SUPREME COURT OF QUEENSLAND

CITATION:	*DPP (Cth) v Buckett; DPP (Cth) v Vaughan* [2004] QCA 206
PARTIES:	**DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)** (appellant/applicant) **v** **MAUREEN C BUCKETT** (respondent/respondent) **DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH)** (appellant/applicant) **v** **GREGORY STEAVEN VAUGHAN** (respondent/respondent)
FILE NO/S:	CA No 24 of 2004 CA No 25 of 2004 DC No 3164 of 2003 DC No 3163 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2004
JUDGES:	Williams and Jerrard JJA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In each application, leave to appeal granted** **2. Each appeal dismissed with costs**
CATCHWORDS:	TAXES AND DUTIES – PENAL PROVISIONS AND PROSECUTIONS – PARTICULAR OFFENCES – FAILURE TO COMPLY WITH REQUIREMENTS – where the respondents failed to submit income tax returns for a number of years – where notices issued by the Deputy Commissioner of Taxation to the respondents required such returns to be lodged in the 'approved form' – whether such 'approved form' existed at the relevant time – whether the respondents were able to comply with the requirement to submit returns in such form – whether leave to appeal and the appeal should be allowed holding that the respondents' non-

compliance with the Commissioner's notices did constitute an offence under the taxation law

A New Tax System (Tax Administration) Act (No. 2) 2000 (Cth), s 4, Sch 2 Pt 2
Acts Interpretation Act 1901 (Cth), s 13
Income Tax Assessment Act 1936 (Cth), s 162
Taxation Administration Act 1953 (Cth), s 8C
Income Tax Regulations 1936 (Cth), reg 15

Knaggs v Commonwealth Director of Public Prosecutions [2003] ATC 4154, cited

COUNSEL: G J Gibson QC, with A J MacSporran, for the applicant
P E Hack SC for the respondents

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the applicant
James White Lawyers for the respondents

[1] **WILLIAMS JA:** The background facts relevant to the issues raised by these appeals, and the critical sections of Commonwealth legislation are set out in the reasons for judgment of Chesterman J, which I have had the advantage of reading, and it is not necessary for me to repeat those matters.

[2] It is, however, necessary to consider in some detail the consequences of the alterations to s 162 of the *Income Tax Assessment Act* 1936 ("ITAA") and s 8C(1)(a) of the *Taxation Administration Act* 1953 ("TAA") brought about by the legislation entitled *A New Tax System (Tax Administration) Act (No. 2)* 2000 ("the 2000 Act"). The original s 162 and s 8C(1)(a) are relevantly set out respectively in paragraphs [26] and [28] of the reasons of Chesterman J.

[3] Relevantly s 4 of the 2000 Act provided that "each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms." One then finds Schedule 2 Part 2 of the 2000 Act headed "Amendments applying to returns etc. for the 2000-01 year and later years." Section 13(1) of the *Acts Interpretation Act* 1901 (Cth) deems that heading to be part of the Act. Item 138 of that Part then provides with respect to s 162 of the ITAA: "Repeal the section, substitute:"; then follows the new s 162 as set out in paragraph [27] of the reasons of Chesterman J. Item 142A of that Part then provides with respect to s 8C(1)(a) of the TAA: "Omit 'return', substitute 'approved form'."; that then makes the new s 8C(1)(a) read as set out in paragraph [29] of the reasons of Chesterman J. The last item in Part 2 is Item 144 which is relevantly set out in paragraph [31] of the reasons of Chesterman J.

[4] The drafting is complex but, in my view, the legislative intention is made clear. The original s 162 of the ITAA is only repealed and replaced by the new s 162 insofar as "returns etc. for the 2000-01 year and later years" are concerned; the original s 162 remains in full force and has full legislative effect with respect to relevant issues relating to income years prior to the 2000 – 01 year. Similarly the original s 8C(1)(a) of the TAA remains in full force and effect with respect to issues relating to returns for income years prior to the 2000 – 01 year. In other words

notwithstanding the use of the term "repeal" in the 2000 Act, both the original and new s 162 and the original and new s 8C(1)(a) must be taken to be part of the ITAA and TAA respectively.

[5] A minor problem is created by the subsequent amendment of s 8C(1)(a); the amendment referred to in paragraph [30] of the reasons of Chesterman J. The first amendment, that of substituting "an approved" for "a approved" can only apply to the new s 8C(1)(a). That to my mind must be taken as a legislative indication that only the new section is being amended. The consequence of that is that the words "to the extent that the person is capable of doing so" would remain in the original section and therefore be relevant for an offence of failing to furnish a return or information with respect to an income year prior to the year 2000 – 01. However, should I be wrong in that there would be no real practical consequences of the deletion of the words in question from the original section.

