

FEDERAL COURT OF AUSTRALIA

Hawkins v Commissioner of Taxation [2017] FCA 1247

File number: NSD 986 of 2017

Judge: **WIGNEY J**

Date of judgment: 24 October 2017

Catchwords: **ADMINISTRATIVE LAW** – application for judicial review of a decision of the Administrative Appeals Tribunal to dismiss the applicant’s application for orders that the Commissioner lodge certain documents – whether Tribunal made jurisdictional error – whether Tribunal applied the incorrect test – whether Tribunal failed to have regard to relevant evidence – whether Tribunal ignored or erroneously disregarded evidence

Held: Application allowed. Decision set aside and proceeding remitted to Tribunal.

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth) s 37
Income Tax Assessment Act 1936 (Cth) s 167
Taxation Administration Act 1953 (Cth) ss 14ZZ, 14ZZF(1), 14ZZK(a)

Cases cited: *Alister v The Queen* (1984) 154 CLR 404
Cosco Holdings Pty Ltd v Commissioner of Taxation [1997] FCA 1504; (1997) 37 ATR 432
Dorajay Pty Limited v Aristocrat Leisure Limited [2005] FCA 588
Kennedy v Administrative Appeals Tribunal (2008) 168 FCR 566
National Employers’ Mutual General Association Ltd v Waind [1978] 1 NSWLR 372
Spencer Motors Pty Ltd v. LNC Industries Ltd [1982] 2 NSWLR 921
Tamwood Limited (ACN 010 954 499) v Habitare Developments Pty Ltd (ACN 122 935 497) [2009] FCA 364
Trade Practices Commission v Arnotts Ltd (No 2) (1989) 88 ALR 90

Date of hearing: 23 August 2017

Registry: New South Wales

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National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 72

Counsel for the Applicant: Mr NJ Williams SC with Ms E Bishop

Solicitor for the Applicant: Speed and Stracey Lawyers

Counsel for the First Respondent: Mr G O'Mahoney

Solicitor for the First Respondent: Minter Ellison Lawyers

Solicitor for the Second Respondent: The Second Respondent did not appear.

ORDERS

NSD 986 of 2017

BETWEEN: **GARRICK MICHAEL HAWKINS**
Applicant

AND: **COMMISSIONER OF TAXATION**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **24 OCTOBER 2017**

THE COURT ORDERS THAT:

1. The decision of the Administrative Appeals Tribunal made on 19 May 2017 be set aside.
2. The proceeding be remitted to the Tribunal for determination according to law.
3. The first respondent pay the applicant's costs of this application.

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

REASONS FOR JUDGMENT

WIGNEY J:

1 The subject-matter of this application for judicial review is an unfortunate interlocutory dispute in the Administrative Appeals **Tribunal**. The applicant, Mr Garrick **Hawkins**, applied to the Tribunal pursuant to s 14ZZ of the *Taxation Administration Act 1953* (Cth) for a review of objection decisions made by the **Commissioner** of Taxation. At a relatively early stage of the review proceedings, Mr Hawkins sought orders which included an order pursuant to s 37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), as modified by s 14ZZF of the Administration Act, that the Tribunal require the Commissioner to lodge with the Tribunal certain specified documents or classes of documents. That application was opposed by the Commissioner and dismissed by the Tribunal. The issue for resolution on this application is whether, in dismissing Mr Hawkins' application pursuant to s 37(2) of the AAT Act, the Tribunal erred in law in the exercise of its jurisdiction because it either applied the wrong test, or failed to have regard to evidence relied on by Mr Hawkins in support of his application.

BACKGROUND

2 On 21 December 2015, the Commissioner issued default **assessments** pursuant to s 167 of the *Income Tax Assessment Act 1936* (Cth) in respect of Mr Hawkins for the income years ended 30 June 2001 and 30 June 2002. The assessments were issued following an audit conducted by the Commissioner. The assessments were also preceded by the Commissioner arriving at a Fraud or **Evasion Opinion** on 8 December 2015.

3 The facts and findings that led the Commissioner to issue the assessments, expressed in deliberately short and simple terms, were as follows. Mr Hawkins was a director of **Matrix Group Limited** from 1 September 1993 to 19 June 2002. Matrix Group was the trustee for the Matrix Finance Group Unit Trust (**MFGUT**) from 1 September 1993 to 20 September 2002. Another director of Matrix Group was Mr Scott **Tyne**.

4 In 1996, Matrix Group entered into a contract with the Western Australian government which involved arranging and managing a leasing transaction for its fleet of cars. It was also awarded a mandate in 1999 to pursue a private funding package for the acquisition of the government's bus fleet. Ultimately, the leasing transaction was terminated early and the funding package for the acquisition of the bus fleet did not proceed. As a result of the

termination or cessation of the agreements with Matrix, the Western Australian Government made certain settlement payments to Matrix Group. Those payments were: \$2,517,980 made on 18 May 2001; \$4,250,000 made on 15 June 2001; \$4,286,248.93 made on 23 August 2001; and \$6,500,000 made on 30 November 2001.

5 Critically, the Commissioner found Mr Hawkins and Mr Tyne directed those four payments be deposited into an offshore bank account in Singapore in the name of **FSA International Inc.** FSA International was a company incorporated in the Cayman Islands. Mr Hawkins and Mr Tyne were its directors and ultimate shareholders. They were also signatories to FSA International's Singaporean bank account. The Commissioner concluded that Mr Hawkins and Mr Tyne applied the money that was payable to Matrix for their own benefit. The Commissioner also believed that Mr Hawkins "set-up an offshore structure and opened an offshore bank account in order to divert funds that were due and payable to Matrix, to [himself] (and Mr Tyne) and to also conceal these funds and the income tax payable on these funds from the Commissioner". The Commissioner also found that Mr Hawkins did not declare the assets he held offshore in his income tax returns for the 2001 and 2002 income years.

6 The amended assessed tax payable by Mr Hawkins in respect of the 2001 tax year was \$3,153,502.70 and the amended tax payable in respect of the 2002 tax year was \$4,950,688.03. The Commissioner also issued notices of assessment of shortfall penalty to Mr Hawkins on 21 December 2015. Those notices stated that Mr Hawkins had "been assessed with an administrative penalty because [he or his agent had] intentionally disregarded a taxation law". The assessed penalty in respect of the 2001 year was \$2,452,387.70 and the assessed penalty in respect of the 2002 year was \$4,704,704.50.

7 Mr Hawkins objected to the assessments. In his notice of objection, Mr Hawkins claimed that he "did not apply to his benefit, receive, constructively or otherwise, or derive as assessable income the [payments made by the Western Australian government], whether as a director's fee or loan as a director of [Matrix], dividend or shareholder's loan from Matrix as a beneficiary of MFGUT or otherwise and consequently ought not be assessed on [those payments]". He claimed that accordingly the assessments were excessive and "the taxable income assessed ought be reduced to nil or some other amount lesser than the amount included in the [assessments]".

