

## BACK TO THE *FUTURIS*: A TALE OF MALADMINISTRATION AND PRIVILEGE

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### ABSTRACT

In 2008, in *Commissioner of Taxation v Futuris Corporation Ltd*<sup>1</sup> (*Futuris*), the High Court determined that a deliberate failure to administer the tax law according to its terms would result in the validity of a tax assessment being challengeable in judicial review proceedings as an example of ‘conscious maladministration’. This is despite the broad restrictions on availability of judicial review of tax assessments contained in sections 175 and 177 of the *Income Tax Assessment Act 1936* (Cth). The Court made numerous references to the existence of the tort of misfeasance in public office to lend support to this conclusion.

In 2015, Logan J in the Federal Court case of *Donoghue v Commissioner of Taxation*<sup>2</sup> (*Donoghue*) determined that the Commissioner’s use of privileged material in order to levy an assessment on a taxpayer was sufficiently reckless to amount to conscious maladministration as described in *Futuris*. In reaching this conclusion, the Court confirmed that the requisite recklessness to constitute conscious maladministration was the same as the measure of recklessness sufficient for the purposes of establishing the tort of misfeasance in public office.

In effect, therefore, in *Donoghue*, Logan J reaffirmed and elaborated on the importance of the tort of misfeasance in public office to determining questions concerning the validity of tax assessments and the limits of tax authority powers. This article closely examines the reasoning in *Donoghue* and assesses the ramifications of the case for the prospects of a successful claim of misfeasance in public office against the Commissioner of Taxation. It also considers the potential broader implications of the *Donoghue* case on the equilibrium between taxpayer rights and the Australian Commissioner of Taxation’s tax assessment powers.

### INTRODUCTION

Misfeasance in public office is a tort which ‘permits an individual to recover for the loss or damage suffered consequent upon administrative action taken by the holder of public office, if the officer acted maliciously or knew that the action was beyond power and was likely to harm the plaintiff.’<sup>3</sup> The tort has its foundation in preventing abuses of office, and is a ‘well established’<sup>4</sup> tort with a long history in Australia and in other common law

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<sup>1</sup> (2008) 237 CLR 146.

<sup>2</sup> [2015] FCA 235.

<sup>3</sup> R Balkin and J Davies, *Law of Torts* (2<sup>nd</sup> ed, 1996), 727.

<sup>4</sup> Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ in *Northern Territory v Mengel* (1995) 185 CLR 307, 345 citing *Dunlop v Woollahra Municipal Council* (1982) AC 158, 172.

jurisdictions including the United Kingdom and New Zealand.<sup>5</sup>

While the tort does indeed have a long history, it is a history peppered with lengthy periods of judicial favour and disfavour. For instance, Dench, writing about the status of the tort in the United Kingdom in 1983, points out that:

It is probable...that by the middle of last century the tort was well established. Thereafter, however, it appears to have fallen into disuse...Not until the latter half of this century was the tort revived in earnest.<sup>6</sup>

Similar comments have been made by Fairgrieve, also writing in the English context, who has observed that the tort appears to presently be ‘experiencing something of a renaissance...’<sup>7</sup> There has been a similar revival of interest in the tort in Australia. Evans asserts that ‘[t]he explanation for the revival of interest in this form of liability is that it is directly concerned with providing a remedy for unlawful administrative action by way of an award of damages.’<sup>8</sup> Certainly, a private law claim in which monetary compensation might be awarded for faulty administrative behaviour should be an alluring alternative for many of those otherwise contemplating an action for judicial review against a public official such as the Commissioner of Taxation. This is because damages are not an available remedy in Australian administrative law judicial review proceedings.<sup>9</sup>

However, while numerous claims have been commenced, no misfeasance claim by a taxpayer has ever succeeded against the Commissioner of Taxation or any of his officers.<sup>10</sup> Notwithstanding, in 2008 in *Commissioner of Taxation v Futuris Corporation*

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<sup>5</sup> The history of the tort is briefly described by Lord Steyn in the leading English case of *Three Rivers District Council v Bank of England* [2000] 3 All ER 1. Also, Evans traces the basic cause of action underlying the modern day tort of misfeasance in public office in England as far back as 1364. See R Evans, ‘Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office’ (1982) 31 *International and Comparative Law Quarterly* 640.

<sup>6</sup> S Dench, ‘The Tort of Misfeasance in Public Office’ (1980-1983) 4 *Auckland University Law Review* 183, 187.

<sup>7</sup> D Fairgrieve, ‘Damages Claims against Public Bodies: The Role of Misfeasance in Public Office’ [2007] *Judicial Review* 169.

<sup>8</sup> R Evans, above n 5, 640.

<sup>9</sup> The availability of damages in administrative law proceedings is discussed further in Part II of this article.

<sup>10</sup> The tax-specific case law is discussed at length in Part III of this article.

