Administrative Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Fox and Commissioner of Taxation (Taxation) [2018] AATA 2791 (10 August 2018)

Division: TAXATION AND COMMERCIAL DIVISION

File Number(s): **2017/0644**

Re: **Alicia Fox**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Senior Member R Pintos-Lopez**

Date: **10 August 2018**

Place: **Melbourne**

The decision under review is affirmed.

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Senior Member R Pintos-Lopez

TAXATION – **OBJECTION DECISION** – Employee Share Scheme - Applicant obtained Performance Rights subject to vesting conditions – deferred taxing point – Employer placed into administration – share value rendered worthless – Notice of Assessment included amount relating to discount from deferral scheme – outstanding tax liability – Applicant claims entry into share scheme influenced by coercion – contract vitiation – lack of evidence to substantiate coercion or undue influence – decision affirmed

PRACTICE AND PROCEDURE – **JURISDICTION OF TRIBUNAL** – Submission that finding of coercion may involve exercise of judicial power by Tribunal – ascertainment of existing rights and liabilities between parties – Tribunal as administrative body cannot exercise judicial power – distinction between resolving questions of law and making findings of fact – Tribunal can make certain findings of fact and form opinion as to party right and liabilities in performing its function – Tribunal would not impermissibly exercise judicial power in granting relief

Legislation

Administrative Appeals Tribunal Act 1975 (Cth) ss 25, 43(1)
Income Tax Assessment Act 1997 (Cth) ss 83A-5, 83A-10, 83A-120, 104, 105, 392-5(1)
Taxation Administration Act 1953 (Cth) ss 14ZY, 14ZY(1A)(b), 14ZY(2), 14ZZ(1), 14ZZK, 392-1, 392-5

Cases

Australia and New Zealand Banking Group Ltd v Karam (2005) 64 NSWLR 149
Brandy v Human Rights & Equal Opportunity Commission (1995) 183 CLR 245
Crescendo Management Pty Ltd v Westpac Banking Corp (1988) 19 NSWLR 40
Denmeade v Stingray Boats [2003] FCAFC 215
General Merchandise & Apparel Group Pty Ltd and Chief Executor of Customs (2009) 114 ALD 289
Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd (1991) 22 NSWLR 298
RE Kalafatis and Commissioner of Taxation [2012] AATA 150
Medical Board of Victoria v Meyer (1937) 58 CLR 62
North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd [1978] 3 All ER 1170
Odorizzi v. Bloomfield School District CA Ct of App 54 Ca Rpt 533 [1964]
Re Cram*;* Ex parte Newcastle Wallsend Coal Co Pty Ltd (1987) 163 CLR 140

Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia (1987) 163 CLR 656
Social Security Appeals Tribunal Registrar, Re; Ex parte Townsend (1995) 130 ALR 163
Thorne v Kennedy (2017) 350 ALR 1
Westpac Banking Corporation v Cockerill (1998) 152 ALR 267

REASONS FOR DECISION

Senior Member R Pintos-Lopez

10 August 2018

1. The Applicant seeks review of a decision made by the Respondent, the Commissioner of Taxation, dated 25 November 2016, disallowing her objection to $106,058 being included as part of her assessable income for the 2014 financial year in relation to shares that she acquired under an employee share scheme (**ESS)** of her then employer NewSat Limited (**NewSat**).

2. For the reasons that follow, the decision is affirmed.

I. BACKGROUND

3. The Applicant was an executive assistant of the chief executive officer (**CEO**) of NewSat, from May 2010 until May 2015.

4. NewSat was an Australian specialist satellite communications company that delivered internet, voice, data and video to customers via third party satellites using its ground-based teleports. NewSat, however, had ambitions to build and own its own satellite. The present application and the company's fortunes became linked as will be explained.

5. In December 2011, NewSat and Lockheed Martin entered into a contract for the design, manufacture and delivery of a satellite to NewSat called Jabiru-1. Arianespace, a commercial launch service provider based in France was contracted to prepare and launch Jabiru-1 on its Ariane 5 launch vehicle.

6. NewSat required financing to pay for the construction and launch of Jabiru-1 and obtained debt funding from US and French financiers in February 2014.

7. Unfortunately, in the second half of 2014, NewSat made a loss and was left with significant outstanding loan repayments.

8. In April 2015, the company was faltering, and it was placed into administration. Having been unable to pay Lockheed Martin and Arianespace, litigation ensued, and the contracts were terminated.

9. In May 2015, administrators made various employees of the company redundant, including the CEO and the Applicant.

10. At the end of 2015, NewSat was wound up.

The NewSat employee share plan

11. During the course of NewSat's attempt to attain its own satellite, it offered certain key employees the opportunity to acquire ownership in the company by way of an employee share plan.

12. Specifically, in September 2011, prior to NewSat's collapse, it offered certain employees and directors, including the Applicant, as part of the planned financing and launch of Jabiru-1, the opportunity to enter into an employee share plan that involved the granting of certain rights to participants, called Performance Rights, at no cost.

13. In October 2011, the Applicant was offered and entered into the ESS, and received 200,000 Performance Rights, without having to pay anything. Those Performance Rights were convertible into shares subject to certain vesting conditions described below.

14. In June 2012, the Applicant was again offered and accepted a further 500,000 Performance Rights. Accordingly, at that time, the Applicant had a total of 700,000 Performance Rights.

15. The Performance Rights entitled the Applicant, at her election, to convert those Performance Rights into NewSat ordinary shares, on a one-to-one basis, subject to certain vesting events.

16. The vesting events in relation to half of the Performance Rights, that is 350,000 Rights, were that:

    (a) The Applicant remain an employee; and

    (b) NewSat publicly announce that it had reached financial close on financing for Jabiru-1, which meant specifically, the attainment of binding commitments for the debt and equity necessary to fund the construction, launch and insurance of the Jabiru-1 satellite. As noted above, this occurred on February 2014.

17. The rest of the Performance Rights were to vest when NewSat publicly announced that it had successfully launched Jabiru-1 into orbit and successfully completed in-orbit testing. That event never occurred because the company was wound up before the satellite had even been delivered.

18. On 17 February 2014, NewSat publicly announced financial close in relation to Jabiru-1. Three days later, on 20 February 2014, corporate counsel at NewSat sent an email to the Applicant stating that she could now convert half of her Performance Rights into NewSat shares.

19. On 13 June 2014, the Applicant converted the 350,000 Performance Rights into NewSat shares.[1]

20. The Respondent was notified that in addition to the 350,000 shares, that the Applicant also had 100,000 further shares with a taxing point of 7 October 2013. There was no explanation as to how these shares came to be offered or accepted.[2]

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[1] For reasons not explained by the documents or by the parties, NewSat reported to the Respondent that the 350,000 shares had a taxing point on 13 June 2014 rather than 17 February 2014, when the second vesting condition, financial close, was announced. It may be that the holding lock referred to in clause 5.2 of the Performance Rights Plan, considered below, explains the four months difference. It is accepted that the relevant taxing point date is 13 June 2014.

[2] Respondent's Statement of Facts, Issues and Contentions paragraph [12].

21. Accordingly, for the 2014 financial year, the Applicant had a discount on employee share scheme interests (the discount being the difference between the amount she paid and the market value of the ESS interest, which in this case is the total market value of the shares acquired because the Applicant did not pay for the interests) of:

(a) $1,058 for 100,000 shares vesting on 7 October 2013;

(b) $30,000 for 100,000 shares vesting on 13 June 2014; and

(c) $75,000 for 250,000 shares vesting on 13 June 2014.

22. As a result, the total to be included as part of the Applicant's assessable income for the 2014 financial year was $106,058.

23. The tax implications for the Applicant were that for the 2014 financial year she had an approximate $40,000 tax liability. What the Applicant did not know in June 2014, when she acquired the tax liability, was that NewSat would be wound up in May 2015 and that, as a result, the shares for which she owed a tax liability would become worthless.

24. The Applicant complains that she agreed to enter into NewSat's employee share scheme, not as a senior executive or board member with real knowledge of the company's prospects or fate, but as an administrative assistant without adequate knowledge or explanation of the consequences of acquiring the NewSat shares. She says that she was pressured to sign her acceptance to the first offer, and that now she is left with nothing but a significant tax bill for worthless shares in a company that no longer exists.

25. Her complaint, although not made by lawyers on her behalf, gives rise to some complexity, which it is necessary to traverse in the course of these reasons, about the limits of the Tribunal's power to determine questions put before it.

II. RELEVANT PROVISIONS

26. The Respondent submits that the Tribunal is limited in the present review from making certain legal determinations as to the existing rights and liabilities as between the Applicant and NewSat. He says that the Tribunal cannot determine the Applicant's complaint, which is that she was not able, in the circumstances, to enter into a binding agreement with NewSat in relation to the share plan.

27. The Respondent says that to determine that question would involve the Tribunal making a finding of law—that the agreement was void or voidable— which is a finding that would involve the exercise of judicial power, which the Tribunal does not possess.[3]

28. Accordingly, a question arises as to the jurisdiction of the Tribunal and the outer limits of its capacity to make determinations. It is necessary, as a result, to fully set out the relevant legislative framework and then to consider first the jurisdictional issue.

29. The statutory provisions that apply to the determination of the present review are contained in:

(a) the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**), which provides that an enactment may grant the Tribunal a power to review decisions made in the exercise of powers conferred by that or another enactment.

