THE CONTROL OF THE COMMISSIONER'S DISCRETIONARY POWER UNDER THE INCOME TAX ASSESSMENT ACT 1936-1974 (Cth)

There are several instances in the application of the *Income Tax Assessment Act* 1936-1974 (Cth) where the tax status or liability of the taxpayer is dependent on the exercise of discretion by the federal Commissioner of Taxation.[1] The expression 'discretion' is almost never used in these instances. Instead, phrases such as 'if the Commissioner is of the opinion',[2] 'to an extent that the Commissioner considers to be fair and reasonable',[3] '[w]here the Commissioner is satisfied',[4] etc, are employed. The courts have held that in these circumstances, it is the Commissioner who must form the opinion, be satisfied, or consider it reasonable, as it is he who has been entrusted by the legislature with the responsibility of evaluating the various matters concerned and forming an opinion or arriving at a decision.[5] Thus in *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* Barwick CJ said:[6]

> Quite clearly the Court cannot in any event substitute its view of any of the matters as to which the Act says the Commissioner is to be satisfied. It can of course decide that because of established facts or because of legal considerations the Commissioner could not have failed to have been satisfied. But if he is satisfied, it matters not in my opinion that he ought not to have been satisfied. The Court cannot overturn that satisfaction.

Accepting this to be so, the obvious question that arises is whether such discretionary power (like all other forms of discretionary power conferred by statute on individuals) is subject, in its exercise, to regulation either by statute or the courts of law.

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1 See for example ss 46A (1), 99A (2), 103A (5), 103A (5A).

2 S 99A (2).

3 S 80DA (2) and cf 80DA (4).

4 S 80B (6).

5 Per Gavan Duffy CJ and Starke J in Metropolitan Gas Co v Commissioner of Taxation (1932) 47 CLR 621, 632; per Dixon J in Avon Downs Pty Ltd v Commissioner of Taxation (1949) 78 CLR 353, 360; per Barwick CJ in Giris Pty Ltd v Commissioner of Taxation (1969) 119 CLR 365, 372. Cf per Isaacs J in Moreau v Commissioner of Taxation (1926) 39 CLR 65, 67; Pure Spring Co Ltd v Minister of National Revenue [1947] 1 DLR 501, 508.

6 (1975) 75 ATC 4028, 4031. Contra Gibbs and Stephen JJ, however, who expressed the view that the court could substitute its own opinion for that of the Commissioner. Such a view would appear to be against the trend of established authority. See the cases cited at note 5 supra and note 37 infra.

As a prelude, it must be noted that the Commissioner in these circumstances is required actually to form the opinion or to do what is desired of him.[7] He must not leave either the court or the taxpayer in a state of uncertainty as to his opinion or satisfaction.[8] The court will determine whether the opinion has been formed or the discretion exercised. As Barwick CJ said in *Giris Pty Ltd v Commissioner of Taxation* when considering sections 99 and 99A of the *Income Tax Assessment Act*:[9]

> The legislature, upon any construction of the sections, has made the existence of an opinion of the stated kind the condition of the operation of one of the sections rather than the other. Thus the Commissioner must hold the opinion. The Court can decide whether or not he did hold it. In my opinion, the Court can require him to form it.[10]

RESTRAINTS ON THE COMMISSIONER'S DISCRETIONARY POWER

There are several restraints on the exercise of the discretionary power by the Commissioner. First the *Income Tax Assessment Act* itself seeks to provide general directions to the Commissioner and to lay down the matters the Commissioner must take into consideration in exercising his discretion. The Commissioner must of course take cognizance of these matters.[11] Secondly, there exist specific provisions in the *Income Tax Assessment Act* for a dissatisfied taxpayer to object to an assessment made by the Commissioner and also to have such an assessment reviewed by a board of review and/or appealed to a state supreme court with a possible appeal to the High Court thereafter. Thirdly, the common law remedy of judicial review may still be available to the aggrieved taxpayer. These are discussed in greater detail below.