*Limited*<sup>11</sup> (*Futuris*) the High Court made numerous references to the tort. The majority pointed to the existence of the tort as lending support to a conclusion that a deliberate failure to administer the tax law according to its terms would result in the validity of a tax assessment being challengeable in judicial review proceedings.<sup>12</sup> This is despite the broad restrictions on judicial review of tax assessments contained in sections 175 and 177 of the *Income Tax Assessment Act 1936* (Cth)<sup>13</sup> (*ITAA36*).

The apparent revival of the tort in *Futuris* has seen no subsequent spate of claims against the Commissioner or his officers. In fact, the tort appeared to have faded back into obscurity in the tax context after its brief moment in the spotlight afforded by the *Futuris* judgment. However, in March 2015, Logan J handed down the Federal Court judgment in *Donoghue v Commissioner of Taxation*<sup>14</sup> (*Donoghue*) which, prima facie, breathed new life into the tort as a potential viable basis for challenging assessment decisions by the Commissioner. In *Donoghue*, Logan J held that the Commissioner's use of privileged material in order to generate an assessment against the taxpayer was sufficiently reckless to constitute conscious maladministration as described in *Futuris* – and quashed the assessment. The judgment confirmed the *Futuris* view that the test of recklessness to be applied to satisfy the test of conscious maladministration was the test derived from the tort of misfeasance in public office.

Given the renewed confirmation of the relevance of the tort in *Donoghue* and its application of the tortious characterisation of what constitutes recklessness sufficient to render a tax assessment invalid, it is an appropriate time to re-examine whether and to what extent misfeasance in public office might constitute a viable avenue of relief for a

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<sup>11</sup> *Futuris*, above n 1.

<sup>12</sup> The majority discuss the tort at 153 and 164. Part II of this article discusses further the specific comments of the High court in this case.

<sup>13</sup> Section 175 provides simply that the validity of an assessment will not be affected by non-compliance with any provisions of the *Income Tax Assessment Act 1936* (Cth). Section 177 provides that the production of a notice of assessment, or of a document purporting to be a copy of a notice of assessment, is conclusive evidence of the due making of the assessment and, except in proceeding under Part IVC of the *Taxation Administration Act 1953* (Cth) on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct. Both of these sections are discussed further in Part II of this article.

<sup>14</sup> *Donoghue*, above n 2.

taxpayer aggrieved by act or omission of the Commissioner or his officers. This article undertakes this re-examination.

Specifically, in Part II, the characteristics of the tort are examined from the perspective of potential applicability in the tax context. The possible attractions of the action in the tax context are identified and discussed, and nature of its revival in *Futuris* is set out. In Part III, attention turns to *Donoghue*, setting out the basis for the judgment of Logan J and emphasising the particular facts which make the case unique.

Part IV centres on demonstrating the broader significance of *Donoghue*, in terms of exposing the ATO to potential future successful taxpayer claims. This discussion extends to consideration of this potential as a way of challenging tax assessment decisions in judicial review proceedings, for bringing tortious claims for misfeasance in public office and tortious claims in negligence. In this context, the potential effects of *Donoghue* on tax official behaviour and good tax administration practices are also discussed.

Ultimately the article concludes that *Donoghue*, in harking back to *Futuris* and building upon the direction as to the significance of the tort of misfeasance in public office provided by the High Court in *Futuris*, signals a transition of the tort from a mere normative taxpayer right to a potentially practical avenue for taxpayer relief.

## PART II: THE NATURE OF THE TORT OF MISFEASANCE AND ITS REVIVAL IN *FUTURIS*

The potential attractions of a tortious claim of misfeasance in public office for taxpayers seeking to challenge actions or decisions of the Commissioner of Taxation are easy to appreciate. First, the tort is directly and exclusively applicable to claims against public officers. Sadler elaborates on this unique characteristic of the tort, pointing out that the tort of misfeasance;

...is the only exception to the principle that, generally speaking, a public officer is not liable in tort unless the act complained of would, if done by a private individual, be

actionable. It is the only tort having its roots and applications within public law alone. It cannot apply in private law; the defendant must be a public officer and the misfeasance complained of must occur whilst the public officer is purporting to exercise the powers of his or her office.<sup>15</sup>

Second, as observed in the preceding introduction, the revival of interest in the tort in Australia has been attributed to its suitability for providing monetary relief in cases of defective administrative action.<sup>16</sup> This is a particular attraction given the general absence of availability of monetary compensation in judicial review cases – tax cases or otherwise. Section 16(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) sets out the available remedies in cases of review under that Act.<sup>17</sup> Notwithstanding that those remedies are ‘very wide indeed’<sup>18</sup> this breadth has been interpreted as not extending to permitting awards of damages in cases of review under any of the grounds set out in the *ADJR Act*. The comments of Sweeney J in *Park Oh Ho v Minister of Immigration and Ethnic Affairs*<sup>19</sup> are typical:

An applicant who merely establishes a ground of review under s 5 of the *ADJR Act* is not thereby entitled to an award of damages. The remedies of judicial review are those in the nature of certiorari, prohibition, mandamus, injunction and declaration, as s 16 of the *ADJR Act* makes plain.<sup>20</sup>

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<sup>15</sup> R Sadler, ‘Liability for Misfeasance in Public Office’ (1992) 14 *Sydney Law Review* 137, 138-139.

