

PROBLEMS IN PARADISE: CONSCIOUS MALADMINISTRATION IN THE ATO

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I BACKGROUND

Du Pont and Lubesky¹ observed in 2013 in relation to the Canada Revenue Authority that:

Even though the majority of tax officials are conscientious and play a vital role in the administration of the tax system, abusive audits can and do occur for a variety of reasons. Some cases have involved personally motivated malevolence toward a taxpayer,² some ... [involved] administrative blunders within the tax department (such as lost records or inaccurate record keeping),³ while others simply result from inadequate training or supervision of the auditor.

So it is with the Australian Taxation Office (ATO) — and most large bureaucracies. The ATO has a proud record of service to the Australian community. Nevertheless, over the years, a number of taxpayers have felt that they have been unfairly treated by the ATO, and have taken action to attack the ATO's alleged lack of bona fides (good faith) in making assessments, or otherwise dealing with taxpayer's affairs.⁴ As noted above and discussed later in this article, similar concerns have been raised in other jurisdictions.

Despite some extreme situations, until 2015 taxpayers had invariably failed in such actions. For example, in *Marijancevic v DCF of T*,⁵ the court found that the ATO had acted 'too hastily in issuing a garnishee notice, too carelessly in addressing the garnishee notice letter, and too slowly subsequently in issuing default assessments'. Nevertheless, the court held that the taxpayer had failed to establish that the ATO had acted in bad faith.⁶

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1 G Du Pont and M H Lubetsky, 'The Power To Audit Is the Power To Destroy: Judicial Supervision of the Exercise of Audit Powers', *Canadian Tax Journal* (2013) 61 (Supp), 103.

2 Citing *Main Rehabilitation Co, v Canada*, 2004 FCA 403 and *Chhabra v The Queen* 89 DTC 5310 (FCTD).

3 Citing *Leroux v Canada Revenue Authority* 2012 BCCA 63 (CRA auditors shredded taxpayer's original documents, then disallowed deductions on the basis that the taxpayer did not have adequate supporting documentation); *Gallant v The Queen* 2012 TCC 119 (CRA's form contained errors which led a taxpayer to claim an excessive deduction); and *Agence du revenu du Quebec v Groupe Enrico Inc* 2011 QCCA 1924 (inflated assessment resulting from significant CRA calculation errors followed by two aborted garnishee actions).

4 The broader potential problem of increased non-compliance which can result from taxpayer perceptions of unfairness or procedural injustice in ATO actions have been highlighted in studies for many years, including K Murphy, 'Procedural justice and tax compliance' Working Paper 56 (Feb 2004) Centre for Tax System Integrity, ANU; M Wenzel, 'Motivation or rationalisation? Causal relationships between ethics, norms and tax compliance', Working Paper 63 (May 2005) Centre for Tax System Integrity, ANU; Simon James, Kristina Murphy and Monika Reinhart, 'Taxpayer Beliefs and Views: Two New Surveys' (2005) *Australian Tax Forum* 157; and, more recently, Julie M Barkworth and Kristina Murphy, 'Procedural justice, policing and citizen compliance behaviour: The importance of emotion' (2015) 21(3) *Psychology, Crime and Law* 254.

5 [2008] ATC ¶20-046, 8267 (Ryan, Kenny and Stone JJ).

6 The formulation of the claim common in Australia prior to the 2008 decision in *Futuris Corporation Ltd v FC of T* [2008] ATC ¶20-039 was in terms of lack of good faith.

The tort of conscious (or ‘deliberate’) maladministration (previously known as ‘misfeasance in public office’) was developed by courts many years ago to deal with abuses of public office,⁸ though it has gone in and out of favour over time. The tort has been extremely difficult to prove, largely because of the requirement to prove knowledge or malice by the decision-maker,⁹ and there was until recently an impressive line of cases in which taxpayers had failed to successfully establish their claim. Indeed, in *Hii v Commissioner of Taxation*¹⁰ Collier J observed that there did not seem to have been a reported case prior to *Donoghue v Commissioner of T* (‘*Donoghue*’)¹¹ in 2015, where a taxpayer was able to successfully establish conscious maladministration by the ATO or its officers.¹²

No doubt this general lack of success also reflects in part the courts’ view that an allegation of bad faith in assessing a taxpayer is ‘a serious allegation and one not lightly to be made. It is, thus, not particularly surprising that allegations directed at setting aside assessments on the basis of [ATO] absence of good faith have generally been unsuccessful... one would hope that this was and would continue to be the case’.¹³ Indeed, as Haggstrom observes, ‘The courts have traditionally operated on the assumption that ATO staff will act honestly in their work and hence the hurdle for proving that the ATO has acted improperly is generally fairly high’.¹⁴

While this is true, a delicate balancing act is involved. In policy terms, imposing too heavy a liability on public officers ‘may deter officials from exercising powers conferred on them when their exercise would be for the public good’. On the other hand, defining liability too narrowly may mean that persons affected by an abuse of public power are left without a remedy. The courts applying the tort of conscious maladministration must try to balance these competing considerations.¹⁵

While the tort of conscious maladministration by a public officer was ‘well-established’¹⁶ in general law, the tort had lain fallow in Australian tax jurisprudence until it was brought to the attention of the tax profession by the 2008 High Court decision in *Futuris*, where it was identified as one of the two possible foundations for an attack under s 39B of the *Judiciary Act 1903* (Cth) on the validity (rather than the accuracy) of a tax assessment.¹⁷ Since then, a number of taxpayers have brought actions alleging ‘conscious maladministration’ by the ATO,¹⁸ although it was 2015 before a taxpayer succeeded in such a claim.

7 *FCT v Futuris Corporation Ltd* 2008 ATC ¶20-039 [66] (Gummow, Hayne, Heydon and Crennan JJ). The tort involves a deliberate failure to comply with e.g. the provisions of an Act (ie knowingly or with deliberate disregard acting in excess of their powers [55]).

8 In *NT v Mengel* [1995] HCA 65 [10], Brennan J stated that ‘it is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of office’; see also N Cox, ‘Justice, fairness and the common law: The tort of misfeasance in public office’ (May 26, 2015) <<http://ssrn.com/abstract-2610837>>; J Bevacqua, *Taxpayer Rights to Compensation for Tax Office Mistakes* CCH & ATTA Doctoral Series No 3.