(1) *Directions to the Commissioner*

In conferring discretionary power on the Commissioner, the *Income Tax Assessment Act* generally lays down the matters the Commissioner

7 Barwick CJ in Giris Pty Ltd v Commissioner of Taxation (1969) 119 CLR 372, 374.

8 Barwick CJ in Kolotex Hosiery Australia Pty Ltd v Commissioner of Taxation (1975) 75 ATC 4028, 4031.

9 (1969) 119 CLR 365, 374.

10 The other members of the Court, Kitto, Menzies, Windeyer and Owen JJ decided on similar lines. Barwick CJ also said that neither s 99 nor s 99A would apply by default.

11 Barwick CJ in Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd (1972) 128 CLR 28, 45.

must take into consideration in exercising his discretion.[12] From the taxpayer's standpoint, however, their usefulness is all too often robbed by the inclusion of a phrase which empowers the Commissioner to take 'any other relevant matter'[13] into account in exercising his discretion. What the relevant matters are would of course vary with the particular fact situation. Even more important however is the fact that a discretion may be exercised in favour of one person but against another on facts and circumstances essentially similar in both situations. Such an outcome would obviously be unfair and therefore unwarranted. It has been suggested by Professor Davis in his book, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY,[14] that such inconsistencies can be avoided by 'confining' and 'structuring' the discretionary power. By 'confining' discretionary power, Davis means the keeping of such power within the designated boundaries, and by 'structuring' he means the regularizing and organizing of the exercise of the power whereby a control on the manner of its exercise can be maintained. Davis suggests as one of the methods of realizing these objectives, the use of administrative rule making, that is, making rules to govern the limits and the manner of the exercise of discretion by the relevant authority, in this instance, by the Commissioner of Taxation. A practice corresponding to this requirement was found in the eight issues of the Public Information Bulletin issued by the Commissioner's Office. However, these documents are no longer published. Further methods suggested by Davis are open policy statements and open reasons. Openness, concludes Davis, is the natural enemy of arbitrariness and a natural ally in the fight against injustice.[15] The Explanatory Memoranda issued by the Treasurer's Office on the occasion of each amendment or addition to the *Assessment Act* perhaps reflects the policy angle of each of the amendments or additions. But the Commissioner does not ordinarily give reasons for exercising his discretion in a particular way. Barwick CJ in *Giris Pty Ltd v Commissioner of Taxation*[16] and Lord Denning MR in the Court of Appeal in *Padfield v Minister of Agriculture, Fisheries and Food*[17] have asserted that the

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12 See for example ss 99A (3), 46A (3), 103A (4E).
13 See for example ss 46A (3) (d), 103A (4E) (h).
14 K Davis, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY (1969).
15 Id at 97-98.
16 (1969) 119 CLR 365, 374; see also Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd (1972) 128 CLR 28, per Menzies J at 52, and Owen J at 60 for similar views.
17 [1968] AC 997, 1006.

person vested with discretionary power could be called upon to give reasons for his decision. The House of Lords, however, in *Padfield's* case has held contrary to this.[18] But the House of Lords also pointed out in the same case that, if there was no reason given for the exercise of a discretion in a particular way, the court may infer that there existed no valid reason. The consequences of such an inference are discussed under (3) below.

(2) *Objection, review and appeal under the* Income Tax Assessment Act

As pointed out earlier the *Income Tax Assessment Act* provides taxpayers with specific relief against an assessment made by the Commissioner. The statutory framework is as follows.

From the returns and any other information in the Commissioner's possession, the Commissioner is required to make an assessment,[19] and serve notice of it[20] to the taxpayer.[21] A taxpayer dissatisfied with an assessment can object in writing within sixty days after service of notice of assessment.[22] The Commissioner shall thereupon consider the objection and inform the taxpayer in writing of his decision.[23] If the Commissioner has disallowed the objection in whole or in part, the taxpayer can request in writing for the Commissioner either[24]

(a) to refer the decision to a Board of Review for review; or

(b) to treat his objection as an appeal and forward it to the supreme court of a specified state.