<sup>16</sup> While other tortious actions such as the tort of negligence are equally capable of providing a compensatory remedy, no other tort specifically caters for defective administrative action by public officers.

<sup>17</sup> Section 16(1) provides as follows: 16(1) On an application for an order for review in respect of a decision, the Federal Court or the Federal Magistrates Court may, in its discretion, make all or any of the following orders: (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies; (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit; (c) an order declaring the rights of the parties in respect of any matter to which the decision relates; (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties. Sub-sections (2) and (3) of section 16 of the *ADJR Act* respectively provide identical remedies in cases of conduct engaged in for the purposes of making a decision, and failure to make a decision or failure to make a decision within the requisite timeframe.

<sup>18</sup> M Walpole, ‘Taxpayer Rights and Remedies - Australia, New Zealand and China’ in *Second World Tax Conference* (2001), 31.

<sup>19</sup> (1988) 81 ALR 288.

<sup>20</sup> *Ibid*, 297. Similar comments are made in that case by Morling J (at 310) and Foster J (at 317). This case was subsequently overruled on other grounds by the High Court, but is still good authority on the question

In *Park Oh Ho* it was also argued that section 22 of the *Federal Court of Australia Act 1976* (Cth) might be of sufficient breadth to allow for monetary compensation in appropriate cases for judicial review.<sup>21</sup> Sweeney J unequivocally rejected this argument, observing that '[s]ection 22 does not enlarge the provision of substantive law so as to authorise the award of damages in circumstances for which the law does not provide...'<sup>22</sup>

Accordingly, the overall position with respect to the availability or otherwise of damages in cases of judicial review of administrative action can be simply summarised: 'Illegality of administrative action, whether by excess of power or denial of procedural fairness, does not give rise to liability in damages.'<sup>23</sup> The tort of misfeasance in public office does not suffer from this limitation and, consequently, is particularly attractive for taxpayers contemplating claims in which monetary compensation is sought from the Commissioner.

However, cases such as *Futuris* suggest that the most promising application of the tort in the tax context is as a viable avenue for overcoming restrictions on judicial review in complaints against the Commissioner of Taxation, particularly where taxpayers are seeking to challenge a tax assessment. This is due to the especially limited scope for availability of judicial review in tax cases – particularly where tax calculation or assessment decisions are at concerned.

Judicial review of administrative action may be available to an aggrieved taxpayer through an application pursuant to the *ADJR Act* or through appeal to the jurisdiction of

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of the availability of damages in cases of judicial review of administrative action. For similar views see *Conyngham v Minister for Immigration and Ethnic Affairs* (1986) 68 ALR 441; *Pearce v Button* (1986) 8 FCR 408; and *O'Neil v Wratten* (1986) 65 ALR 451.

<sup>21</sup> Section 22 provides: 'The Court shall, in every matter before the Court grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.'

<sup>22</sup> Above n 19, 297-298.

<sup>23</sup> M Allars, *Introduction to Administrative Law* (1990), 304. See also *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 724-725 per Kirby P for a good brief summary of the causes of action that would permit an award of damages in appropriate cases of administrative malfunction by a statutory authority. These include the range of tortious remedies, including misfeasance in public office.

the Federal Court pursuant to Section 39B of the *Judiciary Act 1903* (Cth). Decisions are reviewable under the *ADJR Act* provided they are ‘of an administrative character, made or proposed to be made, or required to be made ... under an enactment’ or by a Commonwealth authority or an officer of the Commonwealth.<sup>24</sup> Section 39B of the *Judiciary Act 1903* (Cth) provides the Federal Court of Australia with original jurisdiction in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The two avenues for judicial review of administrative decisions differ in scope and approach.<sup>25</sup>

In tax cases, the section 39B avenue may be preferred. In large part this is because of the limitations contained in paragraph 1(e) of Schedule 1 of the *ADJR Act*. Specifically, paragraph (e) of Schedule 1 of the *ADJR Act* excludes from review decisions forming part of the process of making of, leading up to the making of, or refusing to amend, an assessment of tax. The exclusions in paragraph (e) of schedule 1 have been interpreted as clearly prohibiting review of decisions dealing with the calculation of tax.<sup>26</sup> In effect, these decisions are not considered to be ‘administrative’ in nature.

At first glance, therefore, a taxpayer aggrieved by an error arising out of the calculation of his or her tax liability by the Commissioner may well be inclined to invoke the *Judiciary Act* option in preference to seeking relief pursuant to the *ADJR Act*. However, this strategy also has its obstacles. Most significantly, the combined operation of sections 175 and 177 of the *ITAA36* limits the utility of turning to the *Judiciary Act* for relief. According to section 175, an assessment remains valid notwithstanding that the

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<sup>24</sup> Consistent with the definition of ‘decision to which this Act applies’ in section 3(1) of the *ADJR Act*.

