There does not appear to be any significant change proposed, nor is it likely that there could be, to the limitations on what the courts can do in a federal tax dispute setting, as discussed in this article.

do not apply at a state level such that, at least in theory, tribunals can be vested with judicial powers and courts may venture into merits review.

The distinction between the roles and powers of courts and tribunals has particular significance in circumstances where an affected person has the choice between those fora for challenging a governmental decision, as is the case of a taxpayer seeking to contest a tax assessment decision of a revenue authority. A choice of venue for the resolution of tax disputes has long been a feature of tax law. It was first introduced at a federal level in 1921 and subsequently replicated in the tax administration legislation of a number of states. The choice is significant because, if the wrong choice is made, the court or tribunal deciding the matter may lack the power to give the remedy sought.

Despite the commonality as between the federal and state tax administration provisions, divergent interpretations have been taken regarding the nature of an appeal or review to be undertaken by a court where a taxpayer chooses that setting. It appears that the choice of language adopted by a given legislature has the potential to confirm or negate the traditional demarcation between the roles of the courts and tribunals in such cases. Further, even in situations where the legislative demarcation is maintained, the courts have sometimes been tempted to stray into what appears to be merits-like review.

Nevertheless, as intended when tribunals were established as an alternative pathway to the courts for contesting tax decisions, tribunals have certain procedural features that, at least in some cases, make them a more suitable — and, at times, the only practical — setting for a party seeking to contest a tax assessment decision.

Relevant aspects of the history of the 'Australian taxation system' and a brief overview of the structure for its administration

To understand the choice available to taxpayers as to the setting for challenging taxation decisions, as well as the inter-relationship between the regimes at a Commonwealth and state level, it is necessary to have some general appreciation as to:

- the history of the 'Australian taxation system';[2] and
- the general administration of that system at both levels.

A potted history of the Australian taxation system

Before federation, each of Australia's six colonies raised their own taxes, primarily through customs and excise duties,[3] although stamp duty and land taxes were also imposed.

2 Reinhardt and Steel (n 3).

3 S Reinhardt and L Steel, 'A Brief History of Australia's Tax System', Paper presented to the 22nd APEC Finance Ministers' Technical Working Group Meeting in Khanh Hoa, Vietnam, on 15 June 2006: available at <https://treasury.gov.au/publication/economic-roundup-winter-2006/a-brief-history-of-australias-tax-system>.

At federation, 'exclusive power' to impose customs and excise duties was reserved to the Commonwealth,[4] in order 'to secure interstate free trade and [ensure] adequate protection for Australian industry'.[5]

By the time of federation, most of the colonies had also introduced income taxes;[6] however, while the *Constitution* permitted the Commonwealth to impose taxes in addition to customs and excise duties,[7] federal income taxes were not introduced until 1915, when that became necessary to finance Australia's involvement in the First World War.[8] For a period of time, between the two World Wars, the states continued to impose their own income taxes, with the state and federal taxing systems 'kept separate, and administered separately by the different bureaucracies'.[9]

It was not until 1942, when the Commonwealth government introduced the *States Grants (Income Tax Reimbursement) Act 1942* (Cth) — providing for Commonwealth grants to be made to the states provided they ceased to levy their own income taxes — that the states abolished their own income tax regimes.[10] Constitutional challenges to this regime failed.[11]

Over time, the Commonwealth has also introduced a range of other taxes, some of which have overlapped to a greater or lesser extent with state taxes, including:

- in 1910, a federal (flat-rate) land tax, which was in place until 1952;[12] and
- in 1941, a payroll tax 'to finance a national scheme for child endowment', which continued until 1971 when the Commonwealth 'handed over payroll taxes to the states, acknowledging that this tax represented the sole possible growth tax available to the states'.[13]

The most recent substantive tax reform was the introduction, in 2000, of the goods and services tax (GST). Exceptionally, as part of an intergovernmental agreement,[14] the revenue from the GST is collected by the Commonwealth but distributed to the states and territories. That agreement required the states and territories to abolish a range of inefficient taxes, including stamp duty on a considerable range of transactions and instruments. At the time, some commentators, perhaps optimistically, thought this would presage the end of stamp duty, a tax widely viewed as 'highly inefficient';[15] however, the experience has been otherwise. Although it is true that the number of instruments or transactions to which duty applies has

4 *Australian Constitution* s 90.
5 Reinhardt and Steel (n 3) citing P Groenewegen, *Everyone's Guide to Taxation in Australia* (Allen and Unwin, 1985).
6 Ibid.
7 *Australian Constitution* s 51(ii).
8 Reinhardt and Steel (n 3).
9 Ibid.
10 Ibid.
11 *South Australia v Commonwealth* (1942) 65 CLR 373 and *Victoria v Commonwealth* (1957) 99 CLR 575.
12 Reinhardt and Steel (n 3).
13 Ibid citing R Mathews and B Grewal, 'The Public Sector in Jeopardy: Australian Fiscal Federalism from Whitlam to Keating' (Centre for Strategic Economic Studies, Victoria University, Melbourne, 1997).
14 Intergovernmental Agreement on Reform of Commonwealth-State Financial Relations.
15 K Henry et al, 'Australia's Future Tax System — Final Report — Part 1' (Commonwealth of Australia, 2010) [6.2].

reduced, the duty base has been broadened in various ways. For example, in Victoria, the duty base has been expanded to capture changes in economic entitlements to land[16] and (albeit under separate legislation) windfall gains realised from land.[17]

While the tax mix ebbs and flows, income tax remains the most significant tax imposed at a federal level by a considerable margin.[18] At a state and territory level, duty, land tax and payroll tax each remain significant imposts (although the mix varies between the states and territories, with some — particularly, the Australian Capital Territory — taking active steps to replace duty on property transfers with a broader land tax regime).[19]

Brief overview of the administration of the Australian taxation systems

Given the historical context, it is unsurprising that the essential structure for the administration of the Australian taxation system at the federal and state/territory levels is similar in three important ways:

- A designated commissioner is granted the 'general administration' of the taxation regime,[20] as well as a more specific power (or, in some cases, discretion) to assess a person (normally referred to as a 'taxpayer') to tax under the applicable taxing Act(s).[21]
- A taxpayer is given a right to seek internal review of an assessment, by way of an 'objection' process.[22] While not specifically legislated,[23] the internal review is usually undertaken by a different team or officer within the taxation administration office headed by the relevant commissioner.[24]
- There is then some mechanism for external contest of the assessment in the event that a taxpayer remains dissatisfied with the determination of the objection.

The mechanism for external contest is the focus of this article.

16 *Duties Act 2000* (Vic) pt 4B.
17 *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021* (Vic).
18 59% of all taxes imposed in Australia: OECD, 'Revenue Statistics 2021 — Australia' (2021).
19 For Victoria in 2020/2021, land transfer duty (27.2%), payroll tax (26.2%) and land tax (13.7%) accounted for more than 65% of total taxation revenue: Department of Treasury and Finance, 'State Taxation Revenue' — *Taxation Revenue — Annual* (available at <https://www.dtf.vic.gov.au/state-financial-data-sets/state-taxation-revenue>).
20 For example, at the federal level, see *Income Tax Assessment Act 1936* (Cth) s 8 which confers the power of general administration of income tax on the Commissioner of Taxation, and at the state/territory level, see *Taxation Administration Act 1997* (Vic) s 63 which confers the power of general administration concerning a range of Victorian taxes on the Commissioner of State Revenue.
21 For example, at the federal level, see *Income Tax Assessment Act 1936* (Cth) s 166, and at the state/territory level, see *Taxation Administration Act 1997* (Vic) s 8(1).
22 At the federal level, see *Taxation Administration Act 1953* (Cth) Div 3 of Pt IVC, and at the state/territory level, see *Taxation Administration Act 1997* (Vic) s 96.
23 At various times, calls have been made for the internal review of income tax assessments to be conducted by an independent agency. See, most recently, House of Representatives, Standing Committee on Tax and Revenue, 'Tax Disputes' (Commonwealth of Australia, 2015) [6.68]–[6.77].
24 That is, the Australian Taxation Office in the case of federal income tax, and the State Revenue Office in the case of Victorian taxes.

External contest at the federal level

Background

When income tax was introduced at a Commonwealth level, the *Income Tax Assessment Act 1915* (Cth) provided for external contest of an assessment by way of appeal to the High Court of Australia or to the Supreme, County or District Court of a state.[25]

A bifurcated model was introduced a short time later, when the *Income Tax Assessment Act 1921* (Cth)[26] established a 'Board of Appeal', comprising a chairman and two other members appointed by the Governor-General (each holding office for a term of seven years), as an alternative pathway for the contest of a tax assessment.[27] A taxpayer dissatisfied with the objection decision of the Commissioner of Taxation could request that the Commissioner treat his objection as an appeal and to forward it, as required by the taxpayer, either to the High Court or the Supreme Court of a state (where the objection raises questions of law only), or to the High Court or a Supreme Court or a Board of Appeal (where the objection raises questions of fact).[28]

On hearing an appeal, the powers of a court or the Board were similar; each could 'make such order as it [thought] fit, and [could] either reduce or increase the assessment'.[29]

However, there were also differences. While any decision of a court was expressed to be 'final and conclusive' in all respects,[30] the decision of a board was only final and conclusive 'on questions of fact',[31] and there was a right of appeal to the High Court in its appellate jurisdiction (excluding a decision by the Board on a question of fact).[32]

Further, the legislation establishing the Board of Appeal provided that it should 'not be bound in its consideration of any question by any rules of evidence, but in forming its decision [was to] be guided by good conscience and the facts of the case'.[33]

25 *Income Tax Assessment Act 1915* (Cth) s 37(4).
26 This amended the *Income Tax Assessment Act 1915* (Cth).
27 *Income Tax Assessment Act 1922* (Cth) s 10 (inserting s 36A of the *Income Tax Assessment Act 1915* (Cth)).
28 Ibid s 37(4).
29 Ibid s 38(1).
30 Although, presumably still subject to appeal to a superior court where available, for example, to correct jurisdictional error.
31 *Income Tax Assessment Act 1922* (Cth) s 10 (s 38(2) and (3)).
32 Ibid s 38(8).
33 Ibid s 40(1).

The establishment of the Board of Appeal can be traced to an early recommendation of the Royal Commission on Taxation (Royal Commission), which observed:

> There was perhaps no single subject upon which such unanimity of opinion was manifested by witnesses as upon the necessity for the appointment of a tribunal, other than a Court, to deal with the numerous cases under the Income Tax Act in which taxpayers dissent from the decisions of the Commissioner, but for various reasons are unable or unwilling to assert what they believe to be their rights, in a superior Court.
>
> …
>
> The expense, delay, and risk of proceedings in the superior Courts are said to deter taxpayers (particularly where the amount involved is not large) from seeking a judicial determination of points at issue between themselves and the Taxation Department … It is contended also that, in many cases, no point of law arises, but the issue is one depending upon differing views as to facts. … *[T]he evidence taken by the Commission disclosed a very widespread desire for a tribunal less hampered by technical rules of evidence and procedure than are the ordinary Courts of Law*. There is undoubtedly a general belief that *such a tribunal would be cheaper, more direct, and more speedy in its methods, and would give greater satisfaction* to the taxpayers.[34]

Relevantly, the Royal Commission proposed that the Board of Appeal be given power to deal with appeals in all matters in which the Commissioner's discretionary power is not subject to review [with the exception of purely administrative matters …], and generally with all matters in which taxpayers are dissatisfied with the Commissioner's decision, including those in which there is not a right of appeal to a court under s 37 of the *Income Tax Assessment Act*.[35]

While it is evident that the Royal Commission envisaged the Board of Appeal having a different and broader jurisdiction than the courts, including the power to examine and (if appropriate) re-exercise discretions available to the Commissioner of Taxation, the legislative alignment of the provisions providing for, and the powers to be exercised upon completion of, an appeal (in either setting) was to prove constitutionally fatal.

The Board of Appeal was short-lived. Less than four years after its introduction, the High Court delivered its decision in *British Imperial Oil Company Limited v Federal Commissioner of Taxation*[36] (*British Imperial Oil*), holding that the powers conferred on the Board of Appeal formed part of the judicial power of the Commonwealth. As s 71 of the *Australian Constitution* provided that such power could only be vested in a court, the Board was not validly constituted.

