

KEYNOTE ADDRESS

RECENT TAX LITIGATION: A VIEW FROM THE BENCH

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I INTRODUCTION

The title to this paper is deliberately generic to afford me the licence of making observation and comment on a wide variety of disparate issues arising over the last twelve months which legitimately fall within the rubric of tax litigation.

For a start there have been at least two important cases decided by the High Court of Australia – *Commissioner of Taxation v McNeil* (2007) 229 CLR 656 (*McNeil*): extending the general law concept of income beyond that which was thought to be its boundary, although, as I foreshadowed in the paper I presented to this Conference last year, that result was not surprising have regard to what was said by the majority in *Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 (*Montgomery*); and *Bluebottle UK Limited & Ors v Deputy Commissioner of Taxation & Anor* [2007] HCA 54 (*Bluebottle*): which placed a limitation on the Commissioner’s powers to require withholding of amounts on account of income tax liabilities of non-residents which limitation, two judges of the Federal Court had previously independently concluded did not impede the operation of s 255 notices in the way in which the High Court ruled. I shall return to these cases later.

There have been a number of important cases decided by the Full Federal Court, at least if one assesses that importance by reference to the success of the losing party in securing special leave to appeal to the High Court: *Raftland Pty Ltd v Commissioner of Taxation* (2007) 65 ATR 336 (*Raftland*): a case involving the ‘trust stripping’ provisions of s 100A of the *Income Tax Assessment Act 1936* (Cth) (‘the 1936 Act’) where the taxpayer was successful in obtaining special leave to appeal against the orders of the Full Federal Court and which will be heard by the High Court next week; *Futuris Corporation Ltd v Commissioner of Taxation* (2007) 159 FCR 257 (*Futuris*): a case involving the validity of an assessment to give effect to a determination made under Part IVA of the 1936 Act where it was found, as a fact, that the Commissioner knew the amount of taxable income and the tax assessed thereon were wrong, where the Commissioner was successful in obtaining special leave to appeal against the orders of the Full Federal Court; *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2007) 161 FCR 1 (*Carpenter Holdings*): a case where the taxpayer’s entitlement to particulars of matters taken into account by the Commissioner in exercising his discretion to make determinations under subss 136AD(1)(d), 136AD(2)(d) and 136AD(4) of the 1936 Act were in issue, where the taxpayer was successful in obtaining special leave to appeal against the orders of the Full Federal Court in respect of the first two subsections (special leave in respect of the third subsection was not sought); and finally, but by no means least, *Reliance Carpet Co Pty Ltd v Commissioner of Taxation* (2007) 160 FCR 433 (*Reliance Carpet*): where the issue was whether Division 99 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (‘the GST Act’) applied to a deposit forfeited in

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consequence of the rescission of a contract for the sale of land where the Commissioner was successful in obtaining special leave to appeal against the orders of the Full Federal Court.

I had more than a hand in each of these cases so I cannot claim impartiality in respect of the result in the Full Federal Court or the process of reasoning by which the Court got to that result in each case. In any event, whether or not a particular case is seen as deserving of a grant of special leave is a matter for the justices of the High Court and when the balance, infrequently as it might seem, falls in favour of a grant of special leave, quite often it is considerations which previously have not been brought to bear on the subject that carry the day. On the other hand, recent experience suggests that when a tax case ultimately comes up to the High Court on appeal, the views and conclusions of the members of the Full Federal Court carry little weight. This has implications going to the certainty of application of the taxation laws but that is a subject going beyond the scope of this paper.

There have been other important cases which have come up to the Full Federal Court where special leave to appeal to the High Court against the orders below was refused: *Cajkusic v Commissioner of Taxation* (2006) 155 FCR 433 (*Cajkusic*) is the case which most readily comes to mind and I shall return to this case later although one aspect of it will likely be dealt with by the High Court in *Raftland*.

The other decision of the Full Federal Court in the last twelve months which has attracted a great deal of critical comment, not so much in the public media, although there has been a degree of 'rub-off' in that area, but in the writings and opinions of those retained by the Commissioner, is the case of *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 (*Indooroopilly*). Once again this is a case in which I wrote the principal judgment. This case has attracted critical comment, not of the decision on the substantive issue – the Commissioner never sought special leave to appeal the Full Federal Court's orders – but in response to the Court's criticism of the way in which (1) the Commissioner construed and administered the relevant provisions of the *Fringe Benefits Tax Assessment Act 1986* (Cth) ('the FBTA Act') in the face of a number of single judge decisions of the Federal Court pointing to a contrary construction, and (2) his counsel, in submissions, sought to defend that administration. Fortunately, the occasions on which the Court feels compelled to criticise the Commissioner for the way in which he administers legislation for which he is responsible are very few and far between. This is because the Commissioner and his officers aspire to best practice and in the main this is achieved. But like anyone else, the Commissioner and his officers are not perfect and there will be occasions when something falls between the 'cracks in the floorboards'. It is important that the Court remains vigilant to identify these occasions. Infrequent judicial criticism of the kind that was made in *Indooroopilly* is not made lightly; it is made with the object of promoting review of the processes which impelled the Court to make the criticism it did, and to ensure that, to the extent possible, it does not happen again. Sensitivity to such criticism should not be allowed to get in the way of the review process. I am going to return to this matter later in the paper.

Finally, I wish to say something about the case of *Slade Bloodstock Pty Ltd v Commissioner of Taxation* [2007] FCAFC 173 (unreported) (*Slade Bloodstock*) as an example of the way in which the Court is keen to ensure that not only the parties, but the public at large, is aware of the reason why the Court has decided a case in a particular way, even where the respondent to the appeal concedes that its success below was infected with error. My comments in this regard are contextually relevant

to the steps which are about to be taken by the Court to amend its mechanisms, processes and rules to facilitate greater efficiency, expedition and overall management of tax cases coming into the Court for the ultimate benefit of all tax litigants, both the Commissioner and taxpayer alike.

II THE HIGH COURT CASES

A McNeil

It did not take long for 'the knives to be drawn' following the High Court's judgment in *McNeil* in February of last year. The Court's decision has been widely critiqued (see, for example, D H Bloom QC, *Taxpayer's Heaven: The Citylink Decision; The Opposite of Heaven: The Decision in McNeil*, a paper presented to the National Convention of the Taxation Institute of Australia in Hobart in March 2007) and its departure from what was accepted since the inception of income tax in this country, both by the Commissioner and taxpayers alike, as being the position with respect to renounceable rights issued by a company to its shareholders – that they were not income of the shareholder – was seen as being so significant that the government of the day was forced to announce that legislation would be introduced to preserve the status quo: see the announcement by the then Minister for Revenue and Assistant Treasurer, Mr Peter Dutton, on 26 June 2007. Criticism of the Court's decision on this ground is perhaps not as telling as other criticisms referred to below; the majority were obviously aware from their reference at [21] to Parson's *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (1985) at 87 – 89, that the question whether rights or options issued to a shareholder as a shareholder are ordinary usage income of the shareholder as income derived from his shares had not been considered in any authority. Consequently, it was not as if there was any judicial precedent in the way of the Court coming to the conclusion it did.