9 See Bevacqua, above n 8, 44, 49 and A Freeman and B May, ‘Taking on the government: what is misfeasance in public office?’ <<http://www.lexology.com/library/detail.aspx?g=98d56500-b3d6-49a-a463-5414580372ad>>. Bevacqua notes, at 43, that traditionally, liability for conscious maladministration is personal to the offending public officer, and the Crown is not vicariously liable — though apparently the Commissioner agreed in *Re Young v Commr of Taxation* [2008] AATA 155 to indemnify the employee involved.

10 [2015] FCA 375 [98].

11 [2015] FCA 235.

12 *Hii v Commr of Taxation* [2015] FCA 375; [2015] ATC ¶20-501, [98] (Collier J).

13 *Kordan Pty Ltd v FC of T* [2000] ATC 4812 [60] (Hill, Dowsett and Hely JJ); quoted with approval in the joint judgment in *Futuris*, above n 7 [60].

14 Peter Haggstrom, ‘A Critical Review of Tax Administration in Australia From An Ombudsman’s Office Perspective’ in Abe Greenbaum and Chris Evans (eds), *Tax Administration — Facing the Challenge of the Future* (1998) 263, 267; see also Bevacqua, above n 8, 48–9. However, this ‘trust’ of ATO officers is ‘not unqualified’: *Donoghue*, above [142] (Collier J) — quoting the joint judgment in *Futuris*, above n 7 at [23]–[25], [55]–[57].

15 *Sanders v Snell* [1998] HCA 64 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

16 *NT v Mengel* [1995] HCA 65, joint judgment [65], Brennan J [4]; *Sanders v Snell*, above [42] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) — though they noted that the tort was of ‘imprecise scope’. In *Mengel*, Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ stated at [57] that it ‘was recognised as recently as 1973 that the precise limits of the tort ... were then undefined ... In important respects, that it still true’.

17 *FCT v Futuris Corporation Ltd* [2008] ATC ¶20-039.

18 See A Freeman and B May ‘Taking on the Government: what is misfeasance in public office?’ *Lexology*, 26 January 2015. In *Hii v C of T* [2015] FCA 375 [83], [84], [97], Collier J cited *Gashi v C of T* [2013] FCAFC 30 [43] (Bennett, Edmonds and Gordon JJ) and *C of T v AAT* [2011] FCAFC 37, which equated the concepts of bad faith and conscious maladministration.

II THE ELEMENTS OF ‘CONSCIOUS MALADMINISTRATION’

The cause of action in conscious maladministration had been considered by the High Court in non-tax contexts in *Northern Territory v Mengel*,¹⁹ and subsequently in *Sanders v Snell*.²⁰

In *Mengel*, the plaintiff failed to establish that unauthorised actions taken by Northern Territory cattle inspectors which prevented a station owner from selling their cattle at a particular time constituted conscious maladministration, even though the inspectors were aware of the problems their decision would cause for the complainant. In the course of his judgment, Deane J set out²¹ clearly the elements which the taxpayer was required to prove in order to establish conscious maladministration as being:

1. an invalid or unauthorised act²²
2. done maliciously²³
3. by a public officer²⁴
4. in the purported discharge of his or her public duties
5. which causes loss or harm to the plaintiff.

The critical element is ‘malice’²⁵ — which, not surprisingly, has generally been the most difficult element to establish.

In relation to ‘malice’, the Full Federal Court in *Denlay v FCT* stressed that the ‘bad faith’ in conscious maladministration refers to actual bad faith, and ‘does not include constructive bad faith established by unwitting involvement in [an] offence’. The focus is on the state of mind of the officers making the assessment; and the concept relates to the integrity of the process and the competence and honesty of the officers involved in making the assessment.²⁶

In *Mengel*, Deane J stated that for the purposes of conscious maladministration, ‘malice’ would exist if the act was done (i) with actual intent to cause such injury; (ii) with knowledge of invalidity or lack of power and with knowledge that it would be likely to cause such injury; or (iii) with reckless indifference²⁷ or deliberate blindness to that invalidity or lack of power and that likely injury.²⁸

19 [1995] HCA 65 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gordon, McHugh JJ).

20 *Sanders v Snell* [1998] HCA 64.

21 *NT v Mengel* [1995] HCA 65 [23].

22 *Mengel*, Deane J at [8].

23 Or knowingly — *Mengel*, Brennan J at [9], [10]: that is, the tort is triggered by states of mind that are inconsistent with an honest attempt by a public officer to properly perform the functions of public office. His Honour observed at [9] that in ‘more recent times, the scope of the tort has not been limited to cases in which a public officer has acted maliciously ... but [extends to situations where] a public officer engages in conduct in purported exercise of a power but with actual knowledge that there is no power to engage in that conduct’.

24 Bevacqua, above n 8, 44, notes that there is ‘no single clear test’ to identify a public officer, and that it has been suggested that employees occupying position lower on the public service ladder might not be held to be occupying a public office — thus creating difficulties for plaintiffs. In *Mengel*, above n 21, Brennan J stated at [5] that a ‘public officer’ is anyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise’. In *Donoghue* (below) Collier J avoided this problem by identifying the Commissioner of Taxation as the ‘public officer’ by virtue of their statutory duty to issue the assessments in question — raising the possibility of the Commissioner being personally liable for damages — see the discussion below.

25 *NT v Mengel* [1995] HCA 65, Deane J [23].

26 [2011] FCAFC 63 [76]–[80] — cited in *Roberts v DCT* [2013] FCA 1108 [25 (Besanko J — first instance)].

27 ‘Recklessness’ is usually defined via an objective test as conduct beyond mere inadvertence or carelessness, involving disregard or indifference to consequences that are reasonably foreseeable as being a likely result of actions taken — running what a reasonable person would regard as ‘an unjustifiable risk’ or ‘a conscious disregard of an unjustified risk’ amounting to ‘gross carelessness’: *BRK (Bris) Pty Ltd v FC of T* [2001] ATC 4111 [77]–[80] (Cooper J); *Yazbek v FC of T* [2014] ATC ¶10-369 [93]–[103] (Bennett J) and other cases cited in Woellner et al, *Australian Taxation Law*, (25th edn) 2015, 1,870–1 nn 23–5. ‘Recklessness’ therefore involves an intermediate state between lack of reasonable care (mere carelessness) and intentional conduct: see Woellner (above) at 1,863–4 and 1,871–2 respectively.

28 *NT v Mengel* [1995] HCA 65, Deane J [24].