Where a reference is made to the Board of Review, section 192 of the *Income Tax Assessment Act* empowers the Board to review such decisions 'as are referred to it'. For this purpose the Board is to have all the powers and functions of the Commissioner in making assessments, determinations and decisions under the *Income Tax Assess-*

18 Id at 1016. See also the Canadian case of Pure Spring Co Ltd v Minister of National Revenue [1947] 1 DLR 501.

19 The Commissioner's assessment may be 'the result of official information, or his own investigation, or may come from any source he considers reliable. . . . The Commissioner is not bound to look for corroboration or further test.' Per Isaacs J in Moreau v Commissioner of Taxation (1926) 39 CLR 65, 68. 'The considerations that may properly influence him depend upon the nature of the function he must perform.' Per Thorson P in Pure Spring Co v Minister of National Revenue [1947] 1 DLR 501, 516.

20 S 174.

21 Under s 170, the Commissioner has the power to make 'such alterations therein or additons thereto' on any assessment made by him.

22 S 185.

23 S 186.

24 S 187.

ment Act.[25] The Board therefore stands in the place of the Commissioner and treats the whole matter afresh. It has to form its own opinion unfettered by the Commissioner's decision.[26] Findings of fact by the Board are conclusive,[27] unless the are so 'grossly unreasonable'[28] as to amount to an abuse of power, in which case of course they would be the subject of review.[29]

An appeal is possible to a state supreme court from a decision of the Board of Review on a question of law.[30] The decision of the state supreme court is 'final and conclusive'[31] unless an appeal is made to the High Court by leave of the High Court.[32] Where a direct appeal is made to a state supreme court[33] from the disallowance of an objection[34] by the Commissioner, an appeal is possible to the High

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25 S 193.

26 See 15 CTBR (NS) *Case 28*, 182, Board Member Mr Thompson para 11 at 198.

27 S 196 (1).

28 See Edwards v Bairstow [1956] AC 14 per Lord Radcliffe at 36: 'If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.'
Further, per Viscount Simonds at 29, the courts will also take such a stand where 'finding is perverse or . . . they have misdirected themselves in law by a misunderstanding of the statutory language . . . [or if it appears] that the commissioners [of Inland Revenue] have acted without any evidence or upon a view of the facts which could not reasonably be entertained.'

29 See note 28 supra; also Lord Green MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

30 See s 196 (1). To distinguish between questions of 'law' and 'fact' is not easy. According to Lord Parker in Farmer v Cotton's Trustee [1915] AC 922, 932. '[W]here all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only.' This was approved by Fullagar J in Hayes v Commissioner of Taxation (1956) CLR 47, 51. See Whitmore, *O! That Way Madness Lies: Judicial Review for Error of Law* (1966-1967) 2 FLRev 159, 170-177. Findings of 'primary' facts are therefore distinguished from 'inferences' and 'conclusions'. The former are questions of fact, the latter of fact and/or law. But no real problems arise because under s 185 (1) the Board of Review has to give its decision in writing, and under s 195 (2) it has to state in writing its findings of fact and its reasons in law for the decision. A court on appeal would therefore not have much difficulty in deciding (for itself) the distinction between 'fact' and 'law'.

31 S 196 (4).

32 S 196 (5).

33 S 197.

34 S 186.

Court in its appellate jurisdiction.[35] A state supreme court may of its own accord state a case in writing for the opinion of the High Court upon any question of law arising on the appeal.[36]

There is abundant authority, however, that even on appeal the state supreme court and the Hhigh Court would still regard the Commissioner as being the proper person to exercise discretion in instances where he has been conferred with such a power.

Thus in *Australasian Jam Co Pty Ltd v Commissioner of Taxation,* Fullagar J said:[37]

> It seems quite clear that it would not be enough for the taxpayer that I should myself form the opinion that the avoidance of tax was not due to evasion on the part of the taxpayer. The enactment is plainly one which 'means to withdraw from the consideration of the court the correctness of the opinion of the Commissioner upon the matter in question.'