[6] Given the foregoing analysis, insofar as the reasoning of the learned District Court judge would suggest that the Commissioner may not, after the coming into force of the 2000 Act, require a person to furnish a return pursuant to the original s 162(1) and then prosecute any failure to comply with such requirement pursuant to the original s 8C(1)(a) it is wrong. The position in my view is that, after the coming into force of the 2000 Act, the Commissioner can act under the original s 162 with respect to issues arising out of income years prior to 2000 – 01, and can require the furnishing of information pursuant to the new s 162 with respect to issues arising in income years 2000 – 01 or later. Importantly before a breach could be established the Commissioner would have to establish that there was compliance with the requirements of the applicable section; in other words, the Commissioner would have to comply with the original s 162 where the relevant income year was prior to the year 2000 – 01.

[7] The critical element for present purposes in the original s 162 is that the recipient of the notice must provide in the manner and within the time required by the Commissioner a return of the income that person has received in the year in question. There is no definition in the legislation of the term "return", but relevantly reg 15 of the *Income Tax Regulations* 1936 (repealed as and from October 2001) provided: "Except as otherwise prescribed, every return under the Act shall ... be made and furnished in such of the forms provided by the Commissioner for the purposes as is applicable". Judicial notice can be taken of the fact that prior to the income year 2000 – 01 there was in each year readily available to a taxpayer a form provided by the Commissioner setting out in significant detail the information which the taxpayer had to provide in order for an assessment to be made of taxable income. Those forms varied from year to year to accommodate, for example, changes in the legislation as to allowable deductions.

[8] Before it could be asserted that there had been a failure to comply with a notice issued pursuant to the original s 162 giving rise to an offence under the original s 8C(1)(a) it would have to be demonstrated that the Commissioner had, either by reference to a form provided by him or by giving other directions as to the manner in which the return was to be made, indicated with precision what information was required. The notices in fact given to the respondents are relevantly set out in paragraph [16] of the reasons for judgment of Chesterman J. Those notices required the respondents to give to the Commissioner "income tax returns" for the specified years. It is then said that those returns must "be in the approved form". As at 1 July

2002 when those notices were forwarded to the respondents there was no income tax return which met the description "the approved form". The respondent Vaughan was, inter alia, required to provide a return for the income year ended 30 June 1991. What was the return he had to furnish for that year? Even if he could locate one of the forms provided by the Commissioner for use as an income tax return for that year, containing reference to deductions and the like claimable in that year, he would not know whether or not the Commissioner would class that as the "approved form" for the purpose of the notice.

[9] Section 162 confers coercive powers on the Commissioner and it should be strictly construed. Where the Commissioner is relying on the original s 162 then the notice should specify the form which needs to be returned and further specify the details of the manner in which the return should be completed.

[10] Item 143 of Schedule 2 Part 2 of the 2000 Act inserted ss 388–50 into the TAA; relevantly that section is set out in paragraph [32] of the reasons of Chesterman J. It makes provision for the Commissioner to approve in writing a form of return. If pursuant to that provision the Commissioner had approved a form of income tax return there would be, in my view, no problem with a notice issued under the original s 162 requiring the return to be in that approved form. As already noted the original s 162 empowers the Commissioner to specify the manner in which the requirement is to be satisfied; I can see no reason why the Commissioner could not specify that the return had to be in a form approved by the 2000 Act.

[11] Finally I come to the issue on which these appeals must finally be disposed. In each case the complaint (relevantly set out in paragraphs [17] and [18] of the reasons of Chesterman J) required proof that the respondent had not complied with the notice. As the notices required the respondents to submit income tax returns "in the approved form" in order to prove guilt the Commissioner had to prove that there were approved forms which the respondents could have but did not complete and submit to the Commissioner. As is made clear in the reasons of the Magistrate and the learned District Court judge the Commissioner did not, and indeed could not, do that. It followed that the only course open to the Magistrate was to dismiss each of the complaints.

[12] So holding would not, of course, prevent the Commissioner from issuing further notices pursuant to the original s 162 correctly identifying the return to be furnished. That, of course, could be done in a number of ways; I mentioned in the course of oral argument that one method the Commissioner could adopt is to attach to the notice the form to be completed.

