FEDERAL COURT OF AUSTRALIA

Pintarich v Deputy Commissioner of Taxation [2017] FCA 944

File number:	TAD 24 of 2016
Judge:	**TRACEY J**
Date of judgment:	22 August 2017
Catchwords:	**ADMINISTRATIVE LAW** – application for judicial review of a decision by the Deputy Commissioner of Taxation to grant partial remission of a general interest charge pursuant to s 8AAG of the *Taxation Administration Act 1953* (Cth) – where prior to the impugned decision a letter had been sent to the applicant – whether that letter evidenced the making of an earlier decision to grant full remission of the general interest charge – whether the impugned decision was ultra vires – where applicant relied upon grounds in s 5(1)(c) and (d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – whether the decision-maker lacked jurisdiction to make the impugned decision – whether the decision was not authorised by the enactment in pursuance of which it was purported to be made **INCOME TAX** – application for remission of a general interest charge on an income tax debt – whether decision to partly remit charge vitiated by earlier purported decision to remit entire charge
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(c), 5(1)(d) *Taxation Administration Act 1953* (Cth) s 8AAG *Taxation Administration Regulations 1976* (Cth) reg 45(2)
Cases cited:	*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7 *Guss v Commissioner of Taxation* (2006) 152 FCR 88; [2006] FCAFC 88
Date of hearing:	1 and 2 March 2017
Registry:	Tasmania

Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	58
Counsel for the Applicant:	Mr G O'Rafferty
Solicitor for the Applicant:	Leonard Fernandez Barristers & Solicitors
Counsel for the Respondent:	Mr T Cox
Solicitor for the Respondent:	Dispute Resolution, Australian Taxation Office

ORDERS

TAD 24 of 2016

BETWEEN:	**JOSEPH PINTARICH** Applicant
AND:	**DEPUTY COMMISSIONER OF TAXATION** Respondent

JUDGE: **TRACEY J**

DATE OF ORDER: **22 AUGUST 2017**

THE COURT ORDERS THAT:

1. The application be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

TRACEY J:

1 This is a most unusual application for judicial review of an administrative decision pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act").

2 The decision which the applicant applies to have reviewed is identified, in his originating application, as:

> the decision of the Respondent dated 13 May 2016 that the Applicant be granted pursuant to s.8AAG of the Taxation Administration Act 1953, a partial remission of General Interest Charges.

3 Although this decision is at least partly favourable to the applicant he complains that it is vitiated by a decision, which, he says, the respondent made some 18 months earlier, to grant a full remission of interest charges.

THE LEGISLATION

4 It will be convenient at this point to set out the terms of s 8AAG of the *Taxation Administration Act 1953* (Cth) ("the TA Act"). It provides as follows:

> **8AAG Remission of the charge**
>
> (1) The Commissioner may remit all or a part of the charge payable by a person.
>
> (2) However, if a person is liable to pay the charge because an amount remains unpaid after the time by which it is due to be paid, the Commissioner may only remit all or a part of the charge in the circumstances set out in subsection (3), (4) or (5).
>
> (3) The Commissioner may remit all or a part of the charge referred to in subsection (2) if the Commissioner is satisfied that:
>
> (a) the circumstances that contributed to the delay in payment were not due to, or caused directly or indirectly by, an act or omission of the person; and
>
> (b) the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances.
>
> (4) The Commissioner may remit all or a part of the charge referred to in subsection (2) if the Commissioner is satisfied that:
>
> (a) the circumstances that contributed to the delay in payment were due to, or caused directly or indirectly by, an act or omission of the person; and
>
> (b) the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances; and

(c) having regard to the nature of those circumstances, it would be fair and reasonable to remit all or a part of the charge.

(5) The Commissioner may remit all or a part of the charge referred to in subsection (2) if the Commissioner is satisfied that:

(a) there are special circumstances because of which it would be fair and reasonable to remit all or a part of the charge; or

(b) it is otherwise appropriate to do so.

THE FACTS

5 The circumstances in which the dispute between the parties has arisen are, to a large extent, uncontroversial. Much of the relevant material appears in an agreed statement of facts. The following account draws largely upon that agreed statement and the evidence of Mr Aris Zafiriou, an executive-level officer in the Australian Taxation Office, which, in its amended form as corrected by way of a supplementary affidavit, was not challenged by the applicant.