In *Moreau v Commissioner of Taxation,* Isaacs J said:[38]

> I am satisfied that the Commissioner had reason to believe there was an avoidance of tax owing to an attempted evasion. . . . [However, t]hat does not mean that, in my opinion, there was in fact any attempted evasion. The two things are quite distinct. . . . Judging by the evidence before me, and remembering that such an imputation must be clearly proved, I find as a fact they were not guilty. . . .
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> But that in no way shakes the Commissioner's official conclusion that there had been an attempted evasion, and even fraud, on the part of Moreau.

Furthermore, in *Avon Downs Pty Ltd v Commissioner of Taxation* Dixon J said:[39]

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income.

But the court will take it upon itself to determine whether the Commissioner had exercised his discretion 'properly', and if he had not done so, it will intervene. To quote Dixon J once again from the *Avon Downs* case:[40]

> His [the Commissioner's] decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-

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35 S 200.
36 S 198 (1).
37 (1953) 88 CLR 23, 37.
38 (1926) 39 CLR 65, 67.
39 (1949) 78 CLR 353, 360.
40 Ibid.

> 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 he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the 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 consideration, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

Also, in the recent decision of *Duggan v Commissioner of Taxation* Stephen J said in relation to section 99A:[41]

> It is not the function of this court to determine for itself, having regard to all the circumstances surrounding the creation and subsequent administration of the settlements, whether or not it is unreasonable that sec. 99A should be applied to these trust estates. So long as it is established . . . that income assessed to tax under sec. 99A is not income to which sec. 97, 98, 99A(1) or 99A(5) applies, the only occasion for intervention by this Court will be if it appears from the evidence that the Commissioner has failed in the duty, cast upon him by sec. 99A(2), properly to consider and come to a conclusion concerning the reasonableness or otherwise of the application of sec. 99A. In that event the assessment will be set aside and it will then be for the Commissioner to assess in accordance with law.

The statements made in the above cases obviously contemplate the common law right of judicial review discussed in the next section. What must be noted, however, is that despite the provision of specific statutory relief, the existence and continuance of the right to judicial review is an imperative necessity for the prevention of any abuse of discretionary power. The other point that must be noted is that the fact that the discretion conferred is wide, or the matters to be taken into consideration are a great many, would not dissuade the court from exercising its power of review. As will be seen, the reverse may perhaps be true in that the court would consider more closely the reason why it should scrutinize the exercise of such power.

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41 (1972) 72 ATC 4239, 4242.

To quote Barwick CJ once again from *Giris'* case:[42]

> [A]lthough . . . the discretion is wide and though being really legislative in nature, [and though] what is relevant to its formation may range over an extremely wide spectrum of fact and consideration, the Court can determine whether or not the opinion was formed arbitrarily or fancifully, or upon facts or considerations which could not be regarded as relevant even to such a question as the unreasonableness of applying a taxing provision to a particular taxpayer in respect of the income of a particular year.

(3) *Judicial Review*

Judicial review of administrative acts has always been available at common law.[43] What is of importance is whether it would still be available either as an alternative, or as an addition, to the specific statutory relief provided under the *Income Tax Assessment Act.* In *Hornsby Shire Council v Salmar Holdings Pty Ltd*[44] the respondent, in disregard of a provision for appeal under the *Local Government Act,* brought proceedings seeking declarations under section 10 of the *Equity Act* Myers J in the New South Wales Supreme Court held that he had not jurisdiction to give such relief. The Court of Appeal division of the Supreme Court allowed an appeal against that decision and held unanimously that the Court had jurisdiction and that it ought to exercise that jurisdiction.[45] Hardie J had held similarly in the earlier decision of *Long v Copmanhurst Shire Council,*[46] as did Street J in the later case of *Sutherland Shire Council v Leyendekkers.*[47] It follows then that the provision of specific statutory remedies under the *Income Tax Assessment Act* has not taken away the common law right to judicial review.

