IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TAXATION LIST

Not Restricted

S CI 2017 02964
S CI 2017 02965
S CI 2017 02966
S CI 2017 02967
S CI 2017 02968

NATIONWIDE TOWING & TRANSPORT PTY LTD (ACN 088 026 706) — First Appellant

EASTERN VAN SERVICES PTY LTD (ACN 090 167 552) — Second Appellant

RE'S ROADSIDE RECOVERY PTY LTD (ACN 006 627 710) — Third Appellant

v

COMMISSIONER OF STATE REVENUE — Respondent

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATE OF HEARING:	9 October 2018
DATE OF JUDGMENT:	26 October 2018
CASE MAY BE CITED AS:	Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)
MEDIUM NEUTRAL CITATION:	[2018] VSC 609

TAXATION AND REVENUE – Exceptions to deemed employment relationship for payroll tax purposes – Whether services are performed by a person who ordinarily performs services of that kind to the public generally – Relevance of whether the putative deemed employee conducts a "genuine independent business" – *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606 – *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 – *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 – *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215 – *Payroll Tax Act* 2007 s 32(2)(b)(iv) – *Revenue Ruling PTA021* (1 July 2007).

APPEARANCES:	Counsel	Solicitors
For the Appellants	Mr R Merkel QC Mr E M Nekvapil	JRT Partnership Pty Ltd
For the Respondents	Mr C J Horan QC Ms C M Pierce	Solicitor for the Commissioner of State Revenue

HIS HONOUR:

Introduction

1 These proceedings are a series of appeals under s 106 of the *Taxation Administration Act* 1997 ("the TAA") which arise from the Appellants' objections to assessments under the *Payroll Tax Act* 2007 ("the Payroll Tax Act").[1]

2 On 8 December 2017, this Court ordered a question to be tried as a separate and preliminary question in relation to the nature of an appeal under s 106 of the TAA against a determination of the Commissioner of the kind the subject of the present proceedings. The Court, in a judgment delivered 23 May 2018 ("the previous judgment"),[2] determined the question in favour of the Appellants in answering the question as follows:[3]

> The nature of an appeal of that kind is such that, to succeed, the Appellants must establish that the Respondent's failure to be satisfied of the matter in section 32(2)(b)(iv) of the *Payroll Tax Act 2007* was affected by a legal error of the kind identified by Dixon J in *Avon Downs Proprietary Ltd v FCT* (1949) 78 CLR 353 at 360.

3 The substantive matters the subject of this appeal were heard on 9 October 2018 and are now determined on the basis of the reasons set out in the previous judgment. Terminology, abbreviations and the like used in the previous judgment are also used in these reasons. For the convenience of the reader, there is some repetition of material which appears in the previous judgment, such as statutory material and some other matters, including some procedural history and factual matters.

Factual and procedural background

4 On 24 March 2015, the Commissioner of State Revenue ("the Commissioner") notified the Appellants of assessments under the Payroll Tax Act of tax they were liable to pay for the financial years ending 2010, 2011, 2012, 2013 and 2014 ("the Assessments").[4]

---

1 Notice of Objection (19 May 2015).
2 *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue* [2018] VSC 262.
3 Order of Croft J (23 May 2018), [2].
4 Result of Tax Investigation of Nationwide Towing & Transport Pty Ltd, Eastern Van Services Pty Ltd

5 The Appellants were dissatisfied with the Assessments and, on 19 May 2015, lodged a written objection with the Commissioner ("the Objection"),[5] as they were entitled to do under the provisions of Division 1 of Part 10 of the TAA.

6 The primary substantive ground of objection is set out in paragraphs 14(a) and (b)(ii) of the Objection ("the Primary Ground").[6] The Primary Ground related to payments by the Second Appellant ("EVS") to its contractors, and impugned a significant portion of the total amount of the Assessments.

7 In essence, the Primary Ground asserted was that the Assessments should not have included payments by EVS to its contractors, because:[7]

> (1) the Commissioner should have been satisfied that the services performed by the contractors were services performed by persons who ordinarily performed services of that kind to the public generally in that financial year, within the meaning of s 32(2)(b)(iv) of the [Payroll Tax Act]; and therefore
>
> (2) the payments to the contractors were not made for or in relation to the performance of work relating to a "relevant contract" as defined in ss 31 and 32 of the Payroll Tax Act; and therefore
>
> (3) those payments could not be taken to be "wages" by operation of s 35(1) of the Payroll Tax Act.

8 On 12 November 2015, a delegate of the Commissioner gave notice of the determination of the Objection, in accordance with s 103(1) of the TAA, having considered the Objection and, among other things, disallowed the Primary Ground under s 101(1) of the TAA.[8]

9 The Commissioner, in the notice of determination of the Objection, gave reasons for disallowing the Primary Ground, which, among other things, included that the Commissioner was not satisfied that the services performed by the contractors were services performed by persons who ordinarily performed services of that kind to the

---

and Re's Roadside Recovery Pty Ltd (24 March 2015).

5 Notice of Objection (19 May 2015).

6 *Appellants' Submissions* (17 August 2018), [18].

7 *Appellants' Submissions on Separate Question* (9 February 2018), [4].

8 Notice of Determination on Objection to Payroll Tax Assessments 91598826, 91598834, 91598842, 91598850 and 91598868 (Assessments 1 to 5) (12 November 2015) ("Notice of Determination").

public generally in the relevant financial year, within the meaning of s 32(2)(b)(iv) of the Payroll Tax Act.[9] More particularly, the grounds upon which the Objection was disallowed were summarised by the Commissioner in earlier submissions, as set out in the previous judgment.[10]

10 Between 2009 and 2014, EVS was contracted by RACV Road Services Pty Ltd ("RACV") to provide emergency roadside assistance services to eligible RACV members. EVS contracted with and paid contractors ("the Contractors") to provide the emergency roadside assistance services, which EVS had contracted to provide to eligible RACV members. In oral submissions, the Appellants pointed to four contractual relationships flowing from those arrangements.[11] For the reasons which follow, it is not, however, necessary to examine these relationships in particular detail.

11 The question for the delegate of the Commissioner ("the Delegate") under s 32(2)(b)(iv) of the Payroll Tax Act was whether the Delegate was satisfied that the services supplied by the Contractors to EVS during each financial year were performed by persons "who ordinarily perform[ed] services of that kind to the public generally" in the relevant financial year. As indicated in the previous judgment, the Delegate was not satisfied of that matter, for reasons given in writing in accordance with her obligation under s 103(2) of the TAA on 12 November 2015 ("the Reasons").

12 It follows, on the basis of the previous judgment and the matters to which reference has been made, that the issue on this appeal is whether that failure of the Delegate to be satisfied was affected by a legal error of the kind identified by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* ("*Avon Downs*").[12]

---

9 Notice of Determination (12 November 2015), 15–16.

10 *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue* [2018] VSC 262, [9].

11 Transcript, 1–3.

12 (1949) 78 CLR 353 at 360; and see Order of Croft J (23 May 2018), [2] and *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue* [2018] VSC 262.

13 On this basis, it is necessary to consider the reasons given by the Delegate for disallowing the Objection in order to determine whether there has been legal error of the *Avon Downs* kind. EVS contends that the Reasons disclose that the Delegate misdirected herself as to the relevant question in applying s 32(2)(b)(iv) of the Payroll Tax Act and that her conclusion was affected by a mistake of law as to the proper construction of the sub-section, which constitutes legal error of the kind identified in *Avon Downs*.

Delegate's reasoning

14 The Delegate's reasoning for not being satisfied that the services supplied by the Contractors to EVS during each financial year were performed by persons "who ordinarily perform[ed] services of that kind to the public generally" in that financial year is set out in the following passages in the Reasons:

> [Section 32(2)(b)(iv)], according to *Revenue Ruling PTA021*, requires the Commissioner to be satisfied that the contractor *provides the services in the course of conducting a genuinely independent business*, which stands in the market place and ordinarily renders like services to the public generally. … The Commissioner, in making his determination, will conduct a broad review of the contractor's business and, in so doing, will consider many issues.
>
> …
>
> It is commonplace for a worker to provide services to a third party as part of their role with their principal/employer. In *Accident Compensation Commission v Odco* (1990) 95 ALR 641, the High Court held that by the tradesmen attending and doing work for the builder, the tradesmen supplied services to Odco (a temp agency) for the purposes of its business, notwithstanding at the same time they supplied services to the builder for the purposes of its business…
>
> …
>
> Relevant law relating to [s 32(2)(b)(iv)] is set out above.
>
> …
>
> As set out above, it is commonplace for a worker to provide services to a third party as part of their role with their principal/employer.
>
> The available information indicates that any services provided to the 'public' (i.e. RACV Members) by the [Contractors] *were not provided in the course of conducting a genuinely independent business. Rather, the services were provided to RACV Members in the course of providing services to EVS.* Further, *there is no evidence that the [Contractors] ordinarily render services of the same type rendered to*

> *EVS to the public outside of their agreements with EVS*. In particular, the available information indicates that (whatever the position in prior years) for the 2009-2010 to 2013-2014 financial years, the [Contractors] *did not operate their own garages and/or mobile automotive repair businesses in addition to providing services to RACV Members under their agreements with EVS*."
>
> [Appellants' emphasis]

15 As the Delegate observed in the Reasons, EVS contended, in its written objection, that the Contractors "provide[d] their services to the public generally ('albeit, in part through referrals by EVS and in part directly to the public')".[13]

16 In relation to the services provided by Contractors "directly to the public", the Appellants noted the acknowledgement in the Reasons that:[14]

> 8.1 the Appellants had provided statements by Contractors, which showed that:[15]
>
> (a) while attending RACV members, those Contractors regularly provided to the members "additional services … such as additional automotive repair or the sale of parts/consumables (such as fuel, headlight globes and battery terminals), which [were] outside the scope of their agreement with EVS";
>
> (b) in such cases, the RACV members paid the Contractor directly for these additional services; and
>
> (c) to enable those additional services to be provided the Contractors purchased and stocked the spare parts and consumables at their own cost.
>
> 8.2 the Appellants submitted (by their notice of objection) that the Contractors sold "spare parts to the public and install[ed] them, 'which services were of the same kind to those provided by the [Contractors] to EVS under their respective contractual arrangement".[16]

17 The Appellants also claimed that the services provided to RACV members (including those signing up at the roadside) were services of the relevant kind because those services were available to the public generally, within the meaning of s 32(2)(b)(iv) of the Payroll Tax Act.

---

13 Reasons, 4, 20.
14 Appellants' Submissions (17 August 2018), [8].
15 Reasons, 6.
16 Reasons, 4, 20.

18 The grounds relied upon by the Appellants in this appeal are those contained in paragraphs 14 and 17 of the Objection. The primary substantive ground was set out in paragraphs 14(a) and (b)(ii) of the Objection. Paragraph 14 of the Objection stated:

> 14. The Assessments should not have included payments made by EVS to the Contractors because:
>
> (a) The payments (purported taxable wages) made by EVS to each of the Contractors in the years of assessment were not made for or in relation to the performance of work relating to a "relevant contract" within Division 7 of the *Payroll Tax Act 2007*. It follows that (i) EVS could not be taken to be an "employer" within section 33, (ii) the Contractors could not be taken to be "employees" within section 34, and (iii) the amounts paid by EVS to the Contractors in the years of assessment could not be taken to be "wages" within section 35.
>
> (b) Without limiting the generality of ground (a), the payments (purported taxable wages) are excluded from the scope of Division 7 because they were made by EVS in the course of its business to each of the Contractors who supplied EVS with services for or in relation to the performance of work where the Commissioner was satisfied or should now be satisfied that those services were performed by the Contractors who ordinarily perform services of that kind to the public generally in each of the years of assessment within section 32(2)(b)(iv) of the *Payroll Tax Act 2007*.
>
> Particulars
>
> (i) To the extent that this ground asserts that the Commissioner was relevantly satisfied, it relies upon the earlier determinations.
>
> (ii) If and to the extent that the earlier determinations are not sufficient to sustain the present claim for exemption under section 32(2)(b)(iv), the Taxpayer relies on the facts in attachment B to sustain its contention that the Commissioner should now be relevantly satisfied. To that end, the contractual arrangement between EVS and the Contractor is an arrangement where the Contractors provided services to the public generally, albeit, in part through referrals by EVS and in part directly to the public. To that end, the Contractors provided services to the public generally by way of sale and installation of spare parts, which services were of the same kind to those provided by the Contractors to EVS under their respective contractual arrangement.
>
> …

19 The Delegate summarised the contention, in particular that in (ii), both in the introductory part of the Reasons[17] and again in the part explaining why that contention was rejected.[18] However, the Reasons do not refer to Attachment B, which stated the facts on which EVS relied. Attachment B stated:

> ATTACHMENT B
>
> 1. At all relevant times EVS carried on the business of providing emergency roadside assistance services to members, clients and customers ("Members") of the RACV Road Service Pty Ltd ("RACV").
>
> 2. In the years of assessment, EVS provided the emergency roadside assistance services pursuant to two consecutive agreements entered into on 1 September 2008 covering the period 1 September 2008 to 31 August 2011 ("earlier agreement") and on 1 October 2011 covering the period 1 October 2011 to 30 September 2016 ("later agreement").
>
> 3. It was a term of each of these agreements that EVS can invoice the RACV for any parts or petrol supplied to Members (being the persons eligible to receive the emergency roadside assistance service) where the Members are entitled to receive them free of charge or is unable to pay for them at the time the service is provided up to $33. Where the Member is not entitled to receive the parts supplied free of charge EVS must seek payment directly from the Member in the first instance: Clause 8 schedule B to the earlier agreement and Clause 10 schedule B to the later agreement.
>
> 4. The entitlement of a Member to the spare part allowance of $33 is governed by the RACV "Emergency Roadside Assistance Terms & Conditions" and is made to depend on the kind of package taken. Only members that take the total care and extra care packages are entitled to the spare parts allowance. Members that take the roadside care package are not entitled to the spare part allowance (pages 6 and 9). All Members are entitled to a fuel allowance of up to five litres.
>
> 5. Those terms & conditions also provided that:
>
> (a) Members must pay for all spare parts unless they are provided as part of the emergency roadside assistance package (page 22); and
>
> (b) spare parts do not include consumables such as oil, fluids, coolant and batteries, which the Members must pay for themselves.
>
> 6. In the years of assessment, EVS entered into service van contractor agreements with various entities and made payments pursuant to those agreements. The payments that formed the subject of investigation by the Commissioner and were taken to be "wages" for

[17] Reasons, 4.
[18] Reasons, 20.

the purposes of the *Payroll Tax Act 2007* were made to 82 entities and are listed in attachment A.

7. The Contractors were individuals (operating as sole traders), corporate entities, trustees of trusts, and partnerships. Some of the Contractors owned their own vehicles and others were provided with vehicles by EVS for the purposes of their respective contracts.

8. The arrangements between EVS and the Contractors were governed in part by a written agreement and in part by course of dealing. The terms of the arrangements typically were these:

…

(e) The Contractors were not required to provide services exclusively to EVS and nothing in the arrangements prevented the Contractors from engaging or being concerned in any other business or provide services to the public. However, EVS vehicles could not be used to provide services to any other business unless authorised by EVS.

(f) In consideration of the provision of services, EVS agreed to pay to the Contractor an agreed job rate for each completed job. Payment was made to depend on the Contractors providing to EVS a properly completed invoice that specified the services provided during the invoicing period. … At all times in the years of assessment, EVS paid a per-job rate and not an hourly rate.

…

(h) The Contractors were required, at their own cost, to provide and maintain the necessary equipment, spare parts and consumables to mobilise the Members/public.

(i) The tools that the Contractors were required to hold in their vehicles included:

- testing tools, including multimeter, pressure testers, electrical testers, compression testers;
- drill, rattle gun, impact wrench, soldering iron;
- screw drivers, spanners, socket sets, hammers, pliers, cutters; and
- battery booster pack, trolley jack, jack stands.

(ii) The spare parts that the Contractors were required to hold in their vehicles included:

- fan belts;
- hoses and hose clamps, including fuel hoses and radiator hoses;

- globes;
- battery terminals; and
- fusible links.

(iii) The consumables that the Contractors were required to hold in their vehicles included:

- fuel;
- brake fluid;
- engine oil; and
- tyre puncture sealant

(i) The Contractors provided services/goods and received payments from the Members/public in four situations:

(i) For the sale and installation of spare parts to Members that were not entitled to the spare part allowance. The Contractor charged the Members for the supply and installation of the spare parts, fuel or other consumables and kept the monies received. That is *such monies were not passed on to EVS* or deducted from the Contractor's invoiced fees *because they were sales made by the Contractor directly to Members/public*.

(ii) For the sale and installation of spare parts or fuel in excess of the spare part or fuel allowance. The Contractor charged the Members for the supply and installation of the spare parts or for additional fuel in excess of the allowance and kept the monies received. That is such monies were not passed on to EVS or deducted from the Contractor's invoiced fees *because they were sales made by the Contractor directly to Members*.

(iii) For the sale and supply of consumables. The Contractor charged the Members for the supply of the consumables and kept all the monies received. That is such monies were not passed on to EVS or deducted from the Contractor's invoiced fees *because they were sales made by the Contractor directly to Members*.

(iv) For new RACV membership fees. Money received by Contractors for new RACV membership fees were previously deducted from the Contractor's remuneration, but since mid-2014 were sent directly to the RACV by the Contractor.

(j) The Contractors were entitled to be reimbursed by EVS for any spare parts or fuel sales which the Members received free of charge pursuant to the spare part or fuel allowance.

(k) Major mechanical repairs (repairs in excess of the allowance or that were not the subject of an allowance) were carried out by direct arrangement between the Contractor and the Members.

(l) Member complaints referable to services (including spare parts) provided by the Contractor were referred to the Contractor who bore the cost of any further services and parts necessary to resolve the complaint.