8 On 19 August 2016, the objection against the 2001 assessment was allowed in part and the objection against the 2002 assessment was disallowed. The essence of the objection decisions was that the Commissioner was correct to include in Mr Hawkins' assessable income, as ordinary income, the four payments that were made by the Western Australian government. It was also concluded that the Commissioner was correct to form the opinion that there was evasion by Mr Hawkins in respect of each of the relevant income years. In relation to the 2001 income year, it was concluded that Mr Hawkins was entitled to carry forward certain tax losses, and that accordingly the assessment for that year was excessive in part by \$225,689.90.

9 On 14 October 2016, Mr Hawkins filed an application for review in the Tribunal. In that application, Mr Hawkins contended that the two assessments were excessive and incorrect because the payments from the Western Australian government that were included by the Commissioner in his assessable income for the 2001 and 2002 years were not part of his assessable income for those years. He contended that the assessments should have ascertained a taxable income for those years as nil. He also contended that the assessments were out of time. Finally, he contended that the penalty assessments were excessive and incorrect because the underlying assessments were excessive and there was therefore no shortfall. Perhaps as a precursor to the interlocutory application that was to come, Mr Hawkins' statement of the reasons for the review application were prefaced by the following paragraph:

This is an outline of the reasons why the taxpayer considers the objection decisions to be incorrect, and the assessments which have been issued to be excessive. The taxpayer is mindful that:

- (a) his representatives have not had an opportunity to review the documents referred to, and relied upon by the ATO in the objection decision. The ATO refused to provide those documents to the taxpayer on 30 August 2016;
- (b) a formal statement of facts issues and contentions will be lodged in the ordinary way, following provision of the s.37 material and may be expected to deal in detail with the two relatively complex transactions at the focal point of the dispute.

10 On 23 November 2016, the Commissioner lodged four volumes of documents with the Tribunal pursuant to s 37 of the AAT Act. As will be seen, the question whether the Commissioner fully complied with the obligation under s 37(1) to lodge documents with the Tribunal was a matter of contention between the parties before the Tribunal.

11 On 9 December 2016, the Tribunal directed Mr Hawkins to file and serve his statement of facts, issues and contentions by 28 February 2017. The Commissioner was directed to file

his statement of facts, issues and contentions by 28 March 2017. On 13 December 2016, however, Mr Hawkins' solicitors sent a letter to the Tribunal which enclosed a document headed "Applicant's Request for Directions Production of Documents". The directions requested by Mr Hawkins in that document included the following:

- (a) in accordance with and in furtherance of satisfying s.37(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), as modified, (the Act), the Respondent lodge with the Tribunal and give to the Applicant every document considered by him to be necessary to this review, which the Applicant says includes the documents described in the Schedule hereto.
- (b) alternatively, in accordance with s.37(2) of the Act a notice issue to the Respondent requiring him to lodge with the Tribunal and give to the Applicant:
 - (i) the documents set out in the Schedule hereto; or alternatively;
 - (ii) in respect of a class of documents described in the Schedule, a list of the documents within the class considered by the Respondent to be relevant to this review;
- (c) the timetabling directions made on 9 December 2016 be varied to provide for the Respondent to produce the documents, including any documents directed to be listed, before the parties exchange Statements of Facts Issues and Contentions;

12 The schedule referred to in these proposed directions was a seven page document that contained a wide ranging list of the categories of documents and specific documents that were the subject of the proposed directions. As will be seen, ultimately Mr Hawkins did not press the application in respect of some of the categories of documents. The categories and documents that were pressed are referred to later.

13 On 2 February 2017, the Tribunal directed Mr Hawkins to file and serve any evidence upon which he intended to rely at the hearing of his application for directions. It also directed the parties to file an agreed statement of issues on or before 10 February 2017 or, if the parties were unable to agree, each party was to file a statement of issues. On 8 February 2017, the Tribunal varied the directions made on 2 February 2017. The parties were directed to file an agreed statement of issues on or before 15 February 2017, or if the parties were unable to agree, each party was to file a statement of facts, issues and contentions.

14 A statement of agreed issues was filed in accordance with the directions made on 8 February 2017. The agreed issues were stated to be as follows:

- (a) Whether the taxable income of the Applicant should be reduced by the following amounts:

- (i) AUD\$6,767,980, or any other amount, in respect of the income year ended 30 June 2001 (**2001 income year**); and,
 - (ii) AUD\$10,586,248, or any other amount, in respect of the income year ended 30 June 2002 (**2002 income year**).
- (b) Whether the Applicant has discharged his burden of proving that the assessments were excessive on the ground that there was no evasion in either the 2001 income year or in the 2002 income year.
- (c) Whether the Applicant is liable to administrative penalties under Division 284 of Schedule 1 to the *Taxation Administration Act 1953* of:
- (i) a 75% based penalty amount in respect of the 2001 income year; and
 - (ii) a 90% increased based penalty amount for the 2002 income year.

15 On 16 February 2017, Mr Hawkins also filed the evidence upon which he proposed to rely in support of his application for directions. That evidence took the form of a witness statement signed by Mr Hawkins' solicitor, Mr Robert **Suttie**. The content of Mr Suttie's statement will be referred to in more detail later. Suffice it to say at this stage that in his statement Mr Suttie referred to the agreed statement of issues, but then identified, "by way of elaboration", a number of "specific sub-issues" upon which Mr Hawkins also relied. The so-called sub-issues were as follows:

The **first issue** arising in these proceedings is who derived income when the 4 payments were made?

The **second issue** arising in these proceedings is can the finding of evasion be sustained if the Applicant is right, and he did not in fact divert the 4 payments from himself?

The **third issue** arising in these proceedings is can the finding of evasion be sustained if the 4 payments were fully disclosed to the Commissioner in the 2003 review?

The **fourth issue** arising in these proceedings is what is the effect of the ATO's receipt of \$14m from the Western Australian government on the liabilities, if any, of the Applicant to income tax and penalties in the 2001 and 2002 tax years?

The **fifth issue** in these proceedings is what is the nature of the claims that the Matrix Group makes to the 4 payments?

16 Mr Suttie's statement described, albeit in fairly brief detail, the facts and circumstances that were said to give rise to each of the five sub-issues.

17 The Commissioner did not object to Mr Suttie's statement being received in evidence at the hearing of Mr Hawkins' application for directions. That said, it was, to say the very least, unsatisfactory for Mr Hawkins to raise these sub-issues through Mr Suttie's evidence. If Mr Hawkins maintained that the sub-issues were genuine issues in the review proceedings, he

should have ascertained whether the Commissioner agreed that they were issues. If the Commissioner agreed, they could then have been included in the statement of agreed issues which was filed in compliance with the directions made on 8 February 2017. If the Commissioner did not agree, the issues should have been included in Mr Hawkins' own statement of facts, issues and contentions in accordance with the 8 February 2017 directions. As it was, the status of the sub-issues referred to in Mr Suttie's statement was somewhat unclear. As will be seen, the question of the uncertain status of the sub-issues was never properly resolved.