Brennan J took a similar view, observing that:

Misfeasance in public office consists of a purported exercise of some power or authority by public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of all misfeasance in public office. If the impugned conduct and causes injury, the cause of action is complete.²⁹

The judges delivering the joint judgment in *Mengel*³⁰ were less definite. After earlier stating that principle suggested that misfeasance in public office was a counterpart to torts involving intentional infliction of harm and should be confined in the same way,³¹ their Honours stated merely that if misfeasance in public office was to be viewed as a counterpart to the torts imposing liability on private individuals for the intentional infliction of harm, there was ‘much to be said for the view that’ misfeasance would include reckless disregard of the means of ascertaining the extent of the officer’s power.³²

In *Sanders v Snell*, Sanders failed to prove conscious maladministration in relation to his dismissal from his position as Executive Officer of the Norfolk Island Government Tourist Bureau. The High Court quoted from the judgment in *Mengel* (above) and noted that

For the purposes of deciding *Mengel*, the majority considered it sufficient to proceed on the basis that the tort requires an act which the public official knows is beyond power and which involves a foreseeable risk of harm, but noted also that there seems much to be said for the view that misfeasance extends to the situation of a public official recklessly disregarding the means of ascertaining the extent of his or her power.³³

Accordingly, while *Mengel* is usually cited for the proposition that reckless indifference is sufficient to found the tort,³⁴ this may not reflect the actual decision in that case. It will be interesting to see how the current High Court approaches the issue, should it have another opportunity to consider it.

III THE LANDMARK TAX CASE: *FUTURIS*

In *Futuris*³⁵ the company had lodged tax returns showing a taxable income of some \$86 million flowing from a complex series of intra-group transactions. The ATO subsequently issued two separate amended assessments to *Futuris*, including in each the same amount of \$19.95 million in relation to a capital gain (in the case of the second amended assessment, the \$19.95 million was included in a larger sum assessed under Part IVA of the Income Tax Assessment Act 1936 (Cth) (ITAA36)). *Futuris* claimed that the ATO had thereby knowingly ‘double counted’ the \$19.95 million capital gain and that the ATO had therefore issued the second amended assessment in bad faith, knowing it to be wrong, which (it argued) constituted an abuse of a public office and therefore conscious maladministration. The ATO relied upon the ‘compensating adjustment’ provision in s 177F(3) ITAA36 to enable it to exclude the amount of \$19.95 million from the Part IVA assessment if this was necessary to avoid any ‘double counting’.

In a joint judgment, Gummow, Hayne, Heydon and Crennan JJ³⁶ in the High Court rejected *Futuris*’ argument and held that the ATO had not committed misfeasance in public office, because its actions did not involve a deliberate failure either to comply with the provisions of

29 *NT v Mengel* [1995] HCA 65, Brennan J [10]

30 Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ.

31 *NT v Mengel* [1995] HCA 65, joint judgment at [60].

32 *NT v Mengel* [1995] HCA 65 (Mason CJ, Dawson Toohey, Gaudron and McHugh JJ) [62] (though they noted at [62] that this was not what was put to the Court in *Mengel*). This was the interpretation also adopted by the High Court subsequently in *Sanders v Snell* [1998] HCA 64 [38].

33 Citing *Mengel* (1995) 185 CLR 307 at 347. Similarly, in *Roberts v DFCT* [2013] FCA 238, Besanko J at first instance indicated at [42] merely that he accepted ‘as arguable for the purpose of this application that that form of recklessness which bears a close affinity with deliberate conduct ... may be sufficient’.

34 See for example the observations by the various Law Lords in *Three Rivers (No 3)* [2003] 2 AC 1.

35 *FCT v Futuris Corporation Ltd* [2008] ATC ¶20-039.

36 Gummow, Hayne, Heydon and Crennan JJ.

the Act or to administer a law according to its terms,³⁷ nor was it an act by ATO staff which was knowingly in excess of their powers,³⁸ or the exercise of statutory powers corruptly or with deliberate disregard for the proper scope of those powers.³⁹

The decision in *Futuris* highlighted two interesting questions:

1. Are there only two grounds on which the validity of an assessment can be challenged?
and
2. The role of ‘recklessness’ in relation to conscious maladministration.

A *Are There Only Two Bases for Challenging the Validity of an Assessment?*

The joint judgment in *Futuris* referred to only two bases for attacking the validity of an assessment, namely that the assessment was tentative/provisional, or that there was a conscious maladministration of the Act.⁴⁰

Kirby J disagreed with the other Justices on this point and observed that while tax lawyers had typically focussed on these two issues, this did not justify treating these two grounds as the only ones relevant to ‘jurisdictional error’ for the purposes of s 39B of the *Judiciary Act 1903* (Cth). He commented that:

As the two nominated categories of invalidity have arisen in taxation cases for at least 80 years, there is a risk that specialists in taxation law will overlook, or ignore, the considerable subsequent advances in administrative law ... Specialist disciplines, including in law, can occasionally be myopic and inward-looking ... The recognised ‘jurisdictional error’ categories in Australia are not closed. Least of all are they confined to the two classifications beloved by tax lawyers. According to a leading Australian academic authority on the subject, [8] categories have been recognised⁴¹ ... [which] go well beyond the two that have engaged virtually the entire attention of the Federal Court and of this Court in these proceedings and other cases like it. There is a risk that the broader categories will be overlooked in such taxation matters if reference is made only to past authority and tax appeals. Once disqualifying invalidity (‘jurisdictional error’) is propounded, these other categories are necessarily enlivened. When a suggestion of invalidation is made, it is not sufficient for the courts, or the parties, simply to cite taxation cases.⁴²

Despite His Honour’s strong exhortation, subsequent decisions have tended to favour the ‘myopic’ interpretation of conscious maladministration.

Thus in *Roberts v Deputy Commissioner of Taxation*,⁴³ in the context of an application by the Deputy Commissioner of Taxation for summary judgment based on Notices of Amended Assessments, Besanko J at first instance referred to several passages in the joint judgment in *Futuris*⁴⁴ in concluding:⁴⁵

In my opinion there are only two categories of error which are not protected by s 175 of the ITAA 1936.⁴⁶ The other forms of what constitutes jurisdictional error in other areas of

37 *Futuris* [55] (Gummow, Hayne, Heydon and Crennan JJ).

38 *Futuris* [11] (Gummow, Hayne, Heydon and Crennan JJ).

39 *Futuris* [59].