6 The applicant had failed to file timely tax returns for the 2010, 2011, 2012 and 2013 financial years. On 4 November 2014 a Deputy Commissioner of Taxation ("the first Deputy Commissioner") issued notices of assessment to the applicant in respect of the 2010, 2011 and 2012 financial years. The assessments were for amounts of $807,797.95, $3,264.40 and $7,703.25, respectively.

7 On 10 November 2014 the first Deputy Commissioner issued a further notice of assessment in respect of the 2013 financial year for an amount of $2,474.15.

8 On the same day the first Deputy Commissioner also issued a statement of account which showed that the applicant owed the sum of $1,156,787.72, in respect of the four financial years. This sum included a general interest charge ("GIC").

9 On 24 November 2014 the applicant's accountant, Mr Drew Smith, wrote to the Australian Taxation Office on the applicant's behalf seeking a full remission of the GIC.

10 On 2 December 2014 correspondence by telephone and e-mail passed between Mr Smith and Mr Ian Celantano, an authorised officer in the respondent's Hobart office. Mr Celantano had been authorised to perform certain functions and exercise certain powers in the name of the person who from time to time held the position of Deputy Commissioner of Taxation. Those functions and powers had originally been delegated by the Commissioner of Taxation to the office of the Deputy Commissioner. During those exchanges with Mr Smith, Mr Celantano sought further information about the applicant's circumstances including a claim by the

applicant that the delay in filing returns had been occasioned by ongoing Family Court proceedings between the applicant and his former wife.

11 Mr Smith responded to these queries by e-mail on 4 December 2014. The matters dealt with included the means by which the applicant was proposing to obtain funds to pay his income tax debt and the reasons for the late lodgement of the tax returns.

12 Further telephone communications between Mr Celantano, the applicant and Mr Smith occurred on 4 or 5 December 2014. In paragraph 8 of his affidavit the applicant recalled the substance of his telephone conversation with Mr Celantano as follows:

> (a) Mr Celantano asked me for information about why I didn't lodge my 2010, 2011 and 2012 tax returns;
>
> (b) I said knew nothing about it because I hadn't seen any paperwork, and that I left all that to my advisors;
>
> (c) Mr Celantano mentioned the $818,765.60 plus General Interest Charges of $337,411.96;
>
> (d) I said I'd been through a long divorce trial, where the Family Court had refused to make a decision, and I was up for $3 million in legal fees;
>
> (e) I said I was trying to sell assets and pay mortgages, but it was all in the hands of [the] trustee … and it needed the full consent of my ex-wife which she didn't give;
>
> (f) I said I'd only just got back the control of the assets.
>
> (g) Mr Celantano said I know what you're going through, I've come across these Family Court matters routinely;
>
> (h) I said I don't have any money to pay the tax and interest and I will go broke and have to declare myself bankrupt;
>
> (i) I said there is some land my company is developing which would give me about $820K in equity;
>
> (j) Mr Celantano said if you make sure you can pay it by February 2015 then it will all be over and done with;
>
> (k) I said put it in writing so I can take it to the bank.

13 Mr Celantano made a contemporaneous note of this telephone conversation with the applicant. Subject to one matter, there were no material differences between their accounts. Mr Celantano recorded:

> Received voicemail from Joe Pintarich today at 9:32am requesting a call back to [his telephone number]. Contacted Joe at 3:20pm … .
>
> After background 12 year history of Joe's divorce commencing in 2002, orders that were made in 2010 which resulted in a trustee appointed in 2010 that caused further

> grief due to mishandleing [sic] of his vast business and property portfolio including the Trustee still involved with Super Fund that is a continued mess.
>
> Joe advised this is the first time in a long long time he has been able to see light towards resolution of his problems and has spent the last 4-5 months, starting to clean up their affairs. The court orders resulted in things (assets) taken off him but the trustee they stuffed it up and then dumped it back on him but again stated the Tax office should have been informed about ongoing developments with his divorce.
>
> Joe advised he will pay the debt outstanding because that is the type of person he is and doesn't want to shirk his responsibilities.
>
> After a long clearance of land that was previously unusable he has since developed into a series of commercial properties including General Motors Holden as a tenant with a 30 year lease and is now in a position to remortgage [sic].
>
> Joe advised his accountant Drew has approached solicitors to re mortgage [sic] the property to obtain a loan but he has also approached his financier ANZ bank to do the same.
>
> We put forward that we require the primary tax of $821,762.75 paid in full whilst we consider the remission of general interest charge currently $344,216.13.
>
> Joe offered to pay the primary tax in full before Christmas or in early January at the latest by remortgageing [sic] the GMH Motors property.
>
> … Advised Joe we would agree to the payment in full and would contact his authorised representative to formalise his payment arrangement.