- 18 The parties exchanged detailed, lengthy and, given the nature of the application, somewhat uncompromising, if not at times unnecessarily aggressive and shrill, written submissions. Importantly, Mr Hawkins' reply submissions annexed a document called "Applicant's **Minute of Oral Direction**". While the reply submissions did not indicate that Mr Hawkins was not pressing his original application, it was noted in the submissions that the "Tribunal could move this matter toward a hearing by itself giving [an oral direction] in the terms of the attachment". The direction referred to in the Minute was in the following terms:

In accordance with s 37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), as modified by s 14ZZF(1)(b) of the *Taxation Administration Act 1953* (Cth), within 28 days the Respondent lodge with the Tribunal and give to the Applicant one copy of each of the documents, and each document within each class of documents, set out in Schedules 1, 2 and 3 attached to the Applicant's Minute of Oral Direction (which I initial, date and place with the papers), and which is in the possession of the Respondent or under his control.

- 19 Schedules 1, 2 and 3 referred to in the proposed oral direction (the **Schedule**) were in the following terms (errors in original):

Schedule 1

Evasion Opinion

1. Not used.
2. The documents listed in Schedule 2.

Reasons for Objection Decision

3. A full and complete copy of each of the documents footnoted in the reasons for the objection decision.
4. Not used.

Documents before decision-makers

5. All documents that were before the officers:
 - (a) who authored or contributed to the evasion opinion;

- (b) not used;
- (c) who made the objection decision.

5A. All documents considered in reaching the conclusions reached in the reasons for decision in the audit (see T49), whether or not referred to in the reasons.

Car and Bus Transactions

6. Not used.

2003 Review Documents

7. Correspondence between the ATO and:

- (a) Mr Jack Thomas of Deloitte;
- (b) Williams Hatchman and Kean;
- (c) FSA Oklahoma, Inc or their representatives

with respect to the review undertaken by the ATO from around August 2003 into the unwinding of the WA Car Transaction, including attachments and documents provided to the ATO.

8. The particular documents specified in Schedule 3.

“Full and Final Settlement”

9. Not used.

10. Any settlement agreement or deed and associated settlement documentation relating to the “full and final settlement of tax matters relating to the termination of the Matrix fleet leasing transaction” received by the ATO from the Western Australian government.

Matrix Group Ltd (in Liq)

11. Not used.

12. The following documents:

- (a) Not used;
- (b) Preliminary Audit Findings dated 14 April 2014 (referred to at T40-741);
- (c) Any final audit findings, position paper or reasons for decision for the issue of the assessments and penalty assessments to Matrix Group Limited;
- (d) Copies of the notices of amended assessment and notices of penalty assessment issued to Matrix Group Limited for the 2001 and 2002 income years.
- (e) Any documents recording any decision to remit interest charges, or that Matrix Group Limited was not liable to interest charges.
- (e1) Notification of the interest charges imposed upon Matrix Group Limited as a result of the assessments referred to in paragraph 12(d).

Schedule 2

1. Items 1, 2, 3, 5, 6, 7, 8 and 10 identified in the table below.
2. The attachments referred to in the document at item 9 of the table.
3. Full and complete copies of:
 - (a) “Annexure G” (item 4);
 - (b) the transcript of the interview of the applicant (items 11 to 16) – only a selection of pages included;
 - (c) the transcript of interview of and Mr Tyne (item 17) – only a selected page included.

| | Name of Document | Page Ref | Footnote Ref |
|-----|--|-----------------|---------------------|
| 1. | Allotment Journal – Matrix Finance Group Unit Trust | 6 | 11 |
| 2. | Capital Unit Certificates for Matrix Finance Group Unit Trust | 6 | 11 |
| 3. | PPB Advisory – Liquidators Response to Preliminary Audit Findings (Appendix A) | 6 | 12 |
| 4. | PPB Advisory – Request for Indemnity for Liquidator from ATO – Annexure G (pp. 24-26) [it is noted that only page 25 was provided] | 7 | 22 |
| 5. | PPB Advisory – Liquidators Response to Preliminary Audit Findings (Appendix I) | 8 | 32 |
| 6. | PPB Advisory – Liquidators Response to Preliminary Audit Findings (Appendix J) | 8 | 33 |
| 7. | PPB Advisory – Liquidators Response to Preliminary Audit Findings (Appendix O) | 9 | 39 |
| 8. | PPB Advisory – Liquidators Response to Preliminary Audit Findings (Appendix S) | 10 | 41 |
| 9. | PPB Advisory – Request for Indemnity for Liquidator from ATO – Annexure P | 10 | 42 |
| 10. | ASIC company report for Consolidated Capital Services Pty Ltd – document number 09651680L extracted on 19/11/2013 | 12 | 43 |
| 11. | Section 264 Interview with the applicant on 18 November 2013 – Page 55 to 57 of transcript | 14 | 52 |
| 12. | Section 264 Interview with the applicant on 18 November 2013 – Page 59 and 60 of transcript | 14 | 53 |
| 13. | Section 264 Interview with the applicant on 18 November 2013 – Page 60 of transcript | 14 | 54 |
| 14. | Section 264 Interview with the applicant on 18 November 2013 – Page 61 of the transcript | 14 | 55 |

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|-----|--|----|----|
| 15. | Section 264 Interview with the applicant on 18 November 2013 – Page 64 of the transcript | 14 | 56 |
| 16. | Section 264 Interview with the applicant on 18 November 2013 – Page 74 of the transcript | 14 | 57 |
| 17. | Section 264 Interview with Scott Tyne on 21 November 2013 – Page 43 of transcript | 15 | 58 |

Schedule 3

4. Letter dated 18 March 2003 to Mr Scott Tyne;
 5. Letter dated 7 March 2003 to Mr Brian Graham;
 6. Email exchange dated 4 and 5 March 2003 involving Mr Graham;
 7. Westfleet tax return for the 2002 income year;
 8. Fax dated 18 November 2002 from Mr Graham;
 9. Email from Mr Graham to Mr Thomas dated 9 September 2002;
 10. Email from Mr Graham to K. Lo dated 21 August 2002;
 11. Email dated 19 August 2002 from Mr Peter Cinque to the applicant;
 12. Westfleet working paper dated 30 June 2002;
 13. Email dated 23 August 2002 from Mr Peter Cinque to the applicant with a large attachment;
 14. Westfleet tax return for the 2001 income year.
 15. Email dated 16 August 2002 from the applicant to Mr Jack Thomas;
 16. Westfleet tax return for the 2000 income year;
 17. Fax dated 6 August 2001 from Mr Brian Graham to Mr Jack Thomas;
 18. Deloitte working paper re-2000 income tax return – West Fleet;
 19. Westfleet trial balance – 2000.
 20. The report, position paper of finalisation letter which the ATO may have issued to bring the 2003 Review to a conclusion.
- 20 It would appear that the direction recorded in the Minute became the focus of the parties' submissions at the hearing of the application. Little attention was given to that part of the application that concerned compliance with s 37(1) of the AAT Act.
- 21 Mr Hawkins' application for directions was heard on 5 May 2017. The Tribunal reserved its decision on the application. On 19 May 2017, the Tribunal advised Mr Hawkins by letter that his application under s 37(2) of the AAT act was refused. Mr Hawkins subsequently

requested the Tribunal to provide written reasons for that decision. Those reasons were provided on 9 June 2017 (the **Reasons**).