40 *Futuris* [51]–[52].

41 In truncated and summary form (see Kirby J at [134], quoting Aronson, ‘Jurisdictional error without the tears’ in Groves and Lee (eds) *Australian Administrative Law — Fundamentals, Principles and Doctrines*, 2007 330 at 335–6), these are: a mistaken denial of jurisdiction; a misapprehension of the limits of the decision-maker’s powers; acting outside the general area of the decision-maker’s jurisdiction; acting on a mistaken assumption about the existence of an essential requirement; disregarding a required consideration or paying regard to an irrelevant one; misconceiving the function being performed or the extent of the decision-maker’s powers; acting in bad faith; or breaching natural justice.

42 *Futuris* [133]–[135] (Kirby J) — see also [136]–[140], [151]–[152].

43 [2013] FCA 238 (Besanko J).

44 See the judgment of Besanko J at [36]–[40]. His Honour stated [41] that his conclusion was consistent with the observations of the Full Federal Courts in *Marijancevic* and *Denlay*, and with the observations of *Kenny J* in *DCT v Hua Wang Bank Berhad (No 2)*.

45 *Roberts v DCT* [2013] FCA 1108 [36]–[41] (Besanko J).

46 *Roberts v DCT* [2013] FCA 1108 [19], point 2, citing *Futuris*, joint judgment [25].

administrative law are not sufficient, nor is recklessness in an expanded sense or carelessness in the administrative process ...⁴⁷

In the subsequent hearing seeking leave to appeal from Besanko J's decision,⁴⁸ Mansfield J seemed to endorse the view that there were only two grounds for challenging an assessment.⁴⁹

Subsequently, in *Hii v FCT*,⁵⁰ Collier J referred⁵¹ to the decisions in *Roberts*,⁵² *Marijancevic v DFCT*,⁵³ *Denlay v FCT*,⁵⁴ *DCT v Hua Wang Bank Berhad (No 2)*,⁵⁵ *Commissioner of Taxation v AAT*⁵⁶ and *Gashi v FCT*,⁵⁷ and stated that these decisions of the Federal Court had 'narrowed the categories where the Court has power to intervene' in challenges to assessments pursuant to s 39B of the *Judiciary Act 1903* (Cth) to the two traditional bases.⁵⁸

However, there are occasional exceptions. Thus, in *Woods v DFC of T*,⁵⁹ a case involving an appeal against a summary judgment and refusal to stay enforcement proceedings, Porter J in the Supreme Court of Tasmania suggested that a 'fair reading' of the joint judgment in *Futuris* did not disclose that their Honours had definitively limited the categories of jurisdictional error to only two, and pointed out that it was 'at least arguable, being the view adopted by Kirby J, that there was no intention to limit the categories to these two instances'.⁶⁰

While the prevailing view appears to be that there are only the two bases for conscious maladministration, there is considerable force in the observations by Kirby J in *Futuris*, and it is hard to see any overwhelming rationale in principle for the narrower view — it would seem logical to suggest that tax law should take all aspects of administrative law concepts of jurisdictional error into account, rather than selecting two and excluding others.

B *The Role of Recklessness in Relation to Conscious Maladministration*

As noted above, the conventional view is that *Mengel* held that reckless indifference or deliberate blindness in relation to the invalidity of or lack of power for a public officer's acts is sufficient to ground an action for conscious maladministration.⁶¹

However, it is worth noting that while Deane J and Brennan J were certainly of this view, the joint judgment was more guarded, stating merely that 'there is much to be said for the view that misfeasance extends to the situation of a public official recklessly disregarding the means of ascertaining the extent of his or her power'.

Similarly, the High Court joint judgment in *Futuris* observed that the House of Lords had indicated that *in English law* 'recklessness may be a sufficient state of mind to found the tort',⁶² though their comment was expressly directed to English law, and they did not indicate clearly

47 *Roberts v DCT* [2013] FCA 1108 [42] (Besanko J).

48 *Roberts v DCT* [2015] FCA 238 (Mansfield J).

49 *Roberts v DCT* [2015] FCA 238 [32], [35]–[36], but see [30] (Mansfield J); see also *Gashi v FCT* [2013] ATC ¶20-377 [42]–[43].

50 [2015] ATC ¶20-501 (Collier J)

51 [2015] ATC ¶20-501 [81]–[84] (Collier J).

52 *Roberts v DCT* [2013] FCA 1108 (Besanko J at first instance — referred to by Collier J in *Hii v CT* [2015] FCA 375 at [81], and at [82] to the (unsuccessful) application for leave to appeal — *Roberts v DCT* [2015] FCA 238.

53 *Marijancevic v DFC of T* [2008] ATC ¶20-046.

54 *Denlay v FCT* [2011] FCAFC 63; [2011] ATC ¶20-260

55 *DCT v Hua Wang Bank Berhad (No 2)* (2010) 81 ATR 40 [48].

56 *C of T v AAT* (2011) 191 FCR 400 [23].

57 *Gashi v C of T* [2013] FCAFC 30

58 [2015] ATC ¶20-501 [81].

59 [2011] TASSC 68.

60 [2011] TASSC 68, see [53]–[57].

61 See for example, below, the observations by Logan J in *Donoghue* at [144]–[145], discussing the decision of the House of Lords in *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1; see also Bevacqua, above n 8, 49–50. Compare, as to the position in Canada, Du Pont and Lubetsky (above n 1), 116.

62 *FCT v Futuris Corporation Ltd* [2008] ATC ¶20-039 [11] (Gummow, Hayne, Heydon and Crennan JJ), citing *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 198, 228, 231.

whether they believed that the same development had occurred or should occur in Australian law.⁶³

Subsequently, in *Roberts v DCT*, Besanko J in a guarded statement ‘accepted as arguable’ for the purposes of the application the proposition that while ‘recklessness in an expanded sense or carelessness in the administrative process’ were not sufficient to found an action for conscious maladministration, the form of recklessness which ‘bears a close affinity with deliberate conduct ... may be sufficient’ (emphasis added).⁶⁴

As noted, on the subsequent hearing seeking leave to appeal that judgment, Mansfield J simply endorsed the approach by Besanko J in holding that the facts did not demonstrate conscious maladministration, *whether or not this included reckless maladministration*. Thus His Honour left open the issue of whether recklessness could constitute conscious maladministration.