14 The matter on which, on one view, the accounts of the applicant and Mr Celantano differed related to the scope of the "arrangement". Mr Celantano said that he had told the applicant that the Australian Taxation Office required that the primary tax debt owing be paid in full "whilst we consider the remission of general interest charge". Mr Pintarich deposed that Mr Celantano had told him that "if you make sure you can pay *it* by February 2015 then *it* will all be over and done with" (emphasis added). The first "it" clearly refers to the agreed amount. The second "it" begs the question of what would be "all over and done with" if the payment was made by February 2015. The two accounts are reconcilable if the second "it" refers to the dispute over the non-payment of the primary taxation liability to which Mr Celantano said he was referring. It is, however, conceivable that the applicant understood Mr Celantano to be referring to the applicant's total liability which included interest charges.

15 The telephone conversation between Mr Celantano and Mr Smith occurred shortly after that between and Mr Celantano and Mr Pintarich. Again, Mr Celantano made notes of the conversation. He recorded that:

> Received call back from Drew [Smith] at 3;40pm … . Discussed with Drew the recent conversation with Joe Pintarich and discussions around obtaining payment in full of the primary tax component of $821,762.75 whilst we reviewed the request for remission of GIC.

> Joe indicated he would be able to obtain finance either before Christmas or shortly there after [sic] in the new year. Advised Drew that we didn't think this was feasible or realistic but advised the Commissioner would accept an arrangement of payment in full of the primary tax of $821762.75 on or before 31 January 2014.
>
> Drew advised that it would be sensible and requested a lump sum arrangement by 31 January 2014 with payment slips issued to their office … .
>
> Provided payment arrangement conditions and disconnected. Inputted lump sum payment in ICP [the Integrated Core Processing system] of $821,762.75 due 30 January 2014 as 31st is a non bank day (Saturday).
>
> (Formatting as in original.)

16 At the end of the note Mr Celantano explained his reasons for agreeing with the arrangements which he had discussed with Messrs Pintarich and Smith:

> Decision to enter arrangements in line with PSLA [Practice Statement Law Administration] 2011/14 paragraph 61 which in part states
>
> > 61. Without limiting the Commissioner's discretion in relation to a particular case, the following factors will be taken into account in determining whether to accept payment by instalments:
> >
> > - the information provided by the taxpayer and other information that may be held (or obtained) by the Commissioner
> > - the circumstances that led to the inability to pay
> > - the taxpayer's current financial position, including other current payment obligations and actions taken by the taxpayer to rearrange finances or borrow to meet the debt
> > - the stage that any legal recovery action has reached and any grounds offered by the taxpayer to justify a request that further legal action be deferred
> > - the offer made and the ability to meet payment of the debt (and the additional charges for late payment imposed by legislation) on those terms without seriously impacting on the taxpayer's ability to meet other obligations
> > - compliance with other taxation obligations or commitments (for example, whether all lodgement obligations including activity statements (BAS/IAS) are up to date) and the history of the taxpayer's prior dealings with the Commissioner , and
> > - the willingness of the taxpayer to accept the conditions under which the Commissioner will agree to a payment arrangement.
>
> Authority to agree to s [sic] arrangement in line with taxation authorisation guideline 1.8.5.

17 On Friday, 5 December 2014, Mr Celantano placed a notation on the applicant's case comments report in which he said: "Payment arrangment [sic] inputted – see attached notes".

18 On Monday, 8 December 2014, a letter was sent by the Australian Taxation Office to the applicant. It was headed "Payment arrangement for your Income Tax Account debt" and bore the signature block of the first Deputy Commissioner. It thanked the applicant for his promise to pay his outstanding account. The letter continued:

> We agree to accept a lump sum payment of $839,115.43 on or before 30 January 2015.
>
> This payout figure is inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015. …
>
> Failure to make this payment by the agreed date may result in the commencement of legal action without further notice.