22 Before addressing the Reasons, it is necessary to briefly identify the relevant statutory provisions and principles.

RELEVANT PROVISIONS AND PRINCIPLES

23 Section 37 of the AAT Act makes provision for the lodgement of material documents (known as “T-documents”) with the Tribunal by the decision-maker who made the decision the subject of an application for review. Section 37(1) of the AAT Act provides as follows:

Decision-maker must lodge material documents

(1) Subject to this section, a person who has made a decision that is the subject of an application for review (other than second review) by the Tribunal must, within 28 days after receiving notice of the application (or within such further period as the Tribunal allows), lodge with the Tribunal a copy of:

- (a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and
- (b) subject to any directions given under section 18B, every other document that is in the person’s possession or under the person’s control and is relevant to the review of the decision by the Tribunal.

24 It may be noted that s 37(1) relevantly requires a decision-maker to lodge with the Tribunal a copy of every document that “is relevant” to the review of the decision by the Tribunal. The requirement in s 37(1) is modified in the case of applications for review of objection decisions by s 14ZZF(1)(a) of the Administration Act, which provides as follows:

(1) Section 37 of the AAT Act applies in relation to an application for review of a reviewable objection decision as if:

- (a) the requirement in subsection (1) of that section to lodge with the Tribunal a copy of:
 - (i) a statement giving the reasons for the decision; and
 - (ii) the notice of the taxation decision concerned; and
 - (iii) the taxation objection concerned; and
 - (iv) the notice of the objection decision; and
 - (v) every other document that is in the Commissioner’s possession or under the Commissioner’s control and is considered by the Commissioner to be necessary to the review of the objection decision concerned; and
 - (vi) a list of the documents (if any) being lodged under subparagraph

(v);

...

25 It may be noted that the key change effected by s 14ZZF(1)(a) is that the requirement imposed on the Commissioner to lodge documents with the Tribunal is limited to those that are “considered by the Commissioner to be necessary to the review of the objection decision concerned”.

26 Section 37(2) of the AAT Act makes provision for the Tribunal to require a decision-maker to lodge with it documents not otherwise required to be lodged by s 37(1). Section 37(2) provides as follows:

Tribunal may require other documents to be lodged

(2) Where the Tribunal is of the opinion that particular other documents or that other documents included in a particular class of documents may be relevant to the review of the decision by the Tribunal, the Tribunal may cause to be given to the person a notice in writing stating that the Tribunal is of that opinion and requiring the person to lodge with the Tribunal, within a time specified in the notice, the specified number of copies of each of those other documents that is in his or her possession or under his or her control, and a person to whom such a notice is given shall comply with the notice.

27 It may be noted that the relevant test to be applied by the Tribunal in determining whether the decision-maker should lodge other documents is whether it is of the opinion that the other documents “may be relevant to the review of the decision by the Tribunal”. It may also be noted that the Tribunal’s power to require such other documents to be lodged is discretionary.

28 The Tribunal’s power to require the documents to be lodged pursuant to s 37(2) is modified in the case of applications for review of objection decisions by s 14ZZF(1)(b) of the Administration Act, which provides as follows:

(1) Section 37 of the AAT Act applies in relation to an application for review of a reviewable objection decision as if:

...

(b) the power of the Tribunal under subsection (2) of that section to cause a notice to be served containing a statement and imposing a requirement on a person were instead:

(i) a power to make such a statement and impose such a requirement orally at a conference held in accordance with subsection 34(1) of the AAT Act; and

(ii) a power, by such a notice, to make such a statement and impose a requirement that the person lodge with the Tribunal, within the time specified in the notice, a copy of each of those other

documents that is in the person's possession or under the person's control; and

- (iii) a power, by such a notice, to make such a statement and impose a requirement that the person lodge with the Tribunal, within the time specified in the notice, a copy of a list of the documents in the person's possession or under the person's control considered by the person to be relevant to the review of the objection decision concerned.

29 The operation of s 37(2) of the AAT Act was considered by the Full Court in *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566. In that case, Mr Kennedy asked the Tribunal to require the Commissioner, under s 37(2), to lodge additional documents that were alleged to be relevant to the review of an objection decision by the Commissioner. As it turned out, the Tribunal concluded that it did not have jurisdiction to determine the validity of the assessments that were the subject of the objection decision. That was sufficient to dispose of Mr Kennedy's claim that the Tribunal should require the Commissioner to lodge further documents under s 37(2). Mr Kennedy appealed. The Full Court said the following concerning the disposition of Mr Kennedy's application under s 37(2) of the AAT Act (at [28]):

The Presidential Member was correct to hold that no process of reasoning had been forthcoming which supported the claim as to the relevance of the additional documents sought, and on the face of their description no such relevance is apparent. The submission by Mr Kennedy that his Honour failed to consider whether the documents may be relevant lacks cogency because, **to substantiate such an assertion of error, Mr Kennedy must show how a particular document or category of documents may be relevant to specific issues of fact relating to the excessiveness of the assessment issued to him.** That has not been shown. The intent of s 14ZZF of the [Administration Act] was clearly to narrow the class of documents which the Commissioner must produce to the Tribunal, and in the absence of a demonstration by Mr Kennedy of the relevance of any additional documents, it is not appropriate to widen the class of documents which the Commissioner has already provided in this case.

(Emphasis added)

THE TRIBUNAL'S REASONS

30 The Tribunal's reasons for refusing Mr Hawkins' application pursuant to s 37(2) of the AAT Act are effectively encapsulated in [18] to [20] of the Reasons:

What is plain is that pursuant to s 37(1) of the AAT Act, as amended by s 14ZZF of [Administration Act], the Commissioner is only obliged to produce those documents which the Commissioner considers necessary to the review. Further, pursuant to the amended s 37(2), the obligation rests upon the applicant to demonstrate the relevance of the documents.