Most recently, in *Hii v C of T Collier* J noted that the observations by Besanko J on this point had been ‘carefully qualified’ and did not support a submission that recklessness (carelessness or indifference to the law) constituted bad faith.⁶⁵

Donoghue seems to have been the first Australian case which raised directly the issue of whether reckless indifference was a sufficient ground for an action in conscious maladministration. At first instance (the case is on appeal to the Full Federal Court) Logan J quoted with apparent approval the statements by the various Lords in the UK case of *Three Rivers District Council v Bank of England (No 3)*,⁶⁶ where their Lordships stated variously that:

[it is] settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort ... (Lord Steyn at 192);

[it is sufficient that] the public officer ... is reckless as to [as to the probability that their action will injure another person] (Lord Hutton at 228); and

[it is sufficient if the] official does the act intentionally being aware that it risks directly causing loss ... and the official wilfully disregards that risk (Lord Hobhouse at 231).

Logan J noted that each of their Lordships expressly adopted as correct the proposition which they drew from *Mengel* that ‘proof of recklessness was sufficient in relation to the tort of misfeasance in public office’;⁶⁷ Logan J also observed that recklessness was regarded in *Futuris* as ‘sufficient to establish the element of consciousness in conscious maladministration’.⁶⁸

While including recklessness seems the better approach in policy terms,⁶⁹ it is not clear that the joint judgment in *Mengel* (as distinct from Deane J and Brennan J) actually held that reckless indifference was a sufficient ground.

It will be interesting to see the approach taken by the Full Federal Court on this issue when it hears the appeal in *Donoghue*.

63 Collier J cited the joint judgment in *Futuris* at [11] as support for his interpretation. However, as noted, their Honours in *Futuris* had not clearly endorsed this result, instead stating obliquely that ‘The House of Lords has since indicated that in English law recklessness may be a sufficient state of mind to found the tort. The affinity between tort law and public law has been remarked upon in this Court ... [reflecting] the precept that in a legal system such as that maintained by the *Constitution* executive or administrative power is not to be exercised for ulterior or improper purposes’.

64 *Roberts v DCT* [2013] FCA 1108 [42] — Besanko J had stated earlier in his judgment that ‘Recklessness is very close to conscious maladministration in that it is proceeding with a course of conduct well knowing that it is likely that it is not in accordance with the law and prescribed administrative processes, but careless or indifferent to that fact. It includes a serious departure from the law in prescribed administrative processes to the point that one can infer what blindness or a state of mind akin to that...’ [28]. His Honour at [30]–[33] discounted comments made by French J in *DCT v Warrick (No 2)* [2004] FCA 918 [100] on the point as being of doubtful weight, given that the observations in that case were qualified and made before the decision in *Futuris*.

65 [2015] FCA 375 [99] (Collier J).

66 [2003] 2 AC 1, 193 (Lord Steyn), 228 (Lord Hutton) and 231 (Lord Hobhouse of Woodborough).

67 [2015] ATC ¶20-494 [144] (Logan J).

68 [2015] ATC ¶20-494 [145] (Logan J) — but see the discussion in the text near n 57 above.

69 Bevacqua, above n 8, 50, comments that including recklessness as a sufficient element of the tort ‘gives rise to the only practical hope of the tort being available in all but the rarest cases of ATO operational mistake causing taxpayer loss’.

IV PROBLEMS IN PARADISE: *DONOGHUE V COMMISSIONER OF TAXATION*⁷⁰

It seems that Donoghue is the only Australian case (to date) where a taxpayer has succeeded in proving conscious maladministration by the ATO.⁷¹

The facts of *Donoghue* are startling, to say the least.

In that case, Mr Donoghue had retained a firm of solicitors (Moore & Associates) to act for him in relation to a range of matters. A large part of the relevant work was done by Simeon Moore, the son of Peter Moore, a partner in that legal firm. Simeon was at the time a student in the Law School of an Australian university, but was not then admitted to practice.

The judge found that Simeon performed most of the work for Donoghue in relation to various litigious matters, working as a ‘lay associate’ or ‘consultant’ on behalf of Moore & Associates.⁷² In the course of that work, Simeon created a considerable amount of legal advice, documentation and other materials prepared in relation to anticipated litigation, which the judge held was protected by legal professional privilege.

Simeon subsequently rendered a bill to Mr Donoghue for some \$750,000 for work allegedly done. Logan J found that:

The number of hours stated on this invoice to have been worked ... over the period mentioned is truly fantastic both in total and with reference to individual days. If the entries on the invoice are to be believed, for the period between 20 April and 5 June 2010 (each inclusive) and between 13 and 15 June 2010 (each inclusive), Simeon Moore performed services each and every hour of each and every day that fell in these periods. Again if the entries on the invoice are to be believed, the latter period was worked after working 17 hours on 10 June, 18 hours 11 June and 22 hours on 12 June. In total, including GST and what was said to be ‘ancillary costs’, the total amount said to be owing is \$753,174.62. And this for the services of an as yet not admitted law graduate undertaking post-graduate studies in law ...

The sum sought is outrageously extortionate ... I regard this tax invoice as a fantasy document ...⁷³

Perhaps not surprisingly, Donoghue refused to pay the bill. Following this refusal, Simeon had a conversation with Donoghue to the effect that if the bill was not paid, Simeon would ‘have no hesitation giving the ATO everything I have on you. You should be very worried. A family friend is an Assistant Commissioner and I’ve reported people to him before and he has taken them down ...’⁷⁴

In October 2010, the ATO had already commenced an audit into Donoghue as a result of information apparently received from unrelated third-party sources and by the end of October 2011, the auditor in charge of the case (Main) had prepared a draft report — prior to receiving any information from Simeon. Main was a junior auditor and this was the first ATO audit for which he had primary responsibility.

Subsequently, in November 2011, Simeon provided considerable information and documentation about Donoghue’s affairs by email at various times to Mr Wabeck of the ATO, including material protected by legal professional privilege. This was done without Donoghue’s consent.

70 [2015] ATC ¶20-494 (Logan J); s Grieve and K Bertram ‘The Commissioner of Taxation’s duty of administration of the tax laws under the microscope’ <http://www.lexology.com/library/detail.aspx?g=bd0e75c0-2cfa-40a7-bb85-807f76de052f&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML> (June 30, 2015).