(b) The *Taxation Administration Act 1953* (Cth) (the **TAA**) is such an enactment. It provides that the Tribunal may review objection decisions made by the Respondent where a person is dissatisfied with a decision. That Act also provides certain provisions affecting the manner of the Tribunal's review, at times, by making amendment to the AAT Act specifically in relation to the review of objection decisions.

(c) The *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**) contains the specific provisions that apply to the taxation decision and the objection decision, in particular, certain provisions concerning the income tax treatment of benefits provided under an employee share scheme.

A. The AAT Act and TAA

30. As outlined above, s 25 of the AAT Act provides that an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by an enactment.

31. For the purpose of reviewing a decision, s 43(1) of the AAT Act provides that "the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment

[3] See below at paragraphs [112]-[151] the discussion in relation to the Respondent's submissions concerning the Tribunal's jurisdiction.

on the person who made the decision" and shall make a decision in writing, affirming, varying or setting aside the decision under review.

32. Division 3 of Part IVC of the TAA provides for taxation objections, reviews and appeals. That Division provides for the Commissioner to decide taxation objections: s 14ZY of the TAA.

33. Section 14ZZ(1) of the TAA provides that if a person is dissatisfied with the Commissioner's objection decision (as defined in s 14ZY(2)) the person may apply to the Tribunal for review:

> ***If the person is dissatisfied with the Commissioner's objection decision*** *(including a decision under paragraph 14ZY(1A)(b) to make a different private ruling),* ***the person may****:*
>
> *(a) if the decision is a reviewable objection decision—either:*
>
> *(i)* ***apply to the Tribunal for review of the decision****; or*
>
> *(ii) appeal to the Federal Court against the decision; or*
>
> *(b) otherwise—appeal to the Federal Court against the decision.*
>
> (Emphasis added.)

34. Division 4 of Part IVC of the TAA, following on from Division 3 which deals with the Commissioner's review of objections, concerns the Tribunal's review of objection decisions (as well as extensions of time and refusal decisions). As a result, the AAT Act applies in relation to those kinds of decisions subject to certain modifications set out in Division 4 of the TAA.

35. Section 14ZZK of Part IVC of the TAA provides:

> ***On an application for review of a reviewable objection decision****:*
>
> *(a) the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and*
>
> *(b)* ***the applicant has the burden of proving****:*
>
> *(i)* ***if the taxation decision concerned is an assessment--that the assessment is excessive or otherwise incorrect and what the assessment should have been****; or*
>
> *(ii) in any other case--that the taxation decision concerned should not have been made or should have been made differently.*
>
> (Emphasis added.)

B. The ESS provisions

36. The provisions applicable to the present reviewable objection decision are contained in the ITAA 1997, and, in particular, Division 83A. That Division concerns employee share schemes and the manner in which those schemes are to be subject to income tax.

37. If an employee receives employee share scheme interests, called ESS interests, and did not pay anything to receive them or paid less than market value, the difference between the amount the employee paid and the market value of the ESS interest is known as the ***discount***.[4]

38. Section 83A-5 of the ITAA 1997 provides that the objects of Division 83A are:

> *(a)* ***to ensure that benefits provided to employees under *employee share schemes are subject to income tax at the employees' marginal rates under *income tax law*** *(instead of being subject to *fringe benefits tax law); and*
>
> *(b)* *to increase the extent to which the interests of employees are aligned with those of their employers, by providing a tax concession to encourage lower and middle income earners to acquire *shares under such schemes.*
>
> (Emphasis added.)

39. Section 83A-10 of the ITAA 1997 defines ESS interest and employee share scheme as:

> *(1)* *An ESS interest, in a company, is a beneficial interest in:*
>
> *(a)* *a *share in the company; or*
>
> *(b)* *a right to acquire a beneficial interest in a share in the company.*
>
> *(2)* *An employee share scheme is a *scheme under which*ESS interests in a company are provided to employees, or *associates of employees, (including past or prospective employees) of:*
>
> *(a)* *the company; or*
>
> *(b)* **subsidiaries of the company;*
>
> *in relation to the employees' employment.*

40. Subdivision 83A-C of the ITAA 1997 applies to the deferred inclusion of a gain in assessable income. That subdivision provides for the inclusion of the *discount*, as that term is defined above, in assessable income in the first income year when a person is

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[4] See T21, pg 238. I agree with this summary of the effect of Division 83A as set out in the reasons for the objection decision.

able to dispose of the share or interest. In that way, the inclusion of the discount in a taxpayer's assessable income is deferred to a later point in time.

41. The amount to be included in assessable income in relation to the ESS interest is set out in s 83A-110 of the ITAA 1997:

> *(1)* ***Your assessable income for the income year in which the *ESS deferred taxing point for the *ESS interest occurs includes the *market value of the interest at the ESS deferred taxing point, reduced by the *cost base of the interest****.*
>
> *Note: Regulations made for the purposes of section 83A-315 may substitute a different amount for the market value of the ESS interest.*
>
> *(2)* *Treat an amount included in your assessable income under subsection (1) as being from a source other than an *Australian source to the extent that it relates to your employment outside Australia.*
>
> (Emphasis added.)[5]

42. In simple terms, the value of the discount is the difference between the amount the taxpayer paid for the ESS interest and its market value.

43. Section 83A-120 of the ITAA 1997 sets out the manner of calculating the deferred taxing point:

> *(1)* *Scope*
>
> *This section applies if the *ESS interest is a beneficial interest in a right to acquire a beneficial interest in a*share.*
>
> *(2)* *Meaning of ESS deferred taxing point*
>
> ***The ESS deferred taxing point for the *ESS interest is the earliest of the times mentioned in subsections (4) to (7).***
>
> *(3)* *However, the ESS deferred taxing point for the *ESS interest is:*
>
> *(a)* *the time you dispose of the ESS interest (other than by exercising the right); or*
>
> *(b)* *if you exercise the right--the time you dispose of the beneficial interest in the *share;*

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[5] The terms market value and cost base are defined and, as a result, s 995-1 applies to define those terms. Section 995-1 says that cost base "of a *CGT asset has the meaning given by Subdivision 110-A. Respondent refers in Outline of Submissions [17] s 110-25 (general rules about calculating cost base). Cost base market value is addressed in Subdivision 960-S, which provides under s 960-400 "The expression "market value" is often used in this Act with its ordinary meaning. However, in some cases that expression has a meaning affected by this Subdivision. The Commissioner may approve methods to use for working out the market value of assets or non-cash benefits." At s 960-412(1) "The *market value of an asset or *non-cash benefit that you work out using a method approved under subsection (2) for that kind of asset or benefit binds the Commissioner in relation to you."

if that time occurs within 30 days after the time worked out under subsection (2).

(4) No restrictions on disposing of right

The first possible taxing point is the earliest time when:

(a) you have not exercised the right; and

(b) there is no real risk that, under the conditions of the *employee share scheme, you will forfeit or lose the *ESS interest (other than by disposing of it, exercising the right or letting the right lapse); and

(c) if, at the time you acquired the ESS interest, the scheme genuinely restricted you immediately disposing of the ESS interest--the scheme no longer so restricts you.

(5) Cessation of employment

The 2nd possible taxing point is the time when the employment in respect of which you acquired the interest ends.

(6) Maximum time period for deferral

The 3rd possible taxing point is the end of the 7 year period starting when you acquired the interest.

No restrictions on exercising right and disposing of share

(7) The 4th possible taxing point is the earliest time when:

*(a) there is no real risk that, under the conditions of the scheme, you will forfeit or lose the *ESS interest (other than by disposing of it, exercising the right or letting the right lapse); and*

(b) if, at the time you acquired the ESS interest, the scheme genuinely restricted you immediately exercising the right--the scheme no longer so restricts you; and

*(c) there is no real risk that, under the conditions of the scheme, if you exercise the right, you will forfeit or lose the beneficial interest in the*share (other than by disposing of it); and*

(d) if, at the time you acquired the ESS interest, the scheme genuinely restricted you immediately disposing of the beneficial interest in the share if you exercised the right--the scheme no longer so restricts you.

(Emphasis added.)

44. Section 392-1 of the TAA provides that a company that gives ESS interests to an individual under an employee share scheme during a year must give certain information to the Respondent and the individual. Section 392-5 of the TAA provides that an entity (defined as the provider) may give a statement to the Respondent for a financial year if the provider provides an ESS interest to an individual and subdivision 83A-B or 83A-C of the ITAA 1997 applies to the interests. Section 392-5(1), in part, provides:

Statements

*(1) An entity (the **provider**) must give a statement to the Commissioner and to an individual for a *financial year if:*

…

(b) all of the following subparagraphs apply:

(i) the provider has provided ESS interests to the individual (whether during the year or during an earlier year);

(i) Subdivision 83A-C of the Income Tax Assessment Act 1997 (about employee share schemes) applies to the interests;

*(iii) the *ESS deferred taxing point for the interests occurs during the year.*

III. THE FACTS

45. The Applicant was employed by NewSat from 7 May 2010 until 29 May 2015 as an executive assistant to Adrian Ballantine, who was the CEO.[6]

46. The Applicant provided a signed but undated witness statement, which she affirmed while giving oral evidence. In her statement, she says that in around May 2011 she commenced employment with NewSat as an executive assistant to the CEO and was employed in the same position for approximately five years. In her oral evidence, she said that in addition to being the CEO's assistant, she also assisted William Abbott, inhouse legal counsel, and Adam Shapiro, the chief financial officer (**CFO)** of NewSat, as well as assisting the board more generally.