In the present circumstances, no evidence has been filed which establishes any link or

association between the applicant and the other parties, some of whom or even all of whom may be strangers to the applicant. Relevance will largely depend upon the issues to be determined. In the agreed statement of issues it is not apparent how the documents referred to in the applicant's schedules are relevant to the issues to be determined.

During the course of the hearing the Tribunal received, in effect, a submission of the applicant's solicitor describing the relevance of the documents. However, it is apparent from such statement that the issues referred to therein extended well beyond the issues referred to in the agreed statement of issues. Accordingly, the Tribunal must be guided by the agreed statement which was directed to be filed by the parties at a directions hearing early this year and which was required to specify the very issues in dispute.

31 The Tribunal's reference to the "other parties" would appear to relate back to [9] of the Reasons, where the Tribunal noted that Mr Hawkins had sought "correspondence passing between various persons, including from the Commissioner to various named persons and the relationship to the applicant being unexplained".

32 The Tribunal went on to note (at [21] of the Reasons), that the Commissioner alleges that Mr Hawkins had been "guilty of evasion of tax and this constitutes the basis of his assessment". The Tribunal stated that in those circumstances "the obligation rests upon the taxpayer to disprove the basis of the assessment". The Tribunal concluded, in effect, that the documents sought by Mr Hawkins were not relevant to that issue. That finding is recorded in [26] of the Reasons:

On the evidence placed before the Tribunal in support of this application, there is nothing to suggest that the documents sought to be lodged with the Tribunal are relevant to the issues agreed between the parties. The onus rests on the applicant to demonstrate an absence of evasion and it is not apparent that the documents sought by the applicant are relevant to any such issue.

GROUND OF REVIEW AND SUBMISSIONS

33 The grounds of Mr Hawkins' application for judicial review of the Tribunal's dismissal of his application under s 37(2) of the AAT Act were lengthy and prolix. The Tribunal's Reasons are eight pages long. Mr Hawkins' originating application for judicial review extended to over 24 pages. It raised almost every conceivable ground for judicial review of an administrative decision. It is unnecessary to consider all of the grounds identified in Mr Hawkins' originating application. That is because in his written and oral submissions, Mr Hawkins confined his arguments to three grounds. Mr Hawkins' arguments were also directed to the Schedule that accompanied the Minute, not the schedule that accompanied the original request for directions.

34 The first ground was that the Tribunal erred in applying the incorrect test in considering whether it should require other documents to be lodged by the Commissioner pursuant to s 37(2) of the AAT Act. In short terms, Mr Hawkins contended that the Tribunal applied a test of actual rather than potential relevance. He submitted that the Reasons, when considered fairly and as a whole, disclose that the Tribunal failed to address the question of whether the requested documents “may” be relevant, as the statutory language required, and instead confined itself to the different question of whether the requested documents “were” relevant. In that regard, Mr Hawkins drew attention to [19] of the Reasons, where the Tribunal stated that “it is not apparent how the documents ... **are** relevant to the issues” (emphasis added) and [26] of the Reasons, where the Tribunal concluded that “there is nothing to suggest that the documents sought to be lodged with the Tribunal **are** relevant to the issues” and that “it is not apparent that the documents sought by the applicant **are** relevant to any such issue” (emphasis added). Mr Hawkins submitted, in effect, that the Tribunal imposed a more onerous test of relevance than was required by s 37(2) of the AAT Act.

35 Mr Hawkins’ second ground of review was that the Tribunal failed to consider essential parts of his application under s 37(2). He contended that the Tribunal was required to consider the potential relevance of each of the documents, or categories of documents, described in the Schedule. In Mr Hawkins’ submission, while the Tribunal gave a general outline of the documents the subject of the application (at [3] and [6]-[9] of the Reasons), there was nothing in the Reasons to indicate that the Tribunal gave any, or any proper, genuine or realistic, consideration to the question of whether the specific documents, or classes of documents, described in the Schedule may have been relevant to his review application.

36 A separate, though related, submission made by Mr Hawkins was that the Tribunal either ignored, or erroneously disregarded, critical parts of the evidence relied on by him. In that regard, Mr Hawkins drew attention to paragraphs [9] and [19] of the Reasons, where the Tribunal referred to “various persons” or “other parties” who “may be strangers to the applicant” or whose relationship to the applicant was “unexplained”. Mr Hawkins contended that Mr Suttie’s statement explained Mr Hawkins’ relationship with each of these so-called “other parties”. The inescapable inference, in Mr Hawkins’ submission, was that the Tribunal failed to consider properly, or at all, the evidence that was before it.

37 Mr Hawkins’ third ground of review was that the Tribunal’s decision was illogical, irrational, or one that was so unreasonable that no reasonable decision-maker could have made it. Mr

Hawkins submitted that at least some of the documents that were the subject of the s 37(2) application were such that the Tribunal, acting reasonably, ought to have found may be relevant to the review proceedings before it. In that regard, Mr Hawkins relied in particular on documents referred to in the Schedule that were referred to in the Evasion Opinion and objection decisions, or were before the decision-makers who made those decisions.

CONSIDERATION OF REVIEW GROUNDS

38 It is difficult to avoid the conclusion that the Tribunal erred in the consideration and determination of Mr Hawkins' application. Regrettably, that was in no small part a product of the unhelpful approach to the application that was taken by the parties.

39 The first problem with the approach taken to the application has already been touched upon. It is difficult to see how the Tribunal could determine whether particular documents, or particular categories of documents, may be relevant to the review application in the absence of a firm grasp of the facts, issues and contentions likely to arise in the review application. As the passage from *Kennedy* cited earlier shows, the central question that the Tribunal was required to resolve in determining Mr Hawkins' s 37(2) application was whether any of the documents or categories of documents in the Schedule to the application may be relevant to specific issues of fact relating to the excessiveness of the assessments issued to Mr Hawkins.

40 The conventional way to apprise the Tribunal of the relevant facts, issues and contentions is to require the parties to each file a statement of facts, issues and contentions. As has been seen, that is what the Tribunal initially did. It would seem, however, that Mr Hawkins was reluctant, if not unwilling, to file such a statement unless and until his application for the lodgement of further documents was determined. The Tribunal appears to have been persuaded to vary its initial directions such that it was unnecessary for Mr Hawkins to file a statement of facts, issues and contentions if an agreed statement of issues was filed. That is what ultimately occurred.

41 Regrettably, however, while the agreed statement of issues that the parties filed was not in any sense incorrect or inaccurate, it was nonetheless not particularly helpful in resolving Mr Hawkins' application for the production of further documents. Indeed, it was essentially incapable of resolving the issues that arose on Mr Hawkins' s 37(2) application. That is because it was framed at such a high level of generality. It was, of course, entirely accurate to say that the overarching issue in the review application was whether Mr Hawkins had discharged his burden of proving that the assessments were excessive on the ground that there

was no evasion in either the 2001 or 2002 income years. What was plainly needed, however, was a statement containing the specific issues of fact relating to the excessiveness of the assessments. Only then could the Tribunal assess whether the documents or categories of documents in the Schedule may be relevant to specific issues of fact relating to the excessiveness of the assessments issued to Mr Hawkins and therefore “may be relevant to the review of the decision”.