[Appellants' emphasis]

20 The Reasons referred to a previous determination in favour of EVS on the equivalent question, on 21 September 2006.[19] During that process the Commissioner:

(1) initially considered that "the evidence provided does not support the claim that the Contractors are exempt under [the provision antecedent to s 32(2)(b)(iv)] because the information does not show that each of the Contractors ordinarily renders services of *that kind*, being 'emergency roadside services under contract to RACV' to the public generally in each of the relevant financial years";[20] but

(2) later, following receipt of legal advice, wrote: "[b]ased on the legal opinion, I advise that the sale of spare parts and the services provided by some of the contractors via their own automotive repair shop or mobile repair services are considered to be the services of the same kind to that provided by the contractors to EVS under the Service Van Contractor Agreement".[21]

21 During the process of the consideration of the Objection in 2015, EVS provided four statements from Contractors, in response to the Commissioner's invitation. It is the position, as the Delegate observed, that the statements were "largely identical", although they did have some differences. As contended by the Appellants, it is, consequently, sufficient to set out one by way of example:

I, Marek Lamaskewski, make the following statement:

1. I operate my own automotive mechanic repair business.

---

19 Reasons, 5, referring to Letter from State Revenue Office to Hall & Wilcox Lawyers "Re: Eastern Van Services Pty Ltd ('EVS') and Payments to Contractors" (21 September 2006).

20 Letter from State Revenue Office to Hall & Wilcox (29 August 2005) (Appellants' emphasis).

21 Letter from State Revenue Office to Hall & Wilcox (9 December 2005).

…

3. In the course of carrying on my business, I provide motor vehicle repair services to [EVS] as a contractor by providing emergency roadside assistance to the public who are existing RACV members or who sign-on as an RACV member (***Customers***). I was first engaged by EVS in September 2007 as a contractor.

4. The emergency roadside assistance involves call-outs to a stopped or broken down vehicle, diagnosis and assistance to enable the vehicle to resume running, or arranging secondary services such as towing, battery or other repairs (***Emergency Roadside Assistance***). *My agreement with EVS is limited and restricted to providing Emergency Roadside Assistance and does not cover any other motor vehicle repair services that I may provide to the Customers or to any other person.*

5. In this regard, in the course of carrying on my business, *I also provide motor vehicle repair services to the Customers by delivering, supplying and/or installing spare parts and consumables (**Repairs**). These Repairs are separate and independent transactions between me and the Customer, and are in addition to the Emergency Roadside Assistance I provide to EVS.*

6. The spare parts and consumables that I regularly sell to Customers include the following:

   (a) Consumables: fuel, oil, coolant and power steering fluid;

   (b) Spare Parts: headlight globes, fan belts, fuses and hoses.

7. If a Customer requires any spare parts and consumables, then I will tell the Customer the price for that spare part or consumable and the Customer pays me directly for that Repair.

8. The Repairs I perform for Customers involve small sums of money but happen regularly. I would say that:

   (a) approximately half of my call-outs would involve the sale and supply of spare parts by me to the Customer, commonly headlight globes which I may buy from an automotive supplier for say $10 and sell to Customer for say $15;

   (b) approximately half of my call-outs would involve the sale and supply of fuel and/or oil by me to the Customer;

   (c) if the spare part is minor such as fuses, then I do not usually charge the Customer for these parts because individually they are of little value (e.g. $0.50 to $1.00). I bear this cost.

9. In limited cases, the RACV covers the cost of the Repairs (or a portion of it) on behalf of the Customer depending upon their membership entitlement. All RACV members are entitled to up to 5 litres of fuel ($6.25) and Total Care members are entitled to up to $33 for spare parts. For these Repairs, I am entitled to receive payment from the RACV, but I collect those amounts from EVS. I claim the money from EVS who I understand has received that money from RACV. This

payment is not part of the fees that EVS pays me for the provision of Emergency Roadside Assistance.

10. For all other Repairs, I receive payment directly from the Customer, including for any fuel or spare parts I sell to the Customer of a value exceeding their entitlement.

11. Of the occasions on which I would sell a spare part to a Customer, less than one fifth of them would be to a Customer that is entitled to the $33 spare parts allowance.

12. Accordingly:

    (a) the majority of spare parts I sell and install to my Customers are paid for by the Customer to me at the time of installation; and

    (b) all oil and coolant that I sell and supply to my Customers are paid for by the Customer to me at the time of supply.

13. I keep a record of all Repairs in my Confirmation of Service Book, and would provide a copy of the confirmation to the Customer upon request. This is like a receipt. The RACV does not require me to keep these records beyond six months.[22]

[Appellants' emphasis]

22 On 12 November 2015, the Delegate:

(1) having considered the Objection, disallowed (among other things) the objection particularised in paragraph 14(b)(ii) under s 101(1) of the TAA;

(2) gave notice of the determination of the Objection, in accordance with s 103(1) of the TAA; and

(3) in that notice, provided the Reasons.

23 On 17 December 2015, the Appellants, being dissatisfied with the determination of the Objection, requested in writing, in accordance with s 106(1) of the TAA, that the Commissioner treat their objection as an appeal and cause it to be set down for hearing at the next sittings of this Court.

---

[22] Statement of Marek Lamaskewski, dated 28 October 2015.

24 The contention by EVS that the Contractors provided services of the relevant kind direct to the public relied on evidence of the Contractors providing additional services to drivers, outside of their contract with EVS; as set out above.

25 The Appellants contend that the Delegate rejected that contention by reference to an erroneous dichotomy—erected on the basis of *Revenue Ruling PTA021* and, perhaps, the decision of the High Court in *Accident Compensation Commission v Odco Pty Ltd* ("*Odco*")[23]—between services provided "in the course of conducting a genuinely independent business" and services provided "in the course of providing services to EVS". The dichotomy was erroneous because the services of the same kind that are to be provided to the public for the exemption in sub-section (iv) to apply, might, but do not need to be, provided in the course of conducting a genuinely independent business of providing those services to the public.

26 It is also said by the Appellants that it is a mistake to construe the provisions of s 32(2)(b)(iv) as anti-avoidance provisions—first because there are specific anti-avoidance provisions in this legislation and, secondly, because there is no suggestion that the arrangements the subject of these proceedings are a sham of any kind.[24] In my view, the first proposition does follow from the provisions and structure of the Payroll Tax Act and the second is not suggested by the Commissioner. Consequently, in this context, I am of the view that these provisions do not call for or imply the import of the word "genuine" as though they were anti-avoidance provisions.

27 Thus the Appellants contend that the question arising is whether, in approaching the matter in that way, the Delegate misdirected herself as to the questions required to be addressed by s 32(2)(b)(iv) of the Payroll Tax Act or otherwise made a mistake of law. More particularly, the Appellants contend that the error of the Delegate was to impermissibly read into s 32(2)(b)(iv) additional words, as indicated below:[25]

---

23 (1990) 64 ALJR 606.

24 And as to a statement with respect to the general purpose of the Payroll Tax legislation in this respect, see below, [31].

25 Appellant's Submissions (17 August 2018), [14].

(iv) those services are supplied under a contract to which subparagraphs (i) to (iii) do not apply and the Commissioner is satisfied that those services are performed by a person who ordinarily performs services of that kind *in the course of conducting a genuinely independent business of providing those services* to the public generally in that financial year.[26]

Thus it is said that the Delegate's error is to employ an example of a kind of case that can fall within the exemption set out in s 32(2)(b)(iv) as a mandatory criterion for falling within those provisions.

Statutory provisions

28 As its name implies, the Payroll Tax Act makes "employers" liable to pay "payroll tax" on all "wages" paid by the employer.[27] "Wages" means "wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee" and includes "an amount that is included as or taken to be wages by any other provision of [the Payroll Tax Act]".[28] Section 35(1) of the Payroll Tax Act is one such provision, and a provision which is critical in the present context. It provides:

> For the purposes of [the Payroll Tax Act], amounts paid or payable by an *employer* during a financial year for or in relation to the performance of work relating to a *relevant contract* or the re-supply of goods by an *employee* under a *relevant contract* are taken to be wages paid or payable during that financial year.

The italicised terms are the subject of the provisions of ss 32, 33 and 34 of the Payroll Tax Act.

29 Other critical provisions of the Payroll Tax Act are those contained in s 32(2)(b)(iv) which, together with some legislative context, are as follows:

> **Division 7 — Contractor provisions**
>
> …
>
> **32. What is a relevant contract?**
>
> (1) In this Division, a ***relevant contract*** in relation to a financial year is a contract under which a person (the ***designated person***) during that financial year, in the course of a business carried on by the designated person—

---

26 Cf *HFM043 v The Republic of Nauru* [2018] HCA 37, [21]–[24].
27 See *Payroll Tax Act* 2007 Pt 2, Divs 1, 2.
28 *Payroll Tax Act* 2007 s 13(1)(e).

(a) supplies to another person services for or in relation to the performance of work; or

(b) has supplied to the designated person the services of persons for or in relation to the performance of work; or

(c) gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person or, where the designated person is a member of a group, to another member of that group.

(2) However, a ***relevant contract*** does not include a contract of service or a contract under which a person (the ***designated person***) during a financial year in the course of a business carried on by the designated person—

(a) is supplied with services for or in relation to the performance of work that are ancillary to the supply of goods under the contract by the person by whom the services are supplied or to the use of goods which are the property of that person; or

(b) is supplied with services for or in relation to the performance of work where—

(i) those services are of a kind not ordinarily required by the designated person and are performed by a person who ordinarily performs services of that kind to the public generally; or

(ii) those services are of a kind ordinarily required by the designated person for less than 180 days in a financial year; or

(iii) those services are provided for a period that does not exceed 90 days or for periods that, in the aggregate, do not exceed 90 days in that financial year and are not services—

(A) provided by a person by whom similar services are provided to the designated person; or

(B) for or in relation to the performance of work where any of the persons who perform the work also perform similar work for the designated person—

for periods that, in the aggregate, exceed 90 days in that financial year; or

(iv) those services are supplied under a contract to which subparagraphs (i) to (iii) do not apply and the Commissioner is satisfied that those services are performed by a person who ordinarily performs

services of that kind to the public generally in that financial year; or

…

…

30 Also important are the provisions of s 33(1)(a) and (b) and (2) of the Payroll Tax Act, which provide:

> **33. Persons taken to be employers**
>
> (1) For the purposes of [the Payroll Tax Act], a person—
>
> (a) who during a financial year, under a relevant contract, supplies services to another person; or
>
> (b) to whom during a financial year, under a relevant contract, the services of persons are supplied for or in relation to the performance of work…
>
> …
>
> is taken to be an employer in respect of that financial year.
>
> (2) If a contract is a relevant contract under both section 32(1)(a) and (b)—
>
> (a) the person to whom, under the contract, the services of persons are supplied for or in relation to the performance of work is taken to be an employer; and
>
> (b) despite subsection (1)(a), the person who under the contract supplies the services is taken not to be an employer.

Also important are the provisions of s 34(a) of this legislation, which provides, "[f]or the purposes of [the Payroll Tax Act], a person who during a financial year… performs work for or in relation to which services are supplied to another person under a relevant contract… is taken to be an employee in respect of that financial year".

Interpretation of statutory provisions

31 Division 7 of Part 3 of the Payroll Tax Act had its genesis in s 7 of the *Pay-roll Tax (Amendment) Act* 1983 ("the Amending Act"), which inserted a new s 3C into the *Pay-roll Tax Act* 1971. The legislative purpose of the provisions of the Amending Act is

illuminated in the second reading speech on the 1983 bill by the then Treasurer, Mr Jolly:[29]

> It has been drawn to the attention of the Government that the pay-roll tax base has been eroded considerably during recent years because an increasing number of employees have become or purported to become independent contractors and their employers or former employers no longer pay pay-roll tax on the remuneration paid to these contractors, notwithstanding that for all intents and purposes the relationship between the parties is almost identical. This trend has accelerated in recent years and is continuing to accelerate.
>
> …
>
> The other provision deals with all other contracts involving the supply of labour where it is considered that the pay-roll tax legislation should apply. In essence, the legislation is intended to catch those relationships where the sub-contractor works exclusively or primarily for the one person and where the object of the contract between the parties is to obtain the labour of the sub-contractor. Therefore, an exclusion is provided where the provision of the sub-contractor's labour is only incidental to the supply of goods under the contract.
>
> Further exclusions are provided where the sub-contractor does not work exclusively or principally for the one person. These exclusions are expressed in a somewhat complicated form. This is a matter of regret, but it is a fact of life that complicated legislation is needed to close loopholes in tax legislation, otherwise the fertile minds engaged by the tax avoidance industry will find weaknesses in any simplified amending provisions and exploit those weaknesses to the disadvantage of the revenue.
>
> As a final protection, however, there is provision for the Commissioner of Pay-roll Tax to exclude a contract from the operation of these provisions where he is satisfied that the services provided under the contract are rendered by a person who ordinarily renders services of the kind provided under the contract to the public generally.

In addition to highlighting the then concern of the declining revenue base of payroll tax under existing legislative provisions, the Treasurer's speech also indicates that specific attention was given to the formulation of the provisions "… to exclude a contract from the operation of these provisions …". Indeed, the words of the Treasurer mirror the words of the exempting provisions the subject of these proceedings. Moreover, it is clear that these provisions were seen as exemption, rather than anti-avoidance, provisions.

---

[29] Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 1983, 1579-80.

32 Section 3C(1)(e)(v) of the Amending Act, which commenced on 1 January 1984, was the first direct progenitor of s 32(2)(b)(iv), and is equivalent to the present form of paragraph (iv) of that sub-section. The differences between these provisions are minimal, as indicated by the following mark-up:

> those services are supplied under a contract to which subparagraphs (i) to ~~(iv)~~ (iii) do not apply and the Commissioner is satisfied that those services are ~~rendered~~ performed by a person who ordinarily ~~renders~~ performs services of that kind to the public generally in that financial year …

Consequently, decisions in relation to the operation of these provisions can be taken as informing the position with respect to the current provisions of s 32(2)(b)(iv) of the Payroll Tax Act. Moreover, the indications of the legislative purpose of the provisions of the Amending Act are also of current relevance.

33 Section 3C(1)(e)(v) was considered by Presiding Member Pagone (as his Honour then was), sitting as the Administrative Appeals Tribunal, in *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* ("*Behmer*"):[30]

> Para (v) seems to be concerned to exempt from the net of liability *services provided by a contractor who is genuinely independent from* the person whose liability would be affected by the broadening of the ambit of the Act. The test the legislature has chosen to determine that independence is one which requires a factual inquiry into the rendering of services by the contractor to others. *That the rendering be "to the public generally" means no more than that the Commissioner (and on review the tribunal) is able to exercise the power if the contractor renders services to other members of the public apart from the person otherwise liable to tax*. The words do not confine the exercise of the power to those cases where there is a large class of the public to whom the services are either provided or offered. *The requirement that the services to the public generally be "ordinarily rendered" does no more than require the Commissioner or tribunal to look at the contractor's business and to be satisfied that the ordinary course of that business is to render services to whoever will contract on like terms. The composite phrase conditioning the exercise of the power in para (v) thus requires the Commissioner or tribunal to be satisfied that the contractor is engaged in an independent business and that in that business the contractor will, as an ordinary incident, deal with persons other than the one whose liability will otherwise be increased.*
>
> [Appellants' emphasis]

34 Those observations of Presiding Member Pagone were cited with approval by Balmford J in *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* ("*Drake*").[31]

---

30 (1994) 28 ATR 1082 at 1089 [19].

Drake Personnel Ltd had agreements with individual "temporaries", and with clients to whom it could provide the services of those temporaries. As in *Odco*,[32] the temporary worked for the client under an agreement with Drake, the client paid Drake, and Drake paid the temporary. The question was, consequently, whether those payments were "wages" because the temporaries were common law employees or, alternatively, taken to be "employees" by reason of the operation of s 3C of the payroll tax legislation.

35 Balmford J, in *Drake*, first determined that the temporaries were not common law employees. Then, following *Odco*, her Honour held that there was a "relevant contract", subject to the exemptions in s 3C(1)(e).[33] Thus, her Honour observed:[34]

> 43. The services with which [s 3C(1)(e)(v)] is concerned are the services which the temporary supplies to the client. Thus a nurse, for example, supplies nursing services to a client hospital for the purposes of its business, in that she attends to its patients. She also supplies those services to Drake, for the purposes of its business, in that she is prepared to make those services available to its clients. But subpara (v) is not concerned with the services which she supplies to Drake.

In conclusion on that point, her Honour said:

> 44. … Where a person is registered with a number of other agencies for the supply of the same services as that person is registered with Drake to supply, it would, in my view, be difficult to deny that that person "ordinarily renders services of that kind to the public generally". There is no evidence before me that Drake or the other agencies do not supply the services of their temporaries to the public generally, and it was not suggested that the expression "the public generally" was inappropriate to describe the clients of Drake and the other agencies.
>
> 45. Further, there is no evidence from which I could find that any of the temporaries who gave evidence would provide their services only to clients of Drake. The evidence indicates that they are registered with Drake as a means of obtaining work, not because of any particular quality applicable to the kind of work available through Drake, as opposed to any other kind of relevant work. Not only are many of them registered with other agencies, but some, at least, indicated that they also rendered services, of the same kind as they rendered to the

---

31 (1998) 40 ATR 304 at 314 [41].
32 *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606.
33 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304 at 313 [37].
34 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304 at 315 [43].

clients of Drake, to people to whom they had become known directly, rather than through the intervention of any agency.

46. Thus I find that there will be many temporaries of whom it can be said that that individual "ordinarily renders services [of the kind which that temporary renders to clients of Drake] to the public generally" and thus that moneys paid to those temporaries will be exempt from the liability to payroll tax. However … the evidence before me does not enable me to make any finding as to whether or not any individual temporary, other than those who gave evidence, in fact meets that description.