71 In *Donoghue* [130], the Commissioner of Taxation was held to be the ‘public officer’ because ultimately he was responsible under the Act for the issue of the tax assessments in question. This neatly side-stepped the problem identified by Bevacqua at 44–5 that junior public servants such as Mr Main (the auditor in question) might not be held to be ‘public officers’. This in turn raises the issue of a potential order for damages being made against the Commissioner personally (see above).

72 The judge found that Simeon had initially provided a small amount of preliminary ‘research’ advice on an independent basis.

73 *Donoghue v C of T* [2015] FCA 235 [71]–[72] (Logan J).

74 [2015] FCA 235 [73] (Logan J).

The material supplied by Simeon to the ATO was passed on to another ATO officer (Clark) who in turn passed it on to Main. The information provided significant new insights and information, and as a result, Main abandoned his original report and prepared a new one using the information provided by Simeon. This new report was used as the basis for preparation of default assessments later served on Donoghue, together with imposition of penalties and a Departure Prohibition Order ('DPO'). The whole process had been conducted in secret within the ATO, to avoid Donoghue learning of its plans — the ATO apparently feared that if Donoghue became aware of the proposed assessments and DPO, he might move overseas to avoid payment of tax owing. Main was therefore reluctant to ask either Peter Moore or Donoghue about the documents obtained, in case this alerted Donoghue to the ATO's interest in his affairs. Similarly, neither Wabeck nor Clark sought to explore with Simeon or anyone else whether any of the materials might be privileged,⁷⁵ even though Main had alerted them to his apprehension about the possibility of legal professional privilege applying to at least some of the documents.

Main knew that he should not use for assessment purposes any material covered by legal professional privilege. He gave evidence that when he first received the information, he considered whether the documents received were likely to be covered by the privilege, and concluded that this was 'unlikely' because it was not apparent on the face of the documents that they recorded the provision of legal advice to Donoghue.⁷⁶ Logan J noted that this conclusion was a 'convenient one' for Main, as he was at the time under 'a degree of time pressure to complete the audit',⁷⁷ and observed that Main's 'conclusion as to what was necessary to make these extracted documents privileged was mistaken and reckless'.⁷⁸

Upon receiving the default assessments, Donoghue rightly surmised, in light of the threat made by Simeon, that some of his privileged communications may have been given to the ATO and accordingly retained new solicitors to challenge under s 39B of the *Judiciary Act 1903* (Cth) the validity of the assessments, alleging among other things 'conscious maladministration' by the Commissioner⁷⁹ through the ATO staff's improper use of the privileged materials.

Logan J upheld Donoghue's argument, finding so far as relevant that:

1. While Main did not deliberately use material knowing it definitely to be privileged, he did 'deliberately not pursue or cause to be pursued inquiries which would have quelled an apprehension, always present, which he had that the documents and information provided by Simeon Moore (or some indeterminable part thereof) were subject to legal professional privilege'.⁸⁰
2. Main knew that he could not use privileged material in the audit, that the privilege could not be waived by third parties or a solicitor, and that in any case there was no evidence of waiver in the materials.⁸¹
3. Main was always apprehensive that some of the material might be privileged, but 'chose to take his own counsel' on this issue, 'closed his eyes to the obvious' and (wrongly) concluded that the risk of the documents being protected by privilege was low:

Mr Main deliberately chose not to make or cause to be made inquiries [about the possible application of the privilege]. He chose to take a risk ... that the material might indeed be privileged and its use in the process of assessment forbidden by law. He made these choices under the pressure of a limited time within which to complete his audit ... [and] acted in reckless disregard of a right which Mr Donoghue had at least to claim an important common law privilege.⁸²

⁷⁵ *Donoghue* [107] (Logan J).

⁷⁶ *Donoghue* [100] (Logan J).

⁷⁷ *Donoghue* [101] (Logan J).

⁷⁸ *Donoghue* [102] (Logan J).

⁷⁹ *Donoghue* [123]–[131] (Logan J).

⁸⁰ *Donoghue* [112] (Logan J).

⁸¹ *Donoghue* [112] (Logan J).

⁸² *Donoghue* [107] [112], [113] (Logan J).

[Moreover, Main] ... 'chose, deliberately, not to put in place a regime which would protect any claimed privilege before use was made of that material for assessing purposes'.⁸³

Accordingly, Logan J held that the Commissioner of Taxation⁸⁴ had, through Main's actions, committed conscious maladministration in the assessment process. The assessments were therefore quashed, as were the penalties and DPO.⁸⁵ The materials provided by Simeon were to be either returned to Donoghue or destroyed.

Logan J did not directly address the issue of whether personal liability could attach to the Commissioner (or Main), though presumably the Crown or another body would normally indemnify those found to be liable.⁸⁶

V INADEQUATE SUPERVISION CONTRIBUTED TO THE PROBLEM

In Donoghue, Logan J noted that Mr Main struck him as

an intelligent, serious-minded young man, dedicated to his auditing duties within the Australian Taxation Office ... This was the first audit for which he had primary responsibility... I do not consider that the weakness in the process of assessment revealed by this case was one of character on Mr Main's part but rather ... of inexperience and zeal, coupled with a lack of relevant supervision and guidance.⁸⁷

Logan J went on to observe that Main would have benefited from advice and guidance from 'an engaged, experienced supervisor' and perhaps also external legal advice to advise him on the implications of the proposed use of the questionable material supplied by Simeon Moore in preparing assessments.⁸⁸

On the latter point, Logan J observed that Main's supervisors and colleagues within the ATO had also fallen short of the ideal.⁸⁹ Main had advised the colleagues who had given the Simeon materials to him of his apprehension that at least some of the materials might be covered by legal professional privilege, but despite this, neither colleague tried to persuade him not to use the material, nor did they alert Main's supervisors to his concerns or explore with Simeon Moore or anyone else the question of whether any of the material Simeon was offering to the Australian Taxation Office might be privileged (even though they were the ones who were initially in direct contact with Simeon).⁹⁰

Similarly, although Main did not actually alert his supervisors or others to his concerns about the possibility of legal professional privilege applying, Logan J was critical of the fact that neither of Main's supervisors within the ATO detected his apprehension in relation to this issue, or offered him any guidance as to the possible implications of using the material provided by Simeon Moore to create assessments. His Honour observed that

The defect in the process of assessment revealed by this case is not one for which Mr Main is solely responsible. It is to be remembered that while rank has its privileges, it also has its responsibilities.⁹¹

This is a clear warning to the ATO of the need for systemic reform in these areas if it is to avoid a recurrence of such problems.