Although the letter had a signature block, which recorded the name of the first Deputy Commissioner, it was unsigned. Nothing turns on this: see reg 45(2) of the *Taxation Administration Regulations 1976* (Cth). Mr Celantano said that he had caused the letter to issue but was unable to explain how the sentence in the second extracted paragraph had come to be included. He had "keyed in" certain information into a computer-based "template bulk issue letter". This process had generated the document. He had not read the letter before it was despatched. He deposed that what was said in the first two of the paragraphs, extracted above, did "not accord with the conversations" he had had with Mr Pintarich and Mr Smith. Mr Celantano said that he had not, at any time, made any decision, under s 8AAG, to remit any GIC, owing by Mr Pintarich.

19 The applicant duly paid the sum of $839,115.43 to the Australian Taxation Office on 30 January 2015. That payment was confirmed by Mr Smith in an e-mail to Mr Celantano on the same day.

20 In the meantime, on 11 December 2014, 7 January 2015 and 14 January 2015 further statements of account had been issued by the Australian Taxation Office to the applicant. A further statement of account was issued on 5 February 2015. The statements disclosed a (progressively increasing) outstanding balance because of accruing interest.

21 On 23 February 2015 Mr Smith wrote to Mr Celantano. Mr Smith's e-mail read:

> Please find attached copy of a letter we received form [sic] the ATO [Australian Taxation Office] in relation to the settlement of the ATO debt for Mr Pintarich.
>
> The $839,115.43 that was paid to the ATO is as per the attached letter which refers to the payment being inclusive of GIC.
>
> Can you please update as to the status of the matter given the contents of the letter received by Mr Pintarich.

22 Mr Celantano replied by email on the same day, stating that:

> We're currently reviewing your application for remission of GIC previously made.
>
> Our agreement was to pay the primary debt which was $821,762.75 which your client has made.

23 Within minutes Mr Smith wrote again, saying:

> Can you please advise on the letter we received which stated a different figure.
>
> The reality is my client has absolutely no capacity to borrow any further funds and the ANZ Bank were only willing to allow Mr Pintarich to borrow further funds of [sic] the back of the letter received from the ATO.

24 Mr Celantano continued to consider the application for remission which had been made on 24 November 2014. By office memorandum dated 21 April 2015, Mr Celantano recommended that a decision be made that the application for remission of GIC incurred prior to 24 November 2015 be refused but that any GIC incurred between 24 November 2014 and the date of the decision should be remitted because of the delay in determining the application. The memorandum contained a recital of relevant facts and findings made on each of the criteria stipulated by subsections (3), (4) and (5) of s 8AAG of the TA Act. The memorandum was sent to a more senior, executive-level, officer who had an authorisation with no monetary limit to remit interest charges. In the course of argument it became common ground that Mr Celantano held a similar authorisation, with no monetary limit, from the first Deputy Commissioner. Mr Celantano, however, believed that he was constrained, by an internal policy of the Australian Taxation Office, which provided that the maximum amount that an officer, at his level of seniority, should remit was $75,000.

25 Mr Celantano's recommendation was, for the most part, accepted. On 15 May 2015 a second Deputy Commissioner of Taxation ("the second Deputy Commissioner") wrote to the applicant. He advised that consideration had been given to the applicant's request of 24 November 2014 for remission of the GIC. The applicant was advised that his request for full remission of the GIC had been denied and reasons for that decision were provided. Remission of GIC accrued from 2 January 2015 to 14 days after the date of the letter was granted due to "a delay in responding to [the] request". He was advised that payment in full of the outstanding GIC was required within 14 days. The sum involved was $344,604.90. Under the second Deputy Commissioner's signature block, which included an actual signature, there appeared: "Per (Ian Celantano)".

26 By letter dated 17 June 2015, Mr Smith provided to the Australian Taxation Office a detailed summary of the applicant's financial position and the previous dealings between the applicant and the respondent. This submission was intended "to correct errors of fact in [the] letter" of 15 May 2015. Mr Smith asserted at page 6 of the letter that "the facts as presented fall within the scope of circumstances upon which the Commissioner may remit all or part of any GIC". He asked that the decision to refuse to remit the GIC be reconsidered.

27 The request was considered by the second Deputy Commissioner. By letter dated 18 August 2015, that Deputy Commissioner advised the applicant that his application had been refused. There would be no remission and the outstanding amount, then being $361,222.47, remained due and payable. At paragraph 5, the letter stated:

> We wish to advise you that the letter issued by the Deputy Commissioner of Taxation … dated 8 December 2014 titled 'payment arrangement for your income tax Account debt' ('the letter') was issued in error. The outstanding amount of $839,115.431 [sic] in the letter did not include the entire amount of GIC which had accrued on the entire amount of outstanding debt up to and including 8 December 2014.