When Available

In the exercise of his discretionary power the Commissioner is required to act bona fide and according to law, and not according to private opinion or humour.[48] He must take relevant matters into account and must not take irrelevant matters into account.[49] His

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42 Giris Pty Ltd v Commissioner of Taxation (1969) 119 CLR 365, 374.
43 B Schwartz & H Wade, LEGAL CONTROL OF GOVERNMENT (1972) 281.
44 (1972) 126 CLR 52.
45 Id per Walsh J at 56-57.
46 [1969] 2 NSWR 641.
47 [1970] 1 NSWR 356.
48 See Gavan Duffy CJ and Starke J in Metropolitan Gas Co v Commissioner of Taxation (1932) 47 CLR 621, 632 and see S de Smith, CONSTITUTIONAL AND ADMINISTRATIVE LAW (2d ed 1973) 587.
49 S de Smith, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (1973) 253.

conclusions must not be arrived at 'arbitrarily or fancifully'.[50] He must act legally and regularly.[51] His function is to administer the *Assessment Act* with solicitude for the Public Treasury and fairness to the taxpayer.[52] He must not exercise his discretion against a taxpayer merely because the taxpayer has adopted a particular course of action detrimental to the revenue.[53]

Where the discretion is not so exercised, it would be ultra vires, and would be subject to review by the courts. Thus in *The Perpetual Executors Trustees and Agency Co (WA) Ltd v Commissioner of Taxation,* Macfarlan J said:[54]

> [I]t is established by the authorities cited in argument that, in cases where either liability to or exemption from taxation or right to deduction depends upon the Commissioner being satisfied of certain facts or matters or upon his forming a certain opinion, or where such opinion or satisfaction is a condition precedent to such liability or exemption, the opinion of the Commissioner is examinable. . . .

But His Honour also pointed out that 'it is not examinable merely to ascertain whether the Court would come to the same opinion as the Commissioner'.[55] His Honour continued:[56]

> It is only examinable in order to see whether the Commissioner has acted according to law in forming that opinion [and] whether

50 Barwick CJ in Giris Pty Ltd v Commissioner of Taxation (1969) 119 CLR 365, 374.

51 Sharp v Wakefield [1891] AC 173 per Lord Halsbury LC at 179.

52 Isaacs J in Moreau v Commissioner of Taxation (1926) 39 CLR 65, 67.

53 Barwick CJ in Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd (1972) 128 CLR 28, 46. In Stocks and Holdings (Constructors) Pty Ltd v Commissioner of Taxation (1973) 73 ATC 4053 the taxpayer could have claimed 'public company' status, but as it had made a sufficient distribution during the relevant year of income it continued to retain 'private company' status in order to take advantage of the lower rate of private company tax. The Commissioner pursuant to the discretion vested in him under s 103A (5) treated the taxpayer as a 'public company'. The Full High Court found the Commissioner's discretion not to have been properly exercised.

54 (1935) 3 ATD 132, 135 (SCt Vic).

55 See also the remarks of Lord Denning in Griffiths v J P Harrison (Watford) Ltd [1963] AC 1, 19 (HL): 'It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions, and often do. Juries do. So do judges. And are they not all reasonable men?' At the other end, the Court will intervene where a finding of fact is such that 'no person acting judicially and properly instructed as to the relevant law could have come to the determination. . . . ' and Lord Radcliffe in Edwards v Bairstow [1956] AC 14, 36.

56 (1935) 3 ATD 132, 135.

> he has had regard to circumstances to which he as a matter of law is entitled to have regard. . . .

A conclusion based upon a mistaken view of the relevant facts will lay open the Commissioner's decision to review.[57] So also would a failure to take into account relevant facts, or the taking into account of irrelevant facts,[58] or where the exercise has been grossly unreasonable.[59] Such exercise may be in good faith[60] or bad faith. A discretion is exercised in bad faith if it is exercised dishonestly in order to achieve an object other than that for which the court believe the power had been given.[61] The purpose of the discretion must be ascertained from the terms and subject matter of the legislation.[62] The Commissioner, being the person entrusted with the exercise of the discretion, must not exercise it at the discretion of another.[63] Nor must he fetter himself from exercising his discretion in each individual case by adopting a fixed rule of policy.[64] The fact that the Commissioner

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57 Duggan v Commissioner of Taxation (1972) 129 CLR 365. The mistake that the court found here was that the Commissioner in considering whether it was unreasonable for s 99A to apply had led himself to believe that the settlors had made loans to the trust estate whereas in fact they had delayed claiming the sale price. In Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation (1975) 75 ATC 4028 Mason J in the first instance and the High Court on appeal found that the Commissioner's conclusion that the holding company referred to in s 80C (1) (now repealed) was one in which no other company had a controlling interest was based on error.