The then Chief Justice (Knox CJ) explained that:

> The power conferred on the Board of determining questions of law, the association of the Board as a tribunal of appeal with the High Court and the Supreme Court of a State, and the provisions for an appeal to the High Court in its appellate jurisdiction … establish that the expressed intention of Parliament was to confer on the Board portion of the judicial power of the Commonwealth, which at any rate includes the power to adjudicate between adverse parties as to legal claims, rights and obligations …[37]

34 Parliament of the Commonwealth of Australia, 'First Report of the Royal Commission on Taxation' (Government Printer for the State of Victoria, 1921) (First RC Report) [141] and [143] (emphasis added).
35 First RC Report [150].
36 (1925) 35 CLR 422.
37 Ibid 432.

Noting that s 72 of the *Constitution* required that the office of a justice of a court be for life, Knox CJ observed that the Board of Appeal (whose members were appointed for seven year terms) was 'not a "Court" in the strict sense' and, as such, 'the Parliament has no power to invest it with functions appertaining to the judicial power of the Commonwealth'.[38]

Isaacs J identified the demarcation between permissible administrative review and impermissible judicial appeal in observing that the powers given to the Board were judicial because the Board's function was 'one of ascertaining and determining whether and how far the rights and duties independently enacted have been accurately declared by the Commissioner, *and not for the purpose of superseding his discretionary judgment to create a constitutive element of liability*'.[39]

From Board of Appeal to Board(s) of Review

The Commonwealth Parliament took the hint from the High Court, re-establishing the Board as 'a Board or Boards of Review'[40] and providing taxpayers with the choice of contesting an assessment by referral to the Board for 'review' or to the High Court or a Supreme Court by way of 'an appeal'.[41] The amendments provided that, for the purposes of undertaking any review, the Board 'shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act', which were 'deemed to be assessments, determinations or decisions of the Commissioner'.[42]

In *Federal Commissioner of Taxation v Munro*,[43] the High Court upheld the constitutional validity of the Board(s) of Review. As Isaacs J explained, by the amending legislation, the Commonwealth Parliament 'drastically altered the Act so as to conform to the law as explained in [*British Imperial Oil*], and created a new Board — a Board of Review — on a totally different basis'.[44] His Honour likened the changes to 'the difference between daylight and dark'.[45]

Isaacs J noted that the problem with the original model was the equivalence which had been created between the Board of Appeal and the High Court (and State Supreme and County Courts), being 'an unmistakable and an inseparable indication' that the Board was to exercise judicial power.[46] Critically:

> Instead of assimilating the Board to the Court, as in the old [provisions], the Board in the new [provisions] is assimilated to the Commissioner. Instead of the Board being given the powers and functions of the Court, it is given 'the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act'.[47]

38 Ibid 433.
39 Ibid 436 (emphasis added).
40 *Income Tax Assessment Act 1925* (Cth) s 9 (amending s 41(1) of the *Income Tax Assessment Act 1915* (Cth)).
41 Ibid s 11 (s 50(4)).
42 Ibid s 10 (s 44(1)).
43 (1926) 38 CLR 153.
44 Ibid 172.
45 Ibid 175.
46 Ibid.
47 Ibid 183.

Higgins J, perhaps somewhat dismissively, referred to the Board of Review as 'a mere piece of administrative machinery',[48] and 'auxiliary' to the Commissioner of Taxation 'in his administrative function'.[49] Observing that the Commissioner 'has to consider the law as well as the facts of each case presented to him', but that this 'does not make him a judicial officer', His Honour suggested that, likewise, if 'Parliament provide[s] the Commissioner with a Board to assist him as to law or facts it does not thereby make him or the Board a judicial officer … or [turn] the Board into a Court'.[50]

In a relatively early decision, *Jolly v Federal Commissioner of Taxation*[51] (*Jolly*), the High Court considered the range of discretions which could be re-exercised by the Board of Review. By majority,[52] the High Court held that the Board of Review's power to conduct a review extended to the 'entire process of assessing additional tax',[53] specifically including the discretion of the Commissioner of Taxation to remit additional tax. In forming this view, the High Court noted that the Board was designed to enable taxpayers to seek the 'reconsideration and re-examination of the process by which [a tax] liability had been imposed upon them, particularly in relation to matters where the Commissioner had a discretion'; concluding that 'arguments of fairness' suggested that this should extend to review of the 'discretionary remission of an amount which may prove a ruinous imposition'.[54]

By 1971, the Commonwealth Taxation Boards of Review[55] were well established, with the Commonwealth Administrative Review Committee (more commonly referred to as the 'Kerr Committee') describing them as 'outstanding examples' of federal administrative tribunals enabling review of administrative decisions on the merits.[56]

Appeal to a court

Taxpayers have, of course, always had the ability or option to seek to contest a Commonwealth tax assessment by way of appeal to a court, initially the High Court or the Supreme or County Courts of a state and, more recently, the Federal Court of Australia.

It was not until 1949, 34 years after the introduction of income tax at a federal level, that the High Court expressed its views on the nature of such an appeal in *Avon Downs Proprietary Limited v Federal Commissioner of Taxation*[57] (*Avon Downs*).

The *Avon Downs* decision concerned an appeal of an assessment involving the application of s 80(5) of the *Income Tax Assessment Act 1936* (Cth).[58] At the time, s 80(5) denied

48 Ibid.
49 Ibid 201.
50 Ibid.
51 (1935) 53 CLR 206.
52 Rich, Dixon, Evatt and McTiernan JJ (Starke J dissenting).
53 (1935) 53 CLR 206, 215 (per Rich and Dixon JJ).
54 Ibid 214.
55 As they had come to be known, and noting that separate Boards had been established around Australia by this time.
56 *Report of the Commonwealth Administrative Review Committee* (Kerr Committee) (Commonwealth Government Printing Office, Canberra, 1971) [18(a)].
57 (1949) 78 CLR 353.
58 *Income Tax Assessment Act 1936* (Cth).

deductions for losses incurred by private companies in previous tax years unless sufficient (at least) 25 per cent continuity of underlying ownership of the company had been maintained. Importantly, the requisite level of continuity of ownership needed to be established 'to the satisfaction' of the Commissioner of Taxation. Dixon J observed that the provision was designed to address the then practice 'of turning to account the existence of losses in unsuccessful private companies' (for example, by selling the shares in the loss company to the owners of another profitable company and then vesting the profitable business in the loss company and using its prior year losses to shelter the profits from tax).[59]

In assessing the taxpayer company, the Commissioner had disallowed the prior year losses claimed on the basis that he was not satisfied the company's underlying ownership had been maintained to the requisite extent in circumstances where there had been a sale of most of the shares in the company just before the end of the tax year.

In its objection, the company contended that the assessment should be overturned because the new shareholders had not in fact been entered on the company's share register before the end of the relevant tax year, such that there was no change in the company's underlying ownership. In disallowing the objection, the Commissioner 'gave no reasons and it [did] not appear what view of the facts he took or whether he took any other view of the law'.[60]

Dixon J noted that, had he been required to form the requisite state of satisfaction, he may have been prepared to reach a different conclusion on the evidence before the Commissioner. He said:[61]

> I myself am prepared to accept the explanation given before me of the purported minute of the supposed meeting of directors of 29th June 1944 and I am prepared to accept the evidence that before the end of the year of income no entry was made in any share register of the company of the names of the transferees pursuant to the transfers of 14th June 1944.
>
> But it is for the commissioner, not me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion that he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on some ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition.

Ultimately, however, Dixon J dismissed the appeal and upheld the assessment because he was 'not prepared to find that the Commissioner's refusal to be satisfied upon the issue formulated by s 80(5) [was] due to any such misapprehension, mistake, misconception, unreasonableness or miscarriage of judgment [which] would authorise [the Court] to interfere and set aside [the C,ommissioner's] conclusion'.[62]

59 (1949) 78 CLR 353, 354.
60 Ibid 359.
61 Ibid 360.
62 Ibid 362–3.

At least in a circumstance where a tax assessment involves an opinion or state of satisfaction to be formed on the part of the Commissioner, the *Avon Downs* decision established that the nature of an appeal under the income tax legislation involved 'judicial review' of the assessment made by the Commissioner of Taxation, and the court could (or would) not engage in a consideration as to the merits of the Commissioner's decision.

The choice for a taxpayer to contest an assessment by way of appeal to a court remains to this day,[63] subject to the limitation described by Dixon J in *Avon Downs* where the disputed element of a tax assessment is dependent on the opinion of, or state of satisfaction to be formed by, the Commissioner.

Administrative Appeals Tribunal

In light of the background recounted above, it is hardly surprising that the Kerr Committee:

- formed the view that the courts should 'exercise a supervisory jurisdiction only [in relation to administrative decisions]', which was 'partly for constitutional reasons and partly because [the Committee did] not regard a court as being the most appropriate body to review administrative decisions on the merits';[64] and
- recommended the establishment of an 'Administrative Review Tribunal' to engage in merits review of a broad range of decisions of the federal government and its agencies.

In the latter regard, it is apparent the Kerr Committee had in mind a body with similarities to the Commonwealth Taxation Boards of Review. For example, they envisaged:

- administrative decisions being reviewed by a panel of three, albeit with the chairman being a judge and the other members being an officer of the department concerned and a lay person;[65]
- the rules of evidence would not apply in the new tribunal;[66] and
- the tribunal would be empowered to substitute its own decision for that of the administrator.[67]

63 *Taxation Administration Act 1953* (Cth) s 14ZZ(1)(a)(ii) and Div 5 of Pt IVC.
64 Kerr Committee (n 56) [289].
65 Ibid [292].
66 Ibid [295(g)].
67 Ibid [297(ii)].

The proposed tribunal took form in the shape of the Administrative Appeals Tribunal (AAT), which was established in 1975.[68] Giving life to these concepts, the *Administrative Appeals Tribunal Act 1975* (Cth) has provided from the outset that:

- in undertaking a review, the AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision' and, where it sets aside the decision under review, may make another decision 'in substitution for the decision so set aside';[69]
- any decision as varied or substituted 'shall, for all purposes … be deemed to be a decision of [the person that made the decision]';[70]
- any proceeding is to be 'conducted with as little formality and technicality, and with as much expedition, as … a proper consideration of the matters before the Tribunal permit';[71] and
- the AAT is 'not bound by the rules of evidence' and 'may inform itself on any matter in such manner as it thinks appropriate'.[72]

By 1986, the AAT had replaced the specialist Commonwealth Taxation Boards of Review as the tribunal to which taxpayers could apply for external merits review of income tax assessments made by the Commissioner of Taxation.[73]

Parallel proceedings

Although the tax administration legislation envisages a taxpayer making a choice as between an appeal to the court and review by the AAT, there is, in fact, an option to pursue separate (but related) disputes utilising both settings. As noted in *King v Commissioner of Taxation*,[74] taxpayers can (and not uncommonly do) pursue parallel proceedings, involving 'review by the [AAT] of a decision concerning remission of administrative penalties … [and] elect[ing] to have the substantive revenue law controversies determined by an exercise of judicial power by the [Federal] Court'.[75]

68 *Administrative Appeals Tribunal Act 1975* (Cth).
69 Ibid s 43(1).
70 Ibid s 43(6).
71 Ibid s 33(1)(b).
72 Ibid s 33(1)(c).
73 *King v Commissioner of Taxation* [2022] FCA 935 [5]. See, now, *Taxation Administration Act 1953* (Cth) s 14ZZ(1)(a)(i).
74 [2022] FCA 935.
75 Ibid [4].

Similarities and differences in processes

Notwithstanding the structural differences between the court and tribunal settings for disputing objection decisions with which taxpayers are dissatisfied, at the Commonwealth level there are some striking similarities, both substantive and procedural, between the two.

For reviewable objection decisions,[76] the two settings have:

- a common starting point, namely dissatisfaction with an objection decision;[77] and
- practically identical structural constraints, namely in each setting:
    - — the taxpayer is limited to the grounds stated in the relevant objection unless leave is granted to expand those grounds;[78]
    - — the taxpayer bears the burden of proving that the disputed assessment is excessive or incorrect and what the assessment should have been;[79] and
    - — the arbiter can make decisions affirming, setting aside, substituting or varying the decision made by the Commissioner.[80]

However, one important structural feature of the Tribunal's powers, which differs from the Federal Court, is that the AAT 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'.[81] This reflects the wider scope of the function of the Tribunal, and its ability to substitute its exercise of a discretion, or its state of satisfaction or its opinion, where the relevant taxing provision[82] has such a feature.