What is surprising, and for that reason more susceptible of criticism, is that the issue was raised in the first place. It is difficult to accept that those responsible for raising the issue would not have been aware of the consequences of the High Court's acceptance of the argument. One is reminded of the litigation that arose over thirty years ago, *Commissioner of Taxation v Patcorp Investments Limited* (1976) 140 CLR 247 (*Patcorp Investments*), where the Commissioner successfully took the point that the taxpayer was not entitled to the benefit of a tax rebate under s 46 of the 1936 Act because it was not the registered shareholder, only the absolute beneficial owner. During the course of the hearing it became apparent that the Commissioner's administration of the Act had been to allow the full rebate of tax in situations where the taxpayer was the absolute beneficial owner albeit not the registered shareholder and the High Court raised with counsel for the Commissioner why his position with respect to the case before it should be any different. The only answer available was that in the case before it, the allegation was that the taxpayer was involved in activities which should not receive the benefit of the Commissioner's benevolent administration of the Act in extending the benefit of the s 46 rebate to owners of shares who were not the registered shareholders of those shares. Certainty was only achieved with the introduction of s 45Z into the 1936 Act in 1992, applicable to dividends paid after 17 August 1976, the date the High Court's judgment in *Patcorp Investments* was handed down.

The more telling criticisms of the High Court's process of reasoning in *McNeil* are:

- (1) Its failure to address the ‘convertibility issue’ – where something other than money is received it will not be income unless at the time of its receipt it is convertible into money: *Commissioner of Taxation v Cook and Sherdan* (1980) 42 FCR 403. The High Court seemed to accept (at [27]) that what the taxpayer became entitled to on 19 February 2001 was not the sell-back rights referable to her (which it was accepted had a value of \$514) but rather a chose in action to compel the due administration of a trust, the sell-back rights being assets of the trust. As the commentator referred to above has observed:

There was no evidence as to the value of this chose in action, as the Commissioner had at all times in the Federal Court maintained that the taxpayer was absolutely entitled to the sell-back rights themselves.

- (2) The majority’s reliance on *Eisner v Macomber* (1920) 252 US 189 at 206 – 207 for the reasons advanced in the paper I presented to this Conference last year: *Recourse to Foreign Authority in Deciding Australian Tax Cases* at [41] – [51].

B Bluebottle

Bluebottle was concerned, amongst other matters, with the proper construction of s 255 of the 1936 Act, specifically whether subs 255(1) required the Commissioner to assess a non-resident’s tax liability before the Commissioner could require a third party to pay the tax due and payable by that non-resident. Subsection 255(1) of the 1936 Act relevantly provides:

255 Person in receipt or control of money from non-resident

(1) With respect to every person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder, debenture holder, or depositor in a company deriving income, or profits or gains of a capital nature, from a source in Australia, the following provisions shall, subject to this Act, apply:

- (a) he shall when required by the Commissioner pay the tax due and payable by the non-resident;
- (b) he is hereby authorized and required to retain from time to time out of any money which comes to him on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;
- (c) he is hereby made personally liable for the tax payable by him on behalf of the non-resident to the extent of any amount that he has retained, or should have retained, under paragraph (b); but he shall not be otherwise personally liable for the tax;
- (d) he is hereby indemnified for all payments which he makes in pursuance of this Act or of any requirement of the Commissioner.

In *Elsinora Global Ltd v Healthscope Ltd (No. 2)* (2006) 227 ATR 570 (*Elsinora*) at [51], I said:

The first question of construction which arises is whether the prefatory words of subs 255(1): ‘With respect to every person having the receipt control or disposal of money belonging to a

non-resident', require the person to have that receipt, control or disposal at the time of being served with a notice of requirement pursuant to par (a), or whether it is sufficient that the person subsequently has that receipt, control or disposal even though he did not have that receipt, control or disposal at the time of service of the notice. While the matter is not free from doubt, I have come to the conclusion that it is not necessary for the person to have the receipt, control or disposal of money belonging to the non-resident at the time of service of the notice and that the operative provisions of pars (b), (c) and (d) will be triggered if and when the person, subsequent to service of the notice of requirement pursuant to par (a), has that receipt, control or disposal. Such a construction promotes the section's undoubted legislative function and purpose as a tax collection mechanism. The contrary view would mean that the Commissioner would have to know when a person had the receipt, control or disposal of money belonging to the non-resident and serve him with a notice of requirement pursuant to par (a) before he ceased to have that receipt, control or disposal. In many cases the Commissioner will know that a person will, or is likely to, have the receipt, control or disposal of money belonging to the non-resident, but not when he will have it. The conclusion to which I have come avoids that dilemma. This question was left open by Lindgren J in *Commissioner of Taxation v Wong* (2002) 121 FCR 60 where his Honour said at [24]:

“In order to decide the present case, I need not, and therefore I do not, decide whether, in order for parts (b), (c) and (d) to be enlivened, a person served with a notice under s 255(1)(a) must satisfy the description in the prefatory words at the time of service, or whether it suffices that he does so later and before action is brought. The reason is that in my opinion the recipient of a notice is required to satisfy that description (be a Controller) either at the first, or at either of those two times, but Mr Wong did not satisfy either formulation of the requirement.”

Although, a little later his Honour said at [27]:

“The prefatory words are themselves indefinite in point of time. I see no reason why notional words such as “at any time and from time to time” should not be understood to qualify “having” and “derives” in the prefatory words.”

which suggests, in my view, that his Honour may well have come to the same conclusion as I have.’

In *Bluebottle* the High Court said (at [95]):

... the central focus of attention in both cases [Elsinora and Wong] was upon questions of control of moneys of a non-resident and whether notice can be given under s 255 at a time when the person to whom the notice is directed does not have control of moneys of the non-resident. Argument in neither case seems to have been directed to the issue of what is meant by “tax which is or will become due by the non-resident”.

But as I noted in *Elsinora* at [52], in *Wong* Lindgren J said (at [28]):

Consistently with this view, par (a)'s reference to “the tax due and payable by the non-resident” is a reference to the tax due and payable by the non-resident on the “income, or profits or gains of a capital nature” derived by him at any time and from time to time. In other words, a notice given under par (a) can be expressed to have an ambulatory or ongoing operation and to require the recipient to pay not only tax that is already due and payable, but tax which may become due and payable in the future, and will do so if the non-resident derives further income. This construction apparently treats “when” not as referring to a time for payment, but as meaning “if”. The construction is supported by par (b).

And I went on to say in *Elsinora* at [52]:

I agree that a notice given under par (a) can be expressed to have an ambulatory or ongoing operation and to require the recipient to pay not only tax that is already due and payable, but tax which may become due and payable in the future. As his Honour says, such construction is supported by par (b).

This view of Lindgren J in *Wong* and my view in *Elsinora* was rejected by the High Court in *Bluebottle*. At [75] – [82] the High Court said:

[75] It is to be noticed that s 255(1)(a) obliges the person who has “the receipt control or disposal of money belonging to a non-resident” (the controller) “when required by the Commissioner [to] pay the tax due and payable by the non-resident”. By contrast, s 255(1)(b) gives the controller authority to retain (and requires the controller to retain) “so much as is sufficient to pay the tax which is or will become due by the non-resident”. The commissioner emphasised both the need to give effect to the phrase “the tax which ... will become due” in para (b) and the use of the different phrase in para (a) “the tax due and payable”.

[76] There are two principal points to make about these differences between the two paragraphs. First, para (a) concerns payment; para (b) concerns retention. It is, therefore, not surprising that the provision for payment (para (a)) should deal with what is “due and payable”, and the provision for retention should acknowledge and deal with the possibility that the time for payment of the tax in question may not have arrived when the controller first becomes liable to pay money to the non-resident or money of the non-resident first “comes to him”.