58 See de Smith, supra note 49, 297.

59 Id at 303; Wade, ADMINISTRATIVE LAW (1971) 72.

60 See Roberts v Hopwood [1925] AC 578, where the local council desirous of setting itself up as a model socialist employer had paid excessive wages to its employees.

61 Municipal Council of Sydney v Campbell [1925] AC 338. Bad faith however may be difficult to prove.

62 See Report of the Commonwealth Administrtaive Review Committee (Kerr Committee) Parliamentary Paper No 144 (1971) para 31 (i) at 12 [hereinafter cited as Kerr Committee Report].

63 Wade, supra note 59, 65; de Smith, supra note 49, 273; Simms Motor Units Ltd v Minister of Labour & National Service [1946] 2 All ER 201. The Commissioner in such a case may have regard to government policy, but he must apply his mind to the question, and the decision must be his. See Kerr Committee Report para 31 (iv), 12.

64 Wade, supra note 59, 67-68; de Smith, supra note 49, 274; Southend-on-Sea Corp v Hodgson (Wickford) Ltd [1962] 1 QB 416. The Commissioner may, however, take into account rules of policy provided that he also takes into account the particular circumstances of the case. Kerr Committee Report para 31 (v) at 13. In Kent County Council v Kingsway Investments (Kent) Ltd [1971] AC 72 (HL) the Council had granted planning permission subject to condition that permission shall cease to have effect after the expiration of three years unless approval was notified; held, not ultra vires.

has not made known the reasons for his decision will not prevent the decision from being reviewed. Thus in *Padfield's* case whilst the House of Lords agreed that the Minister concerned there need not give any reasons[65] for his decision, Lords Reid, Hodson and Pearce[66] observed that in such circumstances the court may infer that he had no good reason,[67] and in the latter event, the court will obviously find the exercise of the discretion to be improper.[68] What is needed for review is not the precise particular in which he had gone wrong, 'but that in some way he must have failed in the discharge of his exact function according to law'.[69]

The grounds for review in the above instances is ultra vires. Ultra vires is not confined to cases of plain excess of power, but also governs an abuse of power where something is done for the wrong reasons or by the wrong procedure.[70] In the context of a discretionary power, such power must be exercised for the purpose for which it was granted, in good faith and not arbitrarily or capriciously.[71] Conduct falling short of this would be illegal. Even when a decision is ultra vires, the courts would review a decision if there is an error on the face of the record. An error on the face of the record is generally one of law, but Schwartz and Wade[72] maintain that, on principle, the doctrine ought to extend to self-evident errors of fact as well.

Error of law includes the giving of reasons that are bad in law, or which are inconsistent, unintelligible, and in situations where there is a duty to give reasons, where the reasons given are substantially inadequate.[73] It includes also the application of a wrong legal test to the facts found, and taking irrelevant considerations into account.

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65 Contra Lord Denning MR in the Court of Appeal [1968] AC 997, 1007 ('if asked, he should give reasons'), and also Barwick CJ in Giris Pty Ltd v Commissioner of Taxation (1969) 119 CLR 365, 373.

66 Lord Morris made no comment, and Lord Upjohn found the reasons given to be 'bad in law'. [1968] AC 997, 1062.

67 Lord Denning expressed a similar opinion in the Court of Appeal. [1968] AC 997, 1007.

68 And mandamus will issue, see Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, 1007 (CA) per Denning MR; House of Lords; Lord Hodson at 1049, Lord Morris at 1041, Lord Pearce at 1053, Lord Upjohn at 1061-62.

69 Dixon J in Avon Downs Pty Ltd v Commisioner of Taxation (1949) 78 CLR 353, 360. See also Lord Denning MR in Coleen Properties Ltd v Minister of Housing and Local Government [1971] 1 WLR 433, 437.