28 The second Deputy Commissioner, in the letter of 18 August 2015, also advised the applicant that had not provided the required financial information and that he could submit another GIC remission request with supporting documentation.

29 By letter dated 8 September 2015, Mr Smith advised the Australian Taxation Office that the applicant proposed to accept the offer to apply for remission of the GIC impost. The letter concluded with the following paragraph:

> By accepting your offer to proceed with a further submission for remission, Mr Pintarich should not be taken as agreeing that the amount of GIC is owing, for he remains of the view that he owes nothing further to the Australian Taxation Office. Accordingly, Mr Pintarich reserves his right to dispute both the correctness of your assertion that the Commissioner can retrospectively treat the letter of 8 December 2014 as issued in error and the Commissioner's attempts to impermissibly repudiate the agreement actually made by him on 8 December 2014.

30 On 9 September 2015, the second Deputy Commissioner confirmed by letter that a further application for remission of the GIC would be entertained provided that it was lodged by 30 September 2015.

31 Having obtained an extension of time the applicant made a further request for remission by letter dated 16 October 2015 sent by Mr Smith to the Australian Taxation Office.

32 This request was allocated to an officer other than Mr Celantano. Following consideration of an internal submission prepared by that officer, a senior officer formed the view in March 2016 that partial remission should be granted.

33 By letter dated 13 May 2016, the first Deputy Commissioner, whose name had earlier appeared on the letter of 8 December 2014, advised the applicant that a partial remission of the GIC owing would be granted. This was the impugned decision. One of the reasons given for the partial remission was that:

> You were erroneously advised that the sum of $839,115.43 would satisfy the outstanding debt and was a 'payout' figure. This lead [sic] to you borrowing funds to pay the tax amounts within 2 months. Although the 'payout figure' may be construed as misleading, a Notice for Income Tax and Running Account Balance issued on 11 December 2014 for the period 1 December 2014 to 8 December 2014, advised of accruing GIC amounts, with a total debt of $1,166,902.00. This would have been an indication to you that the GIC component had not been satisfied and was still outstanding. Further notices issued on 7 January 2015, 14 January 2015 and 50 [sic] February would have been further indication of accruing GIC.

The first Deputy Commissioner acknowledged that there had been a delay in responding to the applicant's initial GIC remission request and that the applicant had sought finance "to pay the amount demanded in the letter of 8 December 2014". These considerations justified, he decided, partial but not full remission.

THE PARTIES' CASES

34 The decision recorded in the letter of 13 May 2016 was challenged on the ground that it was ultra vires. More specifically, reliance was placed on s 5(1)(c) and (d) of the ADJR Act which provide that a person aggrieved by a decision may apply for an order of review to be granted, under that Act, on the following grounds:

> (c) That the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (d) That the decision was not authorized by the enactment in pursuance of which it was purported to be made;

35 The impugned decision was said to be ultra vires because the respondent had, by his letter of 8 December 2014, made a decision, under s 8AAG of the TA Act, to remit all GIC with the consequence that, in May 2016, there was no GIC owing which could be made the subject of a remission decision. Furthermore, it was not open to the respondent, in May 2016, to revoke or vary his earlier decision.

36 In his originating application, the applicant sought an order quashing the decision and declarations that:

(a) The Respondent's decision of 8 December 2014 was a proper exercise of its discretion under s.8AAG of the *Taxation Administration Act 1953*;

(b) The Applicant fulfilled the requirements of the Respondent's decision on 8 December 2014; and

(c) The Respondent is unable to revoke, vary, or otherwise revisit its decision of 8 December 2014.

37 The respondent's case was that no decision had been made on the remission application on 8 December 2014 and that the letter, sent on that date to the applicant, did not evidence the making of any such decision.