47. On 6 September 2011, NewSat announced a proposal to implement a Performance Rights Plan in order to reward key employees and directors who had performed a crucial role in achieving the financing and subsequently the launching of the satellite Jabiru-1.

A. The first Performance Rights – the 2011 Offer

48. On 25 October 2011, NewSat sent to the Applicant a letter entitled "Invitation to Participate in the NewSat Long-Term Incentive Plan." In the letter, NewSat invited the Applicant to participate in a Long-Term Incentive Plan on the terms and conditions set out in the letter (the **2011 Offer**).[7] The Applicant was invited to apply for 200,000

[6] T13, pg 100.

[7] T18, pg 188.

Performance Rights enabling, subject to certain conditions, the acquisition of fully paid ordinary shares in the company which were to be granted to her at no cost if she signed and returned the enclosed copy of the letter.

49. The 2011 Offer stated that the invitation was made on the terms generally applicable under the NewSat Executive Performance Rights Plan Rules. As a result, the applicable terms and conditions of the offer for Performance Rights were contained in the 2011 Offer and the NewSat Executive Performance Rights Plan Rules.[8]

50. The 2011 Offer stated that, if the Applicant wished to participate, she must provide a signed copy of the letter to Adam Shapiro, the CFO, by 31 October 2011. Accordingly, the offer was received by the Applicant on Tuesday, 25 October 2011, and the Applicant was required to accept by the following Monday, 31 October 2011, that is, six days later. If accepted, the Performance Rights themselves would be issued within seven days.

51. The 2011 Offer provided that each Performance Right entitled the Applicant to acquire one fully paid ordinary share: paragraph 3.1. Each Performance Right was to be issued at no cost: paragraph 3.2.

52. Paragraph 3.3 of the 2011 Offer provided the vesting conditions:

> *Exercise of the Performance Rights into Shares is conditional on the following conditions (**Performance Hurdles**):*
>
> - *You being continuously employed by the Company or any of its subsidiaries for the period commencing from 1 July 2011 until satisfaction of a relevant vesting condition;*
> - *50% of the Performance Rights will vest on the public announcement by the Company that it has reached Financial Close on Jabiru-1, where "Financial Close" means the execution of binding commitments for the debt and equity necessary to fund the construction, launch and insurance of the Jabiru-1 satellite; and*
> - *50% of the Performance Rights will vest on the public announcement by the Company that it has successfully launched Jabiru-1 into orbit and has successfully completed in-orbit testing of Jabiru-1.*[9]

53. No payment was required to exercise the Performance Rights: paragraph 3.5.

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[8] See below at paragraph [56].

[9] T18, pg 189.

54. Paragraph 4 of the 2011 Offer was entitled "Taxation Advice and Other Independent Advice" and provided:

> *You should note that the taxation laws covering Performance Rights plans are complex and change from time to time.* ***You should seek professional advice on the tax implications for you and your particular circumstances.*** *Further, any advice given on behalf of the Company is general advice only and you should consider obtaining your own financial product advice from an independent person who is licensed by the Australian Securities and Investments Commission to give such advice.*[10]
>
> (Emphasis added.)

55. The 2011 Offer concluded with Paragraph 5 entitled 'General' which provided:

> *You should read this letter and the enclosed copy of the rules, which set out all the terms of the issue of the Performance Rights. If you apply for Performance Rights in the manner described above you should then retain your copy of this document in a safe place for future reference.*
>
> *You are not obliged to participate and there will be no advantages or disadvantages to your employment whatever your decision. However, this gives you the chance to become a prospective owner of equity in the Company and to share personally in the Company's growth and success.*

56. An agreement entitled Performance Rights Plan provides the terms for the grant of Performance Rights by NewSat.[11] I take the Performance Rights Plan to be the NewSat Executive Performance Rights Plan Rules referred to in the 2011 Offer.

57. Clause 5.2 of the Performance Rights Plan provides:

> *To accept an offer made under clause 5.1, the Employee must submit an acceptance form (in the form prescribed by NewSat) on or prior to the Offer Closing Date. The acceptance form must include:*
>
> *(a) a notification that the Employee accepts the offer;*
>
> *(b) confirmation that the Employee agrees to be bound by the terms of this Plan; and*
>
> *(c) if so required by NewSat, the agreement of the Employee to the placing of a Holding Lock on any Shares provided on the exercise of the Performance Rights.*[12]

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[10] T18, pg 190.

[11] T20, pg 219 to 234. The particular copy in the T-documents is dated 27 October 2011 but is referred to as being dated 12 October 2011 in the Performance Rights certificates.

[12] T20, pg 225.

58. Clause 5.5 of the Performance Rights Plan provides:

> *Each Performance Right is a right to be issued with or transferred (at NewSat's election) a single Share.* ***A Participant does not have a legal or beneficial interest in any Share by virtue of acquiring or holding a Performance Right.*** *A Participant's rights under the Performance Right are purely contractual and personal. In particular, a Participant is not entitled to participate in or receive any dividends or other Shareholder benefits until the Performance Right has been exercised and a Share has been allocated or transferred to the Participant as a result of the exercise of the Performance Right.*[13]
>
> (Emphasis added.)

59. Clause 5.4 of the Performance Rights Plan provides:

> *If an Employee has accepted an offer in accordance with clause 5.2, NewSat will:*
>
> *(a) grant the Performance Rights to the Employee on a date which is after the Offer Closing Date; and*
>
> *(b) issue the Employee with a Certificate in respect of the Performance Rights.*
>
> *An Employee has no entitlement to a Performance Right until granted in accordance with this clause.*[14]

60. Clause 8.1 of the Performance Rights Plan provides:

> *A Performance Right (which has not otherwise lapsed under clause 8.2) may be exercised by a Participant if:*
>
> *(a) the Performance Criteria relating to the Performance Right has been met within the Performance Period and any vesting conditions set out in the offer made to the Participant in respect of the Performance Right have been met;*
>
> *(b) an Event occurs and the Board gives notice to the Participant that the Performance Right may be exercised;*
>
> *(c) clause 12.2(b) applies; or*
>
> *(d) the Performance Right has otherwise become exercisable under this Plan.*[15]

61. On 31 October 2011, that is the last day to accept, the Applicant signed the 2011 Offer in the following terms:

> *I, Alicia Fox hereby apply for the Performance Rights on the terms set out above and agree to be bound by the Constitution of the Company.*[16]

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[13] T20, pg 226.

[14] T20, pg 226.

[15] T20, pg 227.

[16] ST4, pg 272.

62. On acquiring the Performance Rights, the Applicant did not, at that time, have a legal or beneficial interest in any NewSat share: clause 5.5 of the Performance Rights Plan (see paragraph 58 above.)

63. Section 83A-120 of the ITAA 1997, set out above at paragraph 43, provides for a deferred taxing point in relation to ESS interests, which applies if, at the time a taxpayer acquired the ESS interest, the scheme genuinely restricted them immediately disposing of the ESS interest. Section 83A-120(4) of the ITAA 1997 applied to defer the taxing point of the Applicant's Performance Rights because:

(a) the 2011 Offer was, once entered into, an employee share scheme;

(b) the Performance Rights were ESS interests;

(c) prior to exercising the Performance Right and converting the Right into a NewSat share there was a risk that under the conditions of NewSat's employee share scheme that the Applicant could forfeit or lose the ESS interests because of the terms of the 2011 Offer; and

(d) because of the terms of the 2011 Offer, NewSat's employee share scheme genuinely restricted the Applicant immediately disposing of her ESS interests.

B. The circumstances surrounding the Applicant signing the 2011 Offer letter

64. The application before the Tribunal turns upon consideration of the circumstances of the Applicant signing the 2011 Offer letter.

65. The Applicant said that when she received the 2011 Offer letter from the CFO, Mr Shapiro, that he explained that it was a reward for her work.

66. The Applicant said that after receiving the 2011 Offer, and before signing it on 31 October 2011, that she only spoke to her husband in relation to the offer but that she cannot now remember what they spoke about in relation to the offer. She did not speak to Mr Shapiro or anyone else at or outside of NewSat about the 2011 Offer letter.

67. The Applicant's statement provides:

> *Despite Paragraph 4 of the First Letter of Offer containing a provision to seek independent legal advice in relation to the Long–Term Incentive Plan,* ***I was not given adequate opportunity to do so and was coerced into signing the First Letter of Offer by Adam Shapiro****.*[17]
>
> (Emphasis added.)

68. In her oral evidence, the Applicant said that she was rushed and pressured into signing the 2011 Offer. When Mr Shapiro asked her to sign the letter, the Applicant was heading into a board meeting and his words to her:

> *were along the lines of if you don't sign this now you will miss out on your opportunity to receive these. At that point, I simply had to head into the meeting and signed it. I hadn't had a chance to seek any external advice.*
>
> *…*
>
> *I was working. I hadn't set up any meetings for any external advice. And when told that I would lose…miss the opportunity if I didn't sign there and then, I signed.*[18]

69. The Applicant's further oral evidence was, to some extent, at odds with the above, because she said that she decided to sign the 2011 Offer as she believed in the company and in the future success of the company, that she wanted a reward because she was working very long hours and thought that it was appropriate. However, I accept that the Applicant's principal complaint remains her allegation that she was coerced or forced into signing the 2011 Offer letter because of the circumstances, in that she was rushed because she was heading into a board meeting when presented with the letter for signature, and that she was told by the CFO that she had to sign it immediately or lose the opportunity to receive the Performance Rights.