[13] It follows that in each application leave to appeal should be given, but in each case the appeal should be dismissed with costs.

[14] **JERRARD JA:** In these proceedings I have read the reasons for judgment and orders proposed by Williams JA and Chesterman J and respectfully agree with those.

[15] **CHESTERMAN J:** The respondents for many years neglected their obligations to furnish income tax returns. On 1 July 2002, the Deputy Commissioner of Taxation gave written notices requiring them both to lodge returns setting out full and complete statements of their income. The notice addressed to Mr Vaughan required him to submit returns for each of the years ended 30 June 1991 to 30 June 2001

inclusive. The notice directed to Ms Buckett required her to submit returns for each of the years ended 30 June 1994 to 2001 inclusive. Both notices required the respondents to submit all returns by 30 August 2002.

[16] The notices were in the same terms and read in part:

> 'This office has no record of income tax returns having been lodged by you for the years …
>
> Under section 162 of the ITAA 1936, I now require you to give the Commissioner of Taxation, at the address shown above, the income tax returns referred to above by 30 August 2002.
>
> The returns must:
>
> - give a full statement of total income from all sources in and out of Australia, and
> - be in the approved form, signed by you.
>
> If you ignore this notice you may be prosecuted.'

[17] Neither of the respondents complied with the notices. No returns of income were given to the Commissioner. Consequently, on 22 October 2002 the Commissioner commenced prosecutions against each of the respondents in the Magistrates Court. The complaint against Mr Vaughan was that, in respect of each of the years identified in the notice, he:

> '… did … commit an offence in terms of s. 8C(1)(a) of the Taxation Administration Act 1953 (as amended), in that (he) failed to furnish a return of income to the Commissioner when and as required pursuant to a taxation law …'

[18] The complaint went on to aver 'in respect of the abovementioned matters of complaint that':

> '(i) The Deputy Commissioner of Taxation … did by notice in writing dated 1 July 2002, which issued pursuant to Section 162 of the Income Tax Assessment Act 1936 … require the defendant to furnish … returns in writing in the prescribed manner duly signed by the defendant setting forth full and complete statements of all his income derived from all sources … during the years …
>
> (ii) The said notice required the returns to be furnished by 30 August 2002.
>
> (iii) The stipulated time for compliance was reasonable.
>
> (iv) The said notice was duly served upon the defendant …
>
> (v) The defendant failed to comply with the said notice within the stipulated time …

(vi) …'

[19] The complaints against Ms Buckett were in the same terms, except of course for the different years in respect of which she had not lodged returns.

[20] The complaints were heard by Mr Quinlan, Stipendiary Magistrate on 11 July 2003 and dismissed with costs on 23 July 2003 on the ground that the Commissioner had not approved forms for income tax returns or, the prosecution had not proved that he had approved such forms, so that an element of the offences had not been proved. The notices, it will be recalled, required the respondents to submit income tax returns 'in the approved form'. The complaint was that they had not complied with the notices. Part of the proof of guilt was that there were approved forms which the respondents could have completed and submitted to the Commissioner.

[21] The learned magistrate based his judgment entirely upon a decision of Adams J, *Knaggs v Commonwealth Director of Public Prosecutions* 2003 ATC 4154.

[22] Appeals to the District Court were dismissed on 22 January 2004. The reasoning of the learned judge differed from that of the magistrate. His Honour concluded that because of amendments made to the *Income Tax Assessment Act* 1936 (Cth) ('ITAA') and the *Taxation Administration Act* 1953 (Cth) ('TAA'), the Commissioner could not, subsequent to 30 June 2000, issue notices requiring members of the public to furnish income tax *returns*. His only power was to issue notices requiring the recipient to submit *approved forms*. No forms had been approved prior to 1 July 2000. His Honour therefore concluded that non-compliance with the notices was not an offence.

[23] The appeals to the District Court were limited to the complaints relating to income tax returns in respect of years prior to the year commencing 1 July 2001.

[24] The Commonwealth Director of Public Prosecutions seeks leave to appeal from the decision of the District Court. It is said that the learned judge's ruling will affect, and invalidate, about 1,000 prosecutions pending in courts throughout Australia for failing to comply with notices issued in respect of the financial years prior to June 2000. The court heard submissions from the parties as though the applications for leave to appeal were themselves the appeals on the basis that if any substance in the applicant's submissions were noticed it would be an appropriate case for a grant of leave.

[25] To appreciate the point in issue it is necessary to refer, at some length, to the relevant legislative provisions and their amendments.