⁸³ *Donoghue* [138] (Logan J).

⁸⁴ Logan J observed at [130] that the Commissioner had rightly been joined as respondent to the action because under the deeming provision in s 8(2) of the *Taxation Administration Act*, the assessments and notices issued by delegates of the Commissioner were deemed to have been given by the Commissioner of Taxation.

⁸⁵ *Donoghue* [145]–[148]. Collier J at [145] noted that it was — in the first instance — for the Commissioner to decide whether, having regard to the information still available to the ATO and 'in the circumstances now prevailing' whether the issue of fresh assessments 'is possible in fact and in law'.

⁸⁶ Bevacqua above n 8, 43; Robert Evans, 'Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office' (1982) 31 *International and Comparative Law Quarterly*, 640, 644–5, Traditionally, Crown vicarious liability has not applied to conscious maladministration: Bevacqua, above n 8, 43.

⁸⁷ *Donoghue* [99], (Logan J).

⁸⁸ *Donoghue* [99] (Logan J).

⁸⁹ *Donoghue* [99] (Logan J).

⁹⁰ *Donoghue* [107], [114] (Logan J).

⁹¹ *Donoghue* [107] (Logan J).

VI ATO ‘OBFUSCATION’ AND DOOMED ARGUMENTS

Logan J was also critical of the ATO’s response when Donoghue’s new lawyers queried whether the ATO had received privileged material and sought to claim privilege in relation to it on behalf of Donoghue.

Logan J observed that the ATO’s initial response of requiring Donoghue to provide details of the specific documents they claimed were subject to privilege ‘might accurately be described as obfuscation by the Australian Taxation Office’, since this was an impossible task for Donoghue and his lawyers, who did not know which documents had been given to the ATO!⁹²

This would seem an inappropriate response from a federal government department, and certainly not one expected of a ‘model litigant’.⁹³

Logan J also gave short shrift to doomed arguments by the ATO that it did not matter whether the material was privileged and Main had been wilfully blind ‘or worse’, because a different ATO officer had actually made the assessment decision.⁹⁴

Logan J also quickly dismissed an argument that s 263 *ITAA 36* impliedly overrode the privilege, holding that authority had established that the section was too general to overthrow a fundamental principle such as legal professional privilege.⁹⁵

His Honour also dismissed an argument that the decision in *Denlay* (above) justified the ATO actions (in *Denlay*, the ATO had been given stolen bank records and used them to assess taxpayers, but had not been a party to the theft of those records). The Full Federal Court there had said that in those circumstances, the Commissioner was not obliged to refrain from carrying out his statutory duty to assess the taxpayer merely because the Commissioner held even a reasonable suspicion that his officers may have committed some illegality in the course of gathering information. Logan J commented that:

The passage ... from *Denlay* is not ... an endorsement of the proposition that s 166 gives the Commissioner carte blanche consciously to maladminister the *ITAA36* in the process of making an assessment.

It is perhaps surprising that the ATO ran these arguments, given their tenuous nature and, particularly, the weight of authority developed over an extended period that legal professional privilege applies to constrain s 263.⁹⁶

VII THE IMPLICATIONS OF *DONOGHUE*

It is important to recognise that the case does not indicate that the ATO is in some way malevolent — in a large bureaucracy, operating in such a sensitive field, some mishaps are almost bound to occur. The key is to learn from them and avoid repetitions.

In that light, the following points (among others) can be drawn from *Donoghue*:

1. The decision in *Donoghue* clearly holds that reckless indifference is a sufficient basis for a finding of conscious maladministration. That is, it is not necessary that an ATO officer ‘deliberately use material which he *knew definitely* to be privileged’ (emphasis added); it is sufficient if they act with reckless indifference in that they ‘deliberately [did] not pursue or cause to be pursued inquiries which would have quelled an apprehension ... that the documents and information ... (or some indeterminable part thereof) were subject to legal professional privilege’.⁹⁷

⁹² *Donoghue* [115] (Logan J).

⁹³ *Donoghue* [132]–[140]. This is not the first time that the ATO has been criticised for inappropriate conduct: see Woellner et al, *Australian Taxation Law* (25th edn) CCH Australia ¶31-505.

⁹⁴ *Donoghue* [117]–[132], [136]–[137]. Logan J also noted at [133]–[134] that while he understood that the Commissioner had been ‘disposed at one stage to submit’ that the words ‘any other information in his possession’ in s 166 authorised the ATO to use for assessment purposes information covered by legal professional privilege ‘no such submission was pressed’ and that to have pressed the point ‘would have run counter to over-whelming authority’.

⁹⁵ *Donoghue* [136]–[139] (Logan J).

⁹⁶ See for example *FC of T & Ors v Citibank Ltd* 89 ATC 4268, 4274–7 (Bowen CJ and Fisher J; *Allen Allen and Hemsley v DFC of T* 89 ATC 4294; *FC of T v Coombes (No 2)* 99 ATC 4634, [32]–[34] (Sundberg, Merkel and Kenny JJ); *JMA Accounting Pty Ltd & Entrepreneur Services Pty Ltd v Carmody* [2004] ATC 4916, 4919–20 (Spender, Madgwick and Finkelstein JJ).

⁹⁷ *Donoghue* (above) [112] (Logan J).

It will be interesting to see what approach the Full Federal Court takes to the issue — and in light of the High Court’s comments in *Mengel* and *Sanders* — perhaps even more interesting to see the High Court’s approach, should the matter proceed that far.

2. The prevailing view is that there are only two bases on which the validity of an assessment can be challenged under s 39B of the *Judiciary Act 1903*: a provisional/tentative assessment or conscious maladministration.
3. The case underlines the need for systemic improvements in education of ATO staff on key issues relevant to their work, particularly junior staff in the early stages of their career. It also points to the need to monitor case-work closely to ensure that unrealistic or looming deadlines do not cause procedural aberrations.
4. There is a clear need for systemic improvements within the ATO in supervision processes and the training and education of potential supervisors.
5. Logan J’s criticism of the ATO’s apparent ‘obfuscation’ in response to the attempt by Donoghue’s lawyers to claim privilege signals a potentially serious issue that needs to be addressed urgently by the ATO.⁹⁸
6. It was surprising to see the ATO argue that s 263 overrode legal professional privilege, given the weight of authority to the contrary and the ATO’s acknowledgment over many years that the privilege does apply to constrain ATO access powers.
7. The fact that the Commissioner was impliedly held to be the public officer is interesting. The decision on this point rested largely on the basis that under the relevant income tax legislation, the Commissioner bears the statutory responsibility to issue assessments, albeit through statutory delegations and authorisations. It is possible that the absence of such direct statutory responsibilities may produce a different result in a future case.⁹⁹
8. The case raises the interesting question of whether the Commissioner — as the relevant public officer — could be held personally liable for any damages caused to Donoghue by the actions of ATO staff, for whom the Commissioner is ultimately responsible.