36 The Court of Appeal in *Drake* did not accept the construction of s 3C(1)(e)(v) of the payroll tax legislation as adopted by Balmford J and allowed a cross-appeal, holding both that Drake's relationship with the temporaries was in the nature of an employment relationship and that s 3C applied and, further, that it was not possible on the evidence for Drake to establish that the exemption in s 3C(1)(e)(v) was enlivened.[35]

37 Phillips JA explained that position as follows:[36]

29. … Drake entered into a contract with the client to supply the services of a temporary and Drake also entered into a contract with the temporary to work for the client. So much seems to flow from the method of payment described by the judge: the client paid Drake for the services of the temporary and Drake paid the temporary for working for the client. *It was common ground on these appeals that there was no direct contractual relationship between the client and the temporary. It is in that context that s 3C of the Act fell to be applied*…

[Appellants' emphasis]

The submissions of the appellant in *Drake* identified three classes of case for consideration:[37]

First, there was the temporary who worked only for Drake and who, [counsel] submitted, *could be seen to satisfy the necessary description simply because Drake itself was servicing members of the public, to wit its clients*. (This was [counsel's] primary submission.) *Secondly*, there was the temporary who, though on the books of Drake, was also on the books of other like employment agencies, working for one or the other as chance or choice would have it. ([Counsel] was disposed to accept, I think, that if in the first case the temporary did not answer the necessary description of one who

35 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635.

36 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 647 [29]; see also at 639 [6], 665 [79].

37 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 652 [43].

"ordinarily renders services of that kind to the public generally" because he or she only worked for Drake, working for more than one employment agency did not advance the case much, if at all.) *Thirdly*, there was the temporary who, although on the books of Drake (and whether or not on the books of some other employment agency), also worked from time to time *otherwise for members of the public* without the intervention of an employment agency. It is not difficult to see how these temporaries might be characterised as rendering services of a kind ordinarily rendered by them to the public generally.

[Appellants' emphasis]

Justice Phillips held that the first class did not fall within the exemption in s 3C(1)(e)(v):[38]

> 46. … I reject [counsel's] primary submission, that working for Drake was sufficient without more to attract the exception in para (e)(v) because Drake itself was servicing members of the public (to wit its clients). Were that submission correct, para (e)(v) would be taken to apply on the ground that each temporary, by supplying services to Drake under the contract between them, was ordinarily rendering services of that kind to the public generally *because Drake*, under the contracts which it had with its clients, was ordinarily supplying services to the public generally. That is not the inquiry posed by the paragraph. That paragraph does not inquire after the performance of the work; it refers only to the supplying of services (and "services" are defined in s 3C(6)(d) to include "the results of work performed", not its performance as such). *Paragraph (e)(v) inquires of the services supplied by the temporary to Drake under the contract between them* (which is a "relevant contract" unless the exception applies), asking whether *those services* are of a kind which *the temporary* ordinarily renders to members of the public — thereby *distinguishing between the public and Drake and asking, it seems, after the rendering of services otherwise than under the contract between the temporary and Drake*. On my reading of the Act, the temporary who generally arranges his or her own work engagements directly with members of the public (that is, without the intervention of an employment agency) but on occasion obtains an engagement through Drake, may well be one who attracts the operation of para (e)(v). In contrast para (e)(v) will *not* be called into play where the temporary is regularly working only through Drake. Such a temporary cannot be said to be supplying to Drake services of such a kind as are ordinarily supplied *by that temporary* to the public generally; that temporary is ordinarily supplying such services only to Drake.
>
> 47. It is true that in *Odco* the High Court said that "there is no necessary separation between the supply of services and the performance of the work", but that was in a different context. In *Odco* the High Court was concerned to establish (contrary to the decision of the Full Court then under appeal) that the person supplying the services need not be different from the person performing the work. Hence the High

[38] *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 653–4 [46]–[48].

> Court said, more than once, that the tradesman, in agreeing to perform work for the client of [TSA], was doing so as much for the benefit of [TSA] and its business (under the contract between the tradesman and TSA) as for the benefit of the client and its business (though the tradesman had no contract with the client). But if, on that account "there is no necessary separation between the supply of services and the performance of the work", *it does not have to follow that the temporary who is performing the work for the client of Drake because of the temporary's own contract with Drake is supplying those services to the public generally as distinct from Drake, or that those services are of a kind ordinarily supplied by the temporary as distinct from Drake to the public generally*. However it is approached, *the temporary is working under contract with Drake, is supplying services to Drake by working at its direction and is not working or supplying services to the public at large, even if Drake is*. [Counsel's] argument depends, I think, upon wrongly converting the inquiry under para (e)(v) into one about the work being performed instead of the services being supplied.
>
> 48. Were it otherwise every employment agency hiring workers to the public at large would escape the net of s 3C because of para (e)(v); yet if that were its purpose, it would surely be more plainly directed to the relationship of the agency to "the public generally", rather than that of the temporary—or at the very least it would be more plainly directed to the work being performed rather than the services being supplied (or "rendered"). The point is not an easy one; but on the paragraph as it stands I think that [counsel's] primary submission should be rejected. The purpose of para (e)(v) is then seen as denying the character of "relevant contract" where the temporary is ordinarily working for the public but from time to time finds an engagement through an employment agency. Of course if those occasional interventions by the agency do not yield employment in excess of 90 days in a financial year, para (e)(iii) may be called into play; but if such engagements through Drake do exceed 90 days, then para (e)(v) may be the relevant exception. That is how I read the exceptions and on that footing those differences which the judge perceived in the evidence became material to the application of para (e)(v) and, with respect, I agree in her Honour's treatment of them.
>
> [additional emphasis added]

As the Appellants observe, in response to the decision of Balmford J in *Drake*, but well before the appeal was heard or determined, Parliament introduced "employment agency contract" provisions,[39] which are now in Div 8 of Pt 3 of the Payroll Tax Act—thus overcoming some of the complexities discussed by Phillips JA in the appeal in *Drake* (though complexities not relevant in the present context or dealt with in the passages from his Honour's judgment set out above).

---

[39] Part 6 of the *State Taxation (Further Amendment) Act* 1998, assented to on 1 December 1998, and see the express discussion of Balmford J's decision in Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 731.

38 The operation of the provisions of s 32(1) and s 33 was also explained, specifically, by Phillips JA in *Drake* in respect of the antecedent provisions:[40]

> It will be apparent from this that if A makes a contract with B under which A "supplies" to B "services for or in relation to the performance of work", then the contract is a "relevant contract" by reason of both paras (a) and (b) of [s 32(1)] (assuming that the exceptions do not apply) and under [s 33(1)(a) and (b)], both the person supplying the services and the person to whom the services are being supplied under the contract are, prima facie, "deemed to be an employer". This apparent duplication is denied by [s 33(2)] which provides as follows:
>
> > Where a contract is a relevant contract pursuant to both sub-sections [32](1)(a) and (1)(b) —
> >
> > (a) the person to whom, under the contract, the services of persons are supplied for or in relation to the performance of work shall be deemed to be an employer; and
> >
> > (b) notwithstanding [s 33(1)(a)] the person who under the contract supplies the services shall not be deemed to be an employer.
>
> Accordingly, it will be B (the person to whom the services are supplied) who is deemed to be an employer, not A (the person supplying the services); and by virtue of subs (2)(b), the person who performs the work for or in relation to which the services are supplied is deemed to be an employee.

39 In *Odco*, the High Court was called upon to determine whether a "labour agency", Troubleshooters Available ("TSA"), was a deemed "employer" under the provisions of the *Accident Compensation Act* 1985, legislation cast in terms similar to s 32(2) of the Payroll Tax Act. In *Odco*, a builder, in need of a tradesperson, would place an order with TSA, which would contact an appropriate tradesperson, who would then work for the builder and the builder would pay TSA for the work, and TSA would pay the tradesperson. TSA submitted that the deeming provision applied "only to contracts under or by which a tradesman agrees to perform work for the other party to the contract".[41] The High Court disagreed, observing:[42]

> Once it is accepted that there was (1) an agreement between TSA and the builder for the supply of a tradesman to the builder to do certain work on terms that the builder was to remunerate TSA for supplying the tradesman and for the work which he did, and (2) an agreement between TSA and the tradesman whereby the tradesman agreed to perform work at the site at the

---

40 (2000) 2 VR 635 at 648 [33].
41 (1990) 64 ALJR 606 at 608–9.
42 (1990) 64 ALJR 606 at 612–3.

> builder's direction for remuneration to be paid by TSA, it follows as a matter of plain language that the tradesman supplies services to TSA by attending at the site and doing work there. By attending there and doing work, *he supplies services to TSA for the purposes of its business, notwithstanding he also at the same time supplies the same services to the builder for the purposes of its business*.
>
> [Appellants' emphasis]

40 The Commissioner sought to argue in favour of the position adopted by Presiding Member Pagone and Balmford J in *Drake* from a more purposive position. Thus, it was submitted that the contractor provisions in Div 7 of Part 3 of the Payroll Tax Act are intended "to catch those relationships where the sub-contractor works exclusively or primarily for the one person and where the object of the contract between the parties is to obtain the labour of the sub-contractor".[43] In other words, it is said, the provisions are "directed to capture several means of disguising the employer-employee relationship by contractual arrangements which have been increasingly resorted to in recent years by persons seeking to defeat the objects of the Principal Act".[44] Moreover, it is contended that the exemptions or exclusions are, on the other hand, designed to ensure that "bona fide independent contractors" are not caught by the provisions,[45] and that "the parties to genuine service contracts will not be prejudiced".[46] In particular, it is submitted that the exemption in s 32(2)(b)(iv) confers a power on the Commissioner "to exempt from the net of liability services provided by a contractor who is genuinely independent from the person whose liability would be affected by the broadening of the ambit of the Act".[47]

---

43 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 1983, 1579; see *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [218]–[219]; *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215, [22]–[26].

44 *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215, [23], quoting from the Explanatory Memorandum to the analogous amendments made to the New South Wales payroll tax legislation.

45 *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (2005) 60 ATR 237 at 264 [219], [221].

46 *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215, [23], quoting from the Explanatory Memorandum to the analogous amendments made to the New South Wales payroll tax legislation.

47 *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1089 [19]; *Re Roden Security Services Pty Ltd v Chief Commissioner of State Revenue* (2010) 78 ATR 555 at 564–5 [44]–[51]; *Drake Personnel v Commissioner of State Revenue* (1998) 40 ATR 304 at 314 [41] (Balmford J).

41 On this basis, the Commissioner contends that the exercise of the power conferred by s 32(2)(b)(iv) of the Payroll Tax Act requires a "factual inquiry into the rendering of services by the contractor to others".[48] The Commissioner is required "to look at the contractor's business and to be satisfied that the ordinary course of that business is to render services to whoever will contract on like terms", and "to be satisfied that the contractor is engaged in an independent business and that in that business the contractor will, as an ordinary incident, deal with persons other than the one whose liability will otherwise be increased".[49] Further, there must, it is said, be evidence that the services provided by the contractor are both available to *and used* by other persons (i.e. not merely advertised or offered).[50]

42 On this basis, the Commissioner says that s 32(2)(b)(iv) involves a consideration of whether the contractor ordinarily performs services of the relevant kind to other members of the public apart from the services provided in the course of their work for the designated person. In this context, it is submitted that it is not sufficient that the contractor performs services for members of the public as clients or customers of the designated person—that is, the contractor cannot be regarded as ordinarily performing services to the public generally solely because the designated person, under its contracts with its clients, was ordinarily supplying services to the public generally.[51] Accordingly, it is said that in the present case, the fact that EVS was itself servicing members of the public (assuming for present purposes that RACV members meet that description or characterization) does not mean that the Contractors were therefore also ordinarily performing services to the public generally. As indicated in the preceding reasons, I accept that this latter proposition is clear from the judgment in *Drake* on appeal.

43 The Commissioner then takes a further step which, as indicated in the preceding reasons, is not supported either by the language of s 32(2)(b)(iv) or the judgment in

---

48 *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1089 [19].

49 *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1089 [19].

50 *Re Roden Security Services Pty Ltd v Chief Commissioner of State Revenue* (2010) 78 ATR 555 at 565 [47], 565 [50]; see also *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215, [62].

51 *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635 at 653 [46].

Drake on appeal. Thus, the Commissioner continues, contending that it is relevant to consider whether the contractor conducts a "genuine independent business", in the sense of a business that is not 'tied' to the designated person.[52] Reference is also made to *Behmer*,[53] where the Tribunal also referred to the exemption of services provided by a contractor who is "genuinely independent" from the designated person. The problems with this decision have already been discussed.[54] As indicated in these reasons, I reject these contentions.

44 Continuing, the Commissioner submits that in conducting the factual inquiry into the contractor's business, it is also relevant to take into account the amount or percentage of any work performed by the contractor for other persons. While it is said that the exemption is not limited to instances where such services are quantitatively significant or substantial, there is plainly "a point below which the quantum of work does not suffice to attract the exception".[55] Whilst it is true that in some circumstances *de minimis* issues may arise, this is not a relevant issue in the present circumstances, given the nature of this appeal and the position I have reached with respect to remitter. On remit, the Commissioner may well have further factual material to consider, and in light of the proper construction of s 32(2)(b)(iv) as indicated in these reasons. So it is only then that any considerations of this nature may arise.

Revenue Ruling PTA021

45 The Commissioner helpfully provides a series of Revenue Rulings with respect to a variety of State taxation legislation, including the Payroll Tax Act. *Revenue Ruling PTA021* ("the Ruling") is intended to provide guidance with respect to the exercise by the Commissioner of the discretion under s 32(2)(b)(iv) of the Payroll Tax Act. In

---

52 *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215, [91]–[94]; *Re Roden Security Services Pty Ltd v Chief Commissioner of State Revenue* (2010) 78 ATR 555 at 565 [49].

53 *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1089 [19].

54 And see *Appellants' Reply* (14 September 2018), [5] which (excluding any reference to merits) effectively summarises the position reached in these reasons.

55 *Levitch Design Associates Pty Ltd ATF Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD 215, [97].

view of the significance of the Ruling in the present circumstances, it is helpful to set out its substantive provisions in full:

> Preamble
>
> The *Payroll Tax Act 2007* (the Act), which commenced on 1 July 2007, rewrites the *Pay-roll Tax Act 1971* and harmonises the payroll tax legislation in Victoria and NSW.
>
> Parties to a 'relevant contract' are deemed to be employers and employees (sections 33 and 34 of the Act) and payments made under a contract are deemed to be wages (section 35 of the Act). Deemed wages are subject to payroll tax under section 36 of the Act.
>
> While most contracts for the provision of services come within the meaning of 'relevant contract' under section 32 of the Act, there are certain types of contracts that are specifically excluded from the definition of 'relevant contract'. A contract is not a 'relevant contract' if the Commissioner of State Revenue (the Commissioner) is satisfied that the person who performed the services under the contract ordinarily performs services of that kind to the general public in that financial year.
>
> This Revenue Ruling provides a non-exhaustive list of factors that the Commissioner takes into consideration in exercising his discretion under section 32(2)(b)(iv) of the Act.
>
> Ruling
>
> *In exercising his discretion under section 32(2)(b)(iv) of the Act, the Commissioner needs to be satisfied that the contractor:*
>
> - *provides the services in the course of conducting a genuine independent business, and*
> - *ordinarily renders those services to the general public.*
>
> *The mere fact that a contractor works on a succession of jobs for different principals does not mean that these criteria are satisfied. It is necessary to consider the steps undertaken by the contractor to create an independent business (i.e. to obtain work from clients other than the principal in question).*
>
> To seek an exemption under section 32(2)(b)(iv) of the Act, a principal is required to apply to the Commissioner for a private ruling. Details on how to apply for a private ruling are set out in Revenue Ruling GEN.009.
>
> In making his determination, the Commissioner will review the contractor's business and consider factors including (but not limited to):
>
> - the use of a business name by the contractor
> - the extent and nature of advertising undertaken by the contractor
> - the range of clients serviced by the contractor

- the extent and nature of plant and equipment provided by the contractor in execution of the services
- the engagement of staff or sub-contractors by the contractor
- the use of business premises by the contractor
- the method of operation of the business (such as tendering for jobs)
- the potential for entrepreneurial risk
- the nature of contracts entered into (e.g. formal long term or informal rolled over contracts)
- the history of the formation of the contractor's business
- how the contractor won the contract
- whether work is performed on separate contracts concurrently
- the nature of the contractor's business and the type of services provided
- whether the contractor bears the cost and responsibility for faulty materials or workmanship
- whether the contractor quotes competitively for jobs on an all inclusive basis (all labour and materials), and
- whether the contractor merely charges for services on an hourly rate and adds on the cost of materials.

None of the above factors is conclusive on its own. The above is not an exhaustive list of factors that the Commissioner will take into account in exercising his discretion under section 32(2)(b)(iv) of the Act, he will also consider any other matters that are relevant to his decision.

However, the Commissioner will accept that a contractor ordinarily renders services to the public generally where, in the financial year in which services were provided under the contract in question, the contractor provided services of that type to:

1. two or more principals (not being members of a group) during the financial year, and
2. the principal claiming the exemption for an average of 10 days or less per month (excluding the months in which no services were provided).

Revenue Ruling PTA014 explains what constitutes a day's work.

If a contractor who has supplied services under a contract to a principal in a particular financial year, meets the above two criteria, the exemption in section 32(2)(b)(iv) of the Act applies. Under these circumstances, there is no need for the principal to obtain a private ruling from the Commissioner.

Example 1

Michael is a computer programmer. During the financial year, he provided services to Principal A and Principal B. Under his contract for service with Principal A, he provided his services as follows during the financial year:

Month	Number of days worked for Principal A
July	5
August	3
September	7
October	5
November	16
December	9
January	13
February	4
March	8
April	5
May	14
June	11
	100

In that financial year, Michael worked for a total of 100 days for Principal A which is an average of 8.3 (100 days divided by 12 months) days per month. As a result, payments made by Principal A to Michael for the financial year are exempt from payroll tax.