[77] Secondly, the amount of money which is to be dealt with in accordance with para (a) (by payment) is readily ascertained. It is the amount of the tax that is due and payable by the non-resident. The description of the tax as “due and payable” necessarily presupposes that an assessment has been made. The commissioner submitted that para (b) should be read differently, and as speaking “both of the time of assessment and of a time prior to assessment”. It was said that it was sufficient that there should be “an inchoate liability for tax” and that “the tax would become due, whether considered temporally or as a matter of probability”. These submissions should be rejected.

[78] When s 255(1)(b) refers to “the tax which is or will become due by the non-resident” it must be read as referring to an ascertained sum. If the paragraph is not read in that way, the obligation to retain money which is imposed on the controller is an obligation of undefined content. It is undefined because all that may be retained (the controller “is hereby authorised ... to retain”) “out of any money which comes to him on behalf of the non-resident” is sufficient to pay the tax which is or will become due. And it is that amount (and only that amount) which the controller is obliged to retain. And as the facts of the present matter show, if s 255(1)(b) is not read as referring to an ascertained sum, the commissioner may require the controller to retain more than the amount later assessed as due from the non-resident. But that would require the controller, as the commissioner’s first notices did in this case, to retain more than sufficient to pay the tax which is or will become due.

[79] Until the tax payable by the non-resident has been assessed it is not possible to say more than that there may be tax due by the non-resident. It is not possible to say that tax is due or that tax will become due. The prediction that tax may be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident’s money would ordinarily, let alone invariably, have that information and be in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives. The present case illustrates why that is so. The taxation liabilities of Cricket and Holdings relate to transactions they are alleged to have made on capital account and yielded a tax liability in the year ended 31 March 2004. The sums of money which Virgin Blue is now alleged to have been obliged to retain were payments in a different tax year and owing to its shareholders on revenue account. Neither the holding of shares by Cricket and Holdings, nor the fact that Virgin Blue was bound to pay the dividend that was

declared, gave any basis for Virgin Blue knowing anything of the relevant Australian taxation affairs of Cricket or Holdings.

[80] Paragraph (b) of s 255(1) should be read as referring to an amount of tax that has been assessed. The phrase “tax which ... will become due” is to be understood as referring to tax which, although assessed, is not yet due for payment.

[81] This construction of s 255(1)(b) gives proper weight to the language used in that paragraph (the tax which is or will become due by the non-resident) when compared with the different expression used in para (a) (the tax due and payable by the non-resident). As Gibbs CJ observed in *Clyne v DCT*, “[t]he word ‘due’ is ambiguous; it can mean owing, although not payable until some future date, or it can mean presently payable”. And as the decision in *Clyne* illustrates, it is necessary to consider expressions like “due”, and “due and payable”, when used in the 1936 Act, in the context of the Act as a whole. When “due” is used in the collocation found in s 255(1)(b), “the tax which is or will become due by the non-resident”, the requirement for specifying the amount of money that meets that description requires that the word “due” is read as meaning assessed as owing.

[82] Once those steps are taken, the obligations to retain and to pay are seen as intersecting obligations. The point of their intersection is the specification of the tax which under para (a) is to be paid when required by the commissioner, and which under para (b) is both the amount that may be retained (the controller “is hereby authorised”) and the amount that must be retained (the controller “is hereby ... required”). Once this intersection between the operation of para (a) and para (b) of s 255(1) is identified, many of the issues that would otherwise arise on the construction urged by the commissioner fall away. It is, however, necessary to consider the statutory setting in which s 255 takes its place. Two aspects of the statutory setting for s 255 require consideration: the history of the section and the other provisions of the 1936 Act that relate to the collection of tax from persons other than the taxpayer.

And at [96] and [97] the High Court said:

[96] It would be wrong to approach the construction of s 255 piecemeal. In particular, it would be wrong to treat s 255(1)(a) as wholly distinct and separate from s 255(1)(b). In that regard, the “trigger” metaphor adopted in *Wong*, though useful, should not be allowed to divert attention from recognising that paras (a) and (b) of s 255(1) have an intersecting operation. As noted earlier in these reasons, the point of that intersection is the amount with which both paragraphs deal: the tax which is or will become due by the non-resident (which defines the amount to be retained) and the amount which is to be paid to the commissioner when required under para (a) (the tax due and payable by the non-resident).

[97] Once it is recognised that content can be given to the obligation imposed by s 255(1)(b) only if an assessment has issued, the operation of the provision, as a whole, can be seen to be that described at [72] of these reasons.

The reference back to [72] of the High Court’s reasons is a reference to the following:

[72] Uninstructed by authority, and considered in isolation from other provisions of the 1936 Act, s 255 takes a form which suggests that its operation can be described as being:

- (a) to oblige persons of the kind described in the chapeau to s 255(1) to pay the tax assessed as due and payable by a non-resident who meets the relevant characteristics identified in that chapeau (s 255(1)(a));
- (b) to permit the person paying the tax to recoup the tax paid or to be paid by retaining sufficient out of the money of the non-resident coming into the payer’s hands and to oblige the person to retain sufficient of the non-resident’s money to do so (s 255(1)(b));

- (c) to extend the notion of money of the non-resident in the hands of the payer to include amounts which the payer is liable to pay the non-resident (s 255(2)) but subject to the presently irrelevant qualification made by s 255(2A);
- (d) to limit the liability of the payer to the amount that comes into the hands of the payer (s 255(1)(c));
- (e) to give the payer indemnity for all payments made in pursuance of the Act (s 255(1)(d)); and
- (f) to make like provision with respect to the Commonwealth, a state or an authority of the Commonwealth or a state (s 255(3)).

III THE PENDING HIGH COURT CASES

For obvious reasons – in particular my involvement in the Full Court decisions below – I do not think it appropriate for me to comment at large on the decisions in *Raftland*, *Futuris*, *Carpenter Holdings* and *Reliance Carpet*. Each raises its own discrete issues and they are undoubtedly issues of importance not only to the Commissioner's administration of the legislation with which each is concerned, and to the litigants in the relevant proceedings, but to taxpayers generally.

Apart from factual issues going to whether what was involved, or part of what was involved, was a sham, *Raftland* raises a number of interesting issues in relation to the taxation of trust income under Division 6 of Part III of the 1936 Act, specifically the operation of s 100A, and in particular subs 100A(3A); whether the rule in *Upton v Brown* (1884) 26 Ch D 588, that losses in one year must, in the absence of any contrary direction in the trust instrument, be made up out of profits of subsequent years and not out of capital, has application where income and capital interests are coterminous; as well as the effect of the defeasible provisions of the trust deed on a beneficiary's claim to be presently entitled to income of the trust fund.

Futuris raises for the first time in the High Court the issue of whether an assessment which the Commissioner knows at the time of issue to be excessive as to both taxable income and tax assessed thereon, is a *bona fide* exercise of the power to assess and, if not, whether it is a valid assessment protected by ss 175 and 177(1) of the 1936 Act.

Carpenter Holdings raises for the first time in the High Court the extent to which a taxpayer can assail assessments in reliance on Division 13 of Part III of the 1936 Act by seeking judicial review of the exercise by the Commissioner of discretions under subs 136AD(1)(d) and (2)(d) of that Act. This, in turn, raises the issue of the nature of the discretions – whether they are substantive or procedural and, if the latter, whether the ultimate answer is dependent on the answer to the intermediate question.

Reliance Carpet is the first GST case to find its way into the High Court. It has its own factual context and, indeed, a specific Division of the GST Act (Division 99) devoted to that factual context, namely, a deposit forfeited in consequence of a failure to perform the obligation for which the deposit is held as security. The real issue in the case is whether one can identify a supply for which the forfeited deposit is the consideration.