[26] Until 1 July 2000 s 162 of the ITAA provided, relevantly:

> 'Section 162 Further returns, etc.
>
> 162(1) [Obligation to furnish return] Every person shall, if required by the Commissioner, whether before or after the expiration of the year of income, furnish to the Commissioner, in the manner and within the time required by him, a return, or a further or fuller return, … of the income … derived by him in any year, whether on his own behalf or as agent or trustee, and whether a return has or

has not previously been furnished by him for the same period.

162(2) [No income] If no income has been so derived by the person so required to furnish a return, … he shall nevertheless furnish a return stating that fact.

162(3) …'

[27] The *A New Tax System (Tax Administration) Act (No. 2)* 2000 (Cth) ('TAA2'), made a number of changes to the ITAA and TAA. Item 138 in Schedule 2 of Part 2 of TAA2 repealed s 162 and replaced it. The change took effect from 1 July 2000.

The new section read:

'Section 162 Further returns and information.

162. A person must, if required by the Commissioner, whether before or after the end of the year of income, give the Commissioner, within the time required and in the approved form:

(a) a return or a further or fuller return for a year of income or a specified period, whether or not the person has given the Commissioner a return for the same period; or

(b) any information, statement or document about the person's financial affairs.'

[28] Prior to 1 July 2000, s 8C(1)(a) of the TAA provided:

'8C(1) [Offence] A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:

(a) to furnish a return or any information to the Commissioner or another person;

… to the extent that the person is capable of doing so is guilty of an offence.'

[29] Section 8C(1)(a) was amended by Item 142A of Schedule 2 of Part 2 of TAA2 by deleting the word 'return' and substituting the words 'approved form'. Accordingly, as from 1 July 2000, s 8C(1)(a) of the TAA provided:

'8C(1) [Offence] A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:

(a) to furnish a approved form or any information to the Commissioner or another person;

… to the extent that the person is capable of doing so is guilty of an offence.'

[30] Section 8C(1) was again amended this time by Commonwealth Act No. 146 of 2001 by substituting 'an approved' for 'a approved' in subparagraph (a) and omitting 'to the extent that the person is capable of doing so'. In consequence of those amendments, which were expressed to apply to acts or omissions after 15 December 2001, s 8C(1)(a) provides:

> '8C(1) [Offence] A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:
>
> (a) to furnish an approved form or any information to the Commissioner or another person;
>
> … is guilty of an offence.'

[31] Item 144(1) of Schedule 2 of Part 2 of TAA2 is important. It provides:

> '144. Application of amendments
>
> (1) Subject to this item, the amendments made by this Part apply to:
>
> (a) for income tax – returns, statements, notices and other documents given for the 2000-01 income year and later years; and
>
> (b) for fringe benefits tax – returns, statements, notices and other documents for the year of tax starting on 1 April 2001 and later years; and
>
> (c) for other taxes – returns, statements, notices and other documents for the period starting on 1 July 2000 and later periods.
>
> (2) …'

[32] Item 143 of Schedule 2 Part 2 of the TAA2 inserted s 388-50 into the TAA. It provided that:

> '388-50 Approved forms
>
> (1) A return, notice, statement, application or other document under a *taxation law is in the *approved form* if, and only if:
>
> (a) it is in the form approved in writing by the Commissioner for that kind of return, … or other document; and
>
> (b) it contains a declaration signed by a person … as the form requires …; and
>
> (c) it contains the information that the form requires …
>
> (d) …'

[33] The result of these provisions and the changes to them can be summarised for ease of comprehension. The Commissioner issued the written notices to the respondents on 1 July 2002. Section 162 of the ITAA then provided:

> '162. A person must, if required by the Commissioner, … give the Commissioner, within the time required and in the approved form:
>
> (a) a return or a further or fuller return for a year of income …'

The terms of s 8C(1) of the TAA were that:

> '8C(1) [Offence] A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:
>
> (a) to furnish an approved form or any information to the Commissioner …;
>
> is guilty of an offence.'

[34] As I understood the arguments of counsel it was common ground that there were no approved forms for income tax return prior to the enactment of TAA2 and the amendments it made to the ITAA and the TAA, which became effective on 1 July 2000. The court's attention was drawn to Regulation 15 of the *Income Tax Regulations* 1936 (Cth), which was repealed as and from October 2001. Prior to its repeal it provided that:

> 'Except as otherwise prescribed, every return under the Act shall … be made and furnished in such of the forms provided by the Commissioner for the purpose as is applicable.'