Example 2

Shelly is also a computer programmer. During the financial year, she provided services to Principal C and Principal D. Under her contract for service with Principal C, she provided her services as follows during the financial year:

Month	Number of days worked for Principal C
July	11
August	16
September	–
October	–
November	–
December	22
January	21
February	20
March	–
April	–
May	18
June	–
	108

> In that financial year, Shelly worked for a total of 108 days for Principal C. This worked out to be 18 (108 days divided by 6 months) days per month. Consequently, payments made by Principal C to Shelly are subject to payroll tax.
>
> This Revenue Ruling is effective from 1 July 2007.
>
> **Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN.001.**
>
> [Emphasis added]

46 It will be seen that in the Preamble to the Ruling, the Commissioner substantially echoes the actual words of s 32 of the Payroll Tax Act and then moves to provide what are described as "a non-exhaustive list of factors that the Commissioner takes into consideration in exercising his discretion under s 32(2)(b)(iv) of the [Payroll Tax] Act". The critical aspects of the Ruling—from which various examples and other commentary follow—are the first two paragraphs of its substantive contents (paragraphs which are set out in italics in the Ruling which is set out above). In my view, it is clear that, as the Appellants contend, the observations of Presiding Member Pagone in *Behmer*, which were adopted and applied by Balmford J in *Drake* (and in spite of the treatment of that decision at first instance in the Court of Appeal, particularly by Phillips JA, as set out previously[56]), influenced the contents of the Ruling significantly and, indeed, its fundamental basis.

47 The effect of the Commissioner's reliance for the purpose of the Ruling on the decisions in *Behmer* and at first instance in *Drake* is, in my view, to introduce a new element into the test or basis upon which the discretion is to be exercised under s 32(2)(b)(iv) of the Payroll Tax Act. The further element is the stated requirement in the Ruling that the Commissioner must be satisfied that the contractor "provides the services in the course of conducting a genuine independent business". There is nothing in the provisions of s 32(2)(b)(iv) which makes any reference to conduct of "a genuine independent business" and nor, in my view, is there any reference in these provisions to such a concept by necessary implication. Moreover, the distinct

---

56 See above, [36]–[37].

and additional element in this respect which the Ruling introduces is made even clearer —in the sense of being a distinct and additional element—by the reference to the contractor being required to satisfy the Commissioner that he, she or it "ordinarily renders those services to the general public". This requirement does have echoes in the actual words of s 32(2)(b)(iv) where, with reference to the relevant services, the legislative requirement is that they be "… performed by a person who ordinarily performs services of that kind to the public generally …".

48 The Commissioner sought to defend the Ruling on the basis that the requirement of "a genuine independent business" does follow from the provisions of s 32(2)(b)(iv) and that all the Ruling seeks to do is to "translate" the words of this statutory provision into concepts readily understandable and applicable in practical terms. For the reasons which follow, I do, however, reject this contention. In my view, the words of s 32(2)(b)(iv) are quite clear and are not cast in language which is difficult to understand, either in abstract or more practical terms. The requirements for this exemption as enacted by Parliament are that the relevant services are performed by a person "who ordinarily performs services of that kind to the public generally …". It is a factual question whether or not the services to which these provisions apply are relevant to the application of its provisions and whether the provider of those services provides them to the public and "ordinarily" does so. The basis upon which the "ordinary" requirement is satisfied depends on the facts in the particular instance and not on whether or not the person providing those services to the public generally conducts some business. It may be, speaking generally, that the fact that such a person does conduct a business suggests that such services are "ordinarily" provided. There may, however, be other circumstances in which this requirement is satisfied. Moreover, this approach is also, in my view, to mistake the inquiry which the provisions of s 32(2)(b)(iv) of the Payroll Tax Act requires, as explained by Phillips JA in *Drake*.[57] Thus, as set out previously, Phillips JA said:[58]

---

57 *Drake Personnel Ltd v The Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 653 [46].

58 *Drake Personnel Ltd v The Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 653 [46], set out above at [37].

> Paragraph (e)(v) inquires of the services supplied by the temporary *to Drake* under the contract between them (which is a 'relevant contract' unless the exception applies), asking whether *those services* are of a kind which *the temporary* ordinarily renders to members of the public—thereby distinguishing between the public and Drake and asking, it seems, after the rendering of services *otherwise than under* the contract between the temporary and Drake.
>
> [emphasis in original]

Delegate erred in law

49 The opening words of s 32(2)(b)(iv) of the Payroll Tax Act are important to its proper construction. They make it clear that these exemption provisions only arise for consideration if paragraphs (i) to (iii) do not apply:[59] that is, it can apply only where the services are of a kind ordinarily required by the "designated person"[60] for more than 180 days in a financial year,[61] and are provided for more than 90 days in the financial year.[62] It therefore contemplates an ongoing and regular supply of services required by the other, which can involve, but not require, the Contractor carrying on a business of supplying those services.

50 *Behmer* concerned a building contractor which had engaged, by tender, the services of an independent contractor to carry out carpentry work. The contractor's business was focused on provision of carpentry services to large projects, which would necessarily involve working for one entity for protracted periods (as it did for the building contractor). That context gave rise to an analogy, during argument, with a barrister who accepts a brief requiring exclusive commitment to one matter, perhaps for several years.[63]

51 It was that context that gave rise to Presiding Member Pagone's concern with whether the contractor was conducting a "genuine independent business". He was concerned in that case to explain the application of the exemption in circumstances

---

59 A point noted by Presiding Member Pagone in *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1088 [16].

60 *Payroll Tax Act* 2007 s 32(2)(b)(i).

61 *Payroll Tax Act* 2007 s 32(2)(b)(ii).

62 *Payroll Tax Act* 2007 s 32(2)(b)(iii).

63 *Re Behmer & Wright Pty Ltd and the Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1088–9 [17].

where a person provides services predominantly to one entity, but remains, in fact, a person "who ordinarily performs services of that kind to the public generally". *Behmer* is a good example of the third class of case identified in argument in *Drake*:[64] the contractor "worked from time to time *otherwise* for members of the public".[65]

52 *Drake* (like *Odco*) concerned a situation where the taxpayer contracts, and pays, the contractor to do work for the client, for which the client pays the taxpayer. That context gave rise to Phillips JA's observation that the provision "inquires of the services supplied by the [contractor to the taxpayer] under the contract between them …, asking whether *those services* are of a kind which [the contractor] ordinarily renders to members of the public—thereby distinguishing between the public and [the taxpayer] and asking, it seems, after the rendering of services *otherwise than under* the contract between [the contractor and the taxpayer]".[66] *Drake* was an example of the first (or second) class of case identified in argument in *Drake*:[67] the contractors worked for members of the public *only* under their contract with an intermediary, or multiple intermediaries. It is to be noted that Phillips JA's analysis of the exemption in sub-section (iv) does not employ as a criterion the carrying on by the contractor of a genuinely independent business of providing the same kind of services to the public.

53 The circumstances of this case—clearly raised by the facts stated in Attachment B and the statements provided to the Commissioner by various contractors—are different from:

(1) *Behmer*, because the Contractors (on the Delegate's factual findings) did not have a business entirely unrelated to the work they did for EVS (such as provision of mechanical repair services from their own garage); and

---

64 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* [2000] 2 VR 635 at 651–2 [43]; and see above, [37].

65 Emphasis added.

66 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 653 [46] (emphasis in original).

67 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 651–2 [43]; and see above, [37].

(2) *Drake* and also *Odco*, because the Contractors regularly provided services to RACV members other than under their contract with EVS and did so on their own behalf and at their own expense as an independent entity.

Consequently, the circumstances of this case do not fall into any of the three classes identified in argument in *Drake*. Moreover, the circumstances of this case distinguish it from, particularly, the first and second class of case identified in argument in *Drake*.[68]

54 The different question of construction raised by the circumstances of this case is whether s 32(2)(b)(iv) of the Payroll Tax Act is available where a contractor regularly provides independent services to members of the public—under a contract between the member of the public and the contractor—in addition to the services provided to those members of the public under the contractor's contract with the taxpayer. This is a question which the Delegate failed to address. Rather, she addressed the question of whether the Contractor provided the same kind of services it supplied to EVS to the public in the course of carrying on a genuinely independent business of providing those services to the public. Thus the Delegate imported, apparently through the application of *Revenue Ruling PTA021*, a criterion that was not required or justified by the statutory text; as discussed previously in these Reasons.[69] This is not a process whereby, in determining whether or not the Delegate made a legal error of the kind identified in *Avon Downs*, the statement of reasons is being "construed minutely and finely with an eye keenly attuned to the perception of error", nor "… scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed".[70] The error on the part of the Delegate is, as I have indicated, very clear.

55 Moreover, the Delegate did not refer to *Drake* or to *Behmer*, but appeared to consider that the "[r]elevant law relating to" s 32(2)(b)(iv) was to be found in *Revenue Ruling*

---

68 See above, [37].

69 See above, [45]-[48].

70 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2016) 258 CLR 173 at 185–6 [25], 195 [59]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–2, 278, 282.

PTA021 and *Odco*, which she considered stood for the proposition that "[i]t is commonplace for a worker to provide services to a third party as part of their role with their principal/employer".[71] It is unclear why the Delegate thought *Odco* stood for that proposition when it came to considering the exemption. The High Court in *Odco* was concerned with the deeming provisions, but expressly did not consider the exemptions. In *Drake*, Phillips JA considered the reliance which Balmford J had placed on *Odco* misplaced, saying "[i]t is true that in *Odco* the High Court said that 'there is no necessary separation between the supply of services and the performance of the work', but that was in a different context".[72]

56 In the present circumstances, the questions required to be addressed in respect of the sub-section 32(2)(b)(iv) exemption were whether the additional services provided by the Contractors—that is, the services provided under the direct contract between the Contractors and the RACV members, were services provided to the public generally and, if so, were they services of the same kind as the services provided by the Contractors to EVS.

57 As submitted by the Appellants, it appears that, having regard to, among other things, the Commissioner's position following legal advice in 2005, on the material and evidence before the Delegate, the answer to that question should be "yes". The services provided by the Contractors to the public directly, and the services provided under the contract with EVS, are both mechanical repair services. On the material and evidence before the Commissioner, it would be very difficult to draw a line between the two kinds of service. However, as the error was plainly material to the decision, it is not necessary for the Court to arrive at a conclusion on this issue, as that will be a matter for the Commissioner on a remittal.

58 The erroneous approach of the Delegate would appear to be—or may possibly explain—the mistaken observation that "there is no evidence that the [Contractors] ordinarily render services of the same type rendered to EVS to the public outside of

---

71 Reasons, 16, 20.

72 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 653 [47].

their agreements with EVS". In my view, that observation cannot stand with the Delegate's acknowledgement in the Reasons that the Appellants had provided material establishing that the Contractors did provide mechanical repair services otherwise than under their contracts with EVS. The Delegate's reasoning was clearly influenced by the "genuinely independent business" criterion which she employed when she stated "[i]n particular, the available information indicates that (whatever the position in prior years) for the 2009-2010 to 2013-2014 financial years, the [Contractors] did not operate their own garages and/or mobile automotive repair businesses in addition to providing services to RACV Members under their agreements with EVS".[73] In pursuing that erroneous approach, the Delegate failed to deal with the class of case presented by the Objection based on the material and evidence relied upon by EVS, and therefore failed to address the question raised by the exemption in sub-s 32(2)(b)(iv) of the Payroll Tax Act. In the present circumstances, the Contractors provided mechanical services not just to clients of EVS, but to any drivers needing RACV assistance. Additionally, the Appellants say that the services are truly provided to the public generally, as most drivers are RACV members, with the remainder able to sign up instantly to receive mechanical repair services.

Conclusions

59 For the preceding reasons, the Appellants have, in my view, established that the failure of the Delegate to be satisfied as sought by the Appellants was affected by a legal error of the kind identified by Dixon J in *Avon Downs*. It follows that, for the reasons set out in the previous judgment, it is not appropriate for the Court in proceedings such as this to substitute its own view as to matters relevant to the forming or not forming of any such satisfaction on the part of the Commissioner.[74] In these circumstances, the Commissioner's assessments should be set aside and the matter remitted to the Commissioner for determination according to law on the basis

---

73 Reasons, 21.

74 Cf the approach of the Commissioner in his submissions which, in effect, invites the Court to investigate the events and to determine the position in this respect itself: see *Respondent's Submissions* (7 September 2018), [26]–[60].

of these reasons as to the proper interpretation of s 32(2)(b)(iv) of the Payroll Tax Act.

60 Additionally, this is not a circumstance where the Court might form the view that, being seized of relevant facts and circumstances, there is no point in a remitter because there is no prospect of a different decision being reached by the Commissioner for the purposes of s 32(2)(b)(iv) of the Payroll Tax Act. This follows because, on a remitting of the matter to the Commissioner for decision according to law, the facts and circumstances before the Commissioner will not necessarily be the same as the facts and circumstances as they presently stand as the basis for the Delegate's decision; a critical factor which distinguishes the present situation from that considered by the High Court in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation*.[75]

61 There is also an issue in the present proceedings in relation to penalty tax which has been levied. However, having regard to the position I have reached on substantive matters, that issue is no longer relevant in these proceedings, as the Commissioner's Assessments upon which that penalty was based are to be set aside.

Orders

62 The parties are to bring in orders to give effect to these reasons. I reserve the question of costs and will hear the parties further in relation to this issue.

---

[75] (1975) 132 CLR 535.

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TAXATION LIST

Not Restricted

S CI 2017 02964
S CI 2017 02965
S CI 2017 02966
S CI 2017 02967
S CI 2017 02968

NATIONWIDE TOWING & TRANSPORT PTY LTD (ACN 088 026 706) — First Appellant

EASTERN VAN SERVICES PTY LTD (ACN 090 167 552) — Second Appellant

RE'S ROADSIDE RECOVERY PTY LTD (ACN 006 627 710) — Third Appellant

v

COMMISSIONER OF STATE REVENUE — Respondent

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATE OF HEARING:	24 April 2018
DATE OF JUDGMENT:	23 May 2018
CASE MAY BE CITED AS:	Nationwide Towing & Transport Pty Ltd & Ors v Commissioner of State Revenue
MEDIUM NEUTRAL CITATION:	[2018] VSC 262

TAXATION AND REVENUE – Services performed by persons who ordinarily performed services of that kind to the public generally – *Payroll Tax Act* 2007 s 32(2)(b)(iv)

TAXATION AND REVENUE – Nature of appeal – Hearing *de novo*, judicial review or some other form of appeal – *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 – *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* [2011] VSC 104; (2011) 85 ATR 120 – *Mould v Commissioner of State Revenue* [2014] VSC 268; (2014) 98 ATR 579 – *Taxation Administration Act* 1997 s 106

APPEARANCES:	Counsel	Solicitors
For the Appellants	R Merkel QC E M Nekvapil	JRT Partnership Pty Ltd
For the Respondents	C J Horan QC C M Pierce	State Revenue Office

HIS HONOUR:

Introduction

1 These proceedings are a series of appeals under s 106 of the *Taxation Administration Act* 1997 ("the TAA") which arise from the Appellants' objections to assessments under the *Payroll Tax Act* 2007 ("the Payroll Tax Act").[1]

2 On 8 December 2017, this Court ordered that the following question be tried as a separate and preliminary question, a question which has been stated for determination under r 47.04 of the *Supreme Court (General Civil Procedure) Rules* 2015:[2]

> Is an appeal under s 106 of the TAA against a determination of the Commissioner … of a taxpayer's objection involving sections 32(2)(b)(iv), 32(2)(c), 32(3), 35(2), 37(1), 37(2), 41, 46(1), 46(2) and 79 of the Payroll Tax Act and sections 28 and 30(3) of the TAA an appeal or appeals by way of:
>
> (a) a hearing de novo;
>
> (b) a judicial review of the decision; or
>
> (c) some other form of appeal?

Factual and procedural background

3 On 24 March 2015, the Commissioner of State Revenue ("the Commissioner") notified the Appellants of assessments under the Payroll Tax Act of tax they were liable to pay for the financial years ending 2010, 2011, 2012, 2013 and 2014 ("the Assessments").[3]

4 The Appellants were dissatisfied with the Assessments and, on 19 May 2015, lodged a written objection with the Commissioner ("the Objection"),[4] as they were entitled to do under the provisions of s 96(1)(a) and (c) of the TAA.

5 The primary substantive ground of objection is set out in paragraph 14(a), (b), and (c) of the Objection ("the Primary Ground").[5] The Primary Ground related to

---

1 *Notice of Objection* (19 May 2015).
2 Orders made by the Honourable Justice Croft on 8 December 2017, Order 1.
3 *Result of Tax Investigation to Nationwide Towing & Transport Pty Ltd* (24 March 2015); *Result of Tax Investigation to Eastern Van Services Pty Ltd* (24 March 2015); *Result of Tax Investigation to Re's Roadside Recovery Pty Ltd* (24 March 2015).
4 *Notice of Objection* (19 May 2015).
5 *Appellants' Submissions on Separate Question* (9 February 2018), [3].

payments by the Second Appellant ("EVS") to its contractors, and impugned 89.7%[6] of the total amount of the Assessments.

6 In essence, the Primary Ground was asserted that the Assessments should not have included payments by EVS to its contractors, because:[7]

> (1) the Commissioner should have been satisfied that the services performed by the contractors were services performed by persons who ordinarily performed services of that kind to the public generally in that financial year, within the meaning of s 32(2)(b)(iv) of the Payroll Tax Act; and therefore
>
> (2) the payments to the contractors were not made for or in relation to the performance of work relating to a 'relevant contract' as defined in ss 31 and 32 of the Payroll Tax Act; and therefore
>
> (3) those payments could not be taken to be 'wages' by operation of s 35(1) of the Payroll Tax Act.

7 On 12 November 2015, a delegate of the Commissioner gave notice of the determination of the Objection, in accordance with s 103(1) of the TAA, having considered the Objection and, among other things, disallowed the Primary Ground under s 101(1) of the TAA.[8]

8 The Commissioner, in the notice of determination of the Objection, gave reasons for disallowing the Primary Ground, which, among other things, included that the Commissioner was not satisfied that the services performed by the contractors were services performed by persons who ordinarily performed services of that kind to the public generally in the relevant financial year, within the meaning of s 32(2)(b)(iv) of the Payroll Tax Act.[9] For convenience, this reason for disallowing the Primary Ground of Objection is referred to as "the Commissioner's non-satisfaction".

9 More particularly, the grounds upon which the Objection was disallowed are helpfully summarised by the Commissioner as follows:[10]

---

6 $528,055.29 of a total primary tax of $588,714.40.

7 *Appellants' Submissions on Separate Question* (9 February 2018), [4].