42 It should perhaps be noted at this juncture that it is perfectly understandable that the Commissioner framed the issues at such a high level of generality, at least in the first instance. The Commissioner is not to be criticised for that. It was really a matter for Mr Hawkins to identify with some degree of particularity exactly how he was going to contend that the assessments were excessive and did not involve evasion.

43 For reasons that were never satisfactorily explained, instead of filing a statement of facts, issues and contentions, Mr Hawkins agreed with the Commissioner’s broad statement of issues. Instead of identifying the specific issues of fact relating to the excessiveness of the assessments by filing his own statement of facts, issues and contentions, Mr Hawkins filed Mr Suttie’s witness statement. That statement identified “by way of elaboration” the five “sub-issues” that Mr Hawkins relied on “in this application”. It also contained some explanation of those issues.

44 The Commissioner did not object to Mr Suttie’s statement. It was therefore before the Tribunal for the purposes of Mr Hawkins’ application. Nor did the Commissioner cross-examine Mr Suttie. Rather, the Commissioner’s approach to the unquestionably unsatisfactory state of affairs was to effectively invite the Tribunal to disregard the issues identified by Mr Suttie, and indeed to disregard Mr Suttie’s explanation of those issues, because they were said to be outside the agreed statement of issues.

45 The Commissioner had good grounds to be critical of the fact that Mr Hawkins had, on the one hand, agreed to the Commissioner’s broad statement of issues, but, on the other hand, sought to introduce further issues through Mr Suttie’s witness statement. However, to invite the Tribunal to disregard the issues identified by Mr Suttie simply because they had been introduced in that unconventional and perhaps unsatisfactory way, was to invite error. It was, in effect, an approach which favoured form over substance. While the issues unquestionably should have been identified in a statement of facts, issues and contentions, rather than a

witness statement, the issues that Mr Hawkins intended to raise in the review proceedings were nonetheless identified by him in Mr Suttie's statement.

46 Of even more significance is the fact that it is difficult to see how the Commissioner could have disagreed with the substance of at least two of the issues identified in Mr Suttie's statement. At paragraphs [24]-[26] of his statement, Mr Suttie introduced the first two issues identified by him in the following terms:

The first issue arising in these proceedings is: who derived income when the 4 payments were made? According to the objection decision-maker's reasons, the Commissioner alleges that the Applicant diverted for himself the receipt of the 4 payments. The objection decision-maker's reasons state:

"[26] The first question here is whether the Car and Bus Transaction Termination Payments "came into" [the Applicant] or can be treated as having been derived by him even if not actually received by him (i.e. where [scil: were] they constructively received by him. That question is answered by examining whether the facts exhibit that [the Applicant] arranged or directed not to actually receive the Car and Bus Transaction Termination Payments and for payment to be made in another way."

The Applicant denies that the allegations as they are made, namely that he "arranged or directed not to actually receive the Car and Bus Transaction Termination Payments" and that he arranged or directed "for payment to be made in another way."

The second issue arising in these proceedings is can the opinion of evasion be sustained if the Applicant is right, and he did not in fact divert the 4 payments?

47 It should perhaps be noted in this context that at the very beginning of his statement, Mr Suttie said that the information in his statement was based on, amongst other things, his instructions. In any event, the statement that Mr Hawkins denied that he arranged or directed the relevant payments to be made in the way referred to by the objection decision-maker, was entirely consistent with Mr Hawkins' notice of objection to the assessments. So too was the implicit assertion that the income derived when the payments were received was the income of someone other than Mr Hawkins. As adverted to earlier, Mr Hawkins' notice of objection to the 2001 assessment included the following paragraphs (at [11]-[13]):

For the Income Year, FSA Oklahoma was beneficially entitled to the Total Payments.

For the Income Year, the Taxpayer did not apply to his benefit, receive constructively or otherwise, or derive as assessable income the Total Payments, whether as a director's fee or loan as a director of MGL, dividend or shareholder's loan from Matrix as a beneficiary of MFGUT or otherwise and consequently ought not be assessed on the Total Payments.

Accordingly, the Assessment is excessive in the amount of \$6,767,980 and the taxable income assessed ought be reduced to nil or some other amount lesser than the

amount included in the Assessment.

48 A similar statement was made in the notice of objection to the 2002 assessment.

49 It was and is tolerably clear that the essence of Mr Hawkins' case in the Tribunal was, or was likely to be, that he did not constructively receive the payments, that he did not derive any income arising from the receipt of the payments, that his tax returns were not incorrect in not including any income relating to those payments, and that therefore there was no evasion. It is undoubtedly true that those issues could and should have been included in the agreed statement of issues, or if not agreed to by the Commissioner, they should have been articulated in Mr Hawkins' own statement of facts, issues and contentions. It is equally true that it is possible to quibble with the way that Mr Suttie couched the issues in his statement. For example, the first issue should probably have been expressed in terms of whether Mr Hawkins had discharged his burden of proving that the income derived when the payments were made was not derived by him, but by someone else. Likewise, Mr Hawkins' denial that he arranged or directed the making of the payments should probably have been expressed as raising the issue whether Mr Hawkins had discharged his burden of proving that he did not constructively receive the payments. Those are, however, to an extent at least, matters of form and expression, not substance.

50 Putting aside matters of form, as opposed to substance, it is not readily apparent that the Commissioner put to the Tribunal that issues one and two as identified in Mr Suttie's statement were not, or were not likely to be, legitimate issues in the review application. On this application, the Commissioner effectively conceded that they were likely to be issues in the review application, again putting aside matters of form or mere expression.

51 The same cannot necessarily be said about some of the other issues identified by Mr Suttie. It is at least questionable that some of the other issues could properly be said to be raised by the review application. That may be so for a number of reasons. The main reason, however, is that s 14ZZK(a) of the Administration Act provides that, unless the Tribunal orders otherwise, the applicant in Tribunal proceedings under Part IVC of the Administration Act is limited to the grounds stated in the taxation objection to which the decision relates. It is not readily apparent that some of the other issues identified by Mr Suttie are raised by the grounds stated in Mr Hawkins' taxation objections. It is, however, also not readily apparent that the Commissioner made that point before the Tribunal. Nor is it apparent that the

Tribunal gave any, or any proper, genuine or realistic consideration to the question whether any of the issues identified by Mr Suttie could arise in the review proceedings.