<sup>25</sup> Allars explains the relationship: ‘Following the insertion of section 39B into the *Judiciary Act* in 1983, the Federal Court developed an approach of permitting an applicant to invoke both sources of jurisdiction in review of the same administrative action, the two proceedings being heard together. The section 39B jurisdiction could be invoked as a fall back position where there was doubt as to whether the decision challenged fell within the definition ‘decision of an administrative character made under an enactment’ in s3(1) of the *ADJR Act* or within Schedule 1 of the Act....Such difficulties were removed by the amendment of O54A of the Federal Court Rules in April 1988. Where an application for an order for review under the *ADJR Act* relief is also sought pursuant to section 39B of the *Judiciary Act* arising out of or connected with the same subject matter, then both sources of jurisdiction are to be invoked in one application.’ M Allars, above n 23, 108.

<sup>26</sup> See the comments of Beaumont J in *Constable Holdings Pty Ltd v Federal Commissioner of Taxation* (1987) 72 ALR 265, 268-269; Ellicott J in *Tooheys Ltd v Minister for Business & Consumer Affairs* (1981) 36 ALR 64, 78; and Smithers J in *Intervest Corporation Pty Ltd v FCT* (1984) 3 FCR 591, 595 -596.

Commissioner may not have complied with any provision of the *ITAA36*. Further, Section 177(1) provides that where the Commissioner produces a notice of assessment, that assessment will be conclusive evidence of the due making of the assessment and that the amount and details of that assessment are correct.<sup>27</sup>

In respect of the reach of section 175, the High court observed in *Futuris* that:

[t]he 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.<sup>28</sup>

In effect, therefore, the majority in *Futuris* confine the availability of judicial review where a purported assessment is concerned to two circumstances: First, where what is said to be assessment is not in truth an assessment; and second, where there has been conscious maladministration. Kirby J, in his minority judgment, takes a more expansive view, urging that claims should not be restricted to the ‘tentative/provisional’ category or ‘lack of good faith’ category and that other categories for judicial review might remain available to plaintiffs. However, there is no evidence of this foreshadowed expansion of avenues of challenge gaining any traction in subsequent cases.<sup>29</sup>

Nevertheless, it is in the context of discussing conscious maladministration that reference is made by the majority to the tort of misfeasance in public office. Most notably, it is observed that:

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<sup>27</sup> The section does preserve the rights of taxpayers to seek a review or appeal against the assessment using the objection and appeal procedures contained in Part IVC of the *Taxation Administration Act 1953* (Cth).

<sup>28</sup> *Futuris*, above n 1, 157.

<sup>29</sup> Kirby J, in *Futuris*, above n 1, at 185-186, lists these alternative categories. Walpole also more fully expands on the circumstances in which judicial review might be available to a taxpayer generally: ‘The major ground on which an action for review might be based would be: that the Commissioner did not have jurisdiction to make the decision; that the decision was not authorized by the Act; that the making of the decision was an improper exercise of the power conferred by the Act, because the Commissioner failed to take a relevant consideration into account or exercised the power in a way that constitutes an abuse of power; or that the decision was otherwise contrary to the law.’ See M Walpole, above n 1818.



The issue here is whether, upon its proper construction, s 175 of the Act brings within the jurisdiction of the Commissioner when making assessments a deliberate failure to comply with the provisions of the Act. A public officer who knowingly acts in excess of that officer's powers may commit the tort of misfeasance in public office...Members of the Australian Public Service are enjoined by the Public Service Act (s13) to act with care and diligence and to behave with honesty and integrity...These considerations point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms.<sup>30</sup>

Accordingly, the tort of misfeasance in public office, insofar as it could be characterised as a claim centred on conscious maladministration by the Commissioner or one of his officers, would overcome the restrictions on judicial review posed by section 175 of the *ITAA36*. In effect, therefore, in it is clear in the wake of *Futuris*, that an assessment resulting from a misfeasance may be sufficient to support both a tortious action and administrative law judicial review proceedings.

It follows that, even where pursuing an action in tort may not be attractive option for a taxpayer plaintiff, the search for evidence of conscious maladministration which underpins the tortious action for misfeasance may, nevertheless, be a worthwhile pursuit in order to facilitate judicial review of a tax assessment decision.<sup>31</sup> However, prior to the recent decision in *Donoghue*, there was very little evidence of the realisation of this potential or any practical guidance as to how that potential might, in future cases, be realised. Part III centres on the reasoning in *Donoghue*.

### PART III: *DONOGHUE*

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<sup>30</sup> *Futuris*, above n 1, 164.