IV CASES WHERE SPECIAL LEAVE WAS REFUSED

The Commissioner sought special leave to appeal from the orders of the Full Federal Court in *Cajkusic* but this was refused. At the risk of criticism of impartiality because of my involvement in that decision, I venture to suggest that it did more to clarify the law relating to the taxation of trust income than many cases before it. Some

commentators might not agree by reference to unusual examples, however, as a member of the Court, I can live with those critiques.

Subject to what might fall from the High Court in *Raftland* in relation to the applicability of the rule in *Upton v Brown* where the income interests and capital interests in the trust fund are coterminous, it is to be hoped that, in the interest of clarity and certainty, the provisions of Division 6 of Part III of the 1936 Act will, on a going forward basis, be administered in accordance with the principles laid down in *Cajkusic*. If it is of any comfort, the Commissioner's Impact Statement on the case issued on 12 September 2007 suggests that they will be.

A Indooroopilly

As I have already mentioned, of all the cases decided over the last twelve months, the one that has attracted the most attention by way of observation and comment has been the Full Court's decision in *Indooroopilly*; not because of the substantive issue it decided, although the importance of the Full Court's conclusion on that issue should not be under-estimated, but because of the comments of two members of the Court (Allsop J and myself – the third judge, Stone J, agreeing with our comments) on the Commissioner's administration of the relevant provisions of the FBTA Act, in the face of earlier decisions of single judges of the Federal Court which held that the construction which formed the basis of the Commissioner's administration of those provisions was wrong.

I gave the principal judgment on the substantive issue with which Stone and Allsop JJ agreed. The background facts are well-known and it is both unnecessary and irrelevant for present purposes to refer to them in great detail. Shares in a public company were issued to the trustee of a share plan under which employees of various employer companies might eventually take, but in the year of tax in which the shares were issued it could not be said of any specific employee that the employee would take. The issue before the Court was whether the definition of 'fringe benefit' in s 136(1) of the FBTA Act required the identification of a particular employee at the 'provision time' in respect of whose employment the benefit was provided. Like the decisions of the single judges of the Court who had previously considered this issue – Kiefel J in *Essenbourne Pty Ltd v Commissioner of Taxation* 2002 ATC 5201; Hill J in *Walstern Pty Ltd v Commissioner of Taxation* (2003) 138 FCR 1; *Spotlight Stores Pty Ltd v Commissioner of Taxation* 2004 ATC 4674 (Merkel J); *Caelli Constructions (Vic) Pty Ltd v Commissioner of Taxation* (2005) 147 FCR 449 (Kenny J); and *Cameron Brae Pty Ltd v Commissioner of Taxation* 2006 ATC 4433 (Ryan J) – the Full Court answered this question in the affirmative.

But it is the observations of Allsop J and myself in relation to the Commissioner's submissions on the respondent's notice of contention which have attracted most comment.

Allsop J observed (at [3] – [7]):

I wish, however, to add some comments about the attitude apparently taken by, and some of the submissions of, the appellant. From the material that was put to the Full Court, it was open to conclude that the appellant was administering the relevant revenue statute in a way known to be contrary to how this Court had declared the meaning of that statute. Thus, taxpayers appeared to be in the position of seeing a superior court of record in the exercise of federal jurisdiction declaring the meaning and proper content of a law of the Parliament, but the executive branch of the government, in the form of the Australian Taxation Office, administering the statute in a manner contrary to the meaning and content as declared by the

Court; that is, seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament by the former. This should not have occurred. If the appellant has the view that the courts have misunderstood the meaning of a statute, steps can be taken to vindicate the perceived correct interpretation on appeal or by prompt institution of other proceedings; or the executive can seek to move the legislative branch of government to change the statute. What should not occur is a course of conduct whereby it appears that the courts and their central function under Chapter III of the Constitution are being ignored by the executive in the carrying out of its function under Chapter II of the Constitution, in particular its function under s 61 of the Constitution of the execution and maintenance of the laws of the Commonwealth.

It is the function of the courts exercising federal jurisdiction to declare the meaning of statutes of the Commonwealth Parliament in the resolution or quelling of controversies. To quote Marshall CJ in *Marbury v Madison* 5 US 87 at 111 (1803):

“It is, emphatically, the province and duty of the judicial department to say what the law is.”

This passage has been recognised as central to the administration of justice and to the relationship between the judiciary and executive in this country: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Corporation of the City of Enfield v Development Assistance Commission* (1999) 199 CLR 135 at 152-154 [42]-[44] and *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 635 [116].

Considered decisions of a court declaring the meaning of a statute are not to be ignored by the executive as inter partes rulings binding only in the earlier lis. As Mahoney J (as his Honour then was) said in *P & C Cantarella v Egg Marketing Board* [1973] 2 NSWLR 366 at 383:

“The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.”

There was some inferential suggestion in argument that the appellant was somehow bound by legislation (not specifically identified) to conduct his administration of the relevant statute by reference to his own view of the law and the meaning of statutory provisions, rather than by following what the courts have declared. It only need be said that any such provision would require close scrutiny, in particular by reference to issues raised by s 15A of the Acts Interpretation Act 1901 (Cth).

I made the following observations at [43] – [47]:

At [12] above, I referred to the reasons relied on by the Commissioner for his answer to question 1. Those reasons included the following statement:

“The definition of ‘fringe benefit’ also refers to a benefit being provided in relation to ‘an employee’, and for reasons outlined in paragraphs 45 - 49 of TR 1999/5 the ATO considers a fringe benefit can arise notwithstanding that a benefit provided to a trust may not be provided in respect of a specific employee.

Whilst Kiefel J’s views in the *Essenbourne* case [2002] FCA 1577 about the proper interpretation of the definition of a fringe benefit in the fringe benefits tax law are contrary to the views expressed in Taxation Ruling TR 1999/5, the Commissioner has determined that as the *Essenbourne* case is not an appropriate vehicle to test the issue with the Full Federal Court, the views expressed in TR 1999/5 will remain the ATO position.”

In written submissions, the Commissioner put his position in the following way:

- “7. The Commissioner was not compelled to follow *Essenbourne* and the other single judge decisions when he ruled on the respondent’s ruling application or when he determined the objection against the ruling which was made.
8. The fact that there are single judge decisions on the meaning of the definition of “fringe benefit” does not mean that the Commissioner was bound to follow those decisions as against taxpayers who were not privy to those decisions: *Business World Computers Pty Ltd v Australia Telecommunications Commission* (1988) 82 ALR 499 at 504.
9. There is no principle of estoppel that would bind the Commissioner to apply the single judge decisions to which the respondent was not a party, in relation to the application of the FBTA Act to the arrangement the subject of the respondent’s ruling request.”

When challenged from the bench that a proposition such that the Commissioner does not have to obey the law as declared by the courts until he gets a decision that he likes was astonishing, the Commissioner submitted:

“The [Commissioner] seeks to make clear that the propositions put in paragraphs 8 and 9 were in response to the respondent’s contentions and were not put as a broader proposition that the appellant is entitled to disregard judicial decisions contrary to the rule of law in the exercise of his statutory powers. On the contrary, the [Commissioner’s] position is that by this private ruling he seeks to have the full court reconsider the first instance decisions because he is mindful of his obligations to apply the law as declared by the courts. It is only in very confined circumstances where the Commissioner would not follow a decision of a single judge of the Federal Court. He was not able to appeal from the observations in *Essenbourne* in view of the finding on the facts on the income tax case. In *Walstern* the relevant observations were obiter and there was no order against which the Commissioner could appeal. In *Caelli* the Court determined the FBT appeal in the Commissioner’s favour “on the assumption” of the correctness of *Essenbourne* and there was no order against which the Commissioner could appeal. The Commissioner has appealed the *Essenbourne* construction in each of the three cases in which he has been able, being *Spotlight Stores* (where the Full Court did not determine the issue), *Cameron Brae* (the appeal is yet to be heard) and this case.”