8 *Notice of Determination on Objection to Payroll Tax Assessments 91598826, 91598834, 91598842, 91598850 and 91598868 (Assessments 1 to 5)* (12 November 2015) ("Notice of Determination").

9 Notice of Determination, 15–16.

10 *Respondent's Submissions on Separate Question* (23 February 2018), [7].

1 the registration of the Third Appellant (**Re's**) as a member of the Nationwide Payroll Tax Group (**the Group**) is effective from 1 August 2011 because one individual has acted as the sole director of each of the First Appellant (**Nationwide**), the Second Appellant (**Eastern**) and Re's at all relevant times since that date, and the Appellants had not shown any basis for the exercise of the discretion to exclude Re's from the Group;

2 the tow-truck drivers identified as contractors by Nationwide were properly characterised as common law employees, or alternatively, if characterised as contractors, the circumstances did not attract the contractor exemptions in any event;

3 the management fees paid to the companies identified by Nationwide as providers of management services were paid either to common law employees or interposed entities and as such constituted taxable wages and, in any event, were not contractor payments or paid under employment agency contracts;

4 on the assumption that the contractors identified by Eastern were properly characterised as such, the circumstances did not enliven any of the contractor exemptions and did not support the contention that services were relevantly provided pursuant to employment agency contracts;

5 on the assumption that the contractors identified by Eastern were properly characterised as such, the Appellants had not established that any portion of the relevant contractor payments was attributable to the costs of materials and equipment;

6 the Appellants had not established that they took reasonable care to comply with the Payroll Tax Act or that their tax defaults occurred because of circumstances beyond their control, and there was no basis for any further remission of penalty tax;

7 there was no basis for any further remission of interest, because premium interest was remitted in full on the assessments and market interest is recovered only to meet the financing costs of revenue improperly lost; and

8 the management fees paid by Nationwide and Eastern to Re's in the period 1 July 2009 to 31 July 2011 constituted taxable wages because they were paid either to common law employees or to interposed entities; were not paid under employment agency contracts; and, if characterised as contractor payments, did not attract any contractor exemption.

10 On 17 December 2015, the Appellants, being dissatisfied with the determination of the Objection, requested in writing, in accordance with s 106(1) of the TAA, that the Commissioner treat their objection as an appeal and cause it to be set down for

hearing at the next sittings of this Court.[11] On 22 December 2017, the Appellants filed a summary of the evidence proposed to be given on their behalf in these appeals, subject to the outcome of the determination of the separate question.[12]

11 The Appellants contend that the reasons for determination by the Commissioner disclose a legal error affecting that determination in that the Commissioner was not satisfied of the matter in s 32(2)(b)(iv) of the Payroll Tax Act. On this appeal, the Appellants contend that:[13]

> (1) on the material before the Commissioner, the Commissioner's failure to be satisfied of the matter in s 32(2)(b)(iv) was affected by a legal error of the kind identified by Dixon J in *Avon Downs Proprietary Ltd v Federal Commissioner of Taxation*[14]; and
>
> (2) as a consequence, the Supreme Court should:
>
> (a) set aside the Commissioner's decision to disallow the Primary Ground; and
>
> (b) remit the Objection to the Commissioner for a new determination in accordance with law.

12 It was made clear at the commencement of the hearing of the separate and preliminary question that the ground of objection now left extant with respect to the five assessments for each of the financial years to which they apply is as set out in paragraphs 14(a) and (b) and paragraph 17 of the Objection.[15] For present purposes, it is helpful to set out the substantive grounds of objection contained in these paragraphs, as follows:[16]

> (a) The payments (purported taxable wages) made by EVS to each of the Contractors in the years of assessment were not made for or in relation to the performance of work relating to a 'relevant contract' within Division 7 of the *Payroll Tax Act 2007*. It follows that (i) EVS could not be taken to be an 'employer' within section 33, (ii) the Contractors could not be taken to be 'employees' within section 34, and (iii) the amounts paid by EVS to the Contractors in the years of assessment could not be taken to be 'wages' within section 35.

---

11 *Request to appeal to the Supreme Court of Victoria* (17 December 2015).
12 *Outline of Evidence* (22 December 2017).
13 *Appellants' Submissions on a Separate Question* (9 February 2018), [8].
14 (1949) 78 CLR 353 at 360, 362-363.
15 *Transcript*, 1–3, 30.
16 *Notice of Objection* (19 May 2015) [14], [17].

> (b) Without limiting the generality of ground (a), the payments (purported taxable wages) are excluded from the scope of Division 7 because they were made by EVS in the course of its business to each of the Contractors who supplied EVS with services for or in relation to the performance of work where the Commissioner was satisfied or should now be satisfied that those services were performed by the Contractors who ordinarily perform services of that kind to the public generally in each of the years of assessment within section 32(2)(b)(iv) of the Payroll Tax Act 2007.
>
> …
>
> 17. Further or alternatively, in the circumstances and particularly the making of and reliance upon the earlier determinations, the Commissioner should:
>
> (a) Be satisfied that the Taxpayer (or a person acting on behalf of the taxpayer) took reasonable care to comply with the requirements of the Payroll Tax Act 2007 and determine, under section 30(3) of the TAA, that no penalty tax is payable in respect of the purported tax default; and
>
> (b) Consider it appropriate to remit, under section 28 of the TAA, any interest payable as included in the Assessments and any further interest that may accrue on amounts outstanding under the Assessments.
>
> …

Consequently, the provisions of the Payroll Tax Act which are now in issue are ss 30(3), 32(2)(b)(iv), 33 and 34, as indicated in these "Substantive Grounds". Nevertheless, as will become clear in the reasons which follow, the critical provisions for the purposes of the preliminary or separate question are the provisions of s 32(2)(b)(iv) of the Payroll Tax Act.

13 The jurisdictional issue arising is whether the Supreme Court has the power, on an "appeal" under Part 10 of the TAA, to determine that contention in the Appellants' favour and grant the relief set out in the preceding paragraph. The Appellants submit that, on the proper construction of Part 10 of the TAA, the nature of an appeal under s 106 of that Act is such that the Court has both the jurisdiction and power to grant that relief.[17] The Commissioner, on the other hand, contends that a s 106 appeal on an objection to an assessment based on s 32(2)(b)(iv) of the Payroll Tax Act "would be determined by way of a *de novo* hearing".[18] In other words, the Commissioner contends that, on appeal, the Court must determine whether the

---

17 *Appellants' Outline of Submissions on Separate Question* (9 February 2018); *Transcript*, 9–10.

18 *Respondent's Submissions on Separate Question* (23 February 2018), [25(1)]; *Transcript*, 30–1.

Court, as opposed to the Commissioner, must be satisfied of the matter in s 32(2)(b)(iv), on the evidence before it.[19]

Statutory provisions

14 The critical provisions of the Payroll Tax Act are those contained in s 32(2)(b)(iv) which, together with some legislative context, are as follows:

> **Division 7 – Contractor provisions**
>
> …
>
> **32. What is a relevant contract?**
>
> (1) In this Division, a ***relevant contract*** in relation to a financial year is a contract under which a person (the ***designated person***) during that financial year, in the course of a business carried on by the designated person—
>
> (a) supplies to another person services for or in relation to the performance of work; or
>
> (b) has supplied to the designated person the services of persons for or in relation to the performance of work; or
>
> (c) gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person or, where the designated person is a member of a group, to another member of that group.
>
> (2) However, a 'relevant contract' does not include a contract of service or a contract under which a person (the ***designated person***) during a financial year in the course of a business carried on by the designated person—
>
> (a) is supplied with services for or in relation to the performance of work that are ancillary to the supply of goods under the contract by the person by whom the services are supplied or to the use of goods which are the property of that person; or
>
> (b) is supplied with services for or in relation to the performance of work where—
>
> (i) those services are of a kind not ordinarily required by the designated person and are performed by a person who ordinarily performs services of that kind to the public generally; or
>
> (ii) those services are of a kind ordinarily required by the

[19] *Respondent's Submissions on Separate Question* (23 February 2018), [19]–[20].

designated person for less than 180 days in a financial year; or

(iii) those services are provided for a period that does not exceed 90 days or for periods that, in the aggregate, do not exceed 90 days in that financial year and are not services—

(A) provided by a person by whom similar services are provided to the designated person; or

(B) for or in relation to the performance of work where any of the persons who perform the work also perform similar work for the designated person—

for periods that, in the aggregate, exceed 90 days in that financial year; or

(iv) those services are supplied under a contract to which subparagraphs (i) to (iii) do not apply and the Commissioner is satisfied that those services are performed by a person who ordinarily performs services of that kind to the public generally in that financial year; or

…

15 The appellate function of the Court is conferred by Part 10 of the TAA. The most relevant provisions in the present context are ss 106(1)(a), 109 and 112, which provide:

106 Right of review or appeal

(1) If—

(a) a taxpayer is dissatisfied with the Commissioner's determination of the taxpayer's objection; or

…

the taxpayer, in writing, may request the Commissioner to refer the matter to the Tribunal or to treat the objection as an appeal and cause it to be set down for hearing at the next sittings of the Supreme Court.

…

109 Grounds of review or appeal

On a review or an appeal—

(a) the taxpayer's case is limited to the grounds of the objection; and

(b) the Commissioner's case is limited to the grounds on which the objection was disallowed—

unless the Tribunal or Court otherwise orders.

…

112 Supreme Court appeals

(1) On the hearing of an appeal by the Supreme Court, the Court may make any order it thinks fit and may by order confirm, reduce, increase or vary the assessment or decision.

(2) The costs of the appeal are in the discretion of the Court.

Nature of an appeal under s 106 of the TAA

Nature of an appeal as a question of interpretation

16 It is uncontroversial between the parties that the nature of the "appeal" to the Supreme Court under s 106 of the TAA must be ascertained as a matter of proper construction of the provision of Part 10 of the TAA having regard to their text and context.[20] Contrast to an appeal on a question of law from a decision of the Victorian Civil and Administrative Tribunal under s 148 of the *Victorian Civil and Administrative Tribunal Act* 1997 ("VCAT Act"), an appeal to the Supreme Court under s 106 of the TAA takes place where there will not previously have been any hearing at first instance.[21]

17 In *BSA Ltd v Victorian WorkCover Authority*,[22] Garde J determined a preliminary question as to the nature of an appeal under s 85 of the *Workplace Injury, Rehabilitation and Compensation Act* 2013 and, in so doing set out the relevant principles for determining the nature of an appeal:[23]

> 21 In *Walsh v Law Society (NSW)*, the plurality of the High Court observed:
>
> > An appeal is a creation of statute. There are various forms of appeal. Accordingly, it is always important, where a process called 'appeal' is invoked, to identify the character of the appeal and the duties and powers of the court or tribunal conducting it.

---

20 *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at 940-1.

21 See *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-22; *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-8.

22 [2016] VSC 435.

23 *BSA Ltd v Victorian WorkCover Authority* [2016] VSC 435 [21]-[24].

22 The six forms of appeal are listed in *Turnbull v NSW Medical Board*:

(1) appeals to supervisory jurisdiction;

(2) appeals on questions of law only;

(3) appeals after a trial before judge and jury;

(4) appeals from a judge in the strict sense;

(5) appeals from a judge by way of rehearing; and

(6) appeals involving a hearing *de novo*.

23 In *Fox v Percy*, the plurality of the High Court referred to the types of appeal defined by Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*:

(i) an appeal *stricto sensu*, where the issue below was right on the material before the trial court;

(ii) an appeal by rehearing on the evidence before the trial court;

(iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and

(iv) an appeal by way of a hearing *de novo*.

24 In *Dwyer v Calco Timbers Pty Ltd*, a proceeding also arising from accident compensation legislation, the High Court said that these categories are not a closed class. Particular legislative measures may use the term 'appeal' to identify a wholly novel procedure or one which is a variant of one or more of those described. The Court added that 'it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature'.

[citations omitted]

18 In determining the proper construction of the provisions of Part 10 of the TAA, the Court is required to give the words of those provisions "the meaning that the legislature is taken to have intended them to have".[24] In that process, "the starting point for the ascertainment of the meaning of [the provisions] is the text of the statute whilst, at the same time, regard is had to [their] context and purpose".[25]

19 The Commissioner does, however, contend that the Appellants' submissions seek to

---

24 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

25 *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at 940-1 [14] (Kiefel CJ, Nettle and Gordon JJ).

erect a false dichotomy between appeals and reviews under s 106 of the TAA, treating the former as proceedings by way of judicial review confined to legal error.[26] The Appellants place undue weight, the Commissioner says, on the reference in the statutory provisions to the Commissioner being "satisfied" of certain matters, without any analysis of the matters in respect of which such satisfaction is to be formed.[27] The Commissioner submits that the most recent and authoritative consideration of these issues in the context of appeals under s 106 of the TAA is that in *Mould v Commissioner of State Revenue* ("*Mould*").[28] In that case, Ginnane J rejected submissions made by the Commissioner that, it is submitted, were in some respects analogous to those pressed by the Appellants in the present case.[29] Properly understood, the Commissioner contends, the decision in *Mould* does not support the Appellants' contentions.[30] The earlier decision of Pagone J in *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* ("*Conte*")[31] can, it is said, be distinguished on the basis that it involved a challenge to the exercise of an administrative discretion entrusted to the Commissioner to "de-group" related companies for payroll tax purposes, and does not stand for a general proposition that all appeals to the Supreme Court under s 106 of the TAA are proceedings by way of judicial review.[32] For the reasons which follow, I do not accept the Commissioner's submissions in this respect and regard *Conte* as a more analogous and relevantly indistinguishable decision in the present circumstances.[33]

20 Moreover, the Commissioner contends that the Appellants mischaracterise the Commissioner's position as "confining" the Court to merits review and as precluding the Court from addressing legal error arising from an assessment.[34] The

---

26 *Respondent's Submissions on Separate Question* (23 February 2018), [5]; *Transcript*, 32–4.
27 *Respondent's Submissions on Separate Question* (23 February 2018), [5]; *Transcript* 30, 55.
28 [2014] VSC 268; (2014) 98 ATR 579; *Respondent's Submissions on Separate Question* (23 February 2018), [5].
29 *Respondent's Submissions on Separate Question* (23 February 2018), [5].
30 *Respondent's Submissions on Separate Question* (23 February 2018), [5].
31 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* [2011] VSC 104; (2011) 85 ATR 120 at 122–4 [2]-[5].
32 *Respondent's Submissions on Separate Question* (23 February 2018), [5].
33 See below, [33]-[36].
34 *Respondent's Submissions on Separate Question* (23 February 2018), [6], citing *Appellants' Submissions on Separate Question* (9 February 2018), [8]-[9], [49], [53].

Commissioner says that he does not contend that the Court has no jurisdiction or power in an appeal under s 106 of the TAA to determine whether the Commissioner's failure to be satisfied of the matters set out in s 32(2)(b)(iv) was affected by legal error.[35] However, the Commissioner says that the question is whether the Court is confined or limited to that question, and is unable to grant any relief other than to set aside the Commissioner's decision to disallow the objection and to remit the objection to the Commissioner for redetermination.[36] The Commissioner submits that the Court can resolve legal questions such as those concerning the proper construction of s 32(2)(b)(iv) of the Payroll Tax Act, but can also apply the statutory criteria to the facts in order to determine whether the exemption is made out on the evidence admitted in the appeal (which may include, but is not necessarily limited to the material that was before the Commissioner).[37] Ultimately, the Commissioner submits that it remains the choice of the taxpayer whether to seek to rely on additional evidence that was not before the Commissioner, or whether to argue that the statutory criteria are met on the material that was before the Commissioner.[38] As will be seen from the reasons which follow, I accept that the taxpayer has a choice, but that it is between a *de novo* hearing before the Victorian Civil and Administrative Tribunal or a more limited review proceeding before the Supreme Court.

21 So the position reached is that it is clear from the text of s 106 of the TAA that a taxpayer is entitled to have an objection "treated as an appeal" and that the Supreme Court has power to hear "an appeal",[39] but the text does not directly provide an answer to the core question in this proceeding: what is the nature of that appeal? Consequently, it is necessary to have regard to context and purpose of this legislation. In this respect, it is helpful to consider three contextual elements put forward by the Appellants as being of particular significance in this process.[40] The

---

35 *Respondent's Submissions on Separate Question* (23 February 2018), [6].
36 *Respondent's Submissions on Separate Question* (23 February 2018), [6].
37 *Respondent's Submissions on Separate Question* (23 February 2018), [6]; *Transcript* 48–56.
38 *Respondent's Submissions on Separate Question* (23 February 2018), [6]; *Transcript* 30–1.
39 Section 106 and 109 of the *Taxation Administration Act* 1997.
40 *Appellants' Submissions on Separate Question* (9 February 2018), [25] et seq.

first is authorities on antecedent provisions; the second, the significance of the choice between review by the Victorian Civil and Administrative Tribunal and a Supreme Court appeal; and the third is the Supreme Court's supervisory role.[41]

Authority on antecedent provisions

22 It is, again, uncontroversial that in interpreting a provision of a piece of taxation legislation, regard may be had to decisions in respect of predecessor provisions of that legislation, which were not materially different.[42] It is not suggested, however, either in these proceedings or in the authorities to which reference is made, that this process is a licence to disregard clear words used in current legislative provisions. Nevertheless, as indicated, the difficulty arises in the present proceedings because s 106 of the TAA, though providing for "an appeal", does not contain express provisions which describe or define the nature of that appeal.

23 In relation to the current legislative regime, the first significant matter in terms of this contextual element is the legislative history of, and contextual background to this regime. In that regard, the Appellants rely on what is said to be strong authority on the construction of the antecedents of Part 10 of the TAA, to the effect that if:[43]

> (1) a taxpayer's objection was disallowed on the basis of a state of satisfaction entrusted to the relevant taxation commissioner; and
>
> (2) the taxpayer elected to have its objection treated as an appeal, rather than referred to an administrative tribunal for review;
>
> then the taxpayer had to demonstrate legal error on the part of the Commissioner in order to succeed.