The result appears to be that prior to 1 July 2000 a return of income tax should have been made in one of the forms provided by the Commissioner, but that thereafter returns should have been made in a form approved for that purpose by the Commissioner pursuant to s 388-50.

[35] The reasoning of the learned judge which led his Honour to dismiss the appeals was:

> '[28] … the prosecution against (the respondents) was based upon a notice pursuant to s 162 of the ITAA. The offences were alleged to have been committed … on or about 2 September 2002. The source of the Commissioner's power to require further returns … when the Commissioner gave the notice … is to be found in s 162 as that section stood at the time the notice was given. …
>
> [29] In my opinion what s 162 empowered the Commissioner to require from the respondents by the notice … was a return "in the approved form". Further, what s 8C(1)(a) of the ITAA [sic] made an offence was the respondent's refusal … to furnish a return in "an approved form".

> [30] … item 144 states the amendments to s 162 … apply to income tax to returns … given for the 2000-01 income year and later years. However, in my opinion it does not follow s 162 … and s 8C(1)(a) … as those sections read before 1 July 2002 are to be applied when considering whether an offence was committed … on or about 2 September 2002 for failing to comply with a notice given on 1 July 2002.'

[36] His Honour therefore concluded that after 1 July 2000 the Commissioner's power to insist upon compliance with notices issued by him was limited to the power conferred by s 162 in its then terms, i.e. to provide a return of income in the approved form, and s 8C(1) made it an offence to fail or refuse, when and as required, to furnish an approved form to the Commissioner. There being no approved forms of income tax return prior to 1 July 2000 the notices given by the Commissioner to the respondents were invalid.

[37] The applicant's answer relies on Item 144 which provided that the amendments made by Schedule 2 of Part 2 of TAA2 applied to income tax returns 'given for the 2000/01 income year and later years'. The amendments made by the Part included those made to s 162 of the ITAA and s 8C(1) of the TAA. The applicant submits that the effect of the Item is to make the amendments to those sections prospective from 1 July 2000 and to preserve the operation of the sections in their unamended form to the submission of income tax returns for the years prior to the financial year 2000/01. In other words the effect of the Item is as though the ITAA contained two forms of s 162, and the TAA provision two forms of s 8C(1). The earlier form of each section remains the relevant provision in respect of the submission of returns for the earlier years, and the second form of each section is applicable to returns for the years commencing 1 July 2000.

[38] On this understanding the provisions relevant to the issue of the notices to the respondents were:

> '162(1) [Obligation to furnish return] Every person shall, if required by the Commissioner … furnish to the Commissioner, in the manner and within the time required … a return … of the income … derived by him in any year …'
>
> and
>
> '8C(1) [Offence] A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:
>
> (a) to furnish a return … to the Commissioner …
>
> … is guilty of an offence.'

[39] The learned judge noted that he had not been referred 'to any legislative provision or authority in support of the proposition that item 144 has the effect contended for by the (applicant).' His Honour therefore rejected the applicant's submission. His Honour thought that subsequent to the amendments the Commissioner's power to compel the production of information was limited to requiring the completion and submission of the relevant documents as described in the amended legislation. This

opinion overlooks the terms of Item 144 itself and has the effect of depriving it of any function. The approach taken by the learned judge treats Item 144 as applying the amendments to operate from their effective date, which they would do anyway. The Item thus serves no purpose. It would have a purpose, namely preserving the Commissioner's powers as they were prior to the amendments in respect of returns etcetera for the financial years prior to the amendments, if construed as the applicant does.

[40] Clearly enough Item 144 confines the operation of the amendments to s 162 and s 8C(1) to returns and other documents for the years subsequent to 1 July 2000. The notices given by the Commissioner were relevantly 'for' years prior to 1 July 2000. The preposition 'for' when used in Item 144 was clearly intended to indicate that the amendments made by Part 2 were to apply to some returns, statements and notices and not others. The Item requires a distinction to be drawn between classes of those documents. The distinction is between those documents 'given for' the years after 1 July 2000 and those given for previous years. It must follow that the amendments were not intended to apply to those documents in respect of earlier years.

[41] The reasons of the judge below would destroy the distinction and thus deprive the Commissioner of the power to compel tax payers, such as the respondents, to provide information about their income for the years prior to 1 July 2000. Those who have deliberately or inadvertently avoided the payment of income tax by reason of their omission to submit returns could not be compelled to submit returns. This is a startling result and one that should be avoided unless the legislation clearly mandates it. Item 144, if it is construed as the applicant submits, does avoid the consequence. Indeed, the Item appears to have been drafted with that point in mind. Accordingly, the applicant's submission should be accepted.