<sup>31</sup> Conceivably, in some cases, behaviour falling short of satisfying the formal requirements of a tortious action for misfeasance in public office may, nonetheless, still constitute 'a deliberate failure to administer the tax law according to its terms' capable of circumventing the section 175 restriction on availability of judicial review of tax assessments. The concern in this article, however, is confined to those instances of conscious maladministration which would satisfy the requirements of a tortious claim of misfeasance in public office.

In 2011, after an audit of the taxpayer's tax affairs, the Commissioner issued the taxpayer in *Donoghue* (Mr Donoghue) with a series of tax assessments in respect of the 2005 – 2007 tax years. The taxpayer sought to have these assessments declared invalid on the basis that the Commissioner unlawfully utilised privileged material secured from third parties in the course of carrying out its audit of the taxpayer's affairs. The claim was successful.

The privileged material was provided to the Commissioner by a law student paralegal (Mr Moore) employed by his father's firm which the taxpayer had engaged to provide him with legal advice. It appears that the information was provided to the Australian Taxation Office ('ATO') in realisation of a threat by Mr Moore to disclose information to the ATO if the taxpayer did not immediately pay almost \$750,000 in legal fees charged to the taxpayer by Mr Moore.<sup>32</sup>

The information supplied to the ATO by Mr Moore was reviewed by a tax auditor from the ATO's Project Wickenby serious non-compliance team assigned to the case – Mr Main. Main immediately identified that '[s]ome of the documents in Mr Moore's possession may be subject to legal professional privilege.'<sup>33</sup> Notwithstanding, a decision was made to use the material in what was, according to Logan J, a '...reckless disregard for a right which Mr Donoghue had at least to claim an important common law privilege.'<sup>34</sup>

Much of the judgment in *Donoghue* is dedicated to discussion of whether the information supplied to the ATO by Moore was in fact privileged (a matter ultimately decided in favour of the taxpayer). However, the Commissioner argued, unsuccessfully, that even if the material was privileged, section 166 of the *Income Tax Assessment Act 1936* (Cth) which authorises the making of assessments<sup>35</sup>, and section 263<sup>36</sup>, a general provision

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<sup>32</sup> His Honour described the legal fees charged as 'outrageously extortionate' and the invoice setting out those fees as a 'fantasy document'. *Donoghue*, above n 2, [72].

<sup>33</sup> *Donoghue*, above n 2, [91].

<sup>34</sup> *Donoghue*, above n 2, [113].

<sup>35</sup> Section 166 simply provides: '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)

giving the Commissioner a right of access to taxpayer information, are both drafted broadly enough to allow potentially unlawful behaviour in the making of assessment decisions, such as the use of legally privileged material. Unsurprisingly, Logan J rejected these arguments concluding that neither of these provisions should be read as giving the Commissioner ‘*carte blanche*’ consciously to maladminister the ITAA36 in the process of making an assessment<sup>37</sup> and that:

Construing s 166 and s 263 of the ITAA36 in this way accords with the principle of legality whereby statutes are not construed as overthrowing principles (of which legal professional privilege is one) unless that intention is manifested with ‘irresistible clarity’.<sup>38</sup>

His Honour then went on to apply the test of ‘conscious maladministration’ set out in *Futuris* to conclude that the assessments should be quashed as not being for a ‘proper purpose’ as required by section 175 for the ITAA36:

Recklessness was regarded in *Futuris* as sufficient to establish the element of consciousness in conscious maladministration, In turn, what amounted to the requisite recklessness was regarded as being informed by that sufficient in respect of the tort of misfeasance in public office...<sup>39</sup>

This seemingly straightforward conclusion is noteworthy in a number of respects. First, finally we have a clear and concrete factual illustration of the relevance of the tort of misfeasance in public office to public law determinations of what constitutes conscious maladministration and proper purposes. This is the first such illustration to emerge since the relevance of the tort was proclaimed by the High Court in *Futuris*.

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the amount of the taxable income (or that there is no taxable income) of any taxpayer; and (b) the amount of the tax payable thereon (or that no tax is payable); and (c) the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).’

<sup>36</sup> Section 263 has been moved to Section 353-15 of the Schedule of the *Taxation Administration Act 1953* (Cth) and provides ATO officers with full and free access to all buildings and documents to make inspect, examine and make copies.

<sup>37</sup> *Donoghue*, above n 2, [135].

<sup>38</sup> *Donoghue*, above n 2, [136].

<sup>39</sup> *Donoghue*, above n 2, [145].

We also now have confirmation that no evidence of any deliberate ill-will or bad faith directed toward the taxpayer is necessary to constitute conscious maladministration sufficient to render an assessment invalid. There was no evidence of any such ill-will or bad faith on the part of the relevant tax officials in this case. In fact there was evidence of an appreciation of the need to proceed with caution given that any material supplied by Moore may have been advanced to pursue Moore's own agenda of self-interest in seeking to compel the taxpayer to pay Moore's legal fees.