70. As noted, the Applicant's account of her consideration of the 2011 Offer and the circumstances of her signing it underpin her application to the Tribunal.

C. The second Performance Rights – the 2012 Offer

71. On 13 June 2012, a further invitation to participate in the NewSat Long-Term Incentive Plan was sent to the Applicant inviting her to apply for a further 500,000 Performance Rights on effectively the same terms as the 2011 Offer (this second offer will be referred to as the **2012 Offer**).

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[17] Applicant Statement [8].

[18] Oral evidence at hearing 10:18am 16 May 2018.

72. The closing date by which the Applicant was required to sign was 20 June 2012. On that day, she was required to sign the letter and return it to Adam Shapiro. Similar to the 2011 Offer, the offer was made on Wednesday, 13 June 2012, and the acceptance was required on the next Wednesday, 20 June 2012, that is seven days later.

73. The Applicant said that she may have received the 2012 Offer letter from Mr Ballantine or William Abbott, inhouse legal counsel, but that it would have come from "the management or the board."[19] She said that she "thought it to be much the same as the first offer."

74. The Applicant said that she only read the 2012 Offer hurriedly as she had the first 2011 Offer. In relation to the 2012 Offer, she said that she may have spoken to Mr Ballantine, Mr Shapiro (if he was still with the company at that time) or Mr Abbott.

75. The Applicant said that she had the same thoughts as those that she had in relation to the first 2011 Offer. She said that she would have spoken to her husband. She said that she did not seek legal advice.

76. The Applicant signed the 2012 Offer on or around 19 June 2012.[20] She received the Performance Right Certificate for 500,000 Performance Rights on or around 20 July 2012.[21]

D. Financial close – February 2014

77. On 17 February 2014, NewSat announced that financial close had been reached in relation to its debt funding for the Jabiru–1 satellite project. The company stated that it completed or obtained waivers for all the conditions precedent to draw down the debt funding.

78. On 20 February 2014 Mr Abbott sent an email to the Applicant stating:

> ***With Financial Close of the financing of Jabiru 1 occurring late on Friday 14 February 2014 350,000 Performance Rights held by you vested.***

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[19] Oral evidence at hearing 10:15am 16 May 2018.

[20] Applicant Statement [12].

[21] The Performance Rights Certificate (ST4, pages 276 and 277), was issued under the Performance Rights Plan dated 12 October 2011 subject to the Performance Rights Plan and the Constitution and setting out the vesting conditions. The Application for Shares on Exercise of Performance Rights, ST4 pg 278, states that the person thereby notifies the company that they wish to exercise the number of performance rights to acquire new shares in the capital of the company. The application is then dated and signed by the Applicant and a witness.

You are now entitled to convert these into 350,000 ordinary shares in NewSat Limited.

The Company would like to have as many Performance Rights converted at the same time as is possible so that conversion can be dealt with efficiently and the notifications to ASX can be limited.

If you intend to convert would you please complete the form of Application For Shares on Exercise Of Performance Rights on the back of your Performance Rights Certificate/s and deliver or email them to Rebecca Lee no later than Tuesday 25 February 2014.

If emailing them would you please have the original Certificate delivered to Rebecca so that a replacement can be issued covering the remainder of the Performance Rights that vest on launch and in orbit testing of the satellite.

***You should be aware that the vesting of the Performance Rights will probably create a taxation liability and you should seek advice from your accountant regarding this**.*[22]

(Emphasis added.)

E. Conversion into shares – June 2014

79. On or around 13 June 2014, the Applicant elected to convert 350,000 Performance Rights into 350,000 NewSat ordinary shares.[23]

80. In relation to the Applicant's decision to convert her Performance Rights into shares, the Applicant says that she spoke with her husband and Mr Ballantine. She says that there was:

> *talk that other people in the office were converting… to which Adrian [Ballantine] told me that he wasn't…that I needn't worry about it and I've simply followed his lead.*
>
> *…*
>
> *I asked [Ballantine] should I be... the conversation was around the vesting date. I believe that the vesting date was either approaching or had passed and I was... had some layer of concern around it to which I spoke to him and simply followed his advice and lead.*[24]

81. The Applicant says that when she elected to convert into shares that she did not believe that she received anything:

> *Applicant: I thought I had to reach the second milestone before I would start thinking about what I was actually entitled to.*

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[22] ST4, pg 299.

[23] Applicant Statement [17].

[24] Oral evidence at hearing 10:25am 16 May 2018.

…

SM Pintos-Lopez: Meaning what? That you got the shares, but it was conditional on something else happening, so they weren't yours until that second thing happened?

Applicant: Correct.[25]

82. On 1 July 2014, the Applicant received a letter entitled Employee Share Scheme Statement, from NewSat, which attached an Employee Share Scheme Statement for the 2014 financial year. The letter states "you will need to include the amount stated on the form in your FY14 tax return."[26]

83. The attached Employee Share Scheme Statement is an Australian Tax Office form signed by NewSat, which provides a summary for the year ending 30 June 2014 for a discount from deferral schemes in the amount of $106,058.

F. The events that followed conversion and the Applicant's objection

84. On 17 April 2015, McGrathNicol were appointed as receivers and managers of NewSat. On that same day, PPB Advisory were appointed liquidators.[27]

85. On 27 May 2015 the Applicant's tax agent lodged her 2014 income tax return, which included the $106,058 at Item 12F as income from the deferral scheme.[28]

86. On 29 May 2015, the Applicant was made redundant with no entitlements by the company administrator while she was on maternity leave.[29]

87. On 4 June 2015, the Respondent issued a "Notice of assessment – year ended 30 June 2014", which provides that the Applicant's taxable income as $231,219. The Notice states that the Applicant is required to pay $42,959.80.[30]

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[25] Oral evidence at hearing 10:23am 16 May 2018.

[26] ST4, pg 296; Applicant Statement [18].

[27] Applicant Statement [19].

[28] T6, pg 21; Applicant Statement [21]. On that day, an online newspaper article, dated 27 May 2015, stated that NewSat had run into financial trouble in the last year after breaching covenants with its US and French financiers: T5, pg 15 - An online newspaper article, dated 29 May 2015, stated that a court in the United States had ruled that Lockheed Martin, the construction company for the Jabiru–1 satellite had the right to cancel construction of the spacecraft: T7, pg 53.

[29] ST4, pg 253; Applicant Statement [22].

[30] T8, pg 57.

88. On 7 August 2015, NewSat was placed into liquidation.

89. On 12 October 2015, the Liquidators of NewSat, made a declaration that they had reasonable grounds to believe that there was no likelihood that NewSat shareholders would receive any distribution in the course of the winding up, pursuant to s 104–145 of ITAA 1997.[31] At this point, the Applicant's shares were worthless.

90. On 27 November 2015, the Applicant lodged an amended 2014 income tax return for the 2014 financial year, which no longer included the amount previously set out at Item 12F relating to deferral scheme income.

91. On 23 December 2015, the Australian Taxation Office issued a "Notice of amended assessment – year ended 30 June 2014". The Notice states that the Applicant's previous taxable income was $231,219 and her amended taxable income is $125,161. The difference between the two amounts is because the Applicant had removed the $106,058 previously declared in relation to the NewSat shares.

92. On 14 April 2016, the Australian Tax Office sent a letter to the Applicant stating that it had received employee share scheme discount information from her employer, NewSat, that did not match what she had included in her 2014 tax return. It stated as a summary of proposed adjustments that the Applicant's 2014 tax return should include a total assessable ESS discount amount of $106,058.

93. On 25 May 2016, the Applicant's husband, Mr Gerner, on behalf of the Applicant, sent a letter to the Deputy Commissioner of Taxation stating that:

- ***She wasn't aware that the tax event was incurred on issue not sale of shares.***
- ***She wasn't given a reasonable opportunity to get independent financial advice****.*
- ***She was pressured by Mr Adam Shapiro (Company Secretary) to execute or lose and not given time to seek independent advice.*** *Her boss Mr Adrian Ballantine told Alicia that he was holding onto his shares and did not sell to cover tax liabilities.*
- *It has been widely reported that NWT suffered poor corporate governance.*[32]

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[31] T13, pg 116.

[32] T13, pg 100. A document records notes taken by a departmental officer, which records, in relation to the 25 May letter that Mr Gerner "stated that the TP was not aware that tax event was incurred on issue not sale

(Emphasis added.)

94. On 22 July 2016, the Australian Tax Office issued a "Notice of amended assessment – year ended 30 June 2014", stating that the Applicant's previous taxable income was $125,161 and that her amended taxable income was $231,219. The deferral scheme income was added back into her tax return. The amount payable on the Notice was $46,031.

95. On 22 August 2016, the Applicant filed an objection which included in relation to her reasons for objection the letter considered above at paragraph 93 sent by Mr Gerner on 25 May 2016.