Nevertheless, most taxing provisions are self-executing[83] or, in the terms expressed by Gibbs J (as his Honour was) in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner*

76 All objection decisions other than ineligible income tax remission decisions (decisions concerning remission of additional taxes): *Taxation Administration Act 1953* (Cth) ss 14ZQ and 14ZS.

77 Ibid s 14ZZ(1)(a)(i) for reviews by the AAT and s 14ZZ(1)(a)(ii) for appeals to the Federal Court.

78 Ibid s 14ZZK(a) for the AAT and s 14ZZO(a) for Federal Court appeals.

79 Ibid s 14ZZK(b) for the AAT and s 14ZZO(b) for Federal Court appeals.

80 *Administrative Appeals Tribunal Act* (Cth) s 43 for AAT decisions and *Taxation Administration Act 1953* (Cth) s 14ZZP for Federal Court decisions, the latter power expressed in more expansive terms ' … such order in relation to the decision as it thinks fit, including an order confirming or varying the decision'.

81 *Administrative Appeals Tribunal Act* (Cth) s 43(1).

82 For present purposes, a provision which has an effect on a tax liability outcome, whether by including an amount in assessable income or the calculation of another amount that is included in assessable income, allowing a deduction in calculating taxable income or allowing a tax offset or credit.

83 Many are plainly self-executing, for example, the *Income Tax Assessment Act 1997* (Cth) ss 6-5 and 8-1, while others require some analysis before a conclusion can be reached, for example, *Income Tax Assessment Act 1997* (Cth) s 102-5 which includes net capital gains in assessable income, a task which calls in many and varied provisions in pts 3-1 and 3-1 (and some elsewhere) in determining the amount of any net capital gain, one of which can be s 149-30(2) which, if it is relevant, requires the Commissioner's satisfaction or reasonable assumption as to underlying ownership. If the calculation of net capital gains in a particular case does not have any component that turns on a state of satisfaction, opinion or belief of the Commissioner, then it will be a self-executing taxing provision.

of Taxation[84] (*Kolotex Hosiery*), 'depend upon the existence of a state of facts or of mixed law and fact, [that can be] found by the court to which an appeal is brought'.[85] These provisions have effect where the facts of a taxpayer's circumstances fall within their terms and no element of discretion, opinion or state of satisfaction is called for or required.

Where an element (sometimes called a particular) of an assessment at the source of a taxpayer's dissatisfaction is a self-executing provision, the controversy over that assessment (and objection decision) can be pursued in every respect, namely as to facts and/or as to how the law applies to those facts, in either the Federal Court or the Tribunal. For example:

- a dispute over a general deduction claim under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) can be pursued in either the AAT or the Federal Court. The same tests apply to answer that question in both settings: for example, whether a loss or outgoing has been 'incurred'. That statutory condition calls, amongst other things, for an evaluation of the relevant contract terms[86] and intentions of parties in a legal or jurisprudential manner to determine whether the taxpayer has 'definitively committed' to the liability;[87] and
- a dispute over whether a receipt is ordinary income and taxable under s 6-5 of the *Income Tax Assessment Act 1997* (Cth) can also be pursued in either the Tribunal or the Federal Court. Again, in both places the same tests apply to determine assessability. For example, this requires an examination of whether an amount has 'come home' to the taxpayer beneficially, and free of restriction.[88]

In these situations, the task of the court or the Tribunal is, in the relevant sense, the same — to find what the critical facts are and to apply the law to those facts. Both settings apply the same tests for deductibility or assessability. If it were otherwise, the law applied by the tribunal would not be the same as that applied by the court, and differing outcomes would be available depending on the setting of the dispute.

Further, and notwithstanding the AAT is not a court, it must perform this court-like function in applying the law, and do it without error, because failure to do so will most likely result in the Tribunal having made an error of law and its decision exposed to being overturned on appeal.[89]

84 (1975) 132 CLR 535.

85 Ibid 561.

86 *Coles Myer Finance Ltd v Federal Commissioner of Taxation* (1993) 176 CLR 640, 662–3 (Mason CJ, Brennan, Dawson, Toohey & Gaudron JJ) and *Federal Commissioner of Taxation v Malouf* [2009] FCAFC 44 [45] (Sundberg, Jessup and Middleton JJ).

87 *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492, 506 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

88 *Arthur Murray (NSW) Pty Ltd v FCT* (1965) 114 CLR 314, 318 (Barwick CJ, Kitto and Taylor JJ).

89 A question of law raised by an AAT decision is the foundation for, and the subject matter of, any appeal from a tribunal decision to the Federal Court, see *Administrative Appeals Tribunal Act 1975* (Cth) s 44. Whether the facts as found fall within the terms of the legislation under review is generally a question of law: see *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (19980 82 ALR 175, 182 (Gummow J), which was referred to with approval in *Haritos v Commissioner of Taxation* [2014] FCA 95 [143] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

Accordingly, the questions in issue in some types of disputes, and the steps involved in their resolution by a court or the AAT, are for all relevant purposes identical.

The processes in both settings also have a number of parallels, namely:

- the parties are obliged to file documents to define the issues in dispute and inform the evidence to be led:
    - — in the Federal Court the Commissioner is obliged to file an appeal statement,[90] and practice calls for a responding appeal statement to be filed by the taxpayer;[91] and
    - — in the AAT, the convention is that Statements of Facts, Issues and Contentions are filed by each party,[92]
- with these documents informing the same process and serving the same purpose; and
- as a practical matter, evidence is introduced in a similar manner, by affidavit in the court and in the AAT by a witness statement. In both settings, witnesses are usually cross-examined. Where expert evidence is required, both settings generally adopt similar processes (for example, the use of 'hot tub' processes) where it is thought beneficial to do so.

In these circumstances, it is not surprising that, despite the statutory direction for the AAT to be less formal, the processes in many tax disputes are very much court-like and deliberately so. Recently Deputy President McCabe[93] said:

> The Tribunal is part of the executive, to be sure, but — at least in its General and Taxation & Commercial Divisions — the Tribunal operates on a court-like model with a well-understood suite of forensic tools and procedures that are adapted to assist the Tribunal to make findings of fact. Most of those tools are wielded by the parties, much as they would in a court. As Foster J explained in *Eldridge v Commissioner of Taxation* [1990] FCA 369 (at [41]), the Tribunal's 'functions partake far more of the Court than of the office desk'. There are some differences between proceedings in court and those in the Tribunal, to be sure. Section 33(1)(c) of the AAT Act makes clear the rules of evidence are not binding in the Tribunal, and s 43 requires the Tribunal to refer to evidence or other material on which it bases its findings of fact. The differences between the two forums are not always apparent in practice. For example, the rules of evidence are often a reliable guide to the underlying challenge of identifying, testing and evaluating relevant and probative material in a way that is procedurally fair. It follows the Tribunal generally goes about its task in way that is functionally the same as the court.[94]

90 *Federal Court Rules 2011* (Cth) r 33.03(a)(iv).
91 Taxation Practice Note (TAX-1) (available at <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/tax-1>) [3.5].
92 AAT, Practice Direction Review of Taxation and Commercial Decisions [4.4(f)].
93 The Head of the Tax & Commercial and Small Business Tax Divisions of the AAT.
94 *TDWF and Commissioner of Taxation* [2022] AATA 3610 [11].

On the other hand, there are also a number of structural differences between the two settings:

- As already noted, one feature of the AAT's powers is that the tribunal 'may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision',[95] reflecting a wider scope of the merits review function of the AAT and its ability to substitute its exercise of a discretion, or its state of satisfaction, or its opinion where the relevant taxing provision[96] has such a feature. The tribunal is a more suitable setting for resolution of such matters.

- In a court setting, where facts are in dispute, that is, there is no agreement between the parties as to any facts, or as to critical facts, the facts must be proved by evidence which is admissible in accordance with common law and *Evidence Act 1995* (Cth) rules.[97] In the AAT, findings of fact also need to be made, but while the tribunal has power to take evidence on oath,[98] it is not bound by the rules of evidence, can inform itself as it sees fit and can base its conclusions on evidence and other material.[99]

- The AAT is a no-cost jurisdiction; the winner bears their own costs and the loser does not have to pay the costs of the other side. This is to be contrasted with the Federal Court which is a jurisdiction in which costs normally 'follow the event'. That is, the winner can expect a proportion (rarely the whole) of the costs they incur in the dispute process to be recovered from the unsuccessful party. This can be an important consideration in choice of setting.

- An appeal from a decision of the AAT is confined to a question of law. Notwithstanding the relaxation of the strictness which has historically been associated with the meaning of a question of law,[100] there is still a limitation. By contrast, an appeal from a decision of a single judge of the Federal Court to the Full Court is an appeal *de novo*, so all issues are able to be disputed again.

The decision in *Henry Jones IXL v Commissioner of Taxation*[101] an illustration of the difference. The primary judge concluded that the proceeds received by the taxpayer company on disposition of a royalty stream were to be regarded as a profit on revenue account (and taxable)[102] because the Court found that the revenue stream was acquired with the intention or purpose of selling it to make a profit.[103] That was a finding of fact. On appeal, the Full Federal Court concluded that the revenue stream was not acquired for the purpose

95 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).
96 For present purposes, a provision which has an effect on a tax liability outcome, whether by including an amount in assessable income or the calculation of another amount that is included in assessable income, allowing a deduction in calculating taxable income or allowing a tax offset or credit.
97 See *Addy v Commissioner of Taxation* [2019] FCA 1768 [35] (Logan J).
98 *Administrative Appeals Tribunal Act 1975* (Cth) s 40(1)(a).
99 Ibid ss 33(1)(c) and 43(2B).
100 *Haritos v Commissioner of Taxation* [2014] FCA 95 [143] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).
101 [1991] FCA 11 (Sweeney J).
102 The disposition occurred in 1982, prior to the introduction of capital gains tax in 1985.
103 [1991] FCA 11 [63] and [66] (based on the first limb of the principles in *Federal Commissioner of Taxation v Myer Emporium Limited* (1987) 163 CLR 199, 209–10).

of profit-making by sale.[104] Had the first instance decision been a decision in the AAT, the finding of the purpose for which the revenue stream entitlement was acquired would have been a finding of fact, such that an appeal in relation to that finding might not be possible (in the absence of any other error of law).

External review at a state level — Victoria

The early contest provisions

The then Colony of Victoria introduced an income tax in 1895.[105] At that time, an objection to a tax assessment could be lodged by any taxpayer 'feeling aggrieved by reason of any assessment'[106] and, if a taxpayer remained dissatisfied after the Commissioner's determination of the objection, the objection was to be 'transmitted by the Commissioner to be heard and determined by a police magistrate'.[107] Any objection was to be 'heard in public', with the police magistrate having 'full power of hearing and determining the objections as to the amount of the assessments so transmitted',[108] with a right of appeal to the County Court.[109]

Similarly, at that time, a person dissatisfied with an assessment of stamp duty made by the Comptroller of Stamps was entitled to appeal to a court (in that case, the Supreme Court of Victoria).[110]

By contrast, under the *Land Tax Act 1890* (Vic), while there an appeal available in respect of the classification of land, it was to be heard by the Commissioner of Land Tax 'in a summary way', and the orders made by the Commissioner were stated to be 'final'.[111]

While there were differences in the contest mechanisms between the different tax regimes, none provided for external merits review.

The establishment of a merits review tribunal and the choice of settings

In 1972, an 'alternative means' of challenging an assessment or ruling in respect of land tax, stamp duty, payroll tax and certain other imposts was introduced, 'for the first time in Victoria'.[112] This was achieved through the formation of a Victorian Taxation Board of Review

104 [1991] FCA 377 at [48] (Hill J) (and therefore the first limb of the *Myer Emporium* principles was not engaged).
105 *Income Tax Act 1895* (Vic).
106 Ibid s 23(3).
107 Ibid s 24(3).
108 Ibid s 25(b) and (e).
109 Ibid s 26.
110 *Stamps Act 1890* (Vic) s 71(1).
111 *Land Tax Act 1890* (Vic) ss 22 and 25.
112 *Hansard*, Legislative Assembly, 21 March 1972 (Mr Hamer, Chief Secretary), 4288.

