LexisNexis

Australian
Tax Law
Bulletin

2016 . Vol 3 No 1

Contents

page 2 **General Editor's introduction**
Dr Helen Hodgson *CURTIN LAW SCHOOL*

page 3 **Are there any restrictions on the use of the Commissioner of illicitly obtained information in rendering assessments?**
John W Fickling *WESTERN AUSTRALIAN BAR*

page 11 **High Court decides on retention of amounts to cover tax — clarity for liquidators, agents and trustees?**
Michael Blissenden *WESTERN SYDNEY UNIVERSITY*

page 15 **ATO calls time on distributions to tax-exempt entities**
Dr Helen Hodgson *CURTIN UNIVERSITY*

General Editor

Dr Helen Hodgson, *Associate Professor, Curtin Law School, Curtin University*

Editorial Panel

Michael Blissenden, *Associate Professor of Law, University of Western Sydney*
Andrew Clements, *Partner, King & Wood Mallesons, Melbourne*
Gordon Cooper AM, *Adjunct Professor in the School of Taxation and Business Law (incorporating Atax), University of New South Wales*
John W Fickling, *Barrister, Western Australian Bar*
Dr Paul Kenny, *Associate Dean Academic, Faculty of Social and Behavioural Sciences, Associate Professor in Taxation Law, Flinders Business School, Flinders University*
Craig Meldrum, *Head of Technical Services & Strategic Advice, Australian Unity Personal Financial Services Limited*
Karen Payne, *Partner, Minter Ellison*
Joseph Power, *Senior Associate, King & Wood Mallesons*
Andrew Sommer, *Partner, Clayton Utz*
Sylvia Villios, *Lecturer in Law, Law School, University of Adelaide*
Chris Wallis, *Barrister, Victorian Bar*

Information contained in this newsletter is current as at February 2016

LexisNexis Butterworths

General Editor's introduction

Dr Helen Hodgson *CURTIN LAW SCHOOL*

This is the first edition of the *Australian Tax Law Bulletin* for the new year, which is already shaping up to bring significant changes in the taxation system. Over summer we have seen the debate shift away from proposals for a Green and White paper and we now expect the first concrete reforms to appear in the pre-election budget in May. Last week the Commissioner for Taxation put multinational companies on notice that the Australian Taxation Office (ATO) will not be backing off on its compliance agenda; and we have an election looming.

On the ground, this is bound to cause some anxiety among practitioners and clients. In an election year there is a long lead time from announcement to enactment of legislation, and the interpretation and implementation of the proposals may be unclear until the legislation has finally passed the Parliament. The role of this *Bulletin* is to brief practitioners on current issues, and we try to adopt a practical perspective. This year we will do our best to advise you on important changes as they become law.

This first edition for the year includes three articles addressing practical issues that arose over the summer break.

The first article, by John Fickling, examines the Full Federal Court decision in *Commissioner of Taxation v Donoghue*.[1] The decision considers whether the Commissioner of Taxation should use information that was obtained through illicit means, following a dispute between Mr Donoghue and his tax advisor. The case makes interesting reading.

This is followed by another report of a case related to tax administration. Michael Blissenden examines the decision in the *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq); Commissioner of Taxation v Muller and Dunn as Liquidators of Australian Building Systems Pty Ltd (in liq)*[2] case which considers the obligations that liquidators have to provide for tax out of the proceeds of the sale of assets. As Michael explains, this has implications for the order in which proceeds are distributed among other creditors of the company.

Finally, I was intrigued by the Commissioner's announcement in January that the ATO will be looking more closely at distributions from trusts to tax exempt entities to ensure that the trusts have complied with ss 100AA and 100AB of the Income Tax Assessment Act 1936 (Cth). I have written a short note on the practical operation of these measures and what trustees need to do to comply.

I hope that you find these topics useful as we look forward to a challenging year in the tax profession.