24 In *Avon Downs Pty Ltd v Federal Commissioner of Taxation* ("*Avon Downs*"),[44] Dixon J determined the nature of an appeal under Div 2 of Part V of the *Income Tax Assessment Act* 1936 (Cth), which relevantly provided:

> **Division 2. Reviews and Appeals**

---

41 *Appellants' Submissions on Separate Question* (9 February 2018), [25] et seq.

42 *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1 at 17 [53] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ). See also the observations in Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation of Legal Sources* (Thomson Reuters, 2013) at 287, second paragraph.

43 *Appellants' Submissions on Separate Question* (9 February 2018), [27].

44 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353.

185. A taxpayer dissatisfied with any assessment under this Act may, within sixty days after service of the notice of assessment, post to or lodge with the Commissioner an objection in writing against the assessment stating fully and in detail the grounds on which he relies:

…

186. The Commissioner shall consider the objection, and may either disallow it, or allow it either wholly or in part, and shall serve the taxpayer by post or otherwise with written notice of his decision.

187. A taxpayer dissatisfied with the decision may, within sixty Application for days after such service, in writing request the Commissioner either-

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

(b) to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State.

…

189. If within sixty days after receiving the request accompanied by the fee of one pound the Commissioner does not refer the decision or forward the objection, the taxpayer may at any time thereafter give him notice in writing to do so, and the Commissioner shall within sixty days after receiving the notice refer the decision or forward the objection to a Board or Court accordingly:

…

190. Upon every such reference or appeal –

(a) the taxpayer shall be limited to the grounds stated in his objection; and

(b) the burden of proving that the assessment is excessive shall lie upon the taxpayer.

…

192. A Board of Review shall have power to review such decisions of the Commissioner, Second Commissioner or a Deputy Commissioner as are referred to it under this Act.

193.-(1.) For the purposes of reviewing such decisions, the Board shall, subject to this section, have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act, and such assessments, determinations and decisions of the Board, and its decisions upon review, shall for all purposes (except for the purpose of objections thereto and review thereof and appeals therefrom) be deemed to be assessments, determinations or decisions of the Commissioner.

…

> 195.-(1.) Upon every reference to the Board, it shall give a decision in writing and may either confirm, reduce, increase or vary the assessment.
>
> (2.) Upon the request of the Commissioner or the taxpayer, made at the hearing, the Board when giving its decision shall state in writing its findings of fact and its reasons in law for the decision.
>
> …
>
> 197. Where, at the request of the taxpayer, the Commissioner has treated his objection as an appeal and forwarded it to the High Court or the Supreme Court of a State, the appeal shall be heard by a single Justice or Judge of the Court.
>
> …
>
> 199.-(1.) The Court hearing the appeal may make such order as it thinks fit, and may by such order confirm, reduce, increase or vary the assessment. The costs of the appeal shall be in the discretion of the Court.
>
> …

25 The Appellants' objection in *Avon Downs* had been disallowed on the basis that the Federal Commissioner of Taxation was not satisfied of the matter specified in s 80(5) of the *Income Tax Assessment Act* 1936 (Cth). Section 80(5) of that Act was concerned with the state of voting power attaching to shares at the end of the year of income. It was held that it was for the Commissioner and not the Court to be satisfied as to the state of voting power at that particular time. Thus, Dixon J said:[45]

> 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. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion 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 considerations, 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

---

45 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; and as to a more recent formulation, see *Wilkie v Commonwealth* (2017) 91 ALJR 1035, especially at 1055 [109].

> discharge of his exact function according to law.

In the alternative, or additionally, Dixon J went on to say that he was "not prepared to find that the Commissioner's refusal to be satisfied upon the issue formulated by s 80(5) [was] due to any such misapprehension, mistake, misconception, unreasonableness or miscarriage of judgment as would authorize me to interfere and set aside his conclusion.[46]

26 *Avon Downs* is a particularly important authority in the present context because of the similarity in structure between the provisions of the *Income Tax Assessment Act* 1936 (Cth) considered in that case and the provisions of and structure of Part 10 of the TAA; a matter which was discussed by Deputy President Macnamara (as his Honour then was) in *Baranov v State Revenue Office* ("*Baranov*")[47] in terms of the structure of Part 10 of the TAA: [48]

> … of objection followed by referral at the election of the taxpayer either to the Supreme Court or to an administrative Tribunal is ultimately based upon the structure for appeals and reviews originally provided for in the *Commonwealth Income Tax Assessment Act 1936*. That structure was adopted at the State level when the *Taxation Appeals Act 1972* established the Victorian Taxation Board of Review upon the model of the Commonwealth Taxation Boards of Review. The same structure was adopted when the Victorian Taxation Board of Review was abolished and its jurisdiction incorporated into the new Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act 1984* and finally when that jurisdiction was given to this Tribunal under the *Victorian Civil and Administrative Tribunal Act*. The present structure is as previously noted set out under the *Taxation Administration Act*.

27 When the Victorian Parliament enacted the *Taxation Appeals Act* 1972, it is clear from both the text and the parliamentary debates[49] that the scheme for appeal and review was modelled on Div 2 of Part V of the *Income Tax Assessment Act* 1936 (Cth). More particularly, this Victorian legislation established the Victorian Taxation Board of Review, and amended the provisions of a number of Victorian taxing Acts to

---

46 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 362-3.

47 [2008] VCAT 2652.

48 *Baranov v State Revenue Office* [2008] VCAT 2652 at [33].

49 See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 1972 at 4288 (Dick Hamer, Chief Secretary); Legislative Assembly, 22 March 1972 at 4417-4418 (Mr Hamer); Legislative Assembly, 11 April 1972 at 4753-4754 (Tom Edmunds); Legislative Assembly, 11 April 1972 at 4756 (Ian McLaren); Legislative Assembly, 11 April 1972 at 4756 (Ian McLaren); Legislative Council, 18 April 1972 at 4998-4999 (Murray Byrne, Minister for Public Works).

emulate the Commonwealth scheme. An example is provided by the following provisions which were substituted for provisions which then appeared in the 1971 *Pay-roll Tax Act*:[50]

> 33. (1) An employer who is dissatisfied with the decision of the Commissioner on an objection made by that employer may within 60 days after service on him of notice of that decision or within such further time as the Commissioner may allow—
>
> (a) in writing request the Commissioner to refer the decision to the Victorian Taxation Board of Review; or
>
> (b) in writing request the Commissioner to treat his objection as an appeal and to cause it to be set down for hearing at the next sittings of the Supreme Court.
>
> (2) The Commissioner shall within 60 days of the request refer the decision for review or cause the objection to be set down for hearing accordingly.
>
> 33A. (1) Upon any review or appeal under this Act, unless the Court or Board otherwise orders, the objector shall be limited to the grounds stated in his objection and the Commissioner shall be limited to the grounds upon which he has disallowed the objection.
>
> …
>
> 33B. (1) Subject to sub-section (2), where a decision is referred to the Victorian Taxation Board of Review, the Board shall review the decision, and may confirm reduce increase or vary the decision assessment or determination.
>
> …
>
> (3) For the purpose of reviewing the decision assessment or determination, the Board shall have all the powers and functions of the Commissioner in making decisions assessments and determinations under this Act and such decisions assessments and determinations of the Board and its decisions upon review shall for all purposes (except for the purpose of objections thereto and review thereof and appeals therefrom) be deemed to be decisions assessments and determinations of the Commissioner.
>
> …
>
> 33C. (1) On the hearing of an appeal by the Court, the Court may make such order as it thinks fit and may by such order confirm reduce increase or vary the assessment.
>
> (2) The costs of the appeal shall be in the discretion of the Court.

---

50 Cited in the *Appellant's Submissions on Separate Question* (9 February 2018) [33].

28 I accept that when the Victorian Parliament enacted the *Taxation Appeals Act* in 1972, it should be taken to have been aware of the construction given to the equivalent provisions of the *Income Tax Assessment Act* 1936 (Cth) by Dixon J in *Avon Downs*.[51] Moreover, on 7 January 1972, less than three months before the First Reading of the *Taxation Appeals Bill*,[52] Barwick CJ, Menzies, Windeyer and Owen JJ allowed an appeal from a decision of Walsh J, each essentially reasoning that his Honour erred in an appeal under the *Income Tax Assessment Act* 1936 (Cth) by failing to properly adopt the approach described by Dixon J in *Avon Downs*.[53] By way of example, Owen J, with whom Windeyer J agreed, said:[54]

> On the appeal to Walsh J, it was for the taxpayer to show that the assessment was wrong and the onus lay upon it to establish that, on the material before the Commissioner, he had failed to address himself to the question which the subsection formulates or had made some mistake of law, or taken some extraneous reason into consideration or had excluded from consideration some factor which should have affected his determination (*Avon Downs* … per Dixon J. …).

29 A few years later, in *Ballarat Brewing Co Ltd v Commissioner of Pay-roll Tax (Vic)*[55] ("*Ballarat Brewing*") Gray J heard an appeal to this Court under the provisions of ss 33, 33A, 33B and 33C of the amendments made to the 1971 *Pay-roll Tax Act*, a de-grouping decision by the Commissioner of Pay-roll Tax under the de-grouping provisions that preceded those considered by Pagone J in *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* ("*Conte*").[56] His Honour held that:[57]

> it is clearly established that in cases where the taxpayer's liability depends upon whether the Commissioner is or is not 'satisfied' of a particular state of facts, the appellant must show that the Commissioner's decision miscarried

---

51 For example, during the debates, Tom Edmunds, the member for Moonee Ponds, reported that one judge had described the procedure on taxation appeals to the Supreme Court as "'an unsatisfactory procedure' and another [had] referred to it as 'an awkward, expensive, dilatory and generally unsatisfactory method of appeal'": see Victoria, *Parliamentary Debates*, Legislative Assembly, 11 April 1972 at 4753-4754 (Mr Edmunds). Those drafting the bill may also be realistically assumed to have considered the High Court decisions about the nature of the scheme they were copying.

52 Victoria, Parliamentary Debates, Legislative Assembly, 21 March 1972 at 4287 (Mr Hamer, Chief Secretary).

53 *Commissioner of Taxation (Cth) v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 44-62.

54 *Commissioner of Taxation (Cth) v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 59.

55 (1979) 10 ATR 228.

56 (2011) 85 ATR 120.

57 *Ballarat Brewing Co Ltd v Commissioner of Pay-roll Tax (Vic)* (1979) 10 ATR 228 at 235-6.

upon the material before him.

The question which arises in such a case was stated by Dixon J in *Avon Downs* … at 360 …

I am satisfied that in order to attack the Commissioner's "satisfaction" or the lack of it on a particular matter, no fresh evidence can be looked at until it is shown by the appellant that the Commissioner's judgment miscarried in one of the ways stated by Dixon J in [*Avon Downs*].

30 As Deputy President Macnamara observed in *Baranov*, there is a clear and direct lineage from the provisions of Division 2 of Part V of the *Income Tax Assessment Act* 1936 (Cth) through the facsimile provisions introduced in Victoria by the *Taxation Administration Act* 1972, to the present operative provisions of Part 10 of the TAA.[58] Thus, for the preceding reasons, it is my view that enacting the appeal provisions in Part 10 of the TAA, Parliament should be taken to have intended them to have the meaning expounded by Dixon J in *Avon Downs* and Gray J in *Ballarat Brewing*.

31 The Commissioner placed particular reliance on the decision of Ginnane J in *Mould* on the basis that his Honour held that the nature of the appeal provided by section 106 of the TAA depends on the character of the decision of the Commissioner against which the appeal is brought.[59] The principles or approach the Commissioner contends flow from this case are:[60]

(1) If the determination of an objection involves the application to the facts of 'objectively stated statutory criteria' in order to determine whether or not tax is payable, the appeal will be a *de novo* hearing on the evidence before the Court.[61]

(2) By contrast, where an assessment or decision involves the exercise of an administrative discretion or the formation of a state of mind by the Commissioner, the appeal will ordinarily be in the nature of judicial review of the Commissioner's decision, requiring the demonstration of legal error: see *Conte*,[62] which involved a challenge to the exercise of a statutory discretion to 'de-group' related companies for payroll tax purposes.

---

58 *Appellants' Submissions on a Separate Question* (9 February 2018), [35].

59 Transcript, 53; *Respondent's Submissions on Separate Question* (23 February 2018), [10]; *Mould v Commissioner of State Revenue* (2014) 98 ATR 579 at 588, [35]. Compare *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446.

60 *Respondent's Submissions on Separate Question* (23 February 2018), [10].

61 *Mould v Commissioner of State Revenue* [2014] VSC 268 at [45]-[47], referring to *Feez Ruthning v Commissioner of Pay-Roll Tax* [2003] 2 Qd R 41 at 48 [19], [22].

62 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 122–4 [2]–[5].

32 Moreover, the Commissioner submits that the approach adopted by Ginnane J in *Mould* is consistent with the statutory context of Part 10 of the TAA, including:[63]

> (1) s 106, which relevantly provides that the taxpayer may request the Commissioner 'to *treat the objection as an appeal* and cause it to be set down for hearing at the next sittings of the Supreme Court', and that the Commissioner must 'cause *the objection* to be set down for hearing accordingly' – in other words, the subject matter of the appeal is the objection as opposed to the Commissioner's determination under s 101 of the TAA;
>
> (2) this is underlined by the fact that the right to have an objection treated as an appeal under s 106 of the TAA can arise in the absence of any determination by the Commissioner, namely, if 90 days have passed since the objection was received by the Commissioner;
>
> (3) further, under s 109 of the TAA, the Court may make orders that the taxpayer's case is not limited to the grounds of the objection, *i.e.* the taxpayer may rely on a ground of objection that has *not* been considered by the Commissioner in any determination under s 101 of the TAA;
>
> (4) s 110 imposes an onus on the taxpayer to prove its case on an appeal; and
>
> (5) s 112 confers wide powers on the Court to "make any order it thinks fit", including to "confirm, reduce, increase or vary the assessment or decision".[64]

33 Returning to *Conte*, it will be recalled that the appellant objected to assessments made by the Commissioner on the basis that the appellant and another entity constituted a group.[65] Specifically, the appellant in that case objected on the basis that the Commissioner should have exercised the power under s 9A(1J) of the *Payroll Tax Act* 1971 and s 79 of the Act to "de-group" the entities. Each of those powers was conditioned on the Commissioner being "satisfied" of specified matters. The Commissioner gave reasons (as required by s 103(2) of the TAA) for not being satisfied of those matters.

34 Justice Pagone dismissed the appeal. His Honour's dispositive reasoning is

---

63 *Respondent's Submissions on Separate Question* (23 February 2018), [11].

64 The reference in s 112 to an 'assessment or decision' reflects the fact that the subject of an objection may be an assessment under the *Taxation Administration Act* 1997, or a decision of the Commissioner under the Payroll Tax Act: see *Taxation Administration Act*, s 96(1)(a), (d).

65 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 122 [1].

conveniently summarised as follows:[66]

> (1) Where:
>
> (a) Parliament has conditioned a taxpayer's payroll tax liability on the Commissioner being satisfied of a matter specified in the *Payroll Tax* Act 2007; and
>
> (b) the Commissioner has disallowed an objection on the basis that the Commissioner is not satisfied of that matter;
>
> then to succeed on an 'appeal' under Pt 10 of the *Taxation Administration* Act 1997, the appellant must establish an error affecting the Commissioner's state of non-satisfaction, of the kind identified by Dixon J in *Avon Downs*.[67]
>
> (2) The Commissioner disallowed the objection because the Commissioner was not satisfied of the matters specified in s 9A(1J) of the *Pay-roll Tax Act* 1971 and s 79 of the *Payroll Tax* Act 2007, which were conditioned on the Commissioner being satisfied of the specified matters.[68]
>
> (3) Therefore, to succeed on the appeal, the appellant had to show an error of the kind identified in *Avon Downs*.[69]
>
> (4) As (unlike in *Avon Downs*) the Commissioner gave reasons for disallowing the objection, the Court had to look to those reasons to see whether there had been a legal defect of the requisite kind.[70]
>
> (5) The appellant could not demonstrate, in the reasons, a legal error of the kind identified in *Avon Downs*.[71]

35 *Conte* cannot, in my view, be distinguished from, what may be described as, the *Avon Downs* line of authority. The Commissioner submits that it can, because s 79 of the Payroll Tax Act confers a discretionary power, conditioned on a state of satisfaction.[72] I reject these submissions for the following reasons:[73]

> (1) The 'de-grouping' provisions at issue in *Conte* were in the nature of a

---

66 *Appellants' Submissions on a Separate Question* (9 February 2018), [17].

67 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 123-124, [4]-[5].

68 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 124 [6].

69 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 125-6, [10].

70 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 126 [10]-[11], 128 [15].

71 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 127-129 [12]-[17].

72 *Transcript*, 51; *Respondent's Submissions on Separate Question* (23 February 2018), [24.1].

73 *Appellants' Reply on Separate Question* (9 March 2018), [3].

discretionary power, conditioned on a state of satisfaction.

(2) *Conte* applied the principle articulated in *Avon Downs* (which must also be taken to have been understood by the Parliament that enacted the TAA)[74] to the formation of the state of satisfaction, not the exercise of the discretion. Justice Pagone observed:[75]

> The provision in [*Avon Downs*], like those in question in this appeal, left it to the Commissioner, and not to the court, to be satisfied about certain matters. … Critical to the 'de-grouping' sought by Conte is that the Commissioner (and on review, the tribunal) rather than the court, be satisfied about certain matters.

For Conte to succeed in an 'appeal' to the court what must be shown is an error by the Commissioner in his reaching, or not reaching, a state of satisfaction.

(3) *Avon Downs* concerned a provision that was not in the nature of a discretionary power, but turned solely on a criterion conditioned on the Tax Commissioner's satisfaction.[76] The subject-matter of that criterion turned on 'the application of objective statutory criteria which [were] capable of application and determination by the [High Court]',[77] as demonstrated by the alternative line of reasoning engaged in by Dixon J.[78]

(4) The dispositive reasoning in *Conte*—when properly understood as an application of *Avon Downs* to the TAA—cannot be distinguished and applies to the present appeal. As the Commissioner effectively endorses *Conte*,[79] there is no basis for considering whether Pagone J was clearly wrong. In any event, for the preceding reasons I am of the opinion that there is no basis to depart from the decision of Pagone J.