38 The applicant contended that, whether or not he was conscious of having done so, Mr Celantano had, in December 2014, made a decision to grant the applicant's application to remit all of the GIC incurred by him up until the time of the decision. In paragraph 20 of his written submissions in reply, the applicant identified the following features of the 8 December 2014 letter which, he said, supported his contention that it evidenced an effective determination of his application for total remission of the GIC:

> [T]he letter:
>
> (a) purports to be from the Respondent and not Mr Celantano;
>
> (b) refers to the Applicant's "outstanding account";
>
> (c) refers to the Respondent "accept[ing] a lump sum payment" in respect of that "outstanding account"; and
>
> (d) refers to the "lump sum" being a "payout figure" in respect of that "outstanding account"; and
>
> (e) refers to the "payout figure" being inclusive of a GIC amount "calculated" to the time limited for payment of the "payout figure";
>
> (f) does not refer to any additional GIC amount being owed after satisfaction of the "payout figure", but instead states that "[f]ailure to make this payment by the agreed date may result in the commencement of legal action without further notice";
>
> (g) does not purport to be an interim decision; and
>
> (h) is written in substantially the same form as other 'GIC remission decisions' by the Respondent in respect of other taxpayers.

39 As a result, so it was submitted, the letter was "unequivocally" a determination which effectively resolved the application earlier made by Mr Pintarich.

CONSIDERATION

40 The applicant's challenge to the respondent's decision, recorded in the May 2016 letter, can only succeed if, in fact, the alleged "decision" had been made on or about 8 December 2014 and that decision rendered the impugned decision wholly otiose. There can be no doubt that, on or about 8 December 2014, Mr Celantano, as an authorised officer, made a number of decisions which were recorded in the letter of that date. The question is whether he made the alleged decision to accede to Mr Pintarich's application for remittal of GIC under s 8AAG of the TA Act.

41 Unless such a decision had been made neither of the grounds advanced for impugning the May 2016 decision can be sustained.

42 The alleged 8 December 2014 decision is not the subject of the present challenge. Nonetheless, it is relevant to determine whether that alleged decision, had it been made, would have been reviewable under the ADJR Act. Unless it was made and was a decision which bore the characteristics of a reviewable decision for the purposes of that Act, it is difficult to see how it could have had any impact on the decision impugned in this proceeding.

43 In order for a decision to be reviewable under the ADJR Act "it will generally be necessary to point to a decision which is final or operative and determinative, at least in the practical sense, of an issue of fact falling for consideration; a conclusion reached as a step along the way in a course of reasoning to an ultimate decision ordinarily will not qualify as a reviewable decision": see *Griffith University v Tang* (2005) 221 CLR 99 at 122; [2005] HCA 7 at [61] (Gummow, Callinan and Heydon JJ) summarising the principles earlier propounded by the Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 (Mason CJ, Brennan and Deane JJ agreeing).

44 The making of a final and operative decision and its promulgation in some form must, necessarily, be preceded by a process of consideration and evaluation of relevant facts. The question of when these processes lead to the making of a reviewable decision was considered by Greenwood J in *Guss v Commissioner of Taxation* (2006) 152 FCR 88 at 107–108; [2006] FCAFC 88 at [75]–[76]. His Honour there said:

> 75 It seems to me, consistent with authority, that a "decision of an administrative character" in its primary sense (leaving aside for the moment the extended meaning of the term by force of s 3(2) of the ADJR Act) must exhibit two central features. First, there must be a determination, a

> resolution, a position taken, a judgment made by a decision-maker. Secondly, that determination must be the emanation of a consideration by the decision-maker or structural organs of an organisation charged with making a determination, of a matter of substance that necessarily involves some feature of deliberation, assessment or analysis that, in the ordinary course, would comprehend those facets of decision-making *behaviour* described at [71].
>
> 76 In a number of cases in the Federal Court of Australia, considerable important intellectual effort has been engaged in seeking to plot the point on the continuum at which a decision arose. Was the "decision" the overt act of communication such as the despatch of a letter, the making of a ruling, the granting of a bylaw, the issue of a notice or, was the decision to be found in the pre-existing deliberative behaviour or "mental process" (*Evans v Friemann* (1981) 53 FLR 229 at 233, per Fox ACJ) or "thought processes taking place in the mind of the person when considering whether or how to exercise a power or to perform a duty of an administrative character under an enactment" (*Ricegrowers Co-op Mills Ltd v Bannerman* (1981) 56 FLR 443 at 453 per Northrop J). In *Ricegrowers*, Northrop J took the view that a decision for the purpose of the ADJR Act must reflect a conjunction of such thought processes and "some overt act by which the conclusions reached as a result of those thought processes are manifested". His Honour further observed (at 543) that:
>
> > The manifestation may take many different forms. It may take the form of a verbal or written communication of the conclusion to the person affected. It may take the form of no action being taken when otherwise a definite action would have been taken. In the present case, the conclusion reached by the Chairman of the Commission was that a notice under s 155 of the *Trade Practices Act* be served on Ricegrowers. The manifestation of that conclusion took the form of the service of the s 155 notice on Ricegrowers.