Dr Helen Hodgson
General Editor
Associate Professor
Curtin Law School
Helen.Hodgson@curtin.edu.au
www.curtin.edu.au

Footnotes

1. *Commissioner of Taxation v Donoghue* [2015] FCAFC 183; BC201512645.
2. *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq); Commissioner of Taxation v Muller and Dunn as Liquidators of Australian Building Systems Pty Ltd (in liq)* [2015] HCA 48; BC201512116.

Are there any restrictions on the use of the Commissioner of illicitly obtained information in rendering assessments?

John W Fickling *WESTERN AUSTRALIAN BAR*

On 17 December 2015, the Full Court of the Federal Court handed down the decision of *Commissioner of Taxation v Donoghue*[1] (*Donoghue FFC*). This is the latest iteration of a case involving an allegation of conscious maladministration against the Commissioner of Taxation (the Commissioner) where the Commissioner has used illicitly obtained information in rendering an assessment and the taxpayer has for this reason sought to have the assessment declared invalid. The Full Court, upholding the Commissioner's appeal, held that the Commissioner was permitted to use the illicitly obtained information.

It is important to note that the *Donoghue FFC* case is one which involves the use of illicitly obtained information by the Commissioner (an "illicit information case"). The only other significant case of relevance where a not-dissimilar allegation has been brought against the Commissioner is *Denlay v Commissioner of Taxation*[2] (*Denlay FFC*).

It is important to note that this kind of case should be clearly distinguished from a case where the Commissioner is alleged to have recklessly or intentionally misapplied the taxation law to cause injury to the taxpayer (such as *Commissioner of Taxation v Futuris Corp Ltd*[3] (*Futuris*)) and it should also be clearly distinguished from a case where the Commissioner is alleged to have exceeded his jurisdiction in issuing an assessment or amended assessment and a reconciliation of provisions is called for (such as *Plaintiff S157/2002 v Commonwealth*, which the majority in *Futuris* was at pains to point out dealt with excess of jurisdiction matters in Commonwealth law).[4] The author makes no further comment as to these latter two kind of cases in this article.

The facts in Donoghue

Ultimately the facts of *Donoghue FFC* are quite simple. Mr Donoghue, the applicant at trial in the court below in *Donoghue FFC*, engaged the services of a law student, Mr Simeon Moore (Simeon), who can be stated for present purposes was operating under the auspices of his father's then legal practice headed up by Mr Peter Moore, who was also involved in providing services. Simeon came to be in possession of a large number of documents for which it can be assumed for present purposes, in the hands of Simeon and or his father, were subject to legal professional privilege. Some or all of these documents in the hands of Simeon and or his father were also subject to a duty of confidence.

Then, after having performed work in the nature of or in furtherance of legal services for a time, on 5 August 2010, Simeon sent Mr Donoghue a tax invoice purporting to be for work done between 30 January 2010 and 5 August 2010 claiming $753,174.62.[5] Logan J, at trial, described the invoice as "a fantasy document".[6] Logan J remarked at trial:[7]

> The number of hours stated on this invoice to have been worked by Simeon Moore 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 periods 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.

Not unexpectedly, Mr Donoghue refused to pay it and Simeon threatened Mr Donoghue between 5 and 11 August 2010, saying, to the effect: "Garry, if you don't pay me and my family, I will have no hesitation in giving the ATO everything I have on you. You should be very worried".[8]

Simeon did in time engage the ATO and started to provide information. Mr Donoghue was already under covert audit by the ATO, due to the information provided by another informant (as found by the trial judge). The ATO auditor who was responsible for the audit at that time, Mr Main, wrote to a fellow ATO officer an email recording the following on 8 November 2011:[9]

> While Mr Moore should be given the opportunity to submit documents … The ATO needs to be cautious because:
>
> …
>
> (2) Mr Moore's emails indicate that he is seeking counsel advice on the likely ramifications of taking information/evidence to the media and contacting Mr Moore (and, indeed, not contacting him) may implicate the ATO in any media coverage;

(3) Mr Moore appears aggrieved by Mr Donoghue and may attempt to use the ATO for his own purposes; and
(4) Some of the documents in Mr Moore's possession may be subject to legal professional privilege.