(Victorian Board), intended to be 'somewhat similar to that operating for many years in the Commonwealth field of taxation'.[113] Like its federal counterpart, the Victorian Board:

- was to consist of a chairman and two other members, each holding office for a term of up to seven years;[114]
- was empowered to *review* decisions referred to it by the Commissioner of State Revenue,[115] although, interestingly, aspects of the *Evidence Act 1958* (Vic) were applicable;[116] and
- had 'all the powers and functions of the Commissioner', was able to 'confirm, reduce, increase or vary the assessment', and its decisions were 'deemed to be assessments determinations or decisions of the Commissioner'.[117]

Taxpayers were given the choice to request that the Commissioner refer a dispute of a tax assessment to the Victorian Board by way of review, or have their objection treated as an appeal and set down for hearing in the Supreme Court of Victoria.[118] Where the objection was reviewed by the Victorian Board, both the Commissioner and taxpayer had a right to appeal to the Supreme Court on a question of law.[119]

As observed by (then) Deputy President Macnamara in *Baranov v State Revenue Office* (*Baranov*),[120] the 'same structure was adopted when the Victorian Taxation Board of Review was abolished and its jurisdiction incorporated into the new Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act 1984* and finally when that jurisdiction was given to [the Victorian Civil and Administrative Tribunal] …'.[121]

The nature of a court appeal

Under the current regime, taxpayers dissatisfied with the determination of an objection by the Commissioner of State Revenue are given the choice to request that the matter be referred to the Victorian Civil and Administrative Tribunal (VCAT) for review or treating the objection as an appeal and causing it to be set down for hearing in the Supreme Court.[122]

In *Conte Mechanical and Electrical Services Pty Ltd v CSR*[123] (*Conte*), Pagone J — who had previously been a member of VCAT — explained that this 'option, and the choice made by the taxpayer, is not without important significance'.[124] Noting that s 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that, in its review jurisdiction, VCAT has all of the functions of the decision maker, Pagone J observed that this 'effectively puts

113 Ibid.
114 *Taxation Appeals Act 1972* (Vic) s 3(2), (4).
115 Ibid s 11(1).
116 Ibid s 14.
117 Ibid s 17 (land tax), s 19 (stamp duty) and s 26 (payroll tax).
118 Ibid.
119 Ibid.
120 [2008] VCAT 2652.
121 Ibid [33].
122 *Taxation Administration Act 1997* (Vic) s 106.
123 [2011] VSC 104.
124 Ibid [2].

[VCAT] in the shoes of the Commissioner [of State Revenue] and, amongst other things, permits the Tribunal to re-exercise for itself any discretion which had otherwise been given to the Commissioner'.[125]

On the other hand, as the court is not given a similar power, Pagone J considered that the court is unable to re-exercise any discretion itself; instead, the 'nature of the proceeding in the Court … requires the taxpayer to demonstrate legal error for the court to set aside the decision of the Commissioner before remitting it back … for re-determination'.[126] Further, any consideration of the determination [of the Commissioner] must generally be upon the materials that were before him'.[127]

While the decision in *Conte* was apparently definitive, Croft J (also a former VCAT member) had occasion to re-consider the nature of an appeal to the Supreme Court in *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue*[128] (*Nationwide Towing*). In that proceeding, a preliminary question arose as to the nature of the appeal, namely whether it involved an appeal by way of hearing *de novo*, judicial review of the decision or some other form of appeal.[129]

Croft J considered that the High Court decision in *Avon Downs* was 'a particularly important authority' given the 'similarity in structure' between the income tax provisions considered by the High Court and the relevant aspects of the *Taxation Administration Act 1997* (Vic).[130] Indeed, he accepted Deputy President Macnamara's observation in *Baranov* that there was a 'clear and direct lineage' from the income tax provisions, through the 'facsimile provisions' introduced in Victorian in 1972, to the present operative provisions in the *Taxation Administration Act 1997* (Vic).[131]

For this reason, Croft J was of the view that, in enacting the appeal provisions in the current legislation, the Parliament 'should be taken to have intended them to have the meaning expounded by Dixon J in *Avon Downs*'.[132] In this regard, he observed the 'dual pathway approach … to enable a taxpayer to review or appeal assessments has been maintained, consistent[ly], in Victoria' over time, as well as between 'different and complementary' statutory provisions.[133] Further, he rejected the Commissioner's contention that the decision in *Conte* could be distinguished based on the nature of the particular decision under review.[134]

In Croft J's view, if an appeal to the Supreme Court involved 'merits review on a *de novo* hearing', this would result in duplication and eliminate the historical choice given to taxpayers, 'without any clear legislative intention being discerned that Parliament intended that outcome'.[135]

125 Ibid.
126 Ibid [3]–[4] (citing *Avon Downs*).
127 Ibid [5].
128 [2018] VSC 262.
129 Ibid [2].
130 Ibid [26].
131 Ibid [30].
132 Ibid.
133 Ibid [45].
134 Ibid [35].
135 Ibid.

Interestingly, His Honour went on to observe that, while VCAT was designed to provide a 'cheap and flexible review', and enable taxpayers to represent themselves, this did not preclude taxpayers from seeking merits review in VCAT by a Supreme Court judge (either the President of VCAT or another judge appointed on an ad hoc basis) as an alternative to a 'more confined appeal' in complex cases.[136] Of course, the nature of any such hearing should not change because a judge who sits as the Tribunal is still required to have regard to s 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), which requires the Tribunal to 'conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of [the Act] and the enabling enactment and a proper consideration of the matters before it permit'.

A choice with some limitations

It has recently been established that, in Victoria, a taxpayer's choice as to setting is a one-off choice. In *Vicinity Funds v Commissioner of State Revenue*,[137] the Court of Appeal of the Supreme Court of Victoria dismissed a taxpayer's appeal of a decision by a trial judge refusing an order in the nature of mandamus to compel the Commissioner to refer a dispute regarding an assessment to VCAT.[138]

The Commissioner had refused to make the referral because the taxpayer had earlier requested that its objection to the relevant assessment be treated as an appeal and set down for hearing in the Supreme Court. The right to make that request was enlivened as a result of the Commissioner's failure to determine the taxpayer's objection within 90 days.[139]

It would appear that the reason the taxpayer was seeking to change the setting is that, in the meantime, the Commissioner had determined the taxpayer's objection and, in doing so, formed the view that the arrangements entered into by the taxpayer amounted to a tax avoidance scheme. As the taxpayer had earlier accepted that appeals to the Supreme Court proceed by way of judicial review,[140] it can be inferred that the taxpayer was concerned about the risk that, even if it were successful in demonstrating error in the Commissioner's decision, the matter might simply be remitted to the Commissioner for reconsideration, who might remain of the same view.

In the event, the Court of Appeal held that, 'once a taxpayer has elected a forum in which to pursue an appeal or review, s 106(1) [of the *Taxation Administration Act 1997* (Vic)],[141] construed by reference to its text, context and purpose, is spent' and, as such, the legislation 'does not permit or require the Commissioner to refer a matter concerning the same objection to a second forum'.[142]

136 Ibid [51] (footnotes omitted).
137 [2022] VSCA 176.
138 The High Court refused the taxpayer special leave to appeal: [2022] HCASL 220.
139 *Taxation Administration Act 1997* (Vic) s 106(1)(b).
140 [2022] VSCA 176 [40].
141 The section which provides taxpayers with the choice as to the setting for resolving a state tax dispute.
142 [2022] VSCA 176 [9].

After observing that the tax administration legislation in New South Wales permits a taxpayer to move a state tax dispute from its Supreme Court to the New South Wales Civil and Administrative Tribunal (NCAT) (or vice versa), the Court of Appeal suggested that, 'had

Parliament intended that a taxpayer could avail themselves of a second choice in relation to the forum for review, it would have made express provision for that second choice … such as is found in … New South Wales'.[143]

While it was unlikely to provide any comfort to the instant taxpayer, the Court of Appeal suggested that, where a taxpayer is concerned about delay in the Commissioner's determination of an objection — but wants to leave open its choice between review and appeal — it would be possible for the taxpayer to seek an order in the nature of mandamus in respect of constructive refusal by the Commissioner to perform his duty (that is, to finalise the determination of the taxpayer's objection).[144]

Before turning to look at the external contest provisions in other states, it is relevant to observe that, while a tribunal can re-exercise most discretions available to the Commissioner in conducting a review, there may also be some limits. In this regard, in *Pitard v Commissioner of State Revenue*,[145] VCAT determined that it did not have the power to re-exercise the discretion, accepted as being reposed in the Commissioner,[146] to determine whether (or not) to issue an assessment in the first place.

The taxpayers were members of the same property development group who had, somewhat unfortunately, triggered the sub-sale provisions in the duties legislation[147] on 35 occasions and were seeking to be relieved from the additional duty payable as a result. In contending that VCAT could re-exercise the Commissioner's discretion to assess[148] (and, hence, to not assess), the taxpayer relied upon the High Court's decision in *Jolly* and Rich and Dixon JJ's description of the word 'decision' as 'being of the widest connotation'.[149] Ultimately, VCAT determined that it did not have the ability to re-exercise the discretion to issue (or not issue) an assessment on the basis that the inclusion of a discretion for the Commissioner to assess (or not) 'should not … be taken to signal a departure from the fundamental scheme of the legislation [which] prevents a challenge to the due making of an assessment once a notice of assessment is produced, with any challenge under Part 10 of the [*Taxation Administration Act 1997* (Vic)] limited to challenging the substantive liability under the assessment'.[150]

The taxpayer companies appealed but went into liquidation (for other reasons) before any appeal could be heard.

143 Ibid [95].
144 Ibid [89].
145 [2019] VCAT 1074.
146 Ibid [30].
147 *Duties Act 2000* (Vic) Pt 4A, Div 3.
148 *Taxation Administration Act 1997* (Vic) s 8 which provides that the Commissioner 'may' issue an assessment. By virtue of s 45 of the *Interpretation of Legislation Act 1984* (Vic), that word 'shall be construed as meaning that the power so conferred may be exercised, or not, at discretion'.
149 (1935) 53 CLR 206, 214–15.
150 [2019] VCAT 1074 [84]–[85].

Similarities and differences between an appeal to the Supreme Court and review by VCAT

As is the case at federal level, there are a number of substantive and procedural similarities between the review of a tax assessment decision by VCAT, and an appeal to the Supreme Court, in that:

- both have a common starting point, that is, a taxpayer dissatisfied with the Commissioner's determination of its objection;[151]
- in each case, the taxpayer must request the Commissioner to initiate a proceeding (by way of referral to VCAT or causing the objection to be set down for hearing in the court) and cannot initiate the proceeding directly;[152]
- except with leave of VCAT or the court, the taxpayer is limited to the grounds of objection and the Commissioner is limited to the grounds on which the objection is disallowed;[153]
- the taxpayer bears the onus of proving its case;[154] and
- the tribunal or the court may, ultimately, 'confirm, reduce, increase or vary the assessment or decision'.[155]

Like the federal tax regime, Victorian tax legislation includes many 'self-executing' provisions. For example, a person who is a foreign resident, as defined by reference to their visa class, must pay foreign purchaser additional duty and there is no discretion for VCAT to relieve a taxpayer from the duty even if they have been misled into believing that they were permanent residents.[156] In such cases:

- the same tests apply, irrespective of the setting;
- the task of the Supreme Court and VCAT is the same — that is, to make findings as to the relevant facts and to apply the law to those facts; and
- to avoid falling into error, VCAT must undertake the task with the same rigour as would be the case if the matter were before the court itself.[157]

There are also similarities in the process in both settings, particularly in terms of the material before the court or VCAT, and evidence being introduced by way of formal statement (an affidavit in the court and witness statement at VCAT).

151 *Taxation Administration Act 1953* (Vic) s 106(1)(a).

152 Ibid s 106. The Commissioner must generally refer the matter to VCAT or set it down for hearing in the Supreme Court within 60 days. It has been held that, as a result of this structure, VCAT cannot extend the 60 day period for a taxpayer to make a request for referral: *Di Dio Nominees Pty Ltd v Commissioner of State Revenue* [2004] VCAT 1352 [65].

153 Ibid s 109.

154 Ibid s 110.

155 Ibid s 111(1) (in the case of VCAT) and 112(1) (in the case of the Supreme Court).

156 *Rudd and Noor v Commissioner of State Revenue* [2022] VCAT 188.

157 It has been observed, albeit outside the state tax context, that even where legislation provides VCAT with the discretion to 'make any order it considers fair', this does not permit 'palm tree justice'; rather, VCAT must accord justice according to law: *Christ Church Grammar School v Bosnich* [2010] VSC 476.