45 The question whether or not Mr Celantano, or anybody else, made the alleged decision in December 2014 is one of fact to be determined on the evidence before the Court. The 8 December 2014 letter may provide evidence that a decision had been made but the letter is not, itself, that decision.

46 The letter does not, in terms, refer to or state that it was responsive to the application, made on Mr Pintarich's behalf, on 24 November 2014. Rather it appears to have been responsive to the communications between Messrs Smith and Pintarich on the one hand and Mr Celantano on the other on or about 5 December 2014. As already noted there was broad agreement about what had passed between them subject to some ambiguity about whether the proposed resolution related to Mr Pintarich's primary indebtedness or whether it extended to interest accrued on that debt. Although, at trial, Mr Celantano had no independent recollection of his conversation with Mr Pintarich on 4 or 5 December 2014, his contemporaneous note recorded that the payment of Mr Pintarich's primary tax should be made in full "whilst we consider the remission of general interest charged". The proximity of

those discussions (which took place on a Thursday or Friday), the notation entered into the case comments on Friday 5 December 2014 and the issuing of the letter on the following Monday 8 December 2014 suggest that Mr Celantano was seeking, in that letter, to record what he understood to be the outcome of those discussions and exchanges. It is unlikely that he would personally have proceeded to make a decision on the waiver application over the weekend. His subsequent conduct is inconsistent with him having done so. No other alleged decision-maker has been identified. There is, for example, no evidence that the first Deputy Commissioner, whose name appeared on the signature block of the letter dated 8 December 2014, had personally made a decision on the waiver application at that time.

47 A strained reading of the 8 December 2014 letter may support the contention that it recorded a decision that the Australian Taxation Office would accept the sum of $839,115.43 on or before 30 January 2015 as full and final settlement of all Mr Pintarich's tax debts and interest charges owing on that day. I say "strained" because a more natural reading of the text, when understood against the background of the previous week's exchanges, is that this figure was made up of the $821,762.75 which was Mr Pintarich's primary debt on 8 December 2014 together with anticipated interest accruing between then and 30 January 2015. This calculation is supported by the interest charges recorded in the statements of account issued to Mr Pintarich on 7 and 14 January 2015. The latter notice, for example, contained a GIC of $2,198.15 which had accumulated between 2 and 8 January 2015. There was no specific mention, in the letter, of interest which had accumulated prior to 8 December 2014.

48 I am not unmindful of the second Deputy Commissioner's view, conveyed to the applicant by letter on 18 August 2015, that the 8 December 2014 letter had been "issued in error". That Deputy Commissioner said that the figure of $839,115.43, which appeared in the 8 December 2014 letter, "did not include the entire amount of GIC which had accrued on the entire amount of outstanding debt up to and including 8 December 2014". I accept this as an implicit recognition, by the Australian Taxation Office, that the language used in the 8 December 2014 letter might be open to such a construction. Such recognition is also implicit in Mr Celantano's acknowledgement that the terms of the 8 December 2014 letter did not reflect the outcome of his respective discussions with Messrs Pintarich and Smith. A more explicit acknowledgement appears in the letter of 13 May 2016, where the first Deputy Commissioner states that the "payout figure" in the 8 December 2014 letter "may be construed as misleading". It does not follow, however, that the 8 December 2014 letter should be so construed. This lack of clarity may explain the consternation and uncertainty

which followed the issue of that letter but it does not, necessarily, evidence the making of a decision to waive all accumulated GIC.

49 The question remains whether Mr Celantano, or anybody else, such as the first Deputy Commissioner, on or about 8 December 2014, made a reviewable decision to accede to Mr Pintarich's 24 November 2014 application for remission of all GIC then owing by him. I do not consider that such a decision was made.