Despite the initial caution of Mr Main that the ATO were dealing with an aggrieved individual, who was actively contemplating on contacting the media, and likely in possession of "documents [which…] may be subject to legal professional privilege", an officer of the ATO, Mr Clark, met with Simeon on 14 November 2011 and received into the ATO's custody from Simeon "a 127 page statement, a bundle of documents (132 pages in all) together with two laptop computers". This information was used to render the reasons for decision to conclude the audit and thereafter issue original assessments against Mr Donoghue, who had not filed his tax returns (presumably on the basis he was not so required as he considered himself non-resident).

The legislative authority to assess

The Commissioner's power to render "assessments" is contained in Pt IV of the Income Tax Assessment Act 1936 (ITAA 36). Broadly:

- section 161 broadly compels citizens and others to file an annual income tax return;
- section 162 allows the Commissioner to require citizens to lodge a "further or fuller return" and "any information, statement or document" about a citizen's affairs;
- section 163 allows the Commissioner to require any person to furnish "any return" required for the purposes of the Act. In respect of all the above sections, ss 263 and 264 of the ITAA 36 allow the Commissioner to lawfully compel the production of information from any person or entity, *other than* information which is subject to client legal privilege which is protected from disclosure by compulsion;
- section 166 requires the Commissioner to render an assessment from the returns and information in his possession:

  > From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:
  > (a) the amount of the taxable income (or that there is no taxable income) of any taxpayer …

- section 167 allows the Commissioner to make an assessment if a taxpayer defaults in filing a return or the Commissioner is not satisfied with the return;
- section 174 requires the Commissioner to serve a notice of assessment as soon as practicable; and
- section 175 provides that the validity of an assessment shall not be affected due to non-compliance with any provision and former s 177[10] provided evidence of a prima-facie debt in recovery proceedings.

A taxpayer who does not like an assessment that has been rendered, given the prima facie "validity" dictated by s 175, may "object" to that assessment under the regime provided by Pt IVC of the Taxation Administration Act 1953 (Cth), notwithstanding that an objection will not change the fact that the "assessment" will remain due and payable. In this respect, Pt IV of the ITAA 36 represents the ultimate "pay now, dispute later" regime, a regime which has existed since at least 1936.

It has been said over time that Pt IV "covers the field".[11] So what must be abundantly clear from the above is that if Pt IV of the ITAA 36 covers the field, one must ask, where is the provision which allows the Commissioner to receive unsolicited illicitly obtained information, particularly information for which he cannot lawfully compel be produced? The answer is that, on its face, there is none. So on what basis has the Commissioner been allowed to use illicit information provided to him which he did not request and could not have compelled production of? This article addresses this point.

The absence of a clear authority from the Parliament to use illicitly obtained information has given rise to litigation whereby taxpayers, notably in *Denlay FFC* and *Donoghue FFC* have sought to challenge the validity of the assessment by resource to seeking a declaration from the Federal Court of Australia that the purported assessment is invalid pursuant to the action allowed by s 39B of the Judiciary Act 1903 (Cth) and ultimately s 75(v) of the Constitution.

Denlay FFC — the ground-breaking case which authorises the use of "illicit information" by the Commissioner

Futuris

In 2008, the High Court decided *Futuris*. As noted above, *Futuris* is not an illicit information case but rather is a case instead about misuse of the taxation law. Nevertheless, the court did note that due to the operation of s 175, considered to be a kind of "privative clause", that there were limited cases where an assessment would not be "valid". As the court noted for a purported assessment lacking a "bona fide attempt to exercise … power", there were limits to the protection granted as the assessment being valid:[12]

> But what are the limits beyond which s 175 does not reach? The section operates only where there has been what answers the statutory description of an "assessment". Reference is made later in these reasons to so-called tentative

> or provisional assessments which for that reason do not answer the statutory description in s 175 and which may attract a remedy for jurisdictional error. Further, conscious maladministration of the assessment process may be said also not to produce an "assessment" to which s 175 applies. Whether this be so is an important issue for the present appeal.