As is the case for the AAT, in its review jurisdiction, VCAT 'has all the functions of the decision-maker',[158] such that it 'stands in the shoes'[159] of the Commissioner of State Revenue and may re-exercise any discretion and reconsider any matter that depends on the opinion or state of satisfaction of the Commissioner.

As the Supreme Court has observed (albeit in a non-tax setting), VCAT's role on review is 'not to sit in appeal from the decision', but rather to review decisions on their merits, 'without any presumption as to the correctness of the decision under review'; and, ultimately, it 'must conduct its own independent assessment and determination of the matters necessary to be addressed'.[160]

Further, as is also the case for the AAT, VCAT is 'not bound by the rules of evidence' (except to the extent that it chooses to adopt them); rather, VCAT 'may inform itself on any matter as it sees fit'.[161]

There are also differences in terms of costs, and the threshold for any appeal from a first instance decision:

- For Victorian state tax disputes, VCAT is a no costs jurisdiction,[162] while the costs of an appeal to the Supreme Court are 'in the discretion of the Court'[163] and, typically, costs will follow the event.
- An appeal is available, from a decision of VCAT, to the trial division of the Court on a question of law, with leave. Such leave may only be granted if the Court is 'satisfied that the appeal has a real prospect of success'.[164] Since 2014, there is no longer an appeal as of right from a decision of a trial judge of the Court: rather, leave is required, but this may be granted if the Court of Appeal 'is satisfied that the appeal has a real prospect of success'.[165] Notably, however, the grant of such leave is not restricted to questions of law.[166]

Accordingly, notwithstanding the substantive and procedural similarities between the review of a tax assessment by VCAT and an appeal to the Supreme Court, it might be going a bit too far to suggest that VCAT can, or should, necessarily go about its task in a way that is 'functionally the same' as the court.

158 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51(1).
159 *Mond v Perkins Architects* [2013] VSC 455 [10]; referenced by VCAT in a state tax context in *Motticant Pty Ltd v Commissioner of State Revenue* [2017] VCAT 1820 [10].
160 Ibid.
161 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b), (c).
162 Ibid sch 1, cl 91(1).
163 *Taxation Administration Act 1997* (Vic) s 112(2).
164 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.
165 *Supreme Court Act 1986* (Vic) s 14C.
166 See, for example, *Jarrold v Registrar of Titles* [2015] VSCA 45 where, on appeal, a new trial was ordered on the basis that the trial judge had made 'erroneous findings of fact'.

External review at a state level — other jurisdictions

The nature of an appeal or review has been considered in some other jurisdictions, with varying approaches taken depending on the precise wording of the tax administration legislation in the jurisdiction.

New South Wales

The New South Wales provisions providing for taxpayer's rights to contest a tax assessment are somewhat different to Victoria. If a taxpayer is dissatisfied with the determination made by the Chief Commissioner of State Revenue regarding the taxpayer's objection, the taxpayer may either:

- apply to NCAT for 'administrative review';[167] or
- apply to the Supreme Court of New South Wales for 'a review' of the decision.[168]

The powers of the Court and NCAT following review are the same. That is, both may 'confirm or revoke the assessment', 'make an assessment or other decision in place of the assessment' or 'remit the matter to the Chief Commissioner for determination in accordance with its finding or decision'.[169]

In its 2011 decision in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue*[170] (*Tasty Chicks*), the High Court accepted that the nature of the review to be undertaken by a judge of the Supreme Court of New South Wales extended to re-exercising the discretion available to the Commissioner to 'de-group' certain members of payroll tax group. The High Court quoted, with apparent approval, the observation of Gzell J at first instance, that:[171]

> The powers in the Taxation Administration Act, s 101 are quite different from the powers of a Court on appeal under the Income Tax Assessment Act. They are specific and include the power to make an assessment or other decision in place of the assessment or decision the subject of the review. And any dichotomy between the powers of the Supreme Court and the powers of the Administrative Decisions Tribunal has been abrogated. The powers on review are the same for Court and Tribunal.

The High Court held that the New South Wales Court of Appeal's reliance on *Avon Downs* for the contrary result (that is, that the taxpayer had to show that the Chief Commissioner's exercise of the discretion was 'vitiated by error') was 'misplaced'.[172] In reaching this conclusion, the High Court noted that the review provisions were amended in 2002 and quoted from the Treasurer's second reading speech which indicated that the legislation was

167 *Taxation Administration Act 1996* (NSW) s 96.
168 Ibid s 97.
169 Ibid s 101.
170 [2011] HCA 411.
171 Ibid [20] (citing *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2009] NSWSC 1007; (2009) 77 ATR 394 [165]).
172 Ibid [19].

being amended to confer 'concurrent jurisdiction' on the Administrative Decisions Tribunal (now NCAT) and the Supreme Court, with the only differences envisaged between the two settings relating to cost, timeliness and flexibility.[173]

In the event, the High Court remitted the matter to the New South Wales Court of Appeal for further hearing. In its decision in *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd*,[174] that Court (differently constituted) observed that the High Court had held that 'the jurisdiction and powers conferred on the Supreme Court on such a review [by the Supreme Court under s 97 of the *Taxation Administration Act 1996* (NSW)] entitled it to address afresh the questions before the Chief Commissioner having regard to the material before it, including questions as to jurisdictional 'satisfaction' and the exercise of discretionary power …'.[175]

Nevertheless, the Court of Appeal found that the Gzell J had 'erred' (in the A*von Downs* sense) in failing to address whether the businesses of certain group entities (including the respondent) were 'carried on substantially independently' of another group entity.[176] The Court of Appeal found that, although the businesses were separately owned and controlled, the businesses of the relevant entities were not carried on substantially independently of that other group entity.[177] It followed that the discretion to de-group the entities did not arise (although if it had, the Court of Appeal was satisfied that Gzell J had provided proper — 'albeit very short' — reasons for its exercise).[178]

Ultimately, the Court of Appeal dismissed the application for review in respect of most of the payroll tax years in question,[179] rendering the High Court outcome something of a pyrrhic victory.

Queensland

On their face, the Queensland provisions regarding the contesting of a tax assessment are closer to the provisions that apply in Victoria than the New South Wales provisions. A taxpayer that is dissatisfied with the Commissioner's decision as to an objection may either 'appeal to the Supreme Court' or 'apply … to QCAT [that is, the Queensland Civil and Administrative Tribunal] for review of the Commissioner's decision'.[180]

However, there are also some important differences.

173 Ibid [21] (referring to New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 October 2000 at 8935).
174 [2012] NSWCA 181.
175 Ibid [2] (Meagher JA). Barrett JA and Sackville AJA concurring with His Honour's reasons (emphasis added).
176 Ibid [58] (Meagher JA).
177 Ibid [60] (Meagher JA).
178 Ibid [63]–[64] (Meagher JA).
179 Ibid, [66] (Meagher, JA). Barrett JA and Sackville AJA agreeing with the orders made.
180 *Taxation Administration Act 2001* (Qld) s 69(2).

In the case of review by the Queensland Civil and Administrative Tribunal (QCAT), the Tribunal must reconsider an assessment based on the 'evidence before the Commissioner when the decision was made', unless it considers it 'necessary in the interests of justice to allow new evidence'.[181]

By contrast, on an appeal to the Supreme Court, if the Court is 'satisfied evidence material to the objection was not before the commissioner', the court *must* '*direct the commissioner* to reconsider the objection having regard to the evidence and any other evidence obtained by the commissioner'.[182] Further, the Supreme Court is ultimately limited to 'allow[ing] the appeal completely or partly or disallow[ing] it'.[183]

In *Wakefield v Commissioner of State Revenue*[184] (*Wakefield*), Bowskill J (as the Chief Justice then was) considered the nature of an appeal under that regime, which had only been the subject of 'passing reference, but not detailed consideration' in a small number of previous cases.[185] Her Honour held that:[186]

> Where, as in this case, the appeal is from a decision involving the application of the law to objective conclusions of fact, which are not dependent upon the Commissioner's state of satisfaction, it is open for the Court to give such judgment on the appeal as it considers ought to have been given, on the law and facts as they are at the time of the hearing of the appeal. The exercise of the Court's powers in this regard are not dependent upon the demonstration of some legal, factual or discretionary error by the decision-maker.
>
> However, where the decision appealed is one which depended upon the Commissioner being satisfied of a particular fact or matter, the appellant does need to demonstrate an error of principle in the Commissioner reaching, or not reaching, that state of satisfaction, before the Court would intervene. As observed by Wilson J in the *Feez Ruthning* case [*Feez Ruthning v Commissioner of Pay-roll Tax* [2003] 2 Qd R 41 [20]], where that is shown, the next question would be whether the Court can or should re-exercise the discretion, or whether the matter should be sent back to the decision maker*. I would not construe ss 69-70C of the Taxation Administration Act as conferring a power on the Supreme Court to stand in the shoes of the Commissioner, and re-exercise any discretionary power conferred on the Commissioner*. In that respect, *the nature of an appeal to the Supreme Court may be distinguished from the alternative option which is available to a taxpayer, of seeking review of an objection decision by QCAT*. A matter referred for review to QCAT invokes the powers and functions of QCAT under the Queensland Civil and Administrative Tribunal Act, including as that does the power to perform the functions of the decision maker (s 19), *which effectively puts the Tribunal into the shoes of the Commissioner and, amongst other things, permits the Tribunal to re-exercise for itself any discretion which had otherwise been given to the Commissioner*. But as this is not an issue that arises for determination in this case, given the different nature of the decision the subject of the appeal, it is unnecessary to address this further.

In the latter regard, Bowskill J appears to have distinguished the High Court's decision in *Tasty Chicks* (on the basis that the powers of the court and the tribunal under the New South Wales provisions 'were the same'), while citing the analysis of Pagone J in *Conte*[187] in support of the limitations on the court's role on an appeal.

181 Ibid s 71(3)(a).
182 Ibid s 70B.
183 Ibid ss 70B(4) and 70C.
184 [2019] QSC 85.
185 Ibid [25].
186 Ibid [34]–[35] (emphasis added, footnotes omitted).
187 Ibid footnotes 28 and 29.

South Australia

While South Australia has had a civil and administrative tribunal since 2015, a taxpayer who is dissatisfied with the Minister's determination (via RevenueSA) of an objection to a tax assessment is only entitled to appeal to the Supreme Court of South Australia.[188] As in New South Wales, following appeal, the Supreme Court may 'confirm or revoke the assessment' or 'make an assessment or decision in place of the assessment or decision to which the appeal relates'.

In *Perpetual Corporate Trust Limited v Commissioner of State Revenue*,[189] Auxiliary Justice Bochner considered the nature of an appeal under the South Australian provisions. Relying on *Tasty Chicks*, it was observed that an appellant 'is not required to show error on the part of the decision maker' and that, in undertaking the appeal, the court 'stands in the shoes of the Commissioner'.[190]

When courts blur the boundaries

The traditional demarcation between merits review by tribunals, and appeal before a court, has generally been maintained by the courts in the absence of clear legislative indications to the contrary. From time to time, however, courts approach the boundaries of, or might even be seen to dip their toes into, ponds where the threshold condition, or gateway, to exercising a statutory power and/or making a decision is an opinion, or a state of satisfaction, or a belief of the relevant Commissioner.

Blurring the boundaries at the federal level

An example, at a federal level, of a court approaching, or (on some views) crossing, the boundary, can be seen in the *Kolotex Hosiery* decision in 1975. After that, a series of cases concerning the tax residency of individual taxpayers can be seen as further illustrations of the phenomena, being the decisions in *FCT v Applegate*[191] (*Applegate*), the first instance Federal Court decision in *Addy v FCT*[192] (*Addy*) and the Full Federal Court decision in *Harding v FCT*[193] (*Harding*).

Like *Avon Downs*, the *Kolotex Hosiery* decision concerned the Commissioner's state of satisfaction concerning elements of the carried forward loss rules for companies in s 80A of the *Income Tax Assessment Act 1936* (Cth) which, so far as is relevant, denied a company's entitlements to deductions for carried forward losses unless the Commissioner was satisfied as to a degree of continuity of underlying ownership of the company seeking to claim the loss deduction. The Commissioner's satisfaction as to these matters was a threshold condition

188 *Taxation Administration Act 1996* (SA) s 92.
189 [2022] SASC 7.
190 Ibid [10].
191 (1979) 27 ALR 114.
192 [2019] FCA 1768 (Logan J).
193 *Harding v F C of T* [2019] FCAFC 29 (Logan, Davies and Steward JJ).

before an entitlement to a deduction arose. As Steward J explained in the Full Federal Court decision in *Addy*,[194] the decision in *Kolotex Hosiery* concerned the following:

> [The Commissioner must be] be satisfied that the same requisite persons beneficially owned shares in the taxpayer company both during the year in which the loss was incurred and the year in which the loss was to be used. In *Kolotex* [Hosiery], the Commissioner was not so satisfied. Gibbs J (as his Honour then was) and Stephen J decided that the Commissioner had erred in law in reaching that conclusion. However, their Honours did not remit the matter back to the Commissioner. Rather, based on alternative grounds raised for the first time before the Court by the Commissioner, it was decided, by reference to those grounds, that the Commissioner could not otherwise properly be satisfied about the necessary continuity of ownership. It followed that the Commissioner had been correct to disallow the taxpayer's deduction.