In response, the respondent submits that if the Commissioner disagreed with the decision of Kiefel J on the fringe benefits tax issue, the appropriate course was for him to have appealed. In specific response to the Commissioner’s submission asserted in [45] above, that the findings of fact on the income tax case precluded an appeal, the respondent says that an examination of *Essenbourne* reveals no such findings – see in particular [33] to [36]. I am inclined to agree, particularly having regard to the terms of subs 148(1) of the FBTA. The respondent also pointed out that the Commissioner explained his reasons for not appealing on a different basis in his Media Release of 14 March 2003:

- The Court held that an income tax deduction was not allowable for an amount contributed by a company to an employee incentive trust because the payment was simply a distribution of the company’s profits to the three principals of the company
- However, the Court disagreed with the Tax Office’s view that fringe benefits tax should apply, *but given the scheme was rendered ineffective by denying deductions, the Tax Office did not appeal to the Full Federal Court.* [Emphasis added]”

At the time the Commissioner issued the ruling, Hill J in *Walstern* had indicated that, in his view, Kiefel J's construction was 'clearly correct' and Merkel J in *Spotlight Stores* had indicated his satisfaction that both those decisions were not clearly wrong and that he intended to follow them. In those circumstances, faced with the ruling application, in my opinion, it was incumbent on the Commissioner, having taken the view that findings of fact precluded him from appealing *Essenbourne* – a view with which I have already expressed my disagreement – either to follow the construction embraced in those cases or seek a declaration from the Court as to the proper construction and apply that construction in the ruling.

The first comment of importance may have fallen from the lips of Gleeson CJ on the hearing of the special leave application in *Petroulias v The Queen* No. S478 of 2006; [2007] HCA Trans 092 on 2 March 2007. The transcript records:

“GLEESON CJ: It is surprising that a circumstance could arise in which Justice Allsop should feel it necessary to say what he said in his reasons in paragraphs 4 and 7, for example.

MR HASTINGS: Yes, I am not aware of that, your Honour, but I can say that in relation to the ...

GLEESON CJ: It sounds as though somebody needs some instruction in basic civics.”

In an article entitled *The relationship between the Commissioner of Taxation and the Judiciary*, published in *Taxation in Australia* Vol. 41 No. 11, June 2007, the Honourable Daryl Davies QC was highly critical of the observations made by Allsop J, and even more critical of my own observations. In relation to Allsop J's observations at [6], Mr Davies wrote:

If his Honour's remarks were read merely as an exhortation to the Commissioner not to disregard decisions of courts of law, there may be no difficulty with them. There would be no difficulty in the Commissioner's adhering to them, for the Commissioner does not ignore decisions of the courts. However, the remarks of Allsop J appear to go further than an exhortation. Allsop J said that the Commissioner's course of action “should not have occurred.”

In relation to my observations at [47], Mr Davies wrote:

With due respect to his Honour, it would have been entirely inappropriate for the Commissioner at any stage to seek a declaration from the Court as to the proper construction of s 136(1). The Court is not empowered to give advisory opinions on matters of law and the Commissioner is not empowered to seek one. The Commissioner was requested by Indooroopilly Children Services (Qld) Pty. Ltd. to give a private ruling and the Commissioner was bound to comply with that request, not to seek a declaration from the Court.

He concluded his article in the following terms:

In Indooroopilly, responsible counsel were seeking to have the important issue as to the interpretation of s 136(1) decided at an appropriate level in the Federal Court.

It is difficult to understand why the Court considered that there was impropriety in the Commissioner's doing that which he had a function and duty to do.

Hopefully, these events will amount to little more than a hiccup in the longstanding cordial relations between the Commissioner and the Court.

The next public comment came in a speech delivered by the Commissioner to the Law Council of Australia Rule of Law Conference in Brisbane on 1 September last. Under the heading ‘*Indooroopilly* and use of declaratory proceedings’ the Commissioner wrote:

Indooroopilly and use of declaratory proceedings

In instances where the law is ambiguous, an appropriate avenue for resolution may be through the courts to obtain judicial clarification of the law. We took this approach recently with regard to deductions claimed in employee benefit arrangements. We consistently won these cases on the basis that the companies were not entitled to deductions under s.8-1 of the *Income Tax Assessment Act 1997*. [*Essenbourne Pty Limited v Commissioner of Taxation* 2002 ATC 5201; *Walstern Pty Ltd v FC of T* 2003 ATC 5076; *Kajewski & Ors v FC of T* 2003 ATC 4375; *Cajkusic & Anor v FC of T* 2006 ATC 2098; *Cameron Brae v FC of T* 2006 ATC 4433]. However, concerned by the possibility of the “holy grail” of deductibility and no fringe benefits tax in relation to such schemes, [*Walstern Pty Ltd v FC of T* 2003 ATC 5076, 5078 where Hill J said: “The ability of a private company employer to obtain unlimited deductions for contributions made to a superannuation fund benefiting employees who are directors and shareholders without either the trustee of the fund being liable to pay tax on the amounts contributed or the employer being liable to pay fringe benefits tax must be the holy grail for tax planners.”] and armed with our understanding of the policy intent of the relevant provisions and a view that we had reasonable prospects of success, we sought to have the FBT issue tested by the Full Federal Court, notwithstanding decisions by single judges contrary to our submission. This course of action culminated in the Full Federal Court case of *Commissioner of Taxation v. Indooroopilly Children Services (Qld.) Pty. Ltd.* [[2007] FCAFC 16].

There is a long history to this matter which arose following the Court’s decision in December 2002 in the *Essenbourne* case. [2002 ATC 5201]. This case involved an employment benefit trust scheme in which the Court decided that the taxpayer was not entitled to a deduction for its contribution to an employee incentive trust. The Court also decided that the contribution was not subject to FBT. [*On 14 March 2003 we published a fact sheet stating that we proposed to further test the Court's construction of the FBT law, explaining also that we did not appeal this aspect of the decision in view of the Court's findings that the payments were not in respect of employment, in which case FBT had no application, and because we had succeeded on our primary argument. In hindsight it may have been better to appeal, notwithstanding these reasons, if we had known that this was open to us.*]

The Court in *Indooroopilly* criticised our course of action. The essence of the criticism being that we should have followed the single justice decisions or promptly initiated other court proceedings, such as seeking a declaration from the Full Court on the FBT issue.

It is important that we explore opportunities for improving the litigation process including particularly the timeliness of law clarification on important issues.

Following on from the comments by the Federal Court we obtained advice from the Commonwealth Solicitor-General, David Bennett QC, the Chief General Counsel of the Australian Government Solicitor, Henry Burmester QC and other legal counsel on the following matters:

- the use of declaratory proceedings to resolve taxation disputes; and
- whether the Tax Office must always follow a single instance decision of a judge.

...

Declaratory Proceedings

The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to seek to use declaratory proceedings to resolve taxation disputes. In many cases, a declaration from the court would not be available to test an interpretation of the law because the question would be hypothetical or advisory. The advice confirms that the usual objection and appeal processes involving assessments and private rulings should be used to resolve issues between a taxpayer and the ATO. [See also *Daryl Davies QC, 'The relationship between the Commissioner of Taxation and the Judiciary.'* *Taxation in Australia, Volume 41, No. 10 May 2007, pp 630 – 633*].