Broadly, conscious maladministration in the assessment process may be said to be where officers of the Commissioner either intentionally, or recklessly, misapply the law so as to cause injury to a taxpayer. While the High Court majority in *Futuris* did not define what *conscious maladministration was*, they did say when it was not present, noting that in the case before them:[13]

> the Commissioner did not apply the Act to facts which were known to be untrue, there was no absence of bona fides attending the Second Amended Assessment [and] there was no jurisdictional error vitiating that amended assessment.

Accordingly, *Futuris* does not provide a ratio as to what *is* conscious maladministration.

Denlay FFC

In 2013, the Full Federal Court decided the case of *Denlay FFC*. In that case, for present purposes, an individual called Mr Kieber who was working for a Liechtenstein finance house called LGT, stole a backup tape. Three very senior ATO officers, Ms Jan Farrell (a Senior Assistant Commissioner), Mr Michael Monaghan (a Deputy Commissioner) and Mr Michael O'Neill (an Assistant Commissioner) then met Mr Kieber at an "undisclosed location outside Australia" between 23 and 25 October 2006 and about that time received into their custody electronic documents which it was reasonably inferred had been stolen from LGT, albeit placed on a lawfully obtained hard disk.[14] As was noted by Logan J, at trial:[15]

> Mr Kieber gave the officers a letter dated 23 October 2006 entitled "Australia and Heinrich Kieber" which covered his handing over (on the following day according to the interview transcript) of copies of documents in paper format and also in electronic format, the latter being housed on two compact discs (CD). Mr Kieber had organised the documents into "chapters" directed to particular subjects. Chapter C was entitled, "The LGT Trust Services, Liechtenstein // The Australian Files".

The Commissioner then used this information to render amended assessments against Mr and Mrs Denlay.

Mr and Mrs Denlay sought to have the amended assessments (which pursuant to s 173 are treated the same as assessments) declared invalid pursuant to an action brought under s 39B. Full consideration of the trial decision and the Full Court decision indicates that the Denlays' evidence of the Commissioner's conduct was less than complete. In this respect, it is noted that Logan J in the trial decision noted that: "No evidence was led before me that Mr Kieber had received any financial reward from the Commonwealth of Australia either via the ATO or any other department or agency of the Commonwealth."[16] Interestingly, however, 2 months after the Full Federal Court published its decision, the *Australian Financial Review* (AFR) reported on 28 July 2011 that Mr Heinrich Kieber had been living under an assumed identity as Mr Daniel Wolf on the Gold Coast which causes one to wonder, if the AFR report is accurate (and there is no suggestion that it is not), how a non-citizen could have achieved this without any assistance of the Commonwealth government.[17] The case therefore appears to be a salutary reminder to litigants to robustly investigate all government conduct and prior to going to trial in a conscious maladministration matter.

The Full Federal Court (Keane CJ (as he then was), Dowsett and Reeves JJ) did finally conclude, but nevertheless indicated that given the officers were outside Australia, it was likely the officers had no lawful right to inspect the documents pursuant to s 263, which, had they been in Australia, would have entitled them to lawfully enter premises and inspect documents (except documents subject to legal professional privilege).[18] In respect of the otherwise lawfulness of the obtaining of the illicit information, Logan J noted at trial:[19]

> I am well satisfied, having regard to the record of the interview with Mr Kieber in October 2006, particularly answers 22, 23 and 31 given by him on 23 October 2006, that it was reasonable then to suspect (suspect in the sense described in *Queensland Bacon Pty Ltd v Rees*) that the LGT documents had been taken by him from the LGT Group not only in breach of a duty of confidence owed by him to his employer but also in breach of the criminal law of Liechtenstein. It was then not possible, just on the basis of the disclosures proved to have been made by Mr Kieber at this interview, to give greater precision to this suspicion.