(5) Further, by reason of the legislative history of the provisions with which these proceedings are concerned, Parliament should be taken to have understood that conditioning s 32(2)(b)(iv) of the *Payroll Tax Act* 2007 on the Commissioner being 'satisfied' would result in an appeal to the Supreme Court on the basis of legal error of the kind identified in *Avon Downs*.

---

74 *Respondent's Submissions on Separate Question* (23 February 2018), [26]-[36].

75 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 123 [4].

76 Section 80(5) of the *Income Tax Assessment Act* 1936 (Cth), inserted by s 10 of the *Income Tax Assessment Act 1944* (No. 3, 1944), provided "notwithstanding any other provision of this section, in the case of a taxpayer which is a private company within the meaning of Division 7 of this Part, no loss incurred by the company in any year prior to the year of income shall be an allowable deduction unless the company establishes to the satisfaction of the Commissioner that, on the last day of the year of income, shares of the company carrying not less than twenty-five percentum of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than twenty-five per centum of the voting power on the last day of the year in which the loss was incurred".

77 *Respondent's Submissions on Separate Question* (23 February 2018), [4.3].

78 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 363-5. By contrast, s 32(2)(b)(iv) of the *Payroll Tax Act* 2007 involves "a degree of subjectivity": see *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205 [20].

79 *Respondent's Submissions on Separate Question* (23 February 2018), [24.1].

36 Moreover, by conditioning s 32(2)(b)(iv) of the Payroll Tax Act on the Commissioner's state of satisfaction, Parliament has invoked "an 'established drafting technique' which has for more than a century been 'used to make the holding of a particular state of mind by the repository a precondition to the performance of a duty or to the exercise of a power'."[80] As has been recognised in a line of cases, it is no part of the role of a court, in reviewing that state of satisfaction, to determine "objectively ascertainable facts" as to which the Commissioner ought be satisfied.[81] That is consistent with *Mould*, where Ginnane J recognised the significance in *Avon Downs* and *Conte* of Parliament making the relevant criteria turn on the satisfaction of the Commissioner.[82]

37 The Commissioner further contends that there is nothing in the legislative history or contextual background to Part 10 of the TAA which requires a contrary approach.[83] In particular, it is said that neither the fact that the Victorian Civil and Administrative Tribunal is endowed with the powers and functions of the "decision-maker" (here, the Commissioner),[84] nor the fact that a taxpayer may elect to have an objection referred either to the Tribunal or to the Supreme Court, necessitate the conclusion that an appeal to the Supreme Court is confined to judicial review of the legality of the Commissioner's determination of the objection or the legality of the assessment.[85] Consequently, it is said that while the Court may not "stand in the shoes" of the Commissioner in relation to the exercise of administrative discretions, the powers conferred on the Court by s 112 of the TAA are nevertheless wide and well adapted to the conduct of a *de novo* hearing of all issues of fact and law.[86] It should, however, be observed that the broad powers conferred on the Court by s 112 of the TAA in relation to appeals equally well accommodate appeals of a more

---

80 *Wilkie v The Commonwealth* (2017) ALJR 1035 at 1053 [98].

81 *Appellants' Reply Submissions on Separate Question* (9 March 2018), [4]; see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

82 *Mould v Commissioner of State Revenue* (2014) 98 ATR 579 at 588–9 [36]–[38]

83 *Respondent's Submissions on Separate Question* (23 February 2018), [12].

84 *Victorian Civil and Administrative Tribunal Act 1997*, s 51.

85 *Transcript*, 45.

86 *Transcript*, 45.

limited nature as contended by the Appellants.[87] As is clear from the provisions of Part 10, the general empowering provisions of s 112 are to accommodate appeals of whatever nature coming before the Court which are subject to the provisions of that part. The broad provisions of s 112 are clearly intended to ensure that the Court is empowered to dispose of those appeals as the Court thinks appropriate—but always having regard to the nature of the particular appeal. Thus, to work from the general empowering provisions of s 112 as a means of characterising the nature of appeals under Part 10 is both to "put the cart before the horse" and to ignore the position that appeals under Part 10 may be very different in character, depending on their nature and the statutory environment from which they arose.

38 As a general proposition, I accept that the application of statutory criteria to the facts in order to determine the correct amount of a taxpayer's liability is a function that is equally capable of being conferred on and exercised by a court or an administrative tribunal. However, this general proposition does not, in my view, advance the resolution of the critical issue in these proceedings. Moreover, the decisions of the courts and the Victorian Civil and Administrative Tribunal to which reference has been made do not support the Commissioner's position either in terms of legislative history, the provisions of Part 10 of the TAA or the relevance and effect of the interpretation of analogous provisions, particular those contained in the *Income Tax Assessment Act* 1936 (Cth).

39 In the latter respect, the Commissioner made particular reference to the nature of an appeal to the Federal Court from the disallowance of an objection to an income tax assessments (under s 14ZZ(c) of the *Taxation Administration Act* 1953 (Cth)).[88] This was considered in *Kajewski v Commissioner of Taxation*,[89] where Drummond J concluded that the taxpayer was entitled to challenge the correctness of both the amount of the assessment and any of the particulars of the assessment, referring to Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* ("*Richard*

---

87 *Respondent's Submissions on Separate Question* (23 February 2018), 12; *Transcript*, 44–5.
88 *Respondent's Submissions on Separate Question* (23 February 2018), 14.
89 (2003) 52 ATR 455 at 457-61 [3]-[13].

Walter") who stated that:[90]

> [t]he procedures in Pt IVC of the *Administration Act* expose an assessment to correction if the application of the general provisions of the Act to the facts as found establishes that the assessment was excessive.

Drummond J noted that:[91]

> it has long been accepted that it is necessary for the taxpayer to prove, by proper evidence put before the appeal Court, what is the correct amount of the taxpayer's taxable income in respect of which the Commissioner should have made his assessment … [s]ubject only to s 14ZZO(a), the taxpayer is, in general, entitled to put before the appeal court evidence that may not have been before the Commissioner and to seek the Court's decision on whether, on all the evidence before it on the appeal, an assessment different in amount from that issued by the Commissioner should issue.

Drummond J described the appeal as one: "against the factual and legal determinations made by the Commissioner in issuing the particular assessment in which the taxpayer has an extensive right to put additional evidence before the Court".[92] Nevertheless, as the Commissioner observes in his submissions,[93] Drummond J accepted that there was "a limitation on the jurisdiction of the Court on an appeal under provisions of the kind now contained in Pt IVC to interfere with an appealable objection decision in so far as that decision may be based upon the *formation of an opinion* confided by the statute to the Commissioner", referring to *Avon Downs*.[94] The Commissioner says further that, even in this situation, once the Court decides that the Commissioner's opinion was affected by an error of the kind identified in *Avon Downs*, it may be open to the Court to determine what opinion ought to have been formed by reference to all of the material before the Court,[95] having regard to the width of the powers conferred on the Court in disposing of the appeal (which extend to reducing, increasing or otherwise varying the assessment).[96]

---

90 (1995) 183 CLR 168 at 198.

91 *Kajewski v Commissioner of Taxation* (2003) 52 ATR 455 at 459 [6].

92 *Kajewski v Commissioner of Taxation* (2003) 52 ATR 455 at 459 [8].

93 *Respondent's Submissions on Separate Question* (23 February 2018) [14].

94 *Kajewski v Commissioner of Taxation* (2003) 52 ATR 455 at 460 [10] [emphasis added].

95 See *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535 at 567-568, 576-577.

96 *Respondent's Submissions on Separate Question* (23 February 2018) [14]; *Transcript*, 59.

As Brennan J said in *Richard Walter*:[97]

> The jurisdiction of the Federal Court on appeal from, or of the Administrative Appeals Tribunal on review of, a decision on an objection extends to every issue which affects the amounts ultimately included in the taxable income or tax liability of a taxpayer. If any of these issues be resolved in favour of the taxpayer, an amendment of the assessment so as to reduce the taxable income or the tax liability of the taxpayer must follow.

The width of the powers conferred on the Court does not, however, assist in determining the nature of the appeal in relation to which those powers may be exercised. Rather, as indicated previously, this is to put the cart before the horse in terms of the analysis.[98]

40 The Commissioner also seeks to support this position on the basis that there is judicial authority in South Australia that supports the view that an appeal to the Supreme Court under s 92 of the *Taxation Administration Act* 1996 (SA) may be characterized as an appeal *de novo*.[99] These cases do not, however, raise the issue critical in the present proceedings, as the South Australian legislative context in which they were decided did not raise the possible application of the approval of Dixon J in *Avon Downs* and its subsequent line of authority.

41 Building on these submissions, the Commissioner contends that although containing a reference to the Commissioner's satisfaction (in relation to one component of one of the requirements for an exemption), s 32(2)(b)(iv) involves the application of objectively stated statutory criteria to the facts as agreed or determined by the Court.[100] Those criteria do not, the Commissioner says, involve the exercise of any administrative discretion, and are capable of application and determination by the Court in the exercise of its original jurisdiction under s 106 of the TAA.[101] Thus, it is submitted that the mere reference in a taxing provision to the satisfaction of the

---

97 (1995) 183 CLR 168 at 199; see also *Federal Commissioner of Taxation v AusNet Transmission Group Pty Ltd* (2015) 231 FCR 59 at 64 [14].

98 See above, [37].

99 *Respondent's Submissions on Separate Question* (23 February 2018), [16]. *Cyril Henschke Pty Ltd v Commissioner of State Taxation* (2008) 104 SASR 1 at 13 [36]; see also *Port Augusta Medical Centre Pty Ltd v Commissioner Of State Taxation* [2011] SASC 31 at [16]-[17]; *Balgra Office Enterprises Pty Ltd v Commissioner of State Taxation* [2008] SASC 50 at [20]-[21].

100 Transcript, 56; *Respondent's Submissions on Separate Question* (23 February 2018) [10], [19].

101 *Respondent's Submissions on Separate Question* (23 February 2018), [12].

Commissioner cannot of itself confine the Court to judicial review of the Commissioner's subjective state of mind on grounds of legal error.[102] This, it is said, is illustrated by the decision in *Mould* itself—where the relevant exemption under s 67 of *the Land Tax Act* 2005 turned on whether the Commissioner had determined (on an application made by the taxpayer) that the land was used solely for the business of primary production. Moreover, it is observed by the Commissioner that many of the exemptions under the *Land Tax Act* 2005 are expressed by reference to the Commissioner's satisfaction of certain matters.[103] The position thus put by the Commissioner is said to be consistent with the approach that was adopted in *Drake Personnel Pty Ltd v Commissioner of State Revenue*.[104] That case concerned predecessor provisions in the *Pay-roll Tax Act* 1971 similar in terms to s 32(2)(b)(iv). Both the parties and the Court (at first instance and on appeal) proceeded on the basis that the Court stood in the Commissioner's shoes for the purposes of the application of those provisions.[105] While Phillips JA noted that no point had been taken in that case about the nature of the appeal,[106] the decision in *Drake Personnel* shows that the Court was prepared to proceed on that basis. However, as discussed further in the reasons which follow, this decision does not, in my view, assist the Commissioner.[107]

42 Moreover, though of course not decisive in these proceedings, reference should be made to the *Commissioner Revenue Ruling PTA021*,[108] as follows:

Exemption for contractors ordinarily rendering services to the public

Payroll Tax Act 2007

Revenue Ruling PTA021

Preamble

The *Payroll Tax Act 2007* (the Act), which commenced on 1 July 2007, rewrites the *Pay-roll Tax Act 1971* and harmonises the payroll tax legislation in Victoria

---

102 *Transcript*, 67.
103 *Transcript*, 54–5.
104 (1998) 98 ATC 4915; 40 ATR 304.
105 *Drake Personnel Pty Ltd v Commissioner of State Revenue* (2000) 2 VR 635 at 643 [21].
106 *Drake Personnel Pty Ltd v Commissioner of State Revenue* (2000) 2 VR 635 at 643 [21].
107 See below, [51]-[52].
108 Commissioner of State Revenue, *Exemption for contractors ordinarily rendering services to the public*, PT A021 1 July 2007.

and NSW.

…

Ruling

In exercising his discretion under section 32(2)(b)(iv) of the Act, the Commissioner needs to be satisfied that the contractor:

- provides the services in the course of conducting a genuine independent business, and
- ordinarily renders those services to the general public.

The mere fact that a contractor works on a succession of jobs for different principals does not mean that these criteria are satisfied. It is necessary to consider the steps undertaken by the contractor to create an independent business (i.e. to obtain work from clients other than the principal in question).

To seek an exemption under section 32(2)(b)(iv) of the Act, a principal is required to apply to the Commissioner for a private ruling. Details on how to apply for a private ruling are set out in Revenue Ruling GEN.009.

In making his determination, the Commissioner will review the contractor's business and consider factors including (but not limited to):

- the use of a business name by the contractor
- the extent and nature of advertising undertaken by the contractor
- the range of clients serviced by the contractor
- the extent and nature of plant and equipment provided by the contractor in execution of the services
- the engagement of staff or sub-contractors by the contractor
- the use of business premises by the contractor
- the method of operation of the business (such as tendering for jobs)
- the potential for entrepreneurial risk
- the nature of contracts entered into (e.g. formal long term or informal rolled over contracts)
- the history of the formation of the contractor's business
- how the contractor won the contract
- whether work is performed on separate contracts concurrently
- the nature of the contractor's business and the type of services provided
- whether the contractor bears the cost and responsibility for faulty

materials or workmanship

- whether the contractor quotes competitively for jobs on an all inclusive basis (all labour and materials), and
- whether the contractor merely charges for services on an hourly rate and adds on the cost of materials.

None of the above factors is conclusive on its own. The above is not an exhaustive list of factors that the Commissioner will take into account in exercising his discretion under section 32(2)(b)(iv) of the Act, he will also consider any other matters that are relevant to his decision.

…

This Ruling is clearly consistent with the position now put by the Appellants.

The significance of a choice between a Victorian Civil and Administrative Tribunal review and a Supreme Court appeal

43 The second contextual matter raised by the Appellants is the significance of: first, the choice given to the taxpayer by s 106 of the TAA whether to request that the Commissioner refer "the matter" to the Victorian Civil and Administrative Tribunal or treat the objection as an appeal and cause it to be set down for hearing at the next sittings of the Supreme Court; and secondly, the distinction between the functions of those two bodies under Part 10 of the TAA.[109]

44 Pagone J, in *Conte*, commenced by observing that the option and choice given to the taxpayer by Parliament in s 106 of the TAA was "not without important significance".[110] His Honour observed that s 106 gave the appellant a choice between reference to the Victorian Civil and Administrative Tribunal, which then "stands in the shoes of the Commissioner" on review, and treating the objection as an appeal to the Supreme Court, which does not then "stand in the shoes of the Commissioner" on appeal.[111] A relevantly similar choice is given to the taxpayer under the *Income Tax Assessment Act* 1936 (Cth).

45 This dual pathway approach to the provision of mechanisms to enable a taxpayer to

109 *Appellants' Submissions on Separate Question* (9 February 2018), [37].

110 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 122 [2].

111 *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 122–3 [2], [3].

review or appeal assessments has been maintained, consistently, in Victorian legislation, both as between different and complementary statutory provisions and also over time.

46 Under earlier legislation, the Victorian Taxation Board of Review was given "all the powers and functions of the Commissioner in making assessments, determinations and decisions" under that legislation and "such assessments, determinations and decisions of the Board and its decisions upon review [were] for all purposes … deemed to be assessments, determinations or decisions of the Commissioner".[112] As Deputy President Macnamara noted in *Baranov*, that Board was abolished and its jurisdiction incorporated into the Administrative Appeals Tribunal, and when the then taxation administration legislation was repealed by the *Administrative Appeals Tribunal Act* 1984.[113] That jurisdiction is now exercised by the Victorian Civil and Administrative Tribunal under Part 10 of the TAA. Section 111(4) of the TAA provides that the powers conferred on that Tribunal by s 111(3) of that Act are in addition to its powers and functions under the TAA and the VCAT Act.

47 Section 48(b) of the VCAT Act provides that the Victorian Civil and Administrative Tribunal's review jurisdiction is invoked by "a decision-maker referring a decision to the Tribunal under an enabling enactment in accordance with s 69 for review of the decision". The TAA is an enabling enactment, and the Commissioner a decision-maker, as defined in s 3 of the VCAT Act. Section 51(1)(a) of the VCAT Act provides that, in exercising its review jurisdiction in respect of a decision, the Victorian Civil and Administrative Tribunal "has all the functions of the decision-maker"; "function" is defined in s 3 of the VCAT Act to include "jurisdiction, power, duty and authority". Moreover, s 51(3)(a) of the VCAT Act relevantly provides that "a decision of a decision-maker as affirmed or varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a decision-maker … is deemed to be a decision of that decision-maker".

---

112 *Taxation Appeals Act* 1972, ss 19D(3), 28(3), 33B(3), 33E(3), 37B(3).

113 *Baranov v State Revenue Office* [2008] VCAT 2652 [33].

48 In *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue*,[114] Gzell J rejected an argument that an appeal under the *Taxation Administration Act* 1996 (NSW) ("the NSW TAA") from a de-grouping decision of the NSW Chief Commissioner of State Revenue under the *Pay-roll Tax Act* 1971 (NSW) had the character described by Dixon J in *Avon Downs*, holding instead that the appeal was in the nature of a full merits review. In so doing, His Honour distinguished *Ballarat Brewing*, saying:[115]

> Reference was made to *Ballarat Brewing* … where Gray J adopted the approach of Dixon J in *Avon Downs* to the exercise of discretion of the Victorian Commissioner of Pay-roll Tax with respect to the grouping of the taxpayer with another company.
>
> It was appropriate for his Honour to do so. The legislation with which he was concerned adopted the same dichotomy between the powers of the court and the powers of a tribunal that were in the provisions of the *Income Tax Assessment Act* 1936 (Cth) with which Dixon J was concerned.