96. On 18 November 2016, Mr Gerner met with departmental officers to discuss the Applicant's objection. An Australian Taxation Office document entitled "Case Notes Report" provides a summary from a departmental officer of the meeting stating:

> *Myles explained that in the absence of further information, at this stage the ATO position is that the discount amount must remain in the assessment. This is because the employer has reported the amounts as being exercised. [Mr Gerner] asked what further information we would require. We suggested that he could provide a letter from the employer advising that the shares were issued in error or they would need to amend their reporting. [Mr Gerner] asked whether the inclusion of ESS discount was negotiable at the meeting. Myles advised it was not as there are no provisions in the legislation which will allow us to exclude the discount.*[33]

97. At that meeting on 18 November 2016, Mr Gerner was advised that—although the shares had become worthless when the company was liquidated—the tax remained payable on the discount amount included in the 2014 income tax return. He was advised, however, that a capital loss could be carried forward to future years as a result of the capital gain tax calculation.[34]

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of shares TP was not given a reasonable opportunity to get independent financial advice….[Mr Gerner] also contacted liquidators who said that they can't do reversal of shares.": T11, pg 95.

[33] T17, pg 178.

[34] T21, pg 239.

G. The objection decision

98. On 25 November 2016, the Respondent disallowed the Applicant's objection against the Notice of Amended Assessment issued by the Respondent in relation to the Applicant's taxable income for the income year ended 30 June 2014 (the **objection decision**).

99. The objection decision stated that the Applicant had objected to the inclusion of the discount amount of $106,058 on the grounds that the shares became worthless, and there was no financial benefit as a result of the acquisition.

100. On 7 February 2017, the Applicant applied to the Tribunal for review of the objection decision, stating in relation to the reasons for the application that "the tax liability does not consider whether the shares were issued legally."[35]

101. The Applicant's husband, Mr Gerner, provided a statement dated 4 May 2018. In his statement, Mr Gerner states that he has made extensive attempts to obtain evidence and witnesses to corroborate the "truth of the Applicant's position."[36]

102. Mr Gerner said that he has made numerous attempts to contact Mr Ballantine, the former CEO of NewSat, and eventually was able to meet with him in March 2018. He said that Mr Ballantine appeared reluctant to assist, indicating that he had "bigger issues to deal with including a significant lawsuit proposed to be started against the former Lenders of the Company."[37]

IV. CONSIDERATION

103. The Applicant submits that she was not given adequate opportunity to obtain advice and that she was, in addition, coerced or pressured into signing the 2011 Offer. She submits that this affects the legal validity of the 2011 Offer and the 2012 Offer and that, as a consequence of the circumstances that she was not validly assigned the NewSat shares. She says that the discount ought never have been added to her assessable income for the 2014 financial year.

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[35] T1, pg 4.
[36] Mr Gerner Statement [4].
[37] Mr Gerner Statement [9].

104. As I have noted above, the Applicant complains that she, without her understanding, acquired an obligation to pay tax for shares that were worthless the next year. She says that she is left with the debt but with no income to account for it.

105. The parties' submissions give rise to complicated issues. In order to consider those issues, these reasons will proceed to consider:

(a) Whether the Tribunal has power to determine the principal question raised in the Applicant's case.

(b) Whether the Applicant was coerced into signing the 2011 Offer.

(c) Whether the objection decision ought be set aside.

A. Whether the Tribunal has power to determine the Applicant's case

106. The Applicant's submissions before the Tribunal, and earlier at the objection decision stage, centred upon the circumstances of her signing the 2011 Offer.

107. The Respondent submitted that the legal consequence of a finding that the entry into the Long-Term Incentive Plan, as an agreement between two parties, was void or voidable, in effect, for want of capacity on the Applicant's part, raises a question as to the Tribunal's capacity to determine the Applicant's case.

108. The Respondent's submissions state that the Tribunal is not able to determine the central issues raised in the Applicant's case because to do so would involve the exercise of judicial power by the Tribunal, which it may not do.

109. The Applicant's evidence and submissions are that she was:

(a) not given adequate or reasonable opportunity to seek independent legal and financial advice. This is despite the 2011 Offer containing a provision to seek independent legal advice.

(b) coerced or pressured by the company secretary, Adam Shapiro, to sign the 2011 Offer because he said words that in lay terms meant that she needed to sign the offer "now or never".

110. Mr Gerner made submissions on behalf of the Applicant at the hearing. He said that the Applicant did not have the legal capacity to understand the implications and the financial risk of entering into the Long-Term Incentive Plan. She was not a sophisticated investor and had no experience with the large amounts of money involved when agreeing to participate in the plan. He submitted that the company should have given her a warning and that she was not given enough time to seek legal advice. Mr Gerner submitted further that, given the high-risk environment that the company operated in, it should have given the Applicant notice of the risks involved in entering into the plan.

111. The Applicant and her husband are not lawyers and, as a result, they were not able to state or refine the basis for her application. The Applicant's submissions and her evidence, however, assist to explain the basis of her application, which as I understand it, is that:

(a) the Applicant was not a sophisticated person with experience in dealing with the kinds of financial consequences that she may face by entry into the 2011 and 2012 Offers: she lacked relevant experience in dealing with the large amounts of money involved if she were to accept entry into the Long-Term Incentive Plan.

(b) NewSat failed to warn the Applicant of the consequences of entry into the Long–Term Incentive Plan. (That duty to warn was not fully explained. Mr Gerner was questioned as to whether it was the Applicant's submission that NewSat had a duty to warn the Applicant of (a) the tax liability consequences and/or (b) the tax liability and the possibility that NewSat would be wound up with the consequence that the Applicant may have a tax liability in circumstances where she had non-existent/worthless shares. I understood Mr Gerner to say it was both.)

(c) Mr Shapiro exercised pressure amounting to coercion over the Applicant to sign the 2011 Offer as:

    (i) she was rushed into signing the agreement at a time when she was focused on an immediate and important task being her attendance at a board meeting; and

    (ii) that his words, which were to the effect that it was "now or never", constituted pressure brought to bear by him for her to sign then and there.

(d) The Applicant's lack of capacity meant that she was not able to fully consider and protect her interests when entering into the 2011 and 2012 Offers without first obtaining independent advice.

(e) As a result of the Applicant's incapacity and the coercion of Mr Shapiro, the 2011 Offer is void.

(f) The 2012 Offer is also void because entry into it by the Applicant was similarly vitiated.

(g) As a result, the Performance Rights issued to her and the subsequent shares were not validly issued.

(h) As the interests and shares were not validly issued, they ought not have been considered as part of her 2014 assessable income because she did not own the shares and could not legally sell or otherwise deal with them.

1. The Respondent's submissions

112. The Respondent provided a Statement of Facts, Issues and Contentions, dated 29 March 2018. The Respondent states that the single issue that the Applicant raises for consideration is whether she was coerced into acquiring the Performance Rights.

113. The Respondent submits that a preliminary issue before the Tribunal is whether or not this is a matter that may be resolved by the Tribunal.

114. The Respondent submits that the jurisdiction conferred on the Tribunal to review a reviewable objection is limited to that which is conferred by s 14ZZ of the TAA: see above at paragraph 35. Section 14ZZK requires the Applicant to prove that the assessment is excessive or otherwise incorrect.

115. It was submitted, that the Tribunal's power is of a limited jurisdiction and it exercises administrative power, otherwise granted to the Respondent to make a decision. Accordingly, the Tribunal does not exercise judicial power.

116. The Respondent submits that the question that the Applicant has asked the Tribunal to resolve, which is whether the 2011 and 2012 Offers are void or voidable, appears to

involve the ascertainment of existing rights and liabilities as between the Applicant and NewSat.

117. The Respondent submits that *RE Kalafatis and Commissioner of Taxation* [2012] AATA 150, provides guidance in support of the Respondent's submission in relation to the issue of jurisdiction and what it is impermissible for the Tribunal to determine. In *Kalafatis* the Tribunal found that it was not able to determine a question as to do so would necessarily involve the exercise of judicial power.

118. The Respondent submits further that the inability to join or to compel the appearance of Mr Shapiro or NewSat, whose legal interests would be affected by a determination that the agreements were void or voidable (accepting that NewSat has been wound up), supports the conclusion that the question raised by the Applicant is beyond the power of the Tribunal.

2. RE Kalafatis and Commissioner of Taxation

119. In *RE Kalafatis and Commissioner of Taxation* [2012] AATA 150, DP Forgie considered an application for review of a decision by the Respondent to disallow an objection to an assessment made which included a net capital gain in relation to a sale of two parcels of land. The Applicant, Mr Kalafatis said he had not sold the land and hence it did not fall to be included as a capital gain in his 1997 taxation return. The Applicant said that he had not signed any transfer papers.

120. In 2009, the Applicant commenced proceedings in the Supreme Court of Victoria against certain family members and a trustee in relation to the land. The Supreme Court proceedings were on foot and a trial was pending when the question arose before the Tribunal. The issue before the Tribunal was whether it should defer its hearing until the outcome of the Supreme Court proceeding was known.

121. The Tribunal decided that the hearing in the Tribunal should be deferred. The issue before the Tribunal, it was decided, could not be determined by the Tribunal but was a relevant matter in considering whether there had been a CGT event. Determination of the question was not merely an evidentiary matter on which the Tribunal could make a finding of fact and its resolution required the exercise of judicial power and amendment of the certificate of title.