On appeal, the Full Court noted, nevertheless was unable to form the view that any Australian law had been broken:[20]

> It may be accepted that the disks which Mr Kieber gave to the Commissioner's officers contained stolen data. But, as we have observed, the disks themselves were not property reasonably suspected of being the proceeds of crime, there being nothing in the evidence to warrant a reasonable suspicion that those disks were not Mr Kieber's property. The amendment subsequently made to the definition of "proceeds of crime" might well alter that position on the basis that the disks were "partly derived" from the commission of an offence against § 131a of the LCC. But the circumstance that the amendment was made does not suggest that this was what the legislation always intended; rather it tends to confirm that the terms of the legislation before the amendment were not apt to achieve that result …

It appears nothing in the Denlays' pleadings raised issues of copyright violation as may well have existed in the documents and data provided by Mr Kieber to the Commissioner.

Accordingly, the Denlays argued that the use of the term "other information" in s 166 "cannot be construed as a reference to information known to have been obtained by the Commissioner's officers by criminal conduct on their part".[21] Such a construction was rejected by the Full Court, which after noting that *Futuris* did not provide for a proper interpretation of s 166, noted:[22]

> We are unable to interpret s 166 of the ITAA 1936 in the way urged by the taxpayers. Section 166 imposes a duty upon the Commissioner. The interpretation of s 166 urged by the taxpayers would limit the performance of that duty to cases where the Commissioner is able to satisfy himself that his officers had not infringed any law in the gathering of the available information. It would be a remarkable state of affairs if the Commissioner were entitled, and indeed obliged, to refrain from doing what is expressed to be his duty by the terms of s 166 of the ITAA 1936 by reason of a suspicion on his part, even a reasonable suspicion, that some illegality on the part of his officers may have occurred in the course of gathering the information. A clear expression of legislative intention so to qualify the duty imposed on the Commissioner would be required to relieve him of his duty under s 166. We are unable to see that such a limitation is consistent with the unqualified language in which the duty is cast upon the Commissioner and the high importance of making an assessment based on the information available to the Commissioner. The expense and inconvenience of casting such a burden on the Commissioner, and the difficulty of defining precisely the kinds of unlawful conduct which might preclude the Commissioner from doing the duty cast on him by the unqualified language of s 166, are further reasons why the interpretation propounded by the taxpayers should be rejected.

However, no authority for this proposition was provided. As has been noted above, there is no provision within Pt IV which permits the Commissioner to receive unsolicited illicit information as part of the assessment process, which is built around receiving returns and then seeking further or fuller returns and information. Indeed, the Full Court's construction of s 166 must be questioned in light of the very recent decision of *Independent Commission Against Corruption v Cunneen*[23] (*Cunneen*) where the High Court majority of French CJ, Hayne, Keifel and Nettle JJ were highly critical of any method of statutory construction which sought to consider a single term according to its dictionary definition, or indeed a single provision in the absence of the consideration of the broader scheme of the legislation:[24]