52 In all the circumstances it was not open to the Tribunal to simply disregard Mr Suttie's evidence concerning the issues simply because the issues were not specifically referred to in the agreed statement of issues. Yet a fair reading of the Tribunal's reasons reveals that the Tribunal did so disregard Mr Suttie's evidence. Mr Suttie's evidence concerning the relevance of the documents sought by reference to the five sub-issues identified in his statement was dismissed as being "in effect, a submission": Reasons at [20]. The fact that the evidence may have amounted to a submission was, at least in the context of the application under consideration, no reason to disregard the evidence, particularly in the absence of any objection. A statement of facts, issues and contentions is, in effect, a submission. That provides no reason to disregard it. There is no question that if the issues identified by Mr Suttie had been referred to in a statement of facts, issues and contentions, as they undoubtedly should have been, they could not have been disregarded as amounting to nothing more than a submission. More significantly, the issues identified in Mr Suttie's statement were said to be "well beyond the issues referred to in the agreed statement". That is true, but it does not mean that they could be disregarded for that reason alone.

53 The Tribunal's disregard of the issues identified by Mr Suttie meant that it did not perform its statutory task under s 37(2). It did not consider and determine whether Mr Hawkins had demonstrated that the particular documents or categories of documents in the Schedule may be relevant to specific issues of fact relating to the excessiveness of the assessments issued to him.

54 The fact that the Tribunal did not perform its statutory task can perhaps be best illustrated by reference to one of the specific documents identified in the Schedule.

55 The Schedule sought the lodgement of certain specific documents identified in footnotes to the Evasion Opinion. The footnotes contained details of the evidence – mostly in the form of documents – that provided evidence of the facts stated in the body of the opinion. Some of the documents referred to in the footnotes had been included in the T-documents, or had subsequently been provided to Mr Hawkins or lodged with the Tribunal. However, some had not. One that had not been lodged with the Tribunal or provided to Mr Hawkins was a document identified as Appendix S to "PPS Advisory – Liquidator's Response to Preliminary Audit Findings". That document was referred to in footnote 41 of the Evasion Opinion as

being evidence of the fact that the “payments of \$4,286,000 and \$6,500,000 were not recorded in the financial accounts of MFGUT (and subsequently in the income tax return) for the income year ending 30 June 2002”. It is not difficult to see how it might be argued that Appendix S may be relevant to the question whether Mr Hawkins had discharged his burden of proving that a person or entity other than him had derived income as a result of the payment. The same could perhaps be said of a number of other documents referred to in footnotes in the Evasion Opinion: see for example the documents described in items 4, 5, 6 and 7 of schedule 2 to the Schedule.

56 That observation should not be construed as amounting to a finding by this Court that the Commissioner should have been required to lodge any of those particular documents with the Tribunal pursuant to s 37(2). That is a question for the Tribunal. The point is that there is nothing in the Tribunal’s reasons to suggest that the Tribunal engaged in the exercise of considering and determining whether Appendix S, or indeed any of the specific documents or categories of documents identified in the Schedule, may be relevant to any of the issues identified by Mr Suttie, in particular issues one and two. Rather, the Tribunal rejected Mr Hawkins’ case on a global basis, without any specific consideration of the individual documents themselves, or the basis upon which Mr Hawkins had contended that the documents may be relevant. The apparent reason for that was that the Tribunal effectively disregarded Mr Suttie’s evidence and articulation of the issues because the issues identified by Mr Suttie fell outside the terms of the agreed statement of issues. In so doing, it erred in the exercise of its jurisdiction.

Did the Tribunal apply the wrong test?

57 There is some force in Mr Hawkins’ submission that the Tribunal applied the wrong test in considering whether the Commissioner should have been required to lodge the documents in the Schedule, or at least some of them, pursuant to s 37(2). While the Tribunal set out the terms of s 37(2) in its reasons (Reasons at [12]), it nonetheless repeatedly expressed the test in terms of whether the documents “are relevant” to the issues: Reasons at [19] and [26]. Nowhere did the Tribunal express the test in terms of whether the documents “may be” relevant.

58 There is unquestionably a difference between saying that documents “are” relevant and saying that documents “may be” relevant. The test of “may be relevant” in s 37(2) of the AAT Act could perhaps be likened to the test that is commonly employed in determining

questions concerning the scope and forensic purpose of a subpoena. The test for whether a subpoena has a legitimate forensic purpose has been put in terms of whether the material caught by the subpoena appears to have relevance in the sense of “throw[ing] light” on at least some of the issues in the principal proceedings: *Cosco Holdings Pty Ltd v Commissioner of Taxation* [1997] FCA 1504; (1997) 37 ATR 432 at 439-440. It has also been said that it must be “on the cards” that the documents sought will materially assist the party at whose request the subpoena has been issued: *Alister v The Queen* (1984) 154 CLR 404 at 414; *Tamwood Limited (ACN 010 954 499) v Habitare Developments Pty Ltd (ACN 122 935 497)* [2009] FCA 364 at [13], [35]-[38]. Slightly more prosaic statements of the test include that the documents must have some “apparent” or “adjectival” relevance, or would be reasonably likely to add, in the end, in some way or another, to the relevant evidence in the case: *Spencer Motors Pty Ltd v. LNC Industries Ltd* [1982] 2 NSWLR 921 at 927-928 G-A; *National Employers’ Mutual General Association Ltd v Waind* [1978] 1 NSWLR 372 at 385 D-F; *Trade Practices Commission v Arnotts Ltd (No 2)* (1989) 88 ALR 90 at 103; *Dorajay Pty Limited v Aristocrat Leisure Limited* [2005] FCA 588 at [17]. The common theme of these various statements of the applicable test of relevance in the context of subpoenas or notices to produce is that it is less stringent than the test of relevance that applies in the context of the admissibility of evidence.

59 There is nothing to suggest that the Tribunal employed the less stringent test that is suggested by the expression “may be relevant”. The reasoning employed by the Tribunal indicates that it did not employ the correct test.

Did the Tribunal fail to consider essential integers of the s 37(2) application?

60 This question has already been answered. For the reasons already given, it is apparent that the Tribunal ignored, or disregarded, critical parts of the evidence relied on by Mr Hawkins. Most significantly, the Tribunal disregarded Mr Suttie’s evidence, based on his instructions, concerning the issues that Mr Hawkins contended did, or would, arise in the review application. It did so because Mr Suttie’s explanation of the issues fell outside the agreed statement of issues. As a result, it disregarded Mr Suttie’s explanation of the potential relevance of the documents or categories of documents identified in the Schedule.

61 There are some other indications that the Tribunal effectively disregarded Mr Suttie’s statement and the evidence contained in it. As has already been indicated, the Tribunal effectively deprecated Mr Hawkins’ request for certain specific documents that comprised

correspondence between certain named persons on the basis that the relationship of those persons to Mr Hawkins was “unexplained”, or that some or all of those persons “may be strangers” to Mr Hawkins: Reasons at [9] and [19]. A fair reading of Mr Suttie’s statement, however, reveals, at the very least, that his evidence identified the connection between the persons named in the correspondence and the five issues identified by Mr Suttie. It was the relationship or connection between the relevant correspondence and the issues identified by Mr Suttie that was important, not whether the relationship between Mr Hawkins and the parties to the correspondence had been explained.