VIII OVERSEAS EXPERIENCES

As noted above, Australia is not alone in finding cause for concern with the actions of government departments. The Canadian tax system is often compared to that of Australia, and again in this context, a comparison is useful and enlightening. There have been similar concerns raised in Canada in recent times,¹⁰⁰ and while the circumstances and context may be different, the underlying issues are analogous.¹⁰¹

For example, it has been reported¹⁰² that in Canada:

- the court in *McCreight* held that the Canadian Revenue Authority (‘CRA’) officer investigating use of R&D tax credits based on advice given by tax advisers in a large accounting firm had sworn an information alleging fraud and conspiracy against certain parties primarily in order to enable the investigator to retain possession of the seized

98 See for example R Woellner, ‘Is the ATO a law unto itself?’, paper presented at ALTA 2007 (Perth).

99 See s 8 *ITAA 1936*, and related provisions which confer a general power of administration on the Commissioner in relation to a wide range of direct and indirect tax Acts.

100 And similar difficulties encountered in taxpayers obtaining relief — indeed, Du Pont and Lubetsky go so far as to assert that in Canada, the result of jurisdictional gaps has been that ‘CRA auditors largely have licence to act with near impunity’ — above n 1, 105, 108.

101 Compare for example J Bevacqua, ‘Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments’, (2013) 61(4) *Canadian Tax Journal* 893; M J Hewitt, ‘Can You Sue the Canada Revenue Agency for Investigating You?’ <http://www.singleton.com/en/Publications/Can_You_Sue_the_Canada_Revenue_Agency_for_Investigating_You.aspx>.

102 By way of background, see D Jacyk, ‘The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts’ (2008) 56(3) *Canadian Tax Journal* 661, 692–6, 704–7; Du Pont and Lubetsky, above n 1, 103; Collins Barlow, ‘Oh! Taxman, what big teeth you have’ <<http://www.collinsbarrow.com/en/cbn/publications/oh-taxman-what-big-teeth-you-have>>. See also D Rotfleisch, ‘Rulings on CRA general duty of care — a positive development’ *Law Times*, Speakers Corner, 26 January 2015; G Purse, ‘How To Sue The CRA’ <http://www.mondaq.com/article.asp?articleid=402130&email_access=on>; Hewitt, above n 101; and cf Bevacqua above n 101, 893.

documents. As a result, the advisers lodged claims for misfeasance in public office, negligence and abuse of process;¹⁰³

- in *Archambault*, Justice Reimnitz at first instance found that Revenu Québec had acted in bad faith by intentionally and maliciously withholding the taxpayer's R&D tax credits to put financial pressure on them, seizing their bank account improperly and keeping the taxpayer uninformed about proceedings, thus making it difficult for them to prepare a defence;¹⁰⁴
- in *Chhabra v The Queen*, the state was ordered to pay exemplary damages for their agents' use of tainted documents and action in maliciously garnisheeing 75% of the taxpayer's gross professional income;¹⁰⁵
- in *Longley v MNR*: punitive damages were awarded where the CRA improperly refused to recognise the taxpayer's arrangement and intentionally misled the taxpayer by falsely denying that it had legal advice supporting the legality of the taxpayer's arrangement;¹⁰⁶
- in *Joncas v Agence du Revenu Quebec*¹⁰⁷ damages were awarded where RQ asserted premises the auditor knew were false, and ignored the obvious in issuing assessments; and
- in *Groupe Enico Inc v Agence du Revenu du Quebec*¹⁰⁸ compensation of some \$4 million plus interest was awarded where CRA created falsely inflated assessments, planted evidence and took a range of other inappropriate actions.

Such cases (and *Donoghue* in Australia) underline the point made at the outset — large bureaucracies, no matter how committed institutionally to public service, must be assiduous in training and monitoring staff to ensure that the organisational ideals are upheld and applied in practice despite human frailties and organisational pressures.

IX CONCLUSION

The tort of conscious maladministration represents an important check on conscious abuse of public office.

The tort has existed for many years, but was largely ignored by the tax profession in Australia¹⁰⁹ until 2008, when it was highlighted by the High Court decision in *Futuris*. Since then, the tort has become almost a staple pleading in cases challenging ATO assessments, though until the 2015 decision in *Donoghue*, no taxpayer had succeeded in such claims.

Understandably, the courts have been concerned to keep the tort within reasonable bounds, requiring that claimants prove that the decision-maker had been actuated by 'malice' as defined in various court decisions.

However, the facts in *Donoghue* — allied to the examples of abuse overseas — demonstrate that the courts must balance this constraint with the need to ensure that people who suffer damage as a result of conscious maladministration by government departments are not denied a remedy on technical grounds.

The decision in *Donoghue* also underlines the need for the ATO (and other government departments) to ensure that staff — particularly those in key areas — are well trained and supervised, and do not allow excess zeal (or other failings) to create the sort of problems that arose in that case.

A key point to emerge from *Donoghue* is the express endorsement by Logan J of recklessness as a foundation for the action in conscious maladministration. If the point is upheld by the Full Federal Court on appeal, this would make it (somewhat) easier for future claimants to succeed in actions against the ATO (and other government departments/officials).

¹⁰³ *McCreight v AG* 2012 ONSC 1983; Purse above n 102, 3.

¹⁰⁴ *Archambault v Revenu Quebec* 2013 QCCS 5189 [699]; Purse above, 5.

¹⁰⁵ 89 DTC 5310 (FCTD).

¹⁰⁶ (1992) 66 B.C.L.R. (2d) 238 (CA).

¹⁰⁷ 2012 QCCQ 5096.

¹⁰⁸ 2013 QCCS 5189.

¹⁰⁹ Though taxpayers had made numerous claims for 'bad faith' in various ATO decisions, as noted.

The decision of the Full Federal Court on this and other issues will therefore have a significant impact on the future development of this area of the law, and will be watched with close interest by the ATO and tax advisers alike.