> *The principle of legality, coupled with the lack of a clearly expressed legislative intention to override basic rights and freedoms on such a sweeping scale* as ICAC's construction would entail, points strongly against an intention that ICAC's coercive powers should apply to such a wide range of kinds and severity of conduct. So does the impracticality of a body with such a wide jurisdiction effectively discharging its functions. It would be at odds with the objects of the Act reflected in s 2A. It would be inconsistent with the assurances in the extrinsic materials earlier referred to that ICAC was not intended to function as a general crime commission. And, last but by no means least, as Basten JA observed, an extended meaning of "corrupt conduct" would be far removed from the ordinary conception of corruption in public administration.
>
> Logically it is more likely and textually it is more consonant with accepted canons of statutory construction that the object of s 8(2) was to extend the reach of ICAC's jurisdiction no further than to offences of the kind listed in s 8(2)(a)-(y) which could adversely affect the probity of the exercise of official functions by public officials in one of the ways described in s 8(1)(b)-(d).
>
> Counsel for ICAC criticised that conclusion as in effect rejecting the plain and ordinary meaning of "adversely affect" in favour of an inference impermissibly drawn from the statement of the objects of the ICAC Act in s 2A.
>
> The criticism is misplaced. *As was earlier observed, "adversely affect" is a protean expression capable of a number of meanings according to the context in which it appears. The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended.* Contrary to counsel's submission, there was and is nothing impermissible about looking to the context in which s 8(2) appears or seeking guidance from the objects of the ICAC Act as stated in s 2A. Rather, as Mason J stated in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*, it was and is essential to do so:
>
> > [T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context …
>
> [Emphasis added, footnotes omitted.]

With respect to the Full Court in *Denlay FFC*, there is nothing in their Honours' reasoning to show that the operation of the words "other information" was considered in the context of the broader ITAA 36, or further that it is consistent with Pt IV of the ITAA 36 as a whole. Indeed, when the original enactment of the ITAA 36 is considered, elsewhere in the ITAA 36, such as ss 16 and 264, the term "information" was used in a far more narrow sense to reflect that "information" which had been acquired pursuant to the powers of the Act, where s 16(1) noted an officer "may acquire or has acquired information respecting the affairs of any other person, *disclosed or obtained under the provisions of this Act*". Accordingly, this author suggests that there is a real question of law in Australia on the proper construction of Pt IV, as dictated by the principles espoused in *Cunneen*, whether the Commissioner has the power to receive unsolicited illicit information.

Analysis of the Commissioner's ability to use privileged and confidential information in Donoghue FFC

At trial, *Donoghue* was run on the basis of the Commissioner's use of information which he suspected subject to legal professional privilege, amounted to *conscious maladministration in the assessment process*. Logan J concluded that:[25]

> … In these circumstances, Mr Main acted in reckless disregard of a right which Mr Donoghue had at least to claim an important common law privilege.
> Even though they knew of Mr Main's apprehension, neither Mr Clark nor Mr Wabeck sought to dissuade him from the use of the material; nor did they alert his supervisors of the existence of this apprehension.

The Full Court appeal in *Donoghue* however found that the use of information by the Commissioner, or indeed any third party that was the subject to legal professional privilege, was not something which was protected by the concept of legal professional privilege; rather legal professional privilege gave clients and their lawyers a right to resist disclosure of that that was privileged. The Full Court accordingly held that, "[t]he trial judge's conclusion that the law of privilege required Mr Main not to examine or use the documents was contrary to *Propend* and *Daniels*".[26]

Rather the Full Court found that the appropriate allegation that should have been prosecuted by Mr Donoghue was that the receipt of confidential information amounted to conscious maladministration, which was originally pleaded by Mr Donoghue but not robustly advanced and indeed found to have been abandoned at trial. An action for a breach of confidence has been said to lie where:[27]

(a) a document has the necessary quality of confidence;
(b) it is imparted in circumstances importing an obligation of confidence; and
(c) there is an unauthorised use of that information to the detriment of the party communicating it.

The Full Court, while accepting that legal professional privilege would apply to all documents even if some of those documents might already be public, expressed some doubt as to whether all of the information would have been confidential particularly in respect of documents that were already in the public domain. The Full Court noted:[28]

> The significance of this is that whilst such a client might resist compulsory production of the copy of the map held by the lawyer, she would be unable to obtain an injunction to restrain a third party who came into possession of the copy from using it on the basis of an action for breach of confidence.