50 The making of any such decision would have required the decision-maker to turn his or her attention to the application and the reasons advanced for it, to decide whether one or more of the relevant parts of s 8AAG had application and to be satisfied that he or she had the necessary authority to make the decision. None of this occurred. As mentioned, there was no evidence that any other officer, or the first Deputy Commissioner personally, had considered or determined the application at the relevant time. Mr Celantano said that he made no decision on the application. He said that he had not done so because he did not consider that he had the necessary authority to waive the GIC amount involved. In this he was mistaken. Nonetheless, this was his state of mind at the relevant time. He acted consistently with this view. By email dated 23 February 2015, he told Mr Smith that the Australian Taxation Office was reviewing the application for waiver of the GIC. He subsequently prepared submissions in a memorandum dated 21 April 2015 for consideration by a more senior officer whom he believed had the necessary authority and made recommendations in that memorandum as to the disposition of Mr Pintarich's waiver application. This led to the making of a decision to refuse the application. The senior officer approved Mr Celantano's recommendation and made the decision. Mr Pintarich was advised of the decision by letter dated 15 May 2015.

51 On 17 June 2015 Mr Smith made a detailed submission on behalf of Mr Pintarich correcting what he said were errors of fact in the 15 May 2015 letter and renewing the application for waiver of accumulated GIC. In one paragraph, on the first page of the six page document, Mr Smith drew attention to the fact that the reasons for the 15 May 2015 decision, recorded in the letter of that date, did not refer to the 8 December 2014 letter and, particularly, to the advice that the first Deputy Commissioner would accept a lump sum payment on or before 30 January 2015 which included an estimated GIC amount calculated to 30 January 2015. Mr Smith did not, however, assert that any decision had been made on 8 December 2014 to waive all Mr Pintarich's accrued GIC.

52 On 18 August 2015 the second Deputy Commissioner responded to Mr Smith's submissions of 17 June 2015 and, again, refused the application for waiver. In doing so, that Deputy Commissioner, as already noted, made the statement that the 8 December 2014 letter had been "issued in error".

53 Not satisfied, Mr Smith made a further submission seeking remission of outstanding GIC. He did so by letter dated 16 October 2015. This letter was eight pages in length and addressed some of the s 8AAG criteria. On the second page, Mr Smith specifically reserved Mr Pintarich's rights in relation to the decision said to have been recorded in the 8 December 2014 letter. He stated:

> [Mr Pintarich] reserves his right to dispute both the correctness of your assertion that the Commissioner can retrospectively treat the letter of 8th December, 2014 as issued in error and the Commissioner's attempts to impermissibly repute [sic] the agreement actually made by him on the 8th December, 2014.

54 These further submissions resulted in the first Deputy Commissioner's impugned decision conveyed by letter on 13 May 2016.

55 The history of the dealings between Mr Pintarich (and his representative) and the Australian Taxation Office after 8 December 2014 is not determinative of the question of whether a decision of the kind alleged was made on that day. It is, however, clear that Mr Celantano, the other officers in the Australian Taxation Office who were involved and the Deputy Commissioners in whose names decisions were made, considered that Mr Pintarich's application of 24 November 2014 remained unresolved at least until the 15 May 2015 decision to refuse the application. It was that decision which, thereafter, Mr Pintarich sought to reopen, a process which culminated in the making of the impugned decision. No such process preceded the making of the agreement recorded in the 8 December 2014 correspondence.

56 The making of a decision required a process of deliberation, assessment and/or analysis on the part of Mr Celantano with a view to deciding whether or not to grant Mr Pintarich's application for waiver of the GIC. He did not undertake any of those facets of decision-making in regard to the application prior to the issuing of the 8 December 2014 letter. Such thought processes which did engage him related to the proposals which had been canvassed with him during the previous week relating to the payment of the outstanding tax liability together with such interest as might accrue between the time at which he made his decision and the payment. The 8 December 2014 letter was intended to confirm Mr Celantano's

appreciation of what had been agreed. Unfortunately, its final draft was not reviewed by Mr Celantano before it was despatched and did not employ language that he might, in retrospect, have preferred to use to record the agreement. The letter was not and did not purport to be the communication of a decision relating to the GIC waiver application. Even if it be construed in the manner contended for by Mr Pintarich, the surrounding circumstances did not evidence the making of such a decision by Mr Celantano or any other person.

57 As no decision was made on 8 December 2014 to remit the applicant's GIC liability, there is no reason why the impugned decision, conveyed by letter on 13 May 2016, should not stand and operate according to its terms.

DISPOSITION

58 The application should be dismissed with costs.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 22 August 2017