Single Judge Decisions

The Solicitor-General and counsel have confirmed their earlier advice that the ATO is not required to follow a single judge decision if, on the basis of legal advice, [*Legal advice provided by Solicitor-General Henry Burmester QC on 16 January 2006 advises that internal ATO legal advice provided by an appropriate officer would constitute sufficiently robust and credible advice for this purpose*] there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position. In the rare circumstances where the Commissioner does not appeal a decision which is considered incorrect, the ATO will seek to take prompt action to test the issue before the Full Court. [*D Davies QC, op. cit.*]. It is our intention in all such cases to act with “due propriety”.

At the same time, the Commissioner released advice he had received from the Commonwealth Solicitor-General, Mr David Bennett QC, the Chief General Counsel of the Australian Government Solicitor, Mr Henry Burmester QC and Mr James Hmelnitsky of Counsel. The advice is dated 18 June 2007. At the same time the Commissioner also released two anterior opinions from Messrs Bennett and Burmester, the first dated 15 December 2005 and the second dated 16 January 2006. In the more recent opinion, Messrs Bennett, Burmester and Hmelnitsky were asked to advise on a number of questions concerning, *inter alia*, my suggestion that the Commissioner might have recourse to declaratory proceedings to clarify the correct legal position. At [11] they advised:

11. Despite the stark alternative posed by Edmonds J, it is not entirely clear how he considered that declarations could be sought in all cases, given the well established limitations on their use, the existence of the assessment and private ruling systems and the procedures for challenging them. It may be that his Honour had in mind that the Commissioner, instead of ruling, should have sought a declaration as to the fringe benefits tax liability of the taxpayer. If that is what his Honour had in mind then there are various considerations, discussed below, as to why that will generally be inappropriate. He appears to have envisaged, however, that the Commissioner would seek a declaration as to how he should rule. If that was the course his Honour had in mind then there are, in addition [sic] to the general considerations, more serious obstacles which we discuss in the following paragraphs.

In response to the specific questions raised for advice they wrote (at [64] – [74]):

64. In light of the above, we answer the questions as follows.

- (a) What process should the ATO follow to challenge perceived incorrect views of the taxation laws expounded by the judiciary in a way that is consistent with the Commissioner’s obligations to administer the law as interpreted by the judiciary?
65. The Commissioner should normally use private rulings or the issue of assessments, rather than declarations, in order to test interpretations of the tax law. Declarations have a

- number of limitations. They require a contradictor. They cannot be used to answer hypothetical questions and they are more easily sought by a taxpayer than by the Commissioner. They will not necessarily lead to a final determination about a taxpayer's tax liability.
66. The more important issue is that steps be taken quickly to identify a suitable case involving a private ruling or assessment to test a decision that is considered incorrect. If a suitable case can be found and proceedings by a taxpayer brought, at that stage there may be case management options such as a stated case or referral to the Full Court that may assist speedily to resolve the issue in an authoritative way.
- (b) To what extent is the process suggested in previous joint opinions given by the Solicitor-General and Chief General Counsel consistent with the approach suggested by the Court in *Indooroopilly* and to what extent, if any, does the process need to be altered having regard to the Court's observations in *Indooroopilly*?
67. We do not consider that the recent decision in *Indooroopilly* requires us to change the views expressed in the earlier advice. The problem in *Indooroopilly* appears to have arisen from a perception that the Commissioner was clinging to an interpretation of the law that had been disagreed with by a number of single instance judges, and that prompt action had not been taken to have this issue resolved by the Full Court.
68. We do not consider that the critical comments of the judges in *Indooroopilly* can be taken as meaning that the ATO must always follow a single instance decision of a judge. For the reasons previously given, that is not required if there are good arguments that, as a matter of law, that decision is incorrect and action is being taken to clarify the position. That does not mean that in issuing private rulings the Commissioner is generally free to ignore judicial decisions. However, where there is a concern with a particular interpretation and the Commissioner intends to issue a ruling contrary to prevailing judicial opinion, we consider that an early test case is the appropriate procedure.
69. In *Indooroopilly*, while the ATO saw it as a test case, that was not how the Court saw it. This may partly have been because at the time of the ruling there were already a number of judicial decisions that had considered the issue yet the ruling had appeared to ignore or give little weight to them. It was probably the perception that the Commissioner stuck doggedly to his preferred interpretation, regardless of authority, that gave rise to the criticism by the Court in *Indooroopilly*. Whilst a quicker test of the issue should probably have occurred, even if that involved an appeal in a case that was not otherwise an ideal test case, it is unclear precisely what course should have been taken. In particular, we do not express any concluded view about whether *Essenbourne* or *Spotlight Stores* was necessarily the appropriate case for that purpose, or whether the observations of *Edmonds J* in relation to the appeal in *Essenbourne* at paragraph [47] of *Indooroopilly* are correct. Nevertheless, once there is a series of decisions expressing the same view it will always be more difficult to justify a private ruling that ignores those decisions even for the purpose of a test case, and legislative change may be necessary.
70. As indicated in the earlier advice, if the ATO considers that the interpretation of the tax laws in a given case is wrong, it is important that prompt action be taken to test the issue, that there be legal advice that supports the view that the decision is legally wrong and that the Commissioner publicly indicate the reason for his actions and his proposed course.
71. He should until the issue is resolved, so far as possible, avoid acting in a way affecting the affairs of similarly affected taxpayers that could give rise to accusations of inconsistency. This may involve putting assessments, rulings, objections or appeals on hold so far as possible pending resolution of the test case, advising affected taxpayers of the reasons for the apparent delay and explaining the steps being taken to resolve the legal issue in question. This course will not, however, be convenient to every taxpayer and it is possible that the Commissioner will have no choice but to continue with the objection and appeals process in relation to other taxpayers in any event: section 14ZYA of the Administration

Act. Time limits applicable to the Commissioner may also require assessments to be issued notwithstanding the fact that the issue remains unresolved. These are practical considerations that can only be addressed case by case.

- (c) Should the Commissioner use declaratory proceedings, as suggested by Edmonds J, or other types of proceedings to obtain a prompt determination by the courts of questions that the ATO thinks have been wrongly decided but for one reason or another the Commissioner has been precluded from appealing or decided not to appeal?

72. For the reasons already given, we consider that in most situations it will be inappropriate for the Commissioner to seek to use declarations as a way to test interpretations of the tax law he considers incorrect. In many cases, a declaration will not be available at all because the question will be hypothetical or advisory. There may conceivably be situations where a declaration will be appropriate but generally we consider that the use of private rulings or assessments will continue to provide the best way to test an issue.

73. The best way to test issues is to identify test cases quickly and use references to Full Courts or other case management procedures to enable an early hearing. It is important from a public perception point of view that test cases be brought not merely because the Commissioner considers a previous case to be wrong but only where he also has legal advice that suggests the decision is wrong as a matter of law. As earlier advice indicated, the legal advice can include advice from within the ATO. What is important, however, is that the legal advice look objectively at the issue in terms of available legal argument. It is not sufficient to conclude that the interpretation given by the courts does not accord with the original intent.

- (d) Should the Commissioner use declaratory proceedings to determine whether his proposed change of position in relation to certain managed investment schemes in the agribusiness sector is correct?