Further there is no need for a taxpayer plaintiff to show that the relevant tax officials were acting with anything state of mind even approaching certainty that their behaviour was unlawful. In *Donoghue*, there was significant uncertainty as to whether the material in question was in fact privileged (certainly enough for this issue to occupy the majority of the judgment of Logan J), hence the relevant tax officers cannot be said to have proceeded with certainty that they were acting unlawfully.

In fact, Logan J was far from scathing in His Honour's assessment of the behaviour of the relevant tax officials in *Donoghue*. His Honour acknowledges the relative inexperience of the officials involved (it was Mr Main's first full audit) and the time pressure to conclude the audit under which the auditor was operating. His Honour states with respect to the actions of Mr Main:

He chose to take a risk, 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 to complete his audit. That the material did not obviously convey legal advice was Mr Main's way of rationalising both his choice and view that the risk it was privileged was 'low'.<sup>40</sup>

The fact this this relatively mild behaviour was considered by Logan J as sufficient to constitute recklessness sufficient to justify a finding of conscious maladministration

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<sup>40</sup> *Donoghue*, above n 2, [113].

should alarm the Commissioner. To understand why requires a somewhat detailed understanding of the case law concerning requirements the mental element of the tort of misfeasance in public office and, in particular, what is meant by ‘recklessness’ according to the leading misfeasance cases cited with approval in both *Futuris* and in *Donoghue*. Part IV turns attention to this issue in the context of setting out the full ramifications of *Donoghue* in terms of exposing the ATO to potential future successful taxpayer claims.

#### PART IV: TAX AUTHORITY LIABILITY IN THE WAKE OF *DONOGHUE*

The elements of the tort of misfeasance in public office were set out by Deane J in the leading Australian misfeasance case, *Northern Territory v Mengel*<sup>41</sup> (*‘Mengel’*) – a case cited as the leading authority in both *Futuris* and *Donoghue* - in the following terms:

(i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duties; (v) which causes loss or harm to the plaintiff.<sup>42</sup>

It is clear from this framework that that in order to establish a cause of action for misfeasance, the plaintiff is required to prove that there has been more than simply an inadvertent or negligent error. The mental element of the tort has been summarised in the following terms:

It is clear that for the purposes of this tort the mental element is satisfied by either evidence of malice or knowledge of the absence of power (including reckless indifference as to the extent of power but not constructive knowledge of the absence of power).<sup>43</sup>

In other words, it is not enough to solely demonstrate an excess of power.<sup>44</sup> In addition, the taxpayer plaintiff will be required to prove that the defendant officer either had

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<sup>41</sup> Above n 4.

<sup>42</sup> *Ibid*, 370.

<sup>43</sup> Tina Cockburn, ‘Personal Liability of Government Officers in Tort and Equity’ in B Horrigan, (ed) *Government Law and Policy: Commercial Aspects* (1998) 340, 350-351.

<sup>44</sup> Writers such as Evans contend that absence of power should be enough. Evans justifies this view: ‘The law looks to the act and the harm following from it. No inquiry is made into the mental state of the

knowledge of the absence of power and that it would probably cause harm to the plaintiff, or malice. Knowledge of absence of power and malice have long been accepted as two separate limbs of the tort.<sup>45</sup> As Smith J noted in *Farrington v Thomason*<sup>46</sup>

Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in a public office, it is, or may be necessary to show that the officer acted maliciously in the sense of having an intention to injure...it appears to me, however, that this is not so, and that it is sufficient to show that he acted with knowledge that what he did was an abuse of his office.<sup>47</sup>

The evidentiary distinction between knowledge of absence of power and malice has been explained by Kneebone:

Whereas a 'malicious exercise of power' requires direct evidence of lack of good faith and improper purposes, a 'knowingly invalid' act is established by subjective evidence that the defendant knew that the act was based upon an invalid decision or was for an improper purpose.<sup>48</sup>

The requirement of malicious intent is open to a number of different interpretations, some of which encompass knowledge of absence of power. For instance, malice has been broadly described by Dench in the following terms:

Popularly, the term conveys a sense of ill-will. Thus, spite, or a desire for revenge is readily termed malicious. This may be termed express malice. Legally, however, the term is broader. In particular, it is broad enough to include the act of an official in exercising a

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defendant either objectively or subjectively. What makes the conduct wrongful is in these cases is that it is based on invalidity. This is consonant with the principle that ignorance of the law provides no defence. The severity of this proposition is not beyond criticism. However, the defence of ignorance based on honesty and good faith should be less applicable in the case of public officials, who should be expected to know the law under which they operate.' R Evans, above n 5, 649.

<sup>45</sup> Although in some of the literature they are viewed simply as two types of malice, the former being referred to as 'untargeted malice' and the latter as 'targeted malice. For instance, this is the approach taken in the leading UK misfeasance case, *Three Rivers District Council v Bank of England*, above n 5.

<sup>46</sup> [1959] VR 286.

<sup>47</sup> *Ibid*, 292.