70 Wade, supra note 59 at 51.

71 de Smith, supra note 49 at 84.

72 Schwartz & Wade, supra note 43 at 237-38.

73 de Smith, supra note 49 at 117, proposition 5.

It also includes the exercise of a discretion on the basis of incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence.[74] Ultra vires and error on the face suggest the extent of the review.[75] The procedure for review are the prerogative writs of mandamus, certiorari, declaration and prohibition amongst several others.

Certiorari quashes an order made without jurisdiction; declaration declares it unlawful; and prohibition restrains any further progress in excess of jurisdiction. Certiorari, declaration and prohibition apply to ultra vires; certiorari would apply to an error on the face.[76] Certiorari would lie even where a spoken order has been issued.[77] But it does not lie to grant an appeal where none is provided by statute; nor does it provide for the whole issue to be reheard.[78]

Prohibition is issued on more or less similar grounds to certiorari. Where a final decision has been made, prohibition would obviously be useless, and in these circumstances certiorari would likely be used to review and quash the decision. The difference between the two writs is as to the point of time at which they may be sought.[79]

Declaration lies for any excess of jurisdiction and may lie for error of law on the fact of the record.[80] But the court can only declare the legal position of the plaintiff, and if he has no legal right it cannot help him. Certiorari on the other hand is available even to a stranger. A declaratory judgement is useless for challenging a mere error on the face of the record, since the court can only declare the existing state of affairs, that is, that the challenged decision is not within jurisdiction and therefore invalid. Certiorari on the other hand 'quashes', and positively invalidates.[81]

The essential requirement for mandamus to issue is that the person or body concerned is under an obligation by law to perform a public duty and that there has been a refusal or failure to do so in the manner

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74 Id.

75 See J Griffith & H Street, PRINCIPLES OF ADMINISTRATIVE LAW (5th ed 1973) 235-36.

76 Schwartz & Wade, supra note 43 at 211.

77 R v Northumberland Compensation Appeal Tribunal ex p Shaw [1952] 1 KB 338.

78 But see Schwartz & Wade, supra note 43 at 238 where the learned authors state that on principle 'review for error on the face is full review'.

79 See Kerr Committee Report para 45 at 17.

80 Barnard v National Dock Labour Board [1953] 2 QB 18.

81 Schwartz & Wade, supra note 43 at 219-20.

in which it is required by law.[82] Mandamus, like certiorari, prohibition and declaration, lies at the discretion of the court, and its issue takes the form of a command to the person or body concerned to carry out the duty imposed.

Mandamus does not lie against the Crown itself or a servant of the Crown to enforce a duty owed exclusively to the Crown.[83] But it issues against the Minister or other Crown servants to enforce a statutory duty owed to the applicant as well as the Crown.[84] Mandamus also lies where a duty has been directly imposed by a statute for the benefit of the subject upon a Crown servant or a designated office, and the duty is to be wholly discharged by him in his own official capacity as distinct from his capacity as a mere agent of the Crown. But it will not issue where there is a specific alternative remedy equally convenient, beneficial and effectual.[85] Mandamus does not lie to compel the exercise of a discretional power.[86] It may however lie to correct an abuse of discretionary power.[87] This is done on the basis that where a discretion has been 'abused', it has not been exercised at all. In these circumstances certiorari will lie to quash the order already made, and mandamus will be granted to enforce the proper performance of the discretionary act.[88] Mandamus can also be applied closely to control the exercise of a discretionary act. The court can exclude several considerations as being wrong ones and have the person entrusted with the discretion act in one particular way only.[89]

CONCLUSION

Discretionary power under the *Income Tax Assessment Act* exists whenever the Commissioner is given the power to act upon an evaluation of various factors. Such discretionary power is not peculiar to the *Income Tax Assessment Act*,[90] nor has it been conferred only in