49 In contrast to *Ballarat Brewing* and the Victorian legislative regime, the NSW TAA conferred identical powers on the New South Wales Supreme Court and the Administrative Decisions Tribunal to "review" a decision of the NSW Commissioner. Thus, in rejecting the adoption of the *Avon Downs* characterisation, Gzell J said:[116]

> The powers in the [NSW TAA], s 101 are quite different from the powers of a court on appeal under the *Income Tax Assessment Act* 1936 (Cth). They are specific and include the power to make an assessment or other decision in place of the assessment or decision the subject of the review. And any dichotomy between the powers of the Supreme Court and the powers of the Administrative Decisions Tribunal has been abrogated. The powers on review are the same for court and tribunal.

Section 101 of the New South Wales TAA conferred identical powers on "[t]he court or tribunal dealing with the application for review": which were very similar to the powers of the Victorian Civil and Administrative Tribunal under s 51 of the VCAT Act.

50 *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* was appealed, and the New South Wales Court of Appeal allowed an appeal, adopting an *Avon Downs* approach

---

114 (2009) 77 ATR 394.

115 (2009) 77 ATR 394 at 411-412 [149]-[150].

116 *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2009) 77 ATR 394 at 413 [165].

wherever the determination under review turned on a state of satisfaction. The Court of Appeal decision was, in turn, reversed by the High Court on appeal. In the course of argument, Crennan J observed that s 101 of the NSW TAA "evokes merits review".[117] The High Court unanimously endorsed the reasoning of Gzell J at first instance, and held that reliance by the Court of Appeal on *Avon Downs* was misplaced, substantially for the reasons given by Gzell J.[118] The High Court also referred to observations in the second reading speech with respect to the relevant provisions of the NSW TAA that suggested an intention by the legislature to confer "concurrent jurisdiction" on the Administrative Decisions Tribunal and the New South Wales Supreme Court, so as to offer a choice between the "cheap and flexible review mechanisms offered by the [Administrative Decisions Tribunal]" and the "expertise of the Supreme Court".[119]

51 In my view, the reasoning of Gzell J, as endorsed by the High Court, is entirely consistent with the reliance by Pagone J in *Conte* on the significance of the distinction in Part 10 of the TAA between the functions of the Victorian Civil and Administrative Tribunal, in exercise of its review jurisdiction, and the functions of the Supreme Court on an "appeal". In my view, this is reinforced when one contrasts the position under the New South Wales legislation which was considered by Gzell J and the provisions of Part 10 of the Victorian legislation, the TAA. Under the provisions of Part 10:[120]

> (1) A person wishing to have a "cheap and flexible review" can apply to the Victorian Civil and Administrative Tribunal and have a relatively simple procedure and hearing. This enables many people to represent themselves,[121] or companies they control.[122]
>
> (2) A person wishing to have a merits review with the expertise of a judge of the Supreme Court, represented by senior and junior counsel, and a

---

117 *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue (NSW)* [2011] HCATrans 255 at 9, lines 293-5, 309.

118 *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446 at 453 [18] – 454 [20].

119 *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446 at 455 [21].

120 *Appellants' Submissions on Separate Question* (9 February 2018), [47]–[48].

121 For a recent example, see *Roach v Commissioner of State Revenue* [2017] VCAT 342.

122 For a recent example, see *Motticant Pty Ltd v Commissioner of State Revenue* [2017] VCAT 1820, where the applicant company was represented by a director, and the Tribunal constituted by an ordinary member.

more formal, adversarial contest, can also apply to the Victorian Civil and Administrative Tribunal, and have a hearing of that kind.[123]

(3) If specific expertise is required and the President of the Victorian Civil and Administrative Tribunal is not available or does not possess the relevant expertise, a Supreme Court judge may be appointed on an ad hoc basis to hear any one or more proceedings under the provisions of s 29(1) and (3) of the VCAT Act.[124]

Thus, in Victoria, it is possible for a taxpayer in a complex case, with substantial financial consequences, to have a hearing before a Supreme Court judge either in:[125]

(1) a merits review, where the Victorian Civil and Administrative Tribunal has all the functions of the Commissioner,[126] including to form for itself states of satisfaction conferred on the Commissioner, and can inform itself on any matter as it sees fit;[127] or

(2) an appeal, where it can assert legal error by the Commissioner in a confined appellate proceeding, and seek to have the matter remitted to the Commissioner to be re-determined in accordance with law.[128]

Consequently, to construe Part 10 of the TAA as confining the Supreme Court, on appeal, to merits review on a *de novo* hearing significantly reduces the efficacy of the taxpayer's choice, as it results in duplication and eliminates the historical choice given to the taxpayer without any clear legislative intention being discerned that Parliament intended that outcome. Accordingly, I am of the opinion that Part 10 of the Victorian legislation, the TAA, should not be construed in the same manner as the New South Wales TAA to confer concurrent jurisdiction on both the Victorian Civil and Administrative Tribunal and the Supreme Court.

52 Moreover, Part 2 of Order 7 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules* 2008 when read with s 109 of the TAA, does suggest a more confined role for

---

123 For an example of the President of the Tribunal sitting in a review proceeding heard over eight days, with lay and expert evidence and representation by experienced senior and junior counsel, see *PTDA & Civic Nexus Pty Ltd v Commissioner of State Revenue* [2016] VCAT 1457.

124 See *Premier Building & Consulting Pty Ltd v Spotless Group Ltd* [2004] VCAT 1364; *Pizza Fellas Pty Ltd v Eat Now Pty Ltd* [2017] VSC 226 [1].

125 *Appellants' Submissions on a Separate Question* (9 February 2018) [47].

126 *Victorian Civil and Administrative Tribunal Act* 1997, s 51(1)(a).

127 *Victorian Civil and Administrative Tribunal Act* 1997, s 98(1)(c).

128 Relief of that kind is clearly available. Justice Walsh made an order of that kind in *Commissioner of Taxation (Cth) v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 44, although the appeal was allowed on other grounds. Such an order is also available on merits review: see *Behmer & Wright Pty Ltd v Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1090 [22]; VCAT Act, s 51(2)(d) and 51A.

the Supreme Court on appeal. This follows, in my view, because the documents filed in the proceeding are limited to: the assessment or decision of the Commissioner; the objection; the Commissioner's determination of the objection; any other relevant documents in the Commissioner's possession or control at the time of filing the appeal; and affidavit evidence from the objector setting out the acts, facts, matters and circumstances relating to the assessment or decision to which the objection was made and the ground or grounds upon which the objector relies.[129]

The Supreme Court's supervisory role

53 The third contextual matter raised by the Appellants is, it is contended, the consequences for the proper understanding of the role of the Supreme Court with respect to the privative clause in s 96(2) of the TAA.[130] This provision is that "[n]o court or administrative review body, including the Tribunal, has jurisdiction or power to consider any question concerning an assessment or decision referred to in subsection (1), except as provided by this Part". In this context, it is submitted that confining the Courts to merit review deprives it of its usual supervisory role in respect of decisions of the Commissioner.[131] More particularly, it is said that ordinarily, the Supreme Court's supervisory jurisdiction is "the mechanism for the determination and the enforcement of the limits on the exercise of State executive … power".[132] Thus, it is said, the combined effect of ss 96(1)(a) and (c) and 96(2) of the TAA—at least when understood literally—is that the Supreme Court does not have jurisdiction or power to consider any question concerning an assessment or decision by the Commissioner under the Payroll Tax Act, except as provided by Part 10 of the TAA.[133] Consequently, if the Court has no power on an appeal under Part 10 to review decisions of the Commissioner under the Payroll Tax Act for legal error, then the taxpayer is deprived of the option to seek judicial review of the lawfulness of a decision. It is, however, conceded that there is no danger of Part 10 creating "islands

---

129 *Appellants' Submissions on Separate Question* (9 February 2018) [51].
130 *Appellants' Submissions on Separate Question* (9 February 2018) [52].
131 *Appellants' Submissions on Separate Question* (9 February 2018) [53].
132 *Appellants' Submissions on Separate Question* (9 February 2018) [53.1]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [98].
133 *Appellants' Submissions on Separate Question* (9 February 2018) [53.2].

of power immune from supervision and restraint",[134] if construed as conferring concurrent merits review jurisdiction on the Victorian Civil and Administrative Tribunal and also on the Supreme Court. Nevertheless, and I think correctly on the basis of the preceding considerations, there are cases, like the present case, in which the taxpayer elects to appeal to the Supreme Court for a judicial review hearing where success would result in the matter being remitted for consideration by the Commissioner in light of the Supreme Court's reasons. Moreover, the construction these provisions as adopted in *Conte* by Pagone J maintains the choice for an appellant taxpayer whether to seek merits review or legal review of a decision by the Commissioner under the Payroll Tax Act, formed on the basis of a state of satisfaction on the part of the Commissioner. For the preceding reasons, I am of the view that the terms of the legislation itself, the authorities and the contextual matters considered do militate against a construction of the TAA provisions which would remove taxpayer choice in this sense and conflate the two processes, whether in the Victorian Civil and Administrative Tribunal or in the Supreme Court.

54 In relation to the nature of the Court's supervisory role in the more limited appeal which I have found applicable in the present circumstances, it should be observed that the Court is not *required* to determine for itself whether the Court is satisfied of the matters set out in s 32(2)(b)(iv) of the Payroll Tax Act. Part 10 of the TAA either – on the authority of *Avon Downs* and *Conte* – *precludes* the Court from hearing a merits appeal on the question of satisfaction or, perhaps, *enables* the Court to hear a merits appeal if the parties proceed on that basis,[135] but it is not necessary to decide that question here, because the Appellants seek only a finding of legal error and remittal for assessment by the Commissioner.[136] I accept that it would be perverse to construe Part 10 as *requiring* the Court to re-make the decision for itself, when the appellant taxpayer seeks only identification of legal error and remittal for reassessment in accordance with the Court's reasons.

---

134 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].
135 *Respondent's Submissions on Separate Question* (23 February 2018), [4.3], [15].
136 *Appellants' Submissions on a Separate Question* (9 February 2018), [8].

55 As the Appellants observe, the effect of the Respondent's Submissions would appear to be that the Court cannot hear an appeal on a ground of legal error affecting the Commissioner's satisfaction and, if a legal error be found, remit the matter for reconsideration by the Commissioner, even where that is all the appellant taxpayer seeks.[137] One consequence of accepting those submissions would be that the Victorian Civil and Administrative Tribunal — which conducts a *de novo* hearing — has power under s 51(2)(d) of the VCAT Act to "set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal", whereas the Supreme Court does not, even when it is only reviewing for legal error. Another consequence is that — in effect — a taxpayer can never approach the Supreme Court simply to supervise the legal limits of the Commissioner's power – even in a case involving an error of law[138] or jurisdictional error.[139] It is compelled to establish the relevant matters, by admissible evidence, to the Court's satisfaction. In the present appeals, that would require the Appellants to adduce admissible evidence about the individual business situation of 86 individuals, whose businesses are outside the control of EVS. The Appellants' construction, by contrast, does enable:

(1) this Court to correct any error in the legal approach taken by the Commissioner to forming the state of satisfaction under s 32(2)(b)(iv), as it pertains to EVS's situation;

(2) EVS to then seek to satisfy the Commissioner, applying the correct legal framework, of the relevant matters (without the need for an extended trial).

This outcome does, in my view, properly effect the scheme and intent of the applicable legislation and, for that reason, is to be preferred. As it was put by the Appellants:

> In any event, an order setting aside and remitting is consistent with the Parliamentary intention that s 32(2)(b)(iv) turn on the Commissioner's

137 *Appellants' Reply on Separate Question* (9 March 2018) [2.2].
138 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-6.
139 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 357 at 350 [26]–[27] (French CJ); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650–2 [128]-[134] (Gummow J).

satisfaction, rather than the satisfaction of the Court.[140]

Other decisions under Part 10 of the TAA

56 As a result of legislative changes, by 1994, the Administrative Appeals Tribunal in Victoria performed the function previously performed by the Victorian Taxation Board of Review. By 1994, the Administrative Appeals Tribunal performed the function previously performed by the Victorian Taxation Board of Review. In *Behmer & Wright Pty Ltd v Commissioner of State Revenue (Vic)*,[141] Presiding Member Pagone heard a matter referred to the Administrative Appeals Tribunal for review, in respect of a determination involving s 3C(1)(e)(v) of the 1971 *Pay-roll Tax Act*: the direct antecedent of s 32(2)(b)(iv) of the Payroll Tax Act. The Presiding Member observed, correctly in my view, that the effect of the powers conferred by s 33B of the 1971 *Payroll Tax Act* was that the Administrative Appeals Tribunal itself had to be satisfied that the person rendering the services was one who "ordinarily renders services of that kind to the public generally".[142] Being satisfied of that matter in respect of certain payments, Presiding Member Pagone set aside the referred decision and remitted it to the respondent for assessment excluding those payments.[143]

57 In *Drake Personnel Ltd v Commissioner of State Revenue (Vic)*,[144] Balmford J heard an appeal under Part 10 of the TAA from a decision involving s 3C(1)(e)(v) of the 1971 *Pay-roll Tax Act*. Her Honour adopted Presiding Member Pagone's substantive

---

140 See *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 120 at 123 [4], referring to *Challenger Listed Investments Ltd v Commissioner of State Revenue* (2010) 80 ATR 630 at 643 [29], where his Honour explained why remitter was appropriate. It is for the same reason, presumably, that Walsh J ordered in *Commissioner of Taxation (Cth) v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 43 that the assessment be set aside and the matter remitted to the Federal Commissioner of Taxation for assessment in accordance with the judgment. An appeal was allowed on other grounds (see Primary Submissions, paragraph 32), but Menzies J made observations (at 56) consistent with remitter being appropriate. An unrestrained remitter may not be desirable where the nature of the appeal grounds results in a trial and hearing of all relevant evidence: see the variation proposed by Gibbs J, and made by the Court despite dismissing the appeal, in *Federal Commissioner of Taxation v ICI Australia Ltd* (1972) 127 CLR 529 at 587, referring to *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64. But that is a question about the appropriate *exercise* of the unquestioned *power* to remit.

141 (1994) 28 ATR 1082.

142 *Behmer & Wright Pty Ltd v Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1088 [16].

143 *Behmer & Wright Pty Ltd v Commissioner of State Revenue (Vic)* (1994) 28 ATR 1082 at 1090 [22].

144 (1998) 40 ATR 304.

interpretation of s 3C(1)(e)(v).[145] Her Honour also appears to have adopted his procedural approach—of stepping into the shoes of the respondent; it does not appear that her Honour heard argument on the significance of s 33B of the *Pay-roll Tax Act* to the approach taken by Presiding Member Pagone. In any event, her Honour did not have sufficient evidence to determine the application of s 3C(1)(e)(v), and therefore declined to uphold that aspect of the appeal.[146] The Court of Appeal dismissed an appeal.[147] Justice Phillips noted that s 3C(1)(e)(v) had been raised for the first time by amendment at commencement of trial, the Commissioner never having been asked by the objection to form the requisite state of satisfaction. His Honour referred to *Avon Downs*, but was content to proceed on the joint position of the parties that the Court stood in the shoes of the Commissioner.[148]

58 In my view, as contended by the Appellants,[149] the *Drake Personnel* decisions do not provide good reason for not following the reasoning of Pagone J in *Conte* for a variety of reasons. First, the Commissioner had never been asked to form a state of satisfaction under s 3C(1)(e)(v) of the 1971 *Pay-roll Tax Act*; secondly, the Commissioner did not object to the appellant amending its notices of objection at the commencement of the trial to rely on that provision; thirdly, it does not appear that Balmford J or the Court of Appeal heard any argument as to the nature of an appeal, or on the relevance of *Avon Downs* or *Ballarat Brewing*; fourthly, Phillips JA, who wrote the leading judgment for the Court of Appeal, clearly had significant doubts as to the correctness of the Court determining for itself whether it was satisfied of the specified matter, but followed the consent position of the parties; and, fifthly, the dispositive reason for the Court of Appeal's decision to dismiss the appeal was that the payees were common law employees, such that s 3C(1)(e)(v) was not engaged in

---

145 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304 at 314 [41].

146 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304 at 315 [46], 321 [75]; *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 642 [18] (Phillips JA).

147 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635.

148 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 643 [21].

149 *Appellants' Submission on Separate Question* (9 February 2018), [60].

any event.[150]

59 In *Mould*,[151] Ginnane J did not doubt the correctness of the approach in *Conte*, where the determination involved a statutory condition that the Commissioner form a state of satisfaction. Indeed, it is correct in my view, that his Honour appeared to accept the correctness of that approach, following consideration of relevant authorities, including *Avon Downs* and *Ballarat Brewing*.[152] In my view, the decision of Ginnane J in *Mould* does, in fact, support the position advanced by the Appellants in the present proceedings. In *LIV v Commissioner of State Revenue*, Digby J expressed the view that the appellant was not required to identify legal error in respect of the Commissioner's state of satisfaction as to the matter specified in s 48(1) of the Payroll Tax Act.[153] However, it should be kept in mind that his Honour stressed this view was unnecessary to the decision.[154] In any event, for the preceding reasons, I am of the opinion that the reasoning in *Conte* should be preferred.

Conclusion

60 For the preceding reasons, the Court should, in my view, answer the separate question in respect of s 32(2)(b)(iv) of the Payroll Tax Act as contended for by the Appellants.

61 The parties are to bring in orders to give effect to these reasons. I otherwise reserve the question of costs and will hear the parties further in relation to that issue.

---

150 *Appellants' Submission on Separate Question* (9 February 2018), [60]; *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635 at 654 [49] (Phillips JA, with whom Ormiston JA (at 638 [4]) and Buchanan JA (at 665 [79]) agreed).

151 *Mould v Commissioner of State Revenue* (2014) 98 ATR 579.

152 *Mould v Commissioner of State Revenue* (2014) 98 ATR 579 at 587-589 [33]-[43], 590 [47].

153 *Law Institute of Victoria v Commissioner of State Revenue* (2015) 101 ATR 899 at 912-5 [66] - [67], [70] - [71].

154 *Law Institute of Victoria v Commissioner of State Revenue* (2015) 101 ATR 899 at 912-5 [66] - [67], [70] - [71].