122. In her reasons, DP Forgie stated:

> *The distinctions between judicial power and administrative power can be difficult to draw on occasion. Various factors may influence the characterisation as one or the other. They include whether the power has a disciplinary, rather than a punitive, function, the method of decision-making prescribed and whether it is unsuited to one power or the other, whether regard must be had to policy considerations and whether a power to enforce a decision is conferred.*[38]

123. Further, DP Forgie considered the question of rights and liabilities:

> *In the situation in which Mr Kalafatis finds himself, resolution lies not in the creation of new rights and liabilities but in a determination of past rights and liabilities between him and his family and the effect of past dealings and actions on those rights and liabilities. That determination will become the benchmark by reference to which his rights and liabilities in relation to the two parcels of land will be determined in the future. They will be determined not only for the purposes of resolving disputes among the Kalafatis family generally but more particularly disputes between Mr Kalafatis and other members of his family. A resolution of this sort can only come about through the exercise of judicial power. It cannot come about through the exercise of administrative power such as that which this Tribunal can exercise.*[39]

124. The Tribunal in *Kalafatis* was concerned also about the effect of certain provisions of the State *Transfer of Land Act*,[40] which provided that the folios of the register were conclusive evidence of an interest in land and thus disposal of the asset in the Applicant's hands:

> *The practical realities of a review of a decision in the Tribunal illustrate why the Tribunal could not determine, or even make a finding of fact, whether any amendment to a folio of the Register has been obtained by fraud. That is an issue that arises between Mr Kalafatis and members of his family, who are not parties to this proceeding. While the family members could be called to give evidence regarding their dealings with the land, they could not call their own witnesses or cross-examine those called on behalf of Mr Kalafatis. That they have an opportunity to do so would be essential before any determination or finding could be made.* [41]

125. The Tribunal considered that it could make certain determinations but not others such as determining the question before it:

> *Quite apart from the legal constraints of s 41 of the TL Act's effectively preventing it from looking behind a folio of the Register, practical considerations of this sort mean that it would be entirely inappropriate for the Tribunal to attempt to make a finding of fact on the issue of alleged fraud.*

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[38] [24].

[39] [26].

[40] *Transfer of Land Act 1958* (Vic)

[41] [29]-[30].

> *If it were relevant to consider whether Mr Kalafatis had created a trust over the land and he were not the sole beneficiary of the trust (and I express no view on the matter), that would be an issue on which the Tribunal could make a finding of fact after considering the evidence. There are no statutory provisions that mirror those of the TL Act relating to the conclusive nature of folios of the Register. Determining a finding of fact would not involve a determination of Mr Kalafatis's rights and obligations against other persons or theirs against him. It would be a finding made purely for the purposes of reviewing the objection decision as required by the TA Act. As such, it would be a finding made in the exercise of administrative power and would have no legal effect or consequences beyond that review and the decision reached upon it.*[42]

126. Another reason that urged DP Forgie to defer the Tribunal's hearing was the fact that the Supreme Court proceedings had been commenced and that, as a result, a hearing was pending.[43]

3. Application

127. The objection raised by the Respondent as to the lack of the Tribunal's jurisdiction to make certain findings is problematic. Jurisdiction, once raised, must be considered. It is not a question of discretion. It either exists or it does not.

128. The Respondent submits that decision of *Kalafatis* is "instructive": paragraph 30 of its Statement of Facts, Issues and Contentions. The Respondent raised the issue of lack of jurisdiction and then proceeded to set out some of the factors in *Kalafatis* along with consideration of the capacity of the Tribunal to join third parties but summarised, in relation to the issue, that the Respondent "raises these preliminary matters for consideration by the Tribunal as to whether complaints of coercion relied upon by the Applicant are in fact appropriate to be resolved in the present proceeding": paragraph 35 of its Statement of Facts, Issues and Contentions.

129. What the Respondent has not provided is any proposition arising from the reasoning in *Kalafatis* or otherwise supported by an identifiable authority which would apply to the matter presently before the Tribunal. Once the issue of jurisdiction has been raised, the Tribunal must consider it, and in these circumstances it must do so by inferring the relevant proposition and by looking to the authorities.

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[42] [31]-[32]
[43] [47].

130. The decision in *Kalafatis* does not assist the Respondent. That application was decided in the context of the specific circumstances before the Tribunal.[44]

131. It is not said explicitly by the Respondent that this Tribunal could not make orders that involve a consideration of the legal effect of an agreement. It must be surmised that the Respondent submits that the Tribunal, as a rule of general application, may not consider and/or find that an agreement has no effect or is invalid because of the circumstances relating to one party's putative entry into that proposed agreement. It would follow that the basis for the general rule would be that to do so would impermissibly involve the attempt by a tribunal to make a decision reserved for a court exercising judicial power. It also follows that any purported decision by that tribunal would be a nullity because it was made outside of jurisdiction.

132. Further, such jurisdiction could never be granted to a tribunal because only a court may exercise judicial power. Logically, that submission must include a proposition that any decision by a tribunal that involves a determination that could be *characterised as judicial*, that is a legal determination, could not be made by the Tribunal. Such a rule would require the Tribunal to be continuously alert to the distinction between findings of fact, which it could make, and findings of law, which it could not.

133. For the reasons that follow, such a general proposition in the above terms is rejected.[45]

134. In *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, the Court held:

> *Inquiry into and determination of facts for the purpose of ascertaining what rights and obligations should be brought into existence in settlement of an industrial dispute does not cease to be an exercise of arbitral power merely because, in the course thereof, the Commission may form an opinion as to the existing legal rights and obligations of the parties.* ***As was pointed out in Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*** *(ALJR at 409; ALR at 176)* ***the formation***

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[44] For example, that the State *Transfer of Land Act* provided for conclusive evidence of transfer (which fact was contested by the Applicant), the fact of the Supreme Court proceeding, and the consequences of such a decision by the Tribunal on third-party family members. The Tribunal in *Kalafatis* noted that the distinction between judicial and administrative power was complex and involved a delineation of power that was difficult to draw. However, the circumstances of this application do not give rise to any concern about the possible attempt to exercise judicial power by this Tribunal.

[45] Much of the case law in relation to the question of judicial power and administrative tribunals concern the validity of a legislative conferral of power to a tribunal, which may or may not be invalid by reason that such power, as it is judicial power, cannot be conferred on any other body than a court. See e.g. *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

> ***of an opinion as to legal rights and obligations does not involve the exercise of judicial power, at least if it is "a step in arriving at the ultimate conclusions on which [is based] the making of an award intended to regulate the future rights of the parties".*** *For, as was there made clear, "the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights".*[46]
>
> (Emphasis added.)

135. In *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, Deane, Dawson, Gaudron and McHugh JJ stated:

> *Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not. These difficulties were recognised by the court in* Precision Data Holdings Ltd v Wills:
>
> > *The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it.* ***Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.***[47]
>
> (Emphasis added.)

136. A tribunal will have acted beyond power in circumstances where it purports to make orders that determine or flow from a determination that an agreement is voided or voidable by reason of the circumstances of entry into that agreement. Such orders would be beyond power because the Tribunal's power, as a question of its scope, does not extend to the granting of such relief. Relief is the marker of the exercise of power.

137. The Tribunal's power is provided by s 43(1) of the AAT Act, which is the power to make orders affirming, varying or setting aside the decision under review.

138. Section 25 of the AAT Act provides that an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by an enactment.

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[46] At 666. Also cited in *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 at 249.
[47] At 267.

139. Section 14ZZ(1) of the TAA provides that if the person is dissatisfied with the Commissioner's objection decision, the person may apply to the Tribunal for review of the decision.

140. Section 14ZZK of Part IVC of the TAA provides that on an application for review of a reviewable objection decision, the applicant has the burden of proving that the assessment is excessive or otherwise incorrect and what the assessment should have been or, in any other case, that the taxation decision concerned should not have been made or should have been made differently.

141. The provisions applicable to the present reviewable objection decision are contained in the ITAA 1997, and, in particular, Division 83A. That Division concerns employee share schemes and the manner in which those schemes are to be subject to income tax.

142. The Respondent's submission that the relevant grant of power to be considered is contained in s 14ZZ of the TAA is rejected. That provision along with s 25 of the AAT Act provides a grant of power, but it says nothing directly as to the scope of that power.

143. The objection decision of the Commissioner is here under review. That decision is made by reference to Division 83A of the ITAA 1997 concerning employee share schemes. The Tribunal must be satisfied, in the terms specified by s 14ZZK of the TAA Act, before granting relief pursuant to s 43(1) of the AAT Act.

144. Accordingly, the Tribunal can make certain determinations of facts, because it must reach a state of satisfaction before granting relief; what the High Court in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 termed "a step in arriving at the ultimate conclusions."[48] That process must not be confused by the distinction between questions of law and fact. The facts, however, must be determined by a judicial process.

145. In *Medical Board of Victoria v Meyer* (1937) 58 CLR 62, Dixon J stated:

> *Although these duties are entrusted to the Board as an administrative body, the Board is under the necessity of acting judicially in performing them. In nearly every respect the Board's decision must depend upon determinations of fact, as opposed to an exercise of discretion. Under para 13 of the Schedule, the Board has a discretion to "recognise" a university, etc. That is a purely administrative function.*

[48] Mason C.J., Brennan, Deane, Dawson and Toohey JJ at 149.