82 Kerr Committee Report para 42 at 16.
83 Reg v Secretary of State for War [1891] 2 QB 326.
84 Reg v Commissioners for Special Purposes of the Income Tax (1888) 21 QB 313.
85 Kerr Committee Report para 44 at 16.
86 Id para 42.
87 Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997.
88 Griffith & Street, supra note 75 at 239; Schwartz & Wade, supra note 43 at 220.
89 Griffith & Street, supra note 75 at 239. A declaratory judgment is also available for improper exercise of a discretion. Id at 242.
90 See Kerr Committee Report (1971) and the Final Report of the Committee on Administrative Directions (1973).

recent times.[91] But it is true that its scope and extent has increased enormously during the last decade, especially since the 1964 amendments to the *Income Tax Assessment Act*. Of even greater importance however, is that these discretionary powers have been conferred as a weapon to combat tax avoidance. Sections 99, 99A, 46(3), 46A(3), 80DA are some of the several examples. Given the history of Australian tax legislation and the ease with which 'tax planners' have circumvented the restraints imposed by previous legislation, it is no surprise that resort to such drastic measures has been necessary. The conferring of discretionary power in this context amounts to specific anti-avoidance legislation and thus supplements section 260 (the general anti-avoidance provision) the effectiveness of which has been successfully eroded by the process of judicial interpretation. The weakness of section 260 has not lain in any requirement of motive or intent, but in its application where an arrangement has had as its purpose or effect the altering of tax consequences. A power of such width has been found hard to accept, perhaps justifiably, in some instances. But its import seems to have been consciously struck down in other instances. What could not be achieved by sertion 260, therefore, has been sought to be achieved by the conferring of discretionary power. Whilst broad discretionary power is an effective tool to combat tax avoidance, its exercise, unless sufficiently regulated and restrained, could be arbitrary and capable of abuse. As Davis points out, discretion is an effective tool only if properly exercised.[92] Its value lies in its proper exercise and in the ensuring of its proper exercise.

Judicial review has been the most common and perhaps the most effective method of regulating discretionary power. Ultra vires and error on the face are of very wide import and provide courts with a large measure of control. Whilst it is true that the Commissioner is not bound to give reasons for his decision, as was pointed out by the House of Lords in *Padfield's* case,[93] where no reason is given, a court may infer that there existed no good reason. In such circumstances the Commissioner's action would be ultra vires and a court may intervene. Certiorari would lie. Alternatively, declaratory relief would be available. As pointed out previously the remedy granted by the courts is by way of the traditional prerogative writs which include certiorari,

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91 'Discretions have been given to the Commissioner of Taxation from the earliest Commonwealth legislation'. Address by the Commissioner of Taxation to the Chartered Accountants Research Society (1965) para 11 at 6.

92 K Davis, supra note 14 at 25.

93 See note 66 supra.

prohibition, declaration and mandamus. These remedies remain available despite the provision of specific statutory relief under the *Income Tax Assessment Act*. Thus even though a court's role in the granting of judicial review is only supervisory, it still is able to compel compliance with norms of conduct it considers desirable.

The existence of exhaustive statutory remedies is the other great weapon. Objection, review and/or appeal are all available. When a question is referred to the Board of Review, Regulation 35(2) requires the Commissioner to forward a copy of his reasons for disallowing the taxpayer's claim to the taxpayer. And upon a reference, the Board reviews the entire question afresh and substitutes its decision for that of the Commissioner. The Board is required to give its decision in writing,[94] and if requested by the taxpayer, shall state in writing its findings of fact and its reasons in law for the decision.[95] As Board Member Mr. O'Neil observed in *Case E23*[96] the court concerns itself with the validity of an administrator's discretionery decision, and not with its intrinsic correctness. The Board of Review on the contrary, makes up its own mind 'unfettered' by the Commissioner's determination. To this extent then, the authority and function of the Board in reviewing discretionary determinations of the Commissioner is wider than that of the court. These avenues of redress to the taxpayer against the exercise of discretionary power by the Commissioner of Taxation compare very favourably with other instances where similar discretionary power has been conferred both in Australia and overseas. But to ensure clarity and some degree of certainty the re-introduction of the now abandoned Public Information Bulletins would be welcome.

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94 S 195(1).
95 S 195(2).
96 (1973) 73 ATC para 78-79 at 198.
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