74. Whatever course of action might be open to a taxpayer (as to which see paragraph 51 above), the Commissioner should not attempt to have this issue resolved in proceedings for declarations. The Commissioner should instead adopt the course suggested in the earlier opinions, namely to identify a matter in which a ruling on the issue has been sought, issue a ruling on the basis of the Commissioner's view and, in the event that the taxpayer objects against the ruling, conduct the resulting appeal under Part IVC of the Administration Act as part of the test case programme. The Commissioner should then use appropriate case management procedures, including an application to have the matter determined by a Full Court if otherwise appropriate, in order to obtain an early resolution of the issue.

Subsequently, on 22 November last, Mr Bruce Quigley, Second Commissioner of Taxation, Law, gave a speech to the Australian Petroleum Production & Exploration Association's annual conference in Hobart. Under the heading 'Declaratory Orders' Mr Quigley refers to both the paper published by the Honourable Daryl Davies QC referred to above and the opinion of Messrs Bennett, Burmester and Hmelnitsky. He writes:

Declaratory Orders

The Commissioner recently sought legal advice regarding the appropriateness of seeking declaratory orders from the Federal Court to clarify contentious points of law. The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to take this course of action.

The advice indicates that the Commissioner should follow the process set down in Part IVC of the *Taxation Administration Act* 1953. This enables a matter to be referred to the Court where a taxpayer objects to an assessment or private ruling made by the Commissioner.

This advice has been endorsed by the Honourable Daryl Davies QC who has publicly expressed the view that justice and certainty are more appropriately served by the existing processes provided for under legislation. [*Daryl Davies QC, 'The relationship between the Commissioner of Taxation and the Judiciary,' Taxation in Australia, Volume 41, No. 10 May 2007, pp 630 – 633*]. Mr Davies QC points to the responsibility of the Commissioner to bring questions of legal interpretation to the courts for determination. [*Ibid.*]. He also refers to the availability of funding to taxpayers under the Tax Office's Test Case Litigation Program where it is in the public interest to have the matter litigated and the law clarified.

The Solicitor-General and counsel also confirmed advice that the ATO is not required to follow a single judge decision if, on the basis of robust legal advice, there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position and communicate the ATO's intention to taxpayers. [*M D'Ascenzo 2007, op cit*].

My responses to these comments and observations are set out below. I hasten to add that they are my responses and I do not speak for either Stone J or Allsop J.

Contrary to the inference in the title to Mr Davies' article, the Court does not have any relationship with the Commissioner – good or bad. While he is, of necessity, a regular and frequent litigant in the Court, there is no relationship between the Commissioner and the Court which places the Commissioner's status as a litigant on a different level from that of any taxpayer litigant. When Mr Davies writes, as he does in the last paragraph –

Hopefully, these events will amount to little more than a hiccup in the longstanding cordial relation between the Commissioner and the Court

I want to assure taxpayer litigants that the Commissioner's relationship with the Court is no different from their relationship with the Court – as a litigant using the Court's services.

I have to say that I was somewhat surprised at the fervour with which Mr Davies put his criticism of the views of Allsop J and myself. With respect, a reader might have better understood that fervour in his defence of the Commissioner's administration and his counsels' submissions had Mr Davies, as a note to the article, disclosed his working relationship with the Commissioner and the identity of his counsel.

With the benefit of hindsight, I would accept that it would not usually be appropriate, nor utile, for the Commissioner to seek to use declaratory proceedings to resolve disputes for the reasons advanced in the joint opinion. On the other hand, I do not regard the background circumstances to the *Indooroopilly* ruling – by that stage the multiple anterior single judge decisions – and the circumstances occurring between the time of the ruling and the hearing before the primary judge (Collier J) – the further single judge decisions – as providing a 'usual' context or environment. So much is recognised at [69] of the joint opinion. With the benefit of hindsight my suggestion of a 'stark alternative' (as it is called at [11] of the joint opinion) may be viewed not as a true alternative, but as an exclamation of exasperation in the face of the Commissioner's refusal to follow the single judge decisions.

Which brings me to the nub of the issue concerning the observations of Allsop J and myself in *Indooroopilly*. In his 1 September speech referred to above, the Commissioner says:

The Solicitor-General and counsel have confirmed their earlier advice that the ATO is not required to follow a single judge decision if, on the basis of legal advice, there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position.

This was repeated in the Second Commissioner's speech on 22 November referred to above:

The Solicitor-General and counsel also confirmed advice that the ATO is not required to follow a single judge decision if, on the basis of robust legal advice, there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position and communicate the ATO's intention to taxpayers.

In my considered view, neither of these statements fully reflects the tenor of the views expressed at [68] – [71] of the joint opinion. Certainly nothing that was expressed in [69] of the joint opinion finds its way into these passages extracted from the speeches of the Commissioner and the Second Commissioner.

That aside, the views expressed in the joint opinion do not meet with universal acceptance. In a paper presented to the Australian Bar Association conference in Paris on 10 July 2002 in a paper entitled '*Tensions between the Executive and the Judiciary*', the Honourable Justice McHugh AC (as he then was) wrote:

Professor Pearce said [*Pearce, 'Executive Versus Judiciary', (1991) 2 Public Law Review 179*] that he had encountered circumstances where Federal agencies were not prepared to follow judicial or quasi-judicial rulings and were prepared to ignore them when they were inconvenient to them. Taxation Ruling IT2612 provided a clear example. There, the Commissioner of Taxation said that he did not accept the decision in Administrative Appeals Tribunal case V135 and ruled "that where similar facts exist that decision is not to be followed". [*Ibid, at 190.*] No doubt an Executive agency is entitled to disregard a decision where it is truly in conflict with another decision that it thinks is correct. It may sometimes also be justifiable to refuse to follow a decision that is the subject of appeal. But that has problems. Judicial decisions are not provisional rulings until confirmed by the ultimate appellate court in the system. Until set aside, they represent the law and should be followed. Moreover, the Executive can run into serious legal problems where it continues to enforce legislation that a court has ruled invalid. [*See Owen v Turner (1989) 19 ALD 550*] Even more difficult to justify is the refusal to follow a ruling that is not the subject of appeal merely because the agency regards it as wrong and will test it at the next opportunity. The Attorney-General's Department has said that an agency should act inconsistently with a court ruling only on the advice of the Attorney-General's Department. One hopes that this advice is followed meticulously.

Even if one does not accept the view of McHugh J (as he then was) and instead embraces the position as articulated in the extract from the speeches of the Commissioner and the Second Commissioner, nevertheless, by reference to its own criteria, the ATO in the *Indooroopilly* ruling was not entitled to refuse to follow the single judge decisions because prompt action was not taken to clarify the position following *Essenbourne*. The Commissioner might well say that he could not take prompt action to clarify the position; for the reasons I gave at [46] and [47] of *Indooroopilly*, I do not agree. Contrary to what Mr Davies wrote in his article, this particular issue may not be such 'a very small point'. But even if the delay was not within the control of the Commissioner, the inability to take prompt action to clarify the position made it, as I said in *Indooroopilly* at [47], incumbent on the Commissioner to follow the many single judge decisions which were then on foot.

B Slade Bloodstock

The last Full Court case I want to say something about is *Slade Bloodstock*, a case decided towards the end of last year, concerning the application of the FBTA Act to repayments made by an employer to employees of loans previously made by the employees to the employer. It came up to a Full Court via an appeal by the Commissioner from a decision of the Administrative Appeals Tribunal setting aside the Commissioner's objection decision. The primary judge upheld the Commissioner's appeal and the taxpayer appealed to a Full Court.