<sup>48</sup> S Kneebone, 'Misfeasance in a Public Office after Mengel's Case: A "Special Tort" No More' (1996) 4 *Tort Law Review* 111, 128.

power which he knows he does not possess. It is in this sense, as well as the narrower sense, that the term malice has been used in the tort of misfeasance.<sup>49</sup>

In contrast, Fridman groups the various interpretations of the term under four main headings: (1) spite or ill-will; (2) any improper motive; (3) the intent to do a wrongful act; and (4) the intent to inflict injury without just cause or excuse.<sup>50</sup>

Despite the various characterisations, it is clear that lack of honesty is the best indicator of malicious intent. This is because dishonesty is viewed as going to the heart of the concept of an abuse of office. Brennan J expressly noted the link between abuse of office and honesty in *Mengel*, observing that '[i]t is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of office.'<sup>51</sup> This is in contrast both to negligence actions and claims of breaches of statutory duty. Hannett confirms this contrast:

Misfeasance can be distinguished from other torts invoked against public authorities such as negligence and breach of statutory duty. Misfeasance can be differentiated from both by its requirements of deliberateness *and dishonesty*, actual or constructive. (Emphasis added).<sup>52</sup>

Given this central undercurrent of dishonesty as a requisite element of the tort of misfeasance, the willingness of Logan J in *Donoghue* to find against the Commissioner notwithstanding the absence of any clear evidence of dishonesty on the part of Mr Main or any of the other tax officials involved in the issue of the impugned notices of assessment is, at first glance, troubling. This is especially so given that historically this has been the key stumbling block for any taxpayer seeking to establish the relevant mental elements of the tort of misfeasance in public office in a claim against a tax official.

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<sup>49</sup> S Dench, above n 6, 193

<sup>50</sup> G Fridman, 'Malice in the Law of Torts' (1958) 21(5) *The Modern Law Review* 484.

<sup>51</sup> *Ibid*, 357.

<sup>52</sup> S Hannett, 'Misfeasance in Public Office: The Principles' (2005) 10 *Judicial Review* 227.

Peter Haggstrom, Special Tax Adviser to the Commonwealth Ombudsman, explains the traditional attitude of the courts to ATO staff when it comes to allegations of dishonest intent:

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.<sup>53</sup>

The comments of Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Federal Commissioner of Taxation*<sup>54</sup> illustrate the Haggstrom point of view:

The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that allegations directed at setting aside assessments on the basis absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case.<sup>55</sup>

These comments are especially pertinent as they are cited with approval by the majority in *Futuris*.<sup>56</sup>

It is probable that Logan J did not consider it necessary to consider dishonest intent on the basis that the leading cases go further, accepting ‘reckless indifference’ as a sufficient basis for founding the necessary state of mind to sustain a misfeasance claim. Reckless indifference has been accepted not only in Australia, but also in the United Kingdom as confirmed by Lord Steyn in the leading UK misfeasance case, *Three Rivers District*

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<sup>53</sup> P Haggstrom, ‘A Critical Review of Tax Administration in Australia from an Ombudsman’s Office Perspective’ in A Greenbaum and C Evans (eds), *Tax Administration - Facing the Challenges of the Future* (1998) 263, 267.

<sup>54</sup> (2000) 46 ATR 191.

<sup>55</sup> *Ibid*, 193. For similar comments see also *San Remo Macaroni Company Pty Ltd v FCT* (1999) 43 ATR 53, 71 per Hill J.

<sup>56</sup> *Futuris*, above n 1, [60].



*Council v Bank of England (No. 3)*.<sup>57</sup> This case was also cited with approval in both *Futuris* and *Donoghue*. In *Three Rivers*, Clarke J, citing *Mengel* in the hearing of the matter at first instance,<sup>58</sup> lucidly explained the reason for the inclusion of recklessness as a sufficient basis for satisfying the mental element of the tort:

The reason why recklessness was regarded as sufficient by all members of the High Court in *Mengel* is perhaps most clearly seen in the judgment of Brennan J. It is that misfeasance consists in the purported exercise of a power otherwise than in an honest attempt to perform the relevant duty. It is that lack of honesty which makes the act an abuse of power.<sup>59</sup>

It is most likely that Clarke J had in mind the following comments by Brennan J in *Mengel* where His Honour stated:

Misfeasance in public office consists of a purported exercise of some power or authority by a 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 or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete.<sup>60</sup>

However, the extension of the tort to cover situations of reckless indifference does not do away entirely with the requirement of dishonest intent. It is clear from the comments of Brennan J in *Mengel* that the extension of the tort to situations of reckless indifference remains highly restrictive because of the search for *subjectively* (as distinct from objectively) measured intent. In other words, the search for dishonesty remains.