The court did not turn to the question as to whether a particular compilation of documents, through individually not having the necessary quality of confidence, may together have the necessary quality, in the same way that copyright can subsist in the particular compilation of documents for which the compiler does not himself hold copyright.[29] In any event, the Full Court declined application by Mr Donoghue to effectively alter the original decision on this basis, holding that leave should be refused on the basis that the allegation of breach of confidentiality resulting in conscious maladministration had been abandoned.[30] Nevertheless, the court noted that having regard to the authority of *Denlay FFC* that "s 166 would supply statutory authority to the Commissioner to use the information in the documents to produce an assessment".[31] As the author has noted, above, if the decision of *Denlay FFC* is not sound in light of the High Court's decision in *Cunneen*, this conclusion is also at risk from *Cunneen* as well. Overall, the author would suggest that Full Court in *Donoghue* has drawn conclusions as to issues of national importance which it appears would benefit from clarification from the High Court in light of its decision in *Cunneen*.

Post note of Donoghue FFC

It is important to note that *Donoghue FFC* deals with other issues, but the Full Court having found that the case should have been prosecuted on misuse of confidential information — and that the use of confidential information being protected by authority of *Denlay FFC*, other issues largely fell away.

That said, the trial decision found that conscious maladministration in the assessment process could be made out both by conduct contrary to the law that was intentional and reckless as to causing injury to the taxpayer based on what had been said by the High Court majority in *Futuris*. The Full Court was not able to further consider the question of whether the necessary "absence of bona fides" was made out because, to use the words of the Full Court, "the findings of the trial judge … are premised upon the wrong question… [and] must be put at nought". This, it must be said, can only be a frustrating outcome for Mr Donoghue who as a result of four days of hearing at trial, was found by the deeply experienced trial judge to be entitled to have the amended assessments invalidated as the Commissioner's conduct crossed the line, only to have that finding overturned on appeal by the Full Court.

As a further post note, it should be noted that, perhaps, for the reason that Pt IV gives rise to a "pay now, dispute later" regime, adopting the approach of the High Court in *Cunneen* and their mantra as to the "principle of legality", there may well be on proper consideration of the law controls on what goes into an

assessment, such that the Commissioner exercises those controls. By analogy, in the manufacture of sausages, as consumers we can take comfort in the fact that sausage manufacturers exercise strict controls as to what goes into their sausages, because, it is suggested, regardless of what is put in, the output likely looks and smells like a sausage. With some comfort, Australian manufacturers tend not to receive unsolicited gifts of input from rogue players (no doubt, with their own twisted agenda) into the sausage machine at the factory door which they then input into the sausage machine, otherwise the first indication of such conduct might be when affected citizens are present at the emergency department. Similarly, both courts which run under the adversarial model (as exists in Australia) and the inquisitive model (as exists in many European nations) have controls on what inputs — called evidence — go into their decision making process to preserve the integrity of that process. The question here, is what controls exist for the input of illicitly obtained information for the Commissioner?