> *But, on the construction of the Act, I think that it sufficiently appears that, where an applicant's right depends upon the discretionary recognition of a university, etc, under para 13 of the Schedule, the question whether a university, etc, ought so to be recognised is not reviewable by the court on appeal. In exercising its power to remove or erase a name from the register, it must determine as a matter of fact whether the conduct or conditions exposing the practitioner to removal from the register have been established. Apparently the Board then has a discretion whether it will remove or erase his name. But that discretion, which must depend upon the nature and seriousness of the case, is of a judicial description. In judging whether an applicant for registration is of good character, the Board is dealing with an indefinite or vague standard, but nevertheless it is a matter of fact to be determined judicially.*[49]

146. The Tribunal will make findings that contain the hallmarks of questions that may be determined in a court as a necessary consequence of its duty to consider the application under review and reach the correct or preferable decision. For example, a finding that a trust existed, as was, in fact, noted in *Kalafatis*,[50] findings that an apparent agreement did not exist because it was procured by fraud or vitiated by mistake, or findings as to the interpretation of a term of an agreement. It must follow that the Tribunal is able to find that a person was coerced or forced into an agreement, such that the agreement is vitiated and, as such, non-existent.

147. The existence of determinations containing legal hallmarks are irrelevant to the question of whether there has been an impermissible attempt to exercise judicial power. In part, the confusion arises because it is wrongly suggested that such a finding would have a legal consequence outside the application, however, the only relevant matter, which is properly consequential, is the granting of relief.

148. The question was posed to the Respondent, as a hypothetical, in the hearing of this application: what if there were several witness statements and a video proving without question that the Applicant's signature had been obtained by fraud, could the Tribunal decide that the 2011 and 2012 Offers were invalid? The Respondent did not answer the question, as it was entitled to do. Such a determination by the Tribunal could not be want because such a determination may only be made by a court. It matters not that a court could similarly decide, on the same facts, in a separate proceeding, as a question of law, having legal consequence on the parties and others, that the 2011 and 2012 Offers were

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[49] At 91-92.

[50] [31]-[32].

invalid because they had been obtained by fraud.[51] The power to determine is coloured in the hands of either a court or a tribunal.

149. In *Re Ranger Uranium Mines Pty Ltd* the Court held:

> *Ordinarily, in industrial tribunals empowered to order reinstatement, the criterion for the making of an order for reinstatement is that the dismissal was harsh, unjust or unreasonable, although more recently the tendency has been to express the test in terms of unfairness: see Re Loty and Holloway and Australian Workers' Union [1971] AR(NSW) 95. In the present case the union and the society each claimed that the dismissals which gave rise to their claim were harsh, unjust and unreasonable. Accordingly it was said that the resolution of the dispute necessarily involved the determination of whether the dismissals were harsh, unjust or unreasonable — a determination which, it was argued, required the Commission, in the context of the award, to determine whether the employer was in breach of the obligation contained in cl 7(d)(vi). This, it was contended, necessarily involved an assumption of the judicial power of the Commonwealth, for it involved the Commission in precisely the same task as would be undertaken by a court in the event that proceedings were taken pursuant to s 119 of the Act alleging breach of cl 7(d)(vi) of the award.*
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> *It is well settled that functions "may be classified as either judicial or administrative according to the way in which they are to be exercised": R v Hegarty; ; Ex parte City of Salisbury; 147 CLR 617 , per Mason J at 628; see also FCT v Munro (1926) 38 CLR 153 , per Isaacs J at 177; R v Spicer; ; Ex parte Australian Builders' Labourers' Federation (1957) 100 CLR 277 , per McTiernan J at 293 and Kitto J at 305; Re Cram; ; Ex parte Newcastle Wallsend Coal Co Pty Ltd (ALJR at 413 ; ALR at 184)* ***A finding that a dismissal is harsh, unjust or unreasonable involves the finding of relevant facts and the formation and expression of a value judgment in the context of the facts so found. Although findings of fact are a common ingredient in the exercise of judicial power, such findings may also be an element in the exercise of administrative, executive and arbitral powers****: see R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 , per McTiernan J at 371 and R v Hegarty; ; Ex parte City of Salisbury , per Murphy J at 631.* ***So too with the formation and expression of value judgments.***
>
> ***In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court in the course of proceedings instituted under s 119 of the Act does not*** **ipso facto** ***mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry and determination is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.***

[51] See e.g. *Social Security Appeals Tribunal Registrar, Re; Ex parte Townsend* (1995) 130 ALR 163, at 166, per Toohey J. See also *General Merchandise & Apparel Group Pty Ltd and Chief Executor of Customs* (2009) 114 ALD 289, at [130] DP Forgie.

> ***The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken.*** *Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterised as an arbitral function when performed by a body charged with the resolution of disputes by arbitration.*[52]
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> (Emphasis added.)

150. Section 43(1) of the AAT Act is the relevant power for the purposes of the inquiry posed by the Respondent. That provision is concerned with the Tribunal's power to grant relief. There is nothing proposed by the Applicant in this case that seeks this Tribunal to grant relief that is prohibited because to do so would involve the attempted exercise of judicial power.

151. Accordingly, the Respondent's submission that the Tribunal does not have power to determine the Applicant's case, or that it is in some way beyond jurisdiction for the Tribunal to so determine, is rejected.

B. Whether the Applicant was coerced into signing the 2011 Offer

152. The Applicant submits that she was coerced or forced into signing the 2011 Offer.

153. She said in her statement that she was not given adequate opportunity to seek independent legal advice and was coerced into signing the First Letter of Offer by Mr Shapiro.[53]

154. Further she said that she was heading into a board meeting and Mr Shapiro's words to her:

> *were along the lines of if you don't sign this now you will miss out on your opportunity to receive these. At that point, I simply had to head into the meeting and signed it. I hadn't had a chance to seek any external advice.*
>
> *…*
>
> *I was working. I hadn't set up any meetings for external advice. And when told that I would lose, miss the opportunity if I didn't sign there and then, I signed.*[54]

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[52] At 665-666.

[53] [8].

[54] Oral evidence at hearing 10:18am 16 May 2018.

155. The Applicant's evidence was that she "thought [the 2012 Offer] to be much the same as the first offer." In effect, it is her submission that because she was coerced into the 2011 Offer that the 2012 Offer was somehow tainted and similarly ineffective.

1. The Respondent's submissions

156. The Respondent provided an outline of submissions, dated 9 April 2018, referring to the Applicant's assertion that she was "coerced" into signing the 2011 Offer.

157. The Respondent stated that coercion was a species of duress. In relation to duress, the Respondent cited *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 and *Australia and New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149, which provides that, in a two-step approach, that a contract may be rescinded for duress where applied pressure induced a person to enter into a contract where that pressure goes beyond what the law is prepared to countenance as legitimate, that is unlawful threats or unconscionable conduct but noting that the limitation to "unlawful conduct" was not always accepted on the authorities. The Respondent stated that the Tribunal should proceed on the basis set out by the Full Federal Court in *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267.

158. The Respondent stated that where duress is established the contract may be rescinded at the election of the affected party and not void ab initio. Rescission, however is not available where the affected party elects to affirm the contract.

159. The Respondent submitted that it is not clear from the evidence what precisely was the nature of the pressure said to have been applied to the Applicant by Mr Shapiro. It was submitted that making a decision quickly does not in itself constitute a legitimate pressure.

160. The Respondent said that even on the Applicant's evidence there was no allegation of pressure in relation to the second letter of offer or her decision to exercise the Performance Rights.

161. Finally, it is submitted that on the Applicant's evidence it seems probable that even if duress were established that the contracts for the offers of Performance Rights would no longer be voidable by the Applicant after the point in time at which she affirmed them by electing to exercise the Performance Rights.

2. The authorities

162. In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1978] 3 All ER 1170, applied in *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, the Court considered whether an agreement had been entered into under duress. In the course of deciding that case, Mocatta J stated:

> *I was referred to a number of cases decided overseas: Nixon v Furphy, Knutson v Bourkes Syndicate and Re Hooper and Grass' Contract, all of which have a similarity to Close v Phipps. Perhaps their greatest importance, however, is the quotation in the first mentioned from the judgment of Isaacs J in Smith v William Charlick Ltd, where he said:*
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> > *'It is conceded that the only ground on which the promise to repay could be implied is "compulsion". The payment is said by the respondent not to have been "voluntary" but "forced" from it within the contemplation of the law . . .* ***"Compulsion" in relation to a payment of which refund is sought, and whether it is also variously called "coercion", "extortion", "exaction" or "force", includes every species of duress or conduct analogous to duress, actual or threatened, exacted by or on behalf of the payee and applied to the person or the property or any right of the person who pays*** *. .. Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay.'*[55]

163. In *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40, the New South Wales Court of Appeal, McHugh JA (Samuels and Mahoney JJA agreeing) held:

> *In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action.* ***The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct.*** *But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.*[56]

164. In *Thorne v Kennedy* (2017) 350 ALR 1, Kiefel CJ**,** Bell, Gageler, Keane, and Edelman JJ determined an appeal from the Full Court of the Family Court of Australia, which had considered the validity of a financial agreement pursuant to a legislative provision that allowed an order to be made setting aside the agreement where it was satisfied, among

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[55] At 1180. See also *Denmeade v Stingray Boats* [2003] FCAFC 215 at [15] (per Whitlam, Kiefel and Dowsett JJ).

[56] At 45-46.

other things, that the agreement was void, voidable or unenforceable or a party to the agreement had engaged in unconscionable conduct.[57] At issue were two financial agreements entered into by a woman prior to marrying the defendant, which the woman sought to set aside because of the circumstances surrounding her entry into those agreements.