In *Kolotex Hosiery* itself, Gibbs J (as his Honour then was) explained the rationale for the Court determining the matter, rather than remitting it back to the Commissioner, in the following passages:

> If the Commissioner has in fact been satisfied he cannot subsequently refuse a deduction on the ground that he ought not to have been satisfied, unless in the circumstances he is entitled to amend the assessment under s 170 of the [*Income Tax Assessment] Act [1936* (Cth)]. By the same reasoning, however, it cannot be said that if the Commissioner has not in fact been satisfied but ought to have been satisfied he is bound to allow the deduction, although such a case may be one in which the court on appeal will hold that the Commissioner's conclusion should be reviewed. Unless it is sought to review the conclusion of the Commissioner that he is not satisfied, it is not enough to say that he ought to have been satisfied, or that he would have been satisfied if he had not fallen into error. The court on appeal cannot purge the Commissioner's reasoning of its errors and then attribute to him a satisfaction which in fact he lacked. …
>
> In the present case the Commissioner was not in fact satisfied of the matters stated in either s 80A or of those stated in s 80C [of the I*ncome Tax Assessment Act 1936* (Cth)] and the first contention made on behalf of *Kolotex* fails.
>
> The questions that then arise are whether the conclusion of the Commissioner is open to review and, if so, whether it should be held that he should reach the requisite satisfaction. The grounds on which the conclusion by the Commissioner that he is not satisfied may be examined by a court of appeal are those stated in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*; … However, it would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available. Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court.
>
> There is no doubt that the decision of the Commissioner was affected by error. It is not contested that he was wrong in thinking that s 80D applied. … On the view that I take of the law and the facts, the Commissioner could not properly have been satisfied of the matters stated in ss 80A and 8OC, whether or not s 80B(5) was applicable ...[195]

194 [2020] FCAFC 135 [311].
195 (1975) 132 CLR 535, 567–8.

Similarly, Stephen J said:

> No doubt, attainment by the Commissioner of a state of satisfaction or his failure to attain that state of mind must, if it is to have any statutory significance, occur before notice of assessment issues to the taxpayer; I would regard as irrelevant to the correctness of the original assessment any state of mind existing after that time. But the present is, in any event, not such a case. Both before and after issue of the notice of assessment the Commissioner has remained unsatisfied. All that has happened is that he has discovered, as time has passed, what he regards as additional and alternative grounds for his failure to be satisfied and the significance of these new grounds is only this: before the court may review the Commissioner's failure to be satisfied it must detect some error of law affecting that conclusion or some other of the grounds for interference referred to by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*. Here such grounds exist, they are provided by the errors affecting the Commissioner's course of reasoning which led him to his conclusion. But having entered upon a review of the Commissioner's conclusion the court must form its own opinion of what should have been the Commissioner's conclusion and must do so unaffected not only by those errors which led the Commissioner to his original conclusion unfavourable to the taxpayer but also unaffected by any other errors or oversights, whether or not favourable to the taxpayer, which may have affected the Commissioner's original conclusion. The court will therefore necessarily have to consider any new grounds urged by the Commissioner as justifying the assessment, not because they may support the Commissioner's already vitiated state of dissatisfaction of mind, but rather because they may assist the court in determining whether either a contrary conclusion should be substituted for the Commissioner's original failure to be satisfied, founded as it was upon reviewable error, the appeal therefore being allowed, or whether, on the contrary, the assessment should stand unaffected and the appeal be dismissed because, once all errors and oversights are rectified, the case is not seen to be one in which the Commissioner should have been satisfied in terms of the Act.[196]

While the court involved itself in consideration of a matter that turned on the Commissioner reaching a state of satisfaction, and the decision can be seen as encouragement for the court to do so, arguably the decision of the court should not be construed as involving the court substituting its satisfaction for the Commissioner's, as the court did not disturb the Commissioner's decision.

The decisions in *Applegate*, *Addy* (at first instance) and *Harding* each concerned the Commissioner's state of satisfaction elements of the definition of 'resident of Australia' in s 6 of the *Income Tax Assessment Act 1936* (Cth) which, so far as is relevant, defines a resident of Australia in the following terms:[197]

> '**resident or resident of Australia**' means:
>
> (a) a person, other than a company, who resides in Australia and includes a person:
>
> (i) whose domicile is in Australia, *unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia*;
>
> (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, *unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia*; …

196 Ibid 567–8.
197 Emphasis added.

The policy underlying paragraphs [(a)(i)] and [(a)(ii)] of that definition is reasonably clear. The definition seeks to identify and distinguish two groups of people so that (subject to relief under any double taxation agreement with the country in which the person is resident) they can be taxed differently, being:

- one group of people, with a sufficient or significant connection with Australia, who will be treated as 'residents' and taxed on their worldwide income; and
- the other group of people, with a lesser connection or potentially no connection with Australia, who will be treated as 'non-residents' and taxed only on their income from Australian sources (for example, earnings for work done in Australia for Australian customers pursuant to contracts made in Australia and the revenue from sales of goods to Australian customers pursuant to contracts made in Australia).

The requirement to be in Australia for more than half the year (commonly referred to as the 183-day test), and the Australian domicile element of the residence test, are both rigid or bright-line tests. Without more, these tests might classify people in inappropriate ways. For example, someone might be trapped in Australia for more than 183 days for medical reasons without ever having intended to be here that long, and without ever having any intention to live here permanently or even indefinitely, and all the while maintaining a usual place of abode abroad. The policy of our system is not to ascribe 'resident' status to that person. The chosen mechanism to allow relief in this setting is the Commissioner's state of satisfaction carve out for those people who are here longer than 183 days in a year and who the Commissioner is satisfied have maintained their usual place of abode outside Australia and have no intention to take up residence in Australia. This carve out allows a degree of flexibility to accommodate particular circumstances and avoids the harshness of a bright-line distinction.

Harding[198] involved the permanent place of abode outside Australia aspect of the definition. Mr Harding was an Australian citizen who was living and working abroad but had not altered his Australian domicile. The Court's discussion focused on what was meant by the concept of a permanent place of abode outside of Australia, and whether Mr Harding had maintained such a permanent place of abode.

Justice Logan commented on the nature of the jurisdiction of the Federal Court conferred by the *Taxation Administration Act 1953* (Cth) to hear and determine appeals concerning taxation objection decisions. Paraphrasing a little, His Honour said:

> When this Court exercises the original jurisdiction conferred on it …. to hear and determine …[a taxation] 'appeal' …., it exercises a jurisdiction which, necessarily, is more extensive than determining on judicial review whether the objection decision is attended with jurisdictional error. The qualification, 'necessarily', flows from the basal constitutional proposition that a right of recourse to an exercise of the judicial power of the Commonwealth so as to contest whether the criteria giving rise to an alleged taxation liability are met is one feature which, at the Federal level, distinguishes a valid law with respect to taxation from an invalid arbitrary exaction:
>
> This feature, necessary for the constitutional validity of a law with respect to taxation is not expressly referred to in *Kolotex Hosiery* …[but] … this feature explains why, [once *Avon Downs* type error has been

198 [2019] FCAFC 29 (Logan, Davies and Steward JJ).

> established] Gibbs J …[concluded] 'it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court'. The court's so doing prevents arbitrary exaction by the Commissioner, who is an officer of the Executive. A like view of the role of the court on a taxation appeal in relation to a satisfaction based liability criterion is evident in the judgment of Stephen J in that case, at 576.[199]

The practical effect of his Honour's approach is that, if the court has power to determine whether the Commissioner ought to have been satisfied, the outcome that follows can be seen to be the court stepping into the shoes of the Commissioner and crafting a conclusion that would flow if the Commissioner had in fact been satisfied. This is very close to, if not the same as, the court assuming a role of being satisfied and crafting an outcome on the basis of that satisfaction.

Justices Davies and Steward took a different approach, with some significance. Again paraphrasing a little, they said:

> Here, in our view, the Commissioner's satisfaction about a taxpayer's place of abode is not just a procedural step but forms part of the criteria for determining residence in subpara (i), which comprises two parts. The first part requires a determination of the domicile of the taxpayer. The second part is an exception or 'carve out' from domicile constituting 'residency'. The carve out is where the 'Commissioner is satisfied' that the taxpayer has a 'permanent place of abode outside Australia'. Unlike the issues of where a person 'resides', where a person is domiciled, and where a person has 'actually been' (subpara (ii) of the definition), the exception in subpara (i) expressly and specifically depends on the state of mind of the Commissioner. It does so, not so as to create an administrative or procedural step to be fulfilled, but to reserve to the Commissioner a function which forms part of the criteria for residence. That function is his sufficient satisfaction about the permanent place of abode of the taxpayer which is the 'fact' that enlivens the exception. For reasons set out below, the statutory history also supports this construction. It follows that the question for the Court below was not whether Mr Harding had in 2011 a permanent place of abode outside of Australia; rather it was whether the Commissioner erred in law in not being satisfied that he did have such a permanent place of abode.
>
> Before us, however, the parties reached an agreement that because the case had proceeded below on a different assumed footing, it should continue on that basis. The Court was content to hear the appeal in that way. As it happens, something similar occurred in …[the *Applegate* decision] …..
>
> Whilst the Court was prepared to accede to the wishes of the parties in this case, that does not detract from our view that the criterion in subpara (i) turns upon the Commissioner's, and not the Court's, state of satisfaction. It also means that the consequences of what was said by [justices] Gibbs and Stephen J … in *Kolotex Hosiery* … concerning the function of the Court in considering whether there was legal error in the formation of the Commissioner's state of satisfaction, need not be addressed.[200]

The agreement to proceed on the basis noted obviated the need for the court to focus on whether the case was a circumstance where the court could finally determine the matter in the event of concluding that there was jurisdictional error, or whether the matter needed to be referred back to the Commissioner. It is open to conclude that the court approached the agreement of the parties as having the effect that the Commissioner would accept that he had the relevant state of satisfaction if the court concluded that, on an approach that did not entail jurisdictional error, he should have been so satisfied.

199 Ibid [3]–[4].
200 Ibid [20]–[22].

The first instance decision in *Addy*,[201] can also be seen to have been at the edge of the court intruding into matters concerning the Commissioner of Taxation's opinion or state of satisfaction. This decision concerned the permanent place of abode aspect of the 183 days in Australia (that is, para [(a)(ii)]) limb of the definition of a resident of Australia. A visitor to Australia who is in the country for 183 or more days in a year is presumed to be a resident of Australia 'unless the Commissioner is satisfied that the person's usual place of abode is outside of Australia', and they have no intention to establish a place of residence here. Ms Addy had been in Australia for more than 183 days. The focus of the Court's discussion was whether Ms Addy had a usual place of abode outside of Australia and did not intend to take up residence here.