[42] The learned judge relied, as had the magistrate, on the decision in *Knaggs*. That was understandable given that the case involved relevantly identical facts and found in favour of the tax payer. Knaggs was required to furnish 20 returns of income, one for each of the years ended 30 June 1983 to 30 June 2001. The notices given by the Commissioner requiring the returns were dated 6 February 2002, after the amendments to the ITAA and the TAA made by TAA2. The complaints against Knaggs were that he had not complied with the notices by furnishing 'a return in writing on the appropriate form duly signed …'. Adams J regarded 'the appropriate form' as a reference to the 'approved form' but dismissed an appeal against the dismissal of the complaints on the ground that the prosecutor had not proved that there were approved forms for the returns in question. His Honour regarded the existence of such forms as an element of the offences. Extraordinarily, counsel for the Commonwealth Director of Public Prosecutions did not refer his Honour to Item 144 so that the case was decided without reference to that provision (which the judge could not have been expected to consider unless it were specifically referred to) and without regard to the arguments on the meaning of the Item which were addressed to this court. There is, I think, little doubt that had Adams J been referred to the Item the reasoning in *Knaggs* would have been different. The outcome may have been the same, for the reasons which follow.

[43] Accordingly the applicant has demonstrated an error in the reasons of the learned judge which led to the dismissal of the appeals from the magistrate. The point is one of importance and accordingly I would grant leave to appeal.

There remains, however, a question whether the result in the District Court was wrong. The complaints against the respondents were that they failed to furnish returns of income when and as required pursuant to a taxation law. The relevant taxation law was s 162 as it stood prior to 1 July 2000 in respect of income tax returns for years before that date. That section obliged every person required by the Commissioner to do so, to furnish in the manner required by the Commissioner a return of income. The notices delivered to the respondents required them to submit income tax returns in respect of identified years 'in the approved form'. There were no approved forms for the years in question. Section 162, in respect of those years, did not therefore empower the Commissioner to require members of the public to furnish information in an approved form. That power was given only with respect to years of income subsequent to 1 July 2000. The relevant requirement of the taxation law was to furnish a return, not an approved form or a return in an approved form. The notices therefore did not express a requirement 'under or pursuant to a taxation law' as s 8C(1) puts it, so that the section did not operate so as to make non-compliance with the notices an offence.

[44] The applicant submitted that this conclusion should not be reached for two reasons. The first was that the specification in the notices that the returns must be in the approved form was surplusage and should be ignored, so that the notices should be read as though the respondents were required only to give income tax returns containing a signed, full statement of income in any form. This treatment of the notices is not, in my opinion, permissible. The notices were formal exercises of the Commissioner's power contained in s 162 of the ITAA. Section 8C(1)(a) makes it an offence not to comply with a requirement made under s 162. The notices are therefore meant to be taken seriously by a recipient and complied with. They contain no intimation that only some part of them should be complied with, and gave no hint about the identity of any part that could be ignored. Indeed, it is only with the benefit of the sedulous examination of the legislation, which the court has been obliged to undertake, that one can see that the reference to approved forms in the notices was an error.

[45] The applicant's second ground was that the offence created by s 8C(1)(a) was complete upon the respondents' failure to provide returns of income in any form by the due date. The applicant points to the terms of that section as it applied to events prior to TAA2 and submits that the respondents failed to furnish returns as required and were therefore guilty of the offences charged. The submission continues that if the reason for the failure was that the respondents could not return a full statement of their income in an approved form they then had a defence. In the absence of any evidence to that effect, non-compliance with the notices, and therefore, the commission of offences pursuant to s 8C(1), was made out.

[46] The difficulty with this submission is that it does not recognise the terms of s 8C(1). The offence is failing to furnish a return as required under a taxation law. The requirement relied upon was to furnish a return in an approved form, and that was not a requirement under or pursuant to a taxation law, for the reasons I have explained. It was essential for the applicant to prove, as part of its case against the respondents, that a requirement had been made of the respondents 'under or pursuant to a taxation law'. It did not do so.

[47] The magistrate and the learned judge were both right to conclude that the complaints should be dismissed. The notices were not in terms authorised by s 162 and non-compliance with them did not constitute an offence created by s 8C(1).

[48] Accordingly, I would give the applicant leave to appeal in both applications but dismiss both appeals. The applicant should pay the costs of both respondents.