62 In any event, for the reasons already given, the approach taken by the Tribunal to Mr Suttie’s statement, and in particular the issues identified in it, meant that the Tribunal did not consider and determine the question that it was required to address in relation to Mr Hawkins’ application under s 37(2). The Tribunal did not give proper, genuine or realistic consideration to whether each of the documents, or categories of documents, in the Schedule may be relevant to any of the specific issues of fact relating to the excessiveness of the assessments issued to Mr Hawkins that were identified by Mr Suttie. The Tribunal effectively dismissed the application in a global way because the specific issues identified by Mr Suttie were not referred to in the agreed statement of issues.

Was the decision unreasonable, illogical or irrational?

63 Mr Hawkins’ submission that no Tribunal, acting reasonably, could have found that the documents or categories of documents in the Schedule, or at least some of them, may not be relevant to his review application has no merit and is rejected. The arguments advanced by Mr Hawkins in that regard amounted, in effect, to an attack on the merits of the Tribunal’s decision. It was for the Tribunal to determine whether Mr Hawkins had shown that some or all of the documents, or categories of documents, in the Schedule may be relevant to the specific issues of fact relating to the excessiveness of the assessments. Mr Hawkins’ submissions concerning unreasonableness effectively required the Court to determine that question.

64 Mr Hawkins’ submissions focussed in particular on those documents referred to in the footnotes in the Evasion Opinion and the objection decisions. He asked rhetorically why the Commissioner would not lodge all of those documents. The submission was, essentially, that it was self-evident that any document referred to in the Evasion Opinion and objection decisions may be relevant to the review application. It may, at first blush, be difficult to see

why the Commissioner would not provide Mr Hawkins with full copies of all the documents referred to in the Evasion Opinion and objection decisions. That is, however, not the relevant question. There may also be legitimate reasons why the Commissioner was unprepared to provide the documents to Mr Hawkins unless required to do so by either s 37(1) or s 37(2) of the AAT Act.

65 Perhaps more significantly, it is at best doubtful that a document necessarily may be relevant to Mr Hawkins' review application simply because it is referred to somewhere in the Evasion Opinion or objection decisions. Much will depend on the particular document and the context in which it is referred to in the Evasion Opinion or objection decisions. It is sufficient to give one example to illustrate why that is so.

66 One of the documents sought by Mr Hawkins was identified in the Schedule as "PPB Advisory – Liquidator's Response to Preliminary Audit Findings (Appendix A)". That document was referred to in footnote 12 of the Evasion Opinion. The text the subject of footnote 12 related to the fact that in 1996 the "WA Department of Transport awarded a mandate for Matrix to arrange and manage a leasing transaction for its fleet of cars". There is no indication whatsoever that the award of the mandate to Matrix in 1996 was, or was likely to be, a fact in issue in the Tribunal's review of the relevant objection decision. It is difficult to see how it could be in issue. Accordingly, there is nothing to suggest that the document referred to in footnote 12 may be relevant to the review proceeding, even though it is referred to in the Evasion Opinion.

Conclusion in relation to review grounds

67 Mr Hawkins has succeeded in demonstrating that the Tribunal relevantly erred in exercising its jurisdiction in respect of the application under s 37(2) of the AAT Act. The Tribunal applied the incorrect test and, by disregarding important elements of Mr Hawkins' case, did not do what it was required to do in the exercise of its jurisdiction; namely consider and determine whether each document, or category of document, in the Schedule to Mr Hawkins' application, may be relevant to a specific issue or issues of fact relating to the excessiveness of the assessments issued to Mr Hawkins.

RELIEF

68 The relief sought by Mr Hawkins included orders the effect of which was that the Court would require the Commissioner, pursuant to s 37(2) of the AAT Act, to lodge with the

Tribunal the documents in the Schedule. That relief is not appropriate for a number of reasons. First, the task of determining whether documents may be relevant to the review application is for the Tribunal, not for the Court on a judicial review application. Second, and in any event, Mr Hawkins has not demonstrated on this application that all of the documents, or categories of documents in the Schedule may be relevant to the review application. Third, for the reasons already adverted to, the material before the Court is inadequate and unsatisfactory in terms of determining whether the documents or categories of documents may be relevant.

69 The preferable course is to remit the matter to the Tribunal to be determined according to law. It appears to be likely that, upon remittal, the Tribunal will be able to consider and determine the s 37(2) application by reference to a statement or statements of facts, issues and contentions. At the hearing Mr Hawkins sought a stay of a direction that had been given by the Tribunal that Mr Hawkins file such a statement. That stay application was refused. While Mr Hawkins had shown that he had an arguable case of error on the part of the Tribunal, the balance of convenience did not favour the grant of such a stay. Mr Hawkins did not demonstrate that he would be materially prejudiced by being required to file a statement of facts, issues and contentions, particularly in the face of an undertaking given on the Commissioner's behalf not to oppose the filing of an amended statement in the event that Mr Hawkins' application pursuant to s 37(2) ultimately resulted in further documents being lodged.

CONCLUSION AND DISPOSITION

70 Mr Hawkins' application for judicial review of the Tribunal's decision to refuse his application pursuant to s 37(2) of the AAT Act is allowed. Orders will be made remitting the matter to the Tribunal for the reconsideration of Mr Hawkins' s 37(2) application according to law.

71 While Mr Hawkins has been largely successful on this application, the question of costs is not entirely straightforward. That is because, for the reasons already given, the main error made by the Tribunal in considering the s 37(2) application was the product of the unconventional and unsatisfactory approach taken by Mr Hawkins before the Tribunal. The problems in the Tribunal largely emanated from the fact that Mr Hawkins agreed to the Commissioner's high level statement of issues, declined to file his own statement of facts, issues and contentions, and instead filed a statement from his solicitor which raised a number of so-called sub-issues

“by way of elaboration”. The Commissioner was rightly critical of that approach. Nevertheless, the Tribunal could have dealt with that unsatisfactory state of affairs in a way that did not involve error. It could have dealt with the issues as a matter of substance rather than form, and treated Mr Suttie’s evidence concerning the issues as being, in effect, Mr Hawkins’ statement of issues. Alternatively it could have refused to entertain the s 37(2) application until Mr Hawkins filed a statement of facts, issues and contentions that addressed the matters in Mr Suttie’s statement. The approach it ultimately took was productive of error.

72 On balance, the criticisms that may be levelled against Mr Hawkins in relation to the manner in which he approached the application in the Tribunal do not provide a sound basis for departing from the general rule that costs follow the event. Accordingly, the Commissioner will be ordered to pay Mr Hawkins’ costs.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 24 October 2017