Further to the legislative context of Pt IV of the ITAA 36, a potential question arises if the constitutional context can assist. No constitutional issue was raised in *Donoghue FFC* but one wonders whether a constitutional question arises. The power of the Commonwealth to expropriate property from citizens in Australia is not absolute. Section 51(ii) of the Constitution permits the Parliament of the Commonwealth to make laws with respect to taxation. However s 51(xxxi) which provides for "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws" effectively prevents the Commonwealth making laws allowing for the expropriation of property except on just terms. There is a scarcity of cases decided by the High Court which explain the difference.[32] With respect to any form of taxation, a citizen has a constitutional right to contest his taxes, ultimately before the High Court of Australia is a constitutional right.[33] As set out above, the Commissioner has been empowered by the Parliament, using his administrative power in Pt IV of the ITAA 36, to render an "assessment" and then enforce that assessment prior to it being contested in the courts, where, if that assessment is ultimately invalid or excessive such that it cannot be wholly attributed to the payment of taxation, what the courts will have allowed is the acquisition of property except on just terms which is absolutely prohibited by the Constitution, possibly with life changing consequences to the taxpayer. Historically the High Court has held that the "pay now, dispute later" regime is constitutional on the basis that what money is paid now to the Commissioner can be refunded later if ultimately found by the courts not to be payable. It is nevertheless suggested in this respect, that the High Court and the Federal Court of Australia perform a solemn duty to preserve, uphold and defend the Constitution, and it is suggested that in this context, the law requires that the administrative power to expropriate property in Pt IV of the ITAA 36 is administered with precision in accordance with the "principle of legality" expressed by the High Court in *Cunneen*. So with the greatest respect to the Full Court decisions in *Denlay FFC* and *Donoghue FFC*, in this light, it is difficult not to wonder how the current High Court would, given the absence of specific authority of the Commissioner in Pt IV of the ITAA 36 to use illicitly obtained material submitted to him on an unsolicited basis (for which he could not otherwise lawfully compel production), find as to the power of the Commissioner to use such information.

John W Fickling
Barrister
Western Australian Bar
jwfickling@taxbar.com.au
www.wabar.asn.au

Footnotes

1. *Commissioner of Taxation v Donoghue* [2015] FCAFC 183; BC201512645.
2. *Denlay v Commissioner of Taxation* [2011] FCAFC 63; BC201102848.
3. *Commissioner of Taxation v Futuris Corp Ltd* (2008) 247 ALR 605; [2008] HCA 32; BC200806862.
4. Above n 3, at [68]–[70]; see also *Woods v Deputy Commissioner of Taxation* [2011] TASSC 68; BC201110120 at [48]–[56]; *Plaintiff S157/2002 v Commonwealth* (2003) 72 ALD 1; [2003] HCA 2; BC200300103 at [17] (Gleeson CJ), [58]–[60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
5. Above n 1, at [24].
6. Above n 1, at [24].
7. *Donoghue v Commissioner of Taxation* (2015) 323 ALR 337; [2015] FCA 235; BC201501574 (*Donoghue*)*(includes Corrigendum dated 2 April 2015)* at [71].
8. Above n 1, at [25].
9. Above n 1,*C* at [32].
10. Now contained in s 350-10 of Sch 1 to the Taxation Administration Act 1953 (Cth).
11. *Commissioner of Taxation (Cth) v Ryan* (2000) 168 ALR 704; [2000] HCA 4; BC200000085 at [21].
12. Above n 3, at [25].
13. Above n 3, at [15].
14. *Denlay v Commissioner of Taxation* (2010) 119 ALD 306; [2010] FCA 1434; BC201009715*(Denlay)* at [23].
15. Above n 14, at [25].
16. Above n 14, at [53].

17. N Chenoweth, M Cranston and H Low "Secret Aussie life of a global tax spy", (2011) *Australian Financial Review* available online at www.afr.com.
18. Above n 2, at [83]-[84].
19. Above n 14, at [82].
20. Above n 2, at [74].
21. Above n 2, at [55].
22. Above n 2, at [81].
23. *Independent Commission Against Corruption v Cunneen* (2015) 318 ALR 391; [2015] HCA 14; BC201502563.
24. Above n 23, at [54]–[57].
25. Above n 7, at [113]–[114].
26. Above n 1, at [69].
27. *Coco v AN Clarke (Engineers) Ltd* (1968) 1A IPR 587 [1969] RPC 41 at 47 (Megarry J).
28. Above n 1, at [68].
29. See, inter-alia, Copyright Act 1968 (Cth), s 10.
30. Above n 1, at [64].
31. Above n 1, at [86].
32. See, for example, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 119 ALR 577; [1994] HCA 9; BC9404619.
33. See above n 3, at [9].