165. A plurality of the Court, Kiefel CJ**,** Bell, Gageler, Keane, and Edelman JJ considered the concepts of duress, undue influence and unconscionable conduct. As to duress it stated:

> *The vitiating factor of duress focuses upon the effect of a particular type of pressure on the person seeking to set aside the transaction. It does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing "only too well" what he or she is doing. As Holmes J said in* Union Pacific Railroad Company v Public Service Commission of Missouri:
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> > *"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."*[58]

166. Their Honours turned to consider undue influence, finding, in effect, that undue influence, to an extent, encompassed duress, without the need to show illegitimate pressure:

> *In* Allcard*, Lindley LJ said that "no Court has ever attempted to define undue influence". One reason for the difficulty of defining undue influence is that the label "undue influence" has been used to mean different things. It has been used to include abuse of confidence, misrepresentation, and the pressure which amounts to common law duress. Each of those concepts is better seen as distinct. Nevertheless, the boundaries, particularly between undue influence and duress, are blurred.* ***One reason why there is no clear distinction is that undue influence can arise from widely different sources, one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper.***[59]

167. *Odorizzi v. Bloomfield School District* CA Ct of App 54 Ca Rpt 533 [1964] provides a salient outline of how undue influence may involve excessive pressure:

> *In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a*

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[57] [21].

[58] [26].

[59] [30].

servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating person make the latter's influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person.

3. Application

168. As determined above, the Tribunal may consider the circumstances of the Applicant's entry into the 2011 Offer for the purposes of making a finding of fact, which may bear upon satisfaction that the taxation decision is excessive or otherwise incorrect.

169. The question raised by the Applicant, which is stated as "coercion", which the Respondent has submitted is a species of duress, is better considered in terms of undue influence by reference to the recent decision in *Thorne v Kennedy*, for the reasons stated in the plurality decision. That decision focusses upon the concept of undue influence and whether there was excessive pressure as a question of the influence one person can have on another.

170. For all of the reasons set out below, I find that the Applicant's account of her signing the 2011 Offer do not amount to circumstances of excessive pressure brought to bear upon her by Mr Shapiro.

171. As an initial point, I note that the fact to be determined is the nature of the beneficial interest or ownership of the NewSat shares held on 13 June 2014, being the taxation point. The relevant fact for the purposes of the taxation decision is not the entry into the 2011 Offers or the 2012 Offer or otherwise, these events only affect the nature of the interest held and sought to be taxed at the taxation point. If the Applicant is correct, that the agreements were vitiated, then the consequence is not that the shares were not in her hands as at 13 June 2014 and ought not be taxed, it is, rather, that the shares she held at that date were not hers to dispose of or deal with.

172. For the reasons that follow, the Applicant has failed to show that she was "coerced" or unduly influenced into signing the 2011 Offer, and as a result there was no restriction on her ownership of NewSat shares at 13 June 2014.

173. I find as a question of fact that there was no coercion or excessive pressure influencing the Applicant's capacity to seek external advice, or otherwise, in relation to her signing and entry into the 2011 Offer because:

(a) The Applicant held the 2011 Offer letter for six days that is from Tuesday, 25 October 2011 until Monday, 31 October 2011.

(b) She said that she read the letter and discussed it with her husband.

(c) The letter contained explicit reference to the need for the Applicant to seek independent advice because of the tax implications: paragraph 4 of the 2011 Offer was entitled "Taxation Advice and Other Independent Advice" and provided: "You should note that the taxation laws covering Performance Rights plans are complex and change from time to time. You should seek professional advice on the tax implications for you and your particular circumstances."[60]

(d) In those circumstances, six days is sufficient time to seek external advice. Put another way, the timeframe could not be said to be rushed.

(e) The pressure brought to bear was created by the Applicant's failure to act upon the direction in the 2011 Offer letter for her to seek independent advice. Mr Shapiro's statement, which in the Applicant's words was that "if you don't sign this now you will miss out on your opportunity to receive these" was not pressure in the sense put by the Applicant, rather, it was the circumstance that bookended her failure to seek external advice in the six days she held the letter.

(f) There is no evidence from the Applicant that, if Mr Shapiro had not said those words, that she would have, on that day, sought external advice. Such a proposition makes plain the untenable nature of the Applicant's claim. The offer specified a natural timeframe; it could not be said to be open until the Applicant had satisfied herself that she had sought advice or understood the consequences of entry into the agreement.

174. I find as a question of fact that, even assuming I had found that 2011 Offer had been vitiated by reason of excessive pressure brought to bear upon the Applicant, that the 2012 Offer could not be similarly vitiated because there is no logical way in which Mr Shapiro's

[60] T18, pg 190

words could be said to continue to influence the Applicant from, 31 October 2011 until June 2012 when she received the 2012 Offer letter.

175. The Respondent rightly referred to a series of positive actions taken by the Applicant post her signing the 2011 Offer letter which amount to ratification of that agreement by reference to principles relating to duress set out in *Westpac Banking Corporation v Cockerill*.[61] The Respondent also referred to *North Ocean Shipping Co Ltd* where Mocatta J cited a relevant passage from *Chitty on Contracts* (24th ed, 1977) regarding a contract entered into under duress being voidable:

> *that a person who has entered into the contract may either affirm or avoid such contract after the duress has ceased; and if he has so voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, or if,* ***after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it.****[62]*
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> (Emphasis added.)

176. It follows from the Respondent's submission that the Applicant's failure to act to set aside the contract when she was no longer under any purported duress resulted in the loss of any right to avoid the contract.

177. The Applicant gave evidence[63] that when she elected to convert the Performance Rights into shares from the 2011 Offer, that she did not believe that she had received anything and that, in effect, ownership of those shares was conditional upon the third vesting condition being the public announcement by NewSat that it had successfully launched Jabiru-1 into orbit and had successfully completed in-orbit testing.[64]

178. In her earlier letter to the Commissioner, she put a similar point, which was that she thought that the tax event occurred on sale of shares and not issue.[65]

179. Both of those submissions are irrelevant to the question of whether the taxation decision is excessive or otherwise incorrect because the Respondent properly applied the ESS

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[61] (1998) 152 ALR 267 (per Northrop, Lindgren and Kiefel JJ).

[62] At 1183.

[63] Oral evidence at hearing 10:23am 16 May 2018.

[64] T18, pg 189.

[65] T13, pg 100. A document records notes taken by a departmental officer, which records, in relation to the 25 May letter that Mr Gerner "stated that the TP was not aware that tax event was incurred on issue not sale of shares TP was not given a reasonable opportunity to get independent financial advice…. [Mr Gerner] also contacted liquidators who said that they can't do reversal shares.": T11, pg 95.

interests provisions as it was entitled to do in relation to the shares held by the Applicant at 7 October 2013 and 13 June 2014. The Applicant does not dispute that she held those shares on those dates; her state of mind, even if accepted in either or both formulations set out above, is irrelevant to the fact that she held those shares free of any other interest.

180. The Applicant's evidence in this regard is entirely at odds with the notice she received on 1 July 2014, entitled Employee Share Scheme Statement, from NewSat, which attached an Employee Share Scheme Statement for the 2014 financial year. That letter stated "you will need to include the amount stated on the form in your FY 14 tax return"[66] and her 2014 income tax return, filed 27 May 2015, which included $106,058 at Item 12F as income from the deferral scheme.[67]

181. In summary the Applicant has failed to establish, as a question of fact, that she was coerced or otherwise unduly influenced by reason of excessive pressure into signing the 2011 Offer. As a result, her submissions in relation to the 2012 Offer also fail.

C. Whether the objection decision ought be set aside

182. Given the consideration of the matters and the reasons set out above, the question of whether the objection decision ought be set aside becomes prosaic.

183. The Applicant bears the burden of proving that the taxation decision is excessive or otherwise incorrect and what the assessment should have been; or in any other case, that the taxation decision should not have been made or should have been made differently: s 14ZZK of the TAA.

184. For the reasons set out above, the Applicant has failed to establish that she was coerced or otherwise unduly influenced by reason of excessive pressure into signing the 2011 Offer, and, as a result, there is no evidence to establish that the taxation is excessive or otherwise incorrect and thus, as a consequence, that an order should be made the objection decision be set aside.

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[66] ST4, pg 296. Applicant Statement [18].

[67] T6, pg 21; Applicant statement [21]. On that day, an online newspaper article, dated 27 May 2015, stated that NewSat had run into financial trouble in the last year after breaching covenants with its US and French financiers: T5, pg 15 - An online newspaper article, dated 29 May 2015, stated that a court in the United States had ruled that Lockheed Martin, the construction company for the Jabiru–1 satellite had the right to cancel construction of the spacecraft: T7, pg 53.

185. Similarly, in relation to the 100,000 shares with a taxing point of 7 October 2013, there is no evidence and, as such, there is no basis for making orders setting aside the objection decisions.[68]

V. DECISION

186. The decision under review is affirmed.

I certify that the preceding 186 (one-hundred and eighty-six) paragraphs are a true copy of the written reasons for the decision of Senior Member R. Pintos-Lopez

…….
Associate

Dated: 10 August 2018

Dates of hearing	**10 April 2018, 16 May 2018**
Applicant	**In person**
Counsel for the Respondent	**Ms F Cameron**
Solicitors for the Respondent	**ATO Review and Dispute Resolution**

[68] Respondent Outline of Submissions [36].