When the dispute came before Logan J in the Federal Court, the Commissioner contended that he had not had the opportunity to consider the 183-day test and whether or not to be satisfied that Ms Addy's usual place of abode was not in Australia.[202] That submission was not accepted by Logan J.[203] His Honour observed that the Commissioner had originally deemed Ms Addy to be a non-resident, which suggested that the Commissioner must necessarily have been satisfied that Ms Addy's usual place of abode was outside of Australia and that she did not intend to take up residence in Australia.[204] Further, given that the Commissioner had issued amended assessments which classified Ms Addy as a resident of Australia, his Honour considered that the Commissioner must have re-visited his earlier state of satisfaction.[205] Interestingly, his Honour observed:[206]

> As to paragraph (a)(ii) of the definition in s 6(1) of the 1936 [Assessment] Act, for reasons already given, the Commissioner must or must be taken to have reached and then revisited a conclusion as to the application of that paragraph, including by reference to its satisfaction based 'carve out': Harding, at [20]. It is not necessary in this case to reach any concluded view as to the extent of the Court's jurisdiction on a taxation appeal in relation to satisfaction based provisions affecting a taxation liability, as it was not in *Harding*, although the subject was adverted to in both my and the joint judgement in that case. It is sufficient if one assumes, given that each of the assessments was made prior to the Full Court's judgement in *Harding*, that it is inferentially likely that the Commissioner acted on his hitherto erroneous conception of what constituted a 'place of abode' and that it is open to the Court to reach its own conclusion.
>
> On this basis and on the whole of the evidence in this proceeding, the Commissioner should have been satisfied that, during the 2017 income year, Ms Addy's 'usual place of abode' was in Australia and that she did intend to take up residence here. For reasons already given above, not only had Australia and more particularly the Earlwood house become her usual place of abode during that income year but also that is where she intended to take up residence.
>
> The foundation for the Court to reach such a conclusion, which appears to involve the Court standing in the shoes of the Commissioner, is not expressed in the decision.[207]

201 [2019] FCA 1768 (Logan J).
202 [2019] FCA 1768 [22].
203 Ibid [26].
204 Ibid [29].
205 Ibid.
206 Ibid [61]–[62].
207 In his appeal decision reasons, Derrington J (at [2020] FCAFC 135 [132]) observed that this conclusion 'was … apparently founded upon his Honour's view of the decision in [*Kolotex Hosiery*] …, albeit that decision was not referenced in his Honour's reasons'.

On appeal,[208] the Full Court in *Addy* essentially proceeded on the basis that the Commissioner had not formed the requisite state of satisfaction in making the amended assessment and, as a consequence, the exception to the 183-day rule for residence in Australia was not applicable. Accordingly, the effect was that Ms Addy was a resident because what remained of the (a)(ii) part of the definition of a resident of Australia was self-executing.

Justice Davies concluded that Logan J was mistaken in concluding that the Commissioner must necessarily have addressed the relevant question and not been satisfied that Ms Addy's usual place of abode was outside Australia because the evidence showed that the Commissioner had not in fact turned his mind to that question.[209] Her Honour disposed of this aspect of the case on the basis that Ms Addy had been in Australia for 183 days, and in the absence of the Commissioner forming the requisite state of satisfaction, she satisfied the test of being a resident of Australia. Davies J considered it perfectly permissible for an absence of the Commissioner's satisfaction to be the product of him not turning his mind to the question.[210]

Justice Derrington reached a similar conclusion. Relevantly, His Honour canvassed the circumstances where a court could substitute its own state of satisfaction for those of the Commissioner[211] and generally observed that, on *Avon Downs* principles, a state of satisfaction might be vitiated, but even if the court could vitiate the Commissioner's state of satisfaction, it was not open to it to substitute an opinion for that of the Commissioner.[212]

His Honour also rejected propositions to the effect that the powers of the court, to make orders as are just and to allow remedies to which the parties appear to be entitled (created by s 22 of the *Federal Court of Australia Act 1976* (Cth) in conjunction with the terms of the *Taxation Administration Act 1953* (Cth)), extend to allow the court to substitute its opinions or states of satisfaction for those of the Commissioner.[213]

Justice Steward concluded that the better view of the evidence was that the Commissioner never turned his mind as to whether he should or should not be satisfied as to matters in the residency test,[214] but concluded that the change in the basis of assessment — that is, accepting that Ms Addy was a resident of Australia — led to the proper conclusion that the Commissioner had changed his mind when he subsequently decided that she was a resident, because there was plain evidence that he had at least made that decision.[215]

208 *Commissioner of Taxation v Addy* [2020] FCAFC 135 (Davies, Derrington & Steward JJ).
209 Ibid [23].
210 Ibid [24] and [25].
211 Ibid [134] and following.
212 Ibid [142].
213 Ibid [182], [183] and [186].
214 Ibid [281].
215 Ibid [284].

His Honour concluded that:

- the role of the court was limited to determining whether the Commissioner had lawfully obtained a state of satisfaction, and that is a limited style of review in the *Avon Downs* sense,[216] and later concluded that the role of the court in relation to the residency test was not to substitute its own opinion for the Commissioner's state of satisfaction. That was the Commissioner's function, and not a function for the court to determine on the merits;[217] and
- if the Commissioner has not formed the relevant state of satisfaction, then the self-executing aspects of the residency definition operated in accordance with their terms and, as such, someone who has been in Australia for more than 183 days is a resident of Australia.[218]

His Honour's remarks concerning the impact of the *Kolotex Hosiery* decision bear reproduction in full:

> The taxpayer relied upon [*Kolotex Hosiery*] as authority for the proposition that in a Pt IVC tax appeal a Court, once satisfied of the presence of error in the attainment by the Commissioner of his state of satisfaction, can decide for itself whether or not the Commissioner should on the evidence before the Court be so satisfied. With respect, I do not accept the correctness of that submission for the following two reasons:
>
> (a) First, the form of the relief ordered by Gibbs and Stephen JJ was the product of what the parties wanted the Court to do. …
>
> As such, *Kolotex* [Hosiery] should not be taken as a binding authority for the proposition put forward by the taxpayer. As McHugh J said in the High Court decision of *Coleman v Power* (2004) 220 CLR 1 at 44–45 [79]:
>
> The only power with which this Court is invested is judicial power together with such power as is necessary or incidental to the exercise of judicial power in a particular case. The essence of judicial power is the determination of disputes between parties. If parties do not wish to dispute a particular issue, that is their business. This Court has no business in determining issues upon which the parties agree. It is no answer to that proposition to say that this Court has a duty to lay down the law for Australia. Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue. If the conceded issue is a necessary element of the decision, it creates an issue estoppel that forever binds the parties. But that is all. The case can have no wider ratio decidendi than what was in issue in the case. Its precedent effect is limited to the issues.
>
> (Emphasis added.)
>
> (b) Secondly, and in any event, it should be accepted that Gibbs and Stephen JJ did not remit the matter for reconsideration because in *Kolotex* [Hosiery], as a matter of law, only one conclusion was open to the Commissioner to reach with respect to the beneficial ownership of the taxpayer. This was

216 Ibid [294].
217 Ibid [306].
218 Ibid [314].

explained by Davies J (Senior) in *Ferris v Commissioner of Taxation* (1988) 20 FCR 202, where his Honour rejected a submission that the Court should re-exercise the Commissioner's power under s 109 of the 1936 [Assessment] Act to treat certain payments made to shareholders or directors by a private company as a dividend. Davies J said at 212:

In an appeal of this nature where what is in issue is the exercise of a discretion by the Commissioner, the Court's function is limited to determining whether there was an error such that, in judicial review proceedings before it, this Court would make an order of review with respect to the challenged decision. That issue is to be determined by reference to the material which was or ought to have been taken into account by the Commissioner when the challenged decision was made: see *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 and *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (1975) 132 CLR 535.

(c) Davies J rejected a submission that the Court should set aside the assessment the subject of appeal based on additional evidence adduced by the taxpayer. His Honour said at 216:

Mr Staff submitted that the Court should set aside the assessment without remitting the matter for reconsideration and that on the evidence before the Court it should do so. Mr Staff referred to *Kolotex Hosiery (Aust) Pty Ltd v Commissioner of Taxation (Cth)* (supra) and *Henry Comber Pty Ltd v Commissioner of Taxation (Cth)* (supra). However, the Court would so act only if it were satisfied that the result contended for was the only one to which a decision maker, properly instructed and not acting unreasonably, could come. It is not for the Court itself to exercise the discretion which is conferred upon the Commissioner. The function of the Court is a function in the nature of judicial review. Unless the Court is satisfied that there is no room for the exercise of the subject discretion, the Court must remit the matter for reconsideration.

I very respectfully agree with and gratefully adopt what Davies J said in *Ferris*.

(d) This is not a case where it can be said that only one conclusion was legally open to the Commissioner in relation to the issue of both the taxpayer's usual place of abode and her intention to take up residence. Whilst the primary judge found that the taxpayer intended to reside in Sydney for more than 12 months, it was also the taxpayer's intention to return to England to study acting. In such circumstances, I do not think that there was only one conclusion that could be legally reached about the taxpayer's intention about residency. Notwithstanding that finding, for my part my strong impression is that the taxpayer's usual place of abode in the 2017 year of income remained Bexleyheath in Kent and that she also had no intention of taking up residence in Australia. The taxpayer was in Australia temporarily on an extended holiday. She only worked to support her holiday. She had no right to stay in Australia permanently. In that respect, I refer to the following observation made by the majority in *Harding* concerning the 183 day test (called the 'third test' in the following) at 329 [39]:

In contrast to the second test, what is described in the Notes as the third test in subpara (ii) is, initially, concerned with a person who is physically present in Australia for most of a given year of income. The exception to it probably applies to a person who is physically present in Australia for the required number of days but who would not be considered to be an Australian because he or she is only a temporary visitor of this country for a period of time. That period might even extend to a term of years.

(e) However, my personal views are not what matter. The authority to determine whether the taxpayer's usual place of abode in the 2017 year of income was in England and to ascertain whether she intended to take up residence in Australia, lay with the Commissioner.

(f) Finally, the taxpayer cited in her written submissions [a number of] authorities in support of the proposition that, based on *Kolotex* [Hosiery], a Court may exercise powers and discretions reposed in the hands of the Commissioner:

….

(g) These cases, in my view, do not clearly support the taxpayer's proposition. Some of them address another issue, namely the relevance of fresh material or evidence in the ascertainment of an error of law. To the extent that some authorities, such as *Russell [v Commissioner of Taxation (Cth)* [2009] FCA 1224] at first instance, may, on one view, appear to favour the broader contention of the taxpayer here, with profound respect I prefer the expression of the law by Davies J in *Ferris*: cf *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 per Gaudron J.[219]

The decision of the Full Federal Court in *Addy* was ultimately overturned by the High Court.[220] However, that was based on a different ground (namely, the operation of the Convention between Australia and United Kingdom for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains).

In a matter where the Commissioner has reached a state of satisfaction and it is necessary to overturn it, any optimism that might be gained from the *Harding* or *Addy* first instance decisions, that a court can substitute its own decision, is illusory. These types of matters need to be pursued in the AAT. This is because the *Avon Downs* principles only go so far: while courts can correct jurisdictional error, it is brave to assume that those principles allow correction by the court itself of non-jurisdictional errors.

Blurring the boundaries at a state level

There are also examples of courts blurring the boundaries at a state level, such as in:

- *Drake Personnel Ltd v Commissioner of State Revenue (Vic)*[221] (*Drake*), where Phillips JA observed that 'the parties have proceeded alike upon the footing that the Court now stands in the shoes of the Commissioner for the purposes of [a provision of the *Payroll Tax Act 1971* (Vic) dependent on the Commissioner's state of satisfaction] and I proceed accordingly'.[222]
- *LIV v Commissioner of State Revenue*[223] (*LIV*), where Digby J suggested that the *Taxation Administration Act 1997* (Vic) did 'not require identification of reviewable error' in relation to provisions of the *Payroll Tax Act 2007* (Vic) depending on the Commissioner's state of satisfaction.[224]

The decision in *Drake* is somewhat equivalent to the decision of Davies and Steward JJ in *Harding* and, as Croft J observed in *Nationwide Towing*, does 'not provide good reason for not following the reasoning of Pagone J in *Conte*'.[225]

219 Ibid [314] (Davies J agreed with these observations: Ibid [26]).
220 *Addy v Commissioner of Taxation* [2021] HCA 34.
221 [2000] VSCA 122; (2000) 2 VR 63.
222 Ibid [21].
223 [2015] VSC 604.
224 Ibid [67].
225 [2018] VSC 262 [58].

Likewise, Croft J observed that, in the *LIV* decision, Digby J 'stressed [his view as to the need to find error] was unnecessary to the decision' and, in any event, concluded that the reasoning in *Conte* was to be preferred.[226]

As such, for similar reasons to those discussed in the federal context above, any hint in those cases that the Supreme Court might be willing in some cases to engage in something akin to merits review must be discounted.

Should the choice of setting for contesting tax assessments be maintained?

In an article published in 2012, Professor Creyke criticised the 'creeping legalism'[227] and the 'judicialised model of tribunal which had eventuated' since the administrative law reforms introduced following the Kerr Committee report; suggesting that tribunals 'need to take up the invitation posed by the High Court in 201[228] to 'identify and to publicise their distinctive nature'.[229]

Arguably, this is even more important where — as is the case for contesting taxation decisions at a federal level and in many states — applicants are given a choice as to setting (and more so in New South Wales where the traditional demarcation in the respective roles of the court and tribunal has been abolished).