Prior to the hearing of the Full Court appeal, the Commissioner indicated that he consented to the appeal being allowed, notwithstanding his success before the primary judge. The Court was concerned that if it merely made consent orders upholding the appeal no-one, other than the parties, would understand the basis upon which the Commissioner consented to the allowance of the appeal. It therefore asked both parties to prepare a joint statement detailing an explanation of the circumstances – a summary of the background facts leading to the Commissioner issuing to the applicant the fringe benefit tax assessments, a summary of the proceedings in the Tribunal and before the primary judge and a summary of the reasons why the parties agreed that the appeal should be allowed. A copy of the joint statement was reproduced in the Court's reasons.

On the material before the Court, the Court was of the view that it deserved to be provided with a more detailed explanation of why the Commissioner, having successfully appealed the decision of the Tribunal, was now conceding that the appellant's appeal to this Court should be allowed and submitting that other orders in terms of an agreed short minute of proposed orders should be made. To this end, on the date fixed for the hearing of the appeal, the Court heard from both parties.

As I indicated in [45] above, the Court was concerned that everyone, not just the taxpayer, should be aware of the reasons which underlay the Commissioner consenting to the allowance of an appeal against him, in the face of his success below. This also enabled the Court to properly recognise and endorse the conduct and position of the Commissioner on the appeal. I would hope that when similar situations arise in the future they would be dealt with on a similar basis.

V COURT REFORMS

Over the last six months, the Court has been undertaking a review of the processes and procedures that are in place for the management of tax cases that come into the Court, from the time that an application is first filed until it is finally disposed of. The objectives by reference to which this review is being undertaken are not new; they are:

- (1) To minimise delays in getting a case ready for hearing.
- (2) To minimise the costs that attend any litigation, not only tax litigation, to the extent that this is within the control of the Court.
- (3) To maintain procedural fairness in a context where the taxpayer bears the onus to prove the assessment is excessive.

What is new is the approach to achieving these objectives – the means to the end.

Before detailing the means under consideration, there may be utility if I identify, from my experience, some matters which seem to me to unnecessarily delay the interlocutory process:

- (1) The failure of the parties to identify the real issues in dispute (both factual and legal), at the earliest possible time and to hold the parties to those issues. Of course, there will be cases where the evidence will raise a new factual issue and that may need to be addressed by further evidence. But if all the known issues are identified at an early date, it should be possible, in the vast majority of cases, to make, at the outset, an informed and definitive assessment of the evidence that will be required to address those issues, I don't find it at all helpful for the Commissioner's appeal statement to say, as it often does:

The respondent relies on section 14ZZO of the *Taxation Administration Act 1953*, and except for any facts expressly agreed or admitted in writing, puts the applicant to proof of all facts on which the applicant seeks to rely to establish that the assessment the subject of this application is excessive. None of the facts contained in this statement constitute an admission of proof by the respondent.

- (2) Far too often the parties, but in particular the taxpayer, seek particulars of matters which are not the subject of a proper request; particulars of fact are one thing, particulars of argument are another.
- (3) A failure to properly rely on the curial processes of the Court whether it amounts to a failure to utilise them or unnecessary recourse to them. Notices to admit facts fall into the first category; discovery into the second.

Following a discussion paper presented by Gordon J at a Taxation Workshop conducted under the auspices of the Taxation Committee of the Business Law Section of the Law Council of Australia, that Committee wrote to the Chief Justice supporting the proposals outlined below. Subject to one or two minor variations, those proposals have received the support of the Australian Taxation Office via a letter from Mr Kevin Fitzpatrick, Chief Tax Counsel, to the Chair of that Committee. The proposals are now before the Practice Committee of the Court.

The proposals are encapsulated in the paragraphs below:

- (1) There is no suggestion that the docket system should be abandoned. On the contrary, abandoning the docket system was seen as antithetical to seeking to address the symptoms that attach to all litigation including tax litigation. However, the participants acknowledge that measures need to be adopted to improve the efficiency (in terms of time and cost) in the management of tax cases and to coordinate the management of the work, on a national basis.
- (2) First, a refinement of the panel system so that the judges on each panel (including the tax panel) are judges committed to the subject matter of the panel. The refinement is designed to take advantage of specialist panels while at the same time maintaining the important advantages at trial and on appeal of a court of broad jurisdiction.

- (3) Secondly, the appointment of a 'Tax List/Coordinating Judge' in each Registry to examine all tax cases before that registry, both existing and future, to ensure that:
- (i) like cases are heard together;
 - (ii) common issues wherever they arise are heard together or sequentially but consistently;
 - (iii) information is disseminated appropriately to the judges on the tax panel universally and uniformly;
 - (iv) there is adjustment to allocations of cases, urgent cases, assistance with workload etc.
- (4) In relation to cases (both existing and future), information should be ascertained to enable the tax list judge to know, for example:
- (i) the history of the matter up to the application to the Court;
 - (ii) the legal issues involved;
 - (iii) the amount of tax and penalty in dispute and the extent to which it is outstanding;
 - (iv) the prospects of other matters coming into the Court involving the same taxpayer and the same issues or a different taxpayer and the same issues;
 - (v) whether there are other matters already in the Court involving the same taxpayer and the same issues or a different taxpayer and the same issues and if so, the stage that these matters have reached;
 - (vi) whether the Commissioner and/or the taxpayer regards it is a matter to be 'fast tracked' and why.

The profession would like to be consulted about the form in which information of this kind would be provided. There was concern that there should be a balance between the level and type of information provided and the cost in providing it.

- (5) Procedurally, two significant changes are proposed. First, that if a particular case or issue in a case is considered by one or both parties to need to be fast tracked, that fact and the reasons why the case needs to be fast tracked should be included in the material provided upon filing. By adopting that relatively simple change, that issue will be identified at the outset and will enable the docket judge (prior to the first directions hearing) to consider whether it should be fast tracked and if so, the most efficient means for doing so. To the extent necessary, the Tax List/Coordinating Judge should assist in that process to assist with national management of tax litigation.
- (6) Secondly, having the Court in tax cases adopt in whole or in part the Fast Track protocols. Set out below are some aspects of the Fast Track protocols that the workshop consider essential to addressing the symptoms and causes earlier identified.

First Directions Hearing

- (7) The First Directions hearing is seen as critical. It may be better to rename it as, for example, a scheduling conference. At this hearing, the factual and legal issues should be discussed in detail identifying:
- (i) the facts in agreement;

- (ii) the facts in dispute;
 - (iii) that fact or those facts which one of the parties needs to prove and disprove and why and the most efficient means of undertaking that task. (Having crystallised the factual and legal issues in dispute, general discovery and categories of discovery may be inappropriate and unnecessary.);
 - (iv) the witnesses (including experts) likely to be called with an identification of what issue their evidence is to address;
 - (v) the legal issues in dispute and whether there is a dispute about the applicable principles. If not, what are they?
- (8) In seeking to identify and narrow the factual and legal issues from the outset, it was accepted that (i) key or core documents could be provided to the judge prior to or at the first directions hearing to assist with the process outlined in [7] above and (ii) the parties' lawyers attending the scheduling conference had to have the knowledge and the ability to undertake the tasks just described.
- (9) Two other important steps should be taken at the scheduling conference:
- (i) a trial date or a period within which the trial will be heard should be stated;
 - (ii) the parties should inform the Court not only whether the case is a 'test case' but whether the parties (or one of them) considers it strategic and if so, why.

Ongoing case management

- (10) Ongoing case management by the Court is essential including the monitoring of compliance with directions. The present practice in some cases of the Court (and parties) not looking at a matter between directions hearings has to be eradicated.

Pre-trial conference

- (11) A pre-trial conference should be held a short period before the trial attended by the parties and their lawyers for the purpose of resolving all outstanding issues including, for example, objections to evidence.

25 January 2008