In the authors' view, it is appropriate to assess the success or otherwise of tribunals that deal with reviews of tax assessments against the expectations set by the Royal Commission (and notwithstanding the initial setback with respect to the Board of Appeal). In this regard, the Royal Commission envisaged that a tribunal undertaking review of a tax assessment would:

- be able to reconsider the facts, and deal with matters the subject of the relevant commissioner's discretionary powers (that is, engage in merits review);
- not be 'hampered' by technical rules of evidence and procedures;
- be cheaper, more direct and speedy in its methods; and
- ultimately, 'give greater satisfaction to the taxpayers'.

Nature of review

Federally, and in Victoria and Queensland, it can be seen that taxpayers are given a real choice — *not without consequences* — to contest a tax proceeding by way of (merits) review by a tribunal, or appeal (more in the nature of judicial review, at least where a discretion, opinion or state of satisfaction is involved) to the applicable superior court.

226 Ibid [59].
227 Quoting the Hon Justice Kevin Bell, *One VCAT: President's Review of VCAT* (2009).
228 *Minister for Immigrations & Citizenship v SZGUR* [2011] HCA 1.
229 R Creyke, 'Tribunals — "Carving Out the Philosophy of Their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19.

Notwithstanding the occasional blurring,[230] or misconception,[231] it is apparent that lawyers have come to appreciate those differences and recommend an appropriate pathway to their clients depending on the nature of the assessment in question.

Of course, consistent with the views expressed by Bowskill J in *Wakefield*, where the matter involves the application of law to objective conclusions of fact, and the stakes are high enough, it is not surprising that an appeal to a court may be preferred.

However, revenue legislation is replete with express discretions,[232] and the application of such legislation is often dependent on the relevant commissioner's state of satisfaction or opinion as to certain matters, or provides the relevant commissioner with a discretion to ameliorate the effect of a strict application of the law.[233] In these cases, the decision in *Avon Downs* illustrates why the tribunal pathway is likely to be preferred to an appeal to a court, given the ability of the tribunal to 'step into the shoes' of the relevant commissioner and re-exercise any discretions, or form its own views as to relevant considerations. This may be so even if the sums involved are significant.

Of course, this difference will not strictly apply where the roles of the courts and tribunals are aligned, as in New South Wales. Similarly, the relevance of the distinction may be diminished in circumstances where courts have shown themselves willing to blur the boundaries by the manner in which they dispose of an appeal (such as in *Harding* and the first instance decision in *Addy*).

Nevertheless, even in those case, it is debatable whether courts are the most appropriate body to review administrative decisions on the merits. Certainly, the Kerr Committee did not think so. By contrast, making the 'correct or preferable decision' has been the *raison d'etre* of general administrative tribunals since they were first introduced.[234] As such, tribunals may well retain a competitive advantage in this regard.

Evidentiary considerations

Generally, tribunals are not bound by the rules of evidence.[235] Also, they may consider new evidence or material not before the relevant revenue commissioner.[236] (The additional hurdle for the admission of new evidence in Queensland revenue proceedings sits as an exception.)

By contrast, the rules of evidence strictly apply in any court proceeding and, as indicated in *Conte*, the court may be largely limited to considering the evidence that was before the

230 As in *Harding*, as well as *Addy* at first instance.
231 As appears to have been the case initially in *Vicinity Funds*.
232 For example, see *Payroll Tax Act 2007* (Vic) ss 8, 23(4), 79(1), 85 and *Land Tax Act 2005* (Vic) ss 16(3), 16A(1), 55(1), 55A(1), 55A(2) and 55A(2A) (based on the phrase the Commissioner 'may determine'). In the *Income Tax Assessment Act 1936* (Cth), that phrase is used 11 times.
233 For example, *Duties Act 2000* (Vic) s 22(3) (based on the phrase 'Commissioner is satisfied', which is used 65 times in that Act). In the *Income Tax Assessment Act 1936* (Cth), that phrase is used 34 times.
234 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.
235 See, for example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b), *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c) and *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2) (except in exercise of its enforcement jurisdiction or civil penalty proceedings).
236 *Shi Migration Agents Registration Authority* (2008) 235 CLR 286.

relevant commissioner (again, noting the unusual position in Queensland). Indeed, the strict rules of evidence may apply even where, as in New South Wales, a court is engaging in *de novo* review.[237]

Given there is a 'reverse' onus of proof in taxation proceedings — that is, a taxpayer bears the burden of establishing that a different assessment should be made[238] — the evidentiary considerations will often favour bringing the contest of an assessment in a tribunal where there is more latitude for the presiding member to take account of material, even if it is not produced in admissible form.

Cost

In her article, Professor Creyke accepted that tribunals 'are cheaper than courts',[239] but in answer to the question of whether they are 'cost-effective', the answer was more ambiguous (that is, 'it depends').

Unsurprisingly, given the complex nature of much tax legislation, the relevant taxation authority may be entitled to[240] and (in any event) will often seek to be represented by counsel in any proceedings where a tax assessment is being contested.

While taxpayers can (and often do) represent themselves, if they are unrepresented, there may be a serious 'inequality of arms'.[241] To a limited extent, this may be ameliorated in the federal sphere, where there are novel issues in play and 'test case' funding[242] is made available by the Commissioner of Taxation, or in a situation where pro bono representation is available.[243] Of course, in the vast majority of the cases, no such assistance is available and it will be left to individual tribunal members to seek to level the playing field for an unrepresented applicant, to the extent possible (and without becoming or being perceived to have become an advocate for either party).

In those jurisdictions where no costs can be awarded in tax proceedings,[244] this at least reduces the risks for a taxpayer who (unsuccessfully) contests a tax assessment. Even where this is not the case, the award of costs is generally discretionary,[245] rather than automatically following the event as they usually do in the courts.[246]

237 See, for example, *Young v Chief Commissioner of State Revenue* [2020] NSWSC 330 [10]–[11].

238 At a federal level, see *Taxation Administration Act 1953* (Cth) ss 1477 and 14ZZK. For example, at a state level, see *Taxation Administration Act 1997* (Vic) s 110.

239 Creyke (n 229) 29.

240 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62(2).

241 Victorian Law Reform Commission, *'Civil Justice Review: Report'* [2008] VLRC 14, 101. A similar issue has been recognised in New Zealand: Law Commission, *'Tribunal in New Zealand'* [2008] NZLCIP 6 [6.37].

242 Australian Taxation Office, 'Test Case Litigation Program': Available at <https://www.ato.gov.au/tax-professionals/tp/test-case-litigation-program/>.

243 For example, under the Victorian Bar pro bono scheme administered by JusticeConnect: see <https://www.vicbar.com.au/public/community/pro-bono-scheme?>.

244 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1, cl 91(1).

245 See, for example, *Civil and Administrative Tribunal Act 2013* (NSW) s 60.

246 In Victoria, the costs of an appeal of a tax assessment to the Supreme Court are 'in the discretion of the Court': *Taxation Administration Act 1997* (Vic) s 112(2). However, costs are often awarded (at least when the taxpayer is successful): see, for example, *Razzy Australia Pty Ltd v Commissioner of State Revenue* [2021] VSC 409.

Of course, if the costs of a successful contest are not recoverable from the relevant commissioner, this may diminish the benefit of the contest if legal representation is required.

Efficiency

In her 2012 article, Professor Creyke observes that tribunals 'have generally been quicker than courts to embrace [ADR or alternative dispute resolution] processes', although the 'significance of this move has not been publicised sufficiently'.[247] She goes on to describe such pre-hearing arrangements as 'the engine rooms of [tribunal] processes for settling disputes'.[248]

ADR is successfully used for tax matters in the AAT, with the vast majority of applications resolved before final hearing.

Compulsory conferences are not available in Victorian state tax proceedings, except with the consent of the Commissioner of State Revenue,[249] which is rare (and, while it may be possible for the tribunal to require mediation,[250] this appears to be rarer still). However, noting that somewhere between 66 per cent and 80 per cent of state tax matters initiated in the Tribunal in 2020/2021 and 2021/2022 and 79.4 per cent of the number of Commonwealth tax cases initiated in the Taxation and Commercial and Small Business Taxation Divisions of the AAT over that period were resolved without a final hearing, it can be inferred that the initiation of a referral to VCAT and the AAT is still an effective mechanism to bring about an efficient resolution of such disputes. This is likely to be the case because, in preparing for a hearing, the parties have an opportunity to exchange evidence and their respective positions, which facilitates them reaching a mutually agreed outcome.

Of course, where ADR processes are not available, or fail to resolve proceedings, then the contest will need to progress to a hearing.

While somewhat impacted by the effects of the pandemic, it is usually the case that a proceeding will progress more quickly in a tribunal than a court. An analysis of Victorian state tax cases decided between 1 July 2020 to 30 June 2022 reveals that the median time for resolution of a dispute before the Supreme Court of Victoria was 83 weeks, whereas the median time for resolution of a review at VCAT was 61 weeks (that is, around half a year less).

Efficiency may be particularly important in tax matters, as the revenue authority will not necessarily be prohibited from enforcing payment pending any review or appeal[251] and, even where the revenue authority does not press payment of the full amount in dispute, the exposure to interest in the event of any delay may be significant (because the rate of interest is set at a market rate).[252]

247 Creyke (n 229) 25.
248 Ibid 26.
249 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1, cl 90.
250 Ibid s 88.
251 See, for example, *Taxation Administration Act 1953* (Cth) s 14ZZM and *Taxation Administration Act 1997* (Vic) s 108 (if the Commissioner of State Revenue requires payment of some or all of the tax in dispute, he can apply for an order to this effect from the Supreme Court of Victoria).
252 See, for example, *Taxation Administration Act 1997* (Vic) s 25(1) and *Taxation Administration Act 1953* (Cth) s 8AAD(1).

Satisfaction of taxpayers

While it is not suggested that tribunals are perfect, the authors consider that the 'philosophy of their existence',[253] at least in the tax field, was clearly established by the Royal Commission in 1921 and, by and large, they still fulfil the role for which they were established.

Unfortunately, no direct data is available on whether taxpayers are satisfied with the outcome of review proceedings in the AAT or VCAT or, more to the point, whether their level of satisfaction is greater or lesser than would have been the case if they proceeded by way of appeal to a Court.

However, it is relevant to observe:

- A customer survey conducted by VCAT in 2018 indicated strong 'overall customer satisfaction', that parties were satisfied as to the 'fairness of way in which [their] case was handled' and felt that they received 'equal treatment in hearings' and that the 'member listened to [the] parties before making a decision'.[254] Similarly, the AAT has rated well for 'fairness'.[255]

- As can be seen from the following table (for the 2020/21 financial year), appeal rates of tribunal decisions are relatively low, and the success rate of such appeals even smaller:

Tribunal	Cases finalised	Appeals	Appeal upheld
AAT (Taxation and Commercial)	897	19 (2.1%)	6 (0.7%)
VCAT (All)[256]	34,132	76 (0.2%)	3 (0.0%)

- There are a much smaller number of tax cases decided by the Federal Court (in the case of Commonwealth taxes) or Supreme Court of Victoria (in the case of Victorian taxes). An analysis of published decisions indicates there were only four appeals of Victorian state tax matters which were, at the request of a taxpayer, set down before the Supreme Court and finalised between July 2020 and June 2022, compared with 17 reviews finalised by VCAT over the same period (that is, around four times as many reviews as appeals were initiated and concluded over that period).

Taken collectively, it can be inferred — albeit tentatively — that taxpayers still appreciate the option to pursue review of tax assessments by a tribunal, consistent with the 'unanimity' of views that led to the implementation of the additional pathway in 1921.

253 Creyke (n 229) (referencing J McMillan, 'Merit Review and the AAT A Concept Develops' in J McMillan (ed), *The AAT — Twenty Years Forward* (Canberra, 1998), 33.

254 86% overall customer satisfaction for 2018: VCAT, 'Customer Surveys', available at: <https://www.vcat.vic.gov.au/about-vcat/feedback-and-complaints/customer-surveys>.

255 The AAT also conducts a survey of fairness, which recorded ratings of 76% from parties: AAT, *Annual Report 2020–21*, 34.

256 While these figures include civil cases in high volume lists, the number of appeals of state tax decisions is too small to be statistically significant.