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<sup>57</sup> *Three Rivers*, above n 5. Lord Steyn notes, at 9: 'The Australian High Court and the Court of Appeal of New Zealand have ruled that recklessness is sufficient: *Northern Territory v. Mengel* (1995) 185 CLR 307; *Garrett v. Attorney-General* [1997] 2 N.Z.L.R. 332; *Rawlinson v. Rice* [1997] 2 N.Z.L.R. 651.'

<sup>58</sup> The Clarke J views were affirmed by the House of Lords on appeal.

<sup>59</sup> [1996] 3 All E.R. 558, 581.

<sup>60</sup> *Mengel*, above n 4, 327.

This is where there is scope for the Commissioner to take issue with the determination of Logan J in *Donoghue*. Specifically, there is little in the facts of *Donoghue* to suggest the existence of a *subjectively* measured intent to act unlawfully in the behaviour of Mr Main or any other tax official involved in the issue of the impugned notices of assessment. It would be open to the Commissioner to argue that Logan J appears to have applied an interpretation of the meaning of reckless indifference which was expressly rejected in *Mengel* – namely that constructive knowledge of the unlawfulness of the relevant official’s should suffice to establish the mental element of the tort.

The reason why the constructive knowledge argument was rejected in *Mengel* is easy to appreciate. It was due to the fact that imposing this objective measure of recklessness would be tantamount to imposing a test of reasonable foreseeability of harm similar to that which would be applied in cases of negligence, thus rendering the tort redundant. The court reasoned:

In this country governments and public officers are liable in negligence according to the same general principles that apply to individuals. And, in that context, the argument that misfeasance in public office should be reformulated to cover the case of a public officer who ought to know of his or her lack of power can be disposed of shortly. So far as unintentional harm is concerned, the proposed reformulation ... serves no useful purpose if there is a duty of care to avoid the risk in question and is anomalous if there is not. And it serves no purpose if the public officer is actuated by an intention to harm the plaintiff for that constitutes misfeasance in public office whether or not the officer knows that he or she lacks authority.<sup>61</sup>

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<sup>61</sup> (1995) 185 CLR 307, 348. Similar observations are made in the commentary on the case by Hiley and Lindsay in A Hiley and A Lindsay, ‘Tort Liability Clarified: *Northern Territory of Australia v Mengel*’ (1994) 18 *University of Queensland Law Journal* 334, 338 where the authors note: ‘The rejection of a constructive knowledge element seems to be based upon the assumption that constructive knowledge more appropriately belongs to a negligence action (ie an action based upon a duty of care to ascertain the extent of one’s powers)...’

It has also been noted that to allow the cause of action to be founded on constructive knowledge would be tantamount to making the breach of the relevant legal principle an offence of strict liability which may not at all have been the legislative intent.<sup>62</sup>

The result of the rejection of constructive knowledge as a sufficient basis for sustaining a misfeasance case has been that, prior to *Donoghue*, in no Australian case has a taxpayer plaintiff succeeded in demonstrating the required mental element to sustain a misfeasance claim against a tax officer. Notable failed attempts include *Henderson v Deputy Commissioner of Taxation*<sup>63</sup> ('*Henderson*'), *Engler v Commissioner of Taxation (No 3)*<sup>64</sup> ('*Engler*'), *Gates v Commissioner of Taxation*<sup>65</sup> ('*Gates*'), and *Madden v Madden & Ors*<sup>66</sup> ('*Madden*').

In *Henderson* the taxpayer failed to establish the necessary mental intent for invalid garnishee notices issued by the Commissioner to be deemed an act of misfeasance in public office, with Sundberg J observing that the plaintiff's claim consisted of little more than 'mere conjecture'<sup>67</sup> as to the state of mind of the relevant tax officer. In *Engler*, the taxpayer alleged that certain Notices of Assessment were issued in bad faith. French J struck out the plaintiff's claim on the grounds that it indicated 'no basis beyond bald assertion for the contentions of bad faith action on the part of the respondent.'<sup>68</sup> In *Gates* too, the taxpayer's assertions that the Commissioner acted in bad faith were unsupported with sufficient particulars to prevent Besanko J striking out the taxpayer's misfeasance claim.

In *Madden*, although the taxpayer similarly failed to satisfy the majority as to the necessary mental element of the tort, there was at least a divergence of judicial opinion.

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<sup>62</sup> See S Dench, above n 6, 198. See also S Kneebone, above n 4848, 119. Kneebone also contends that the rejection of the constructive knowledge argument was tantamount to the rejection by the High Court of the argument that a negligent state of mind would satisfy the malicious intent test. The Kneebone view is certainly consistent with the views expressed by the High Court in *Mengel*, above n 4, 347-348.

<sup>63</sup> [2005] FCA 1806.

<sup>64</sup> [2003] FCA 1571.

<sup>65</sup> [2006] FCA 739.

<sup>66</sup> (1996) 136 ALR 98.

<sup>67</sup> Above n 63, [16].

<sup>68</sup> Above n 64, [34].

The majority held that there was no arguable case for abuse of power sufficient to support the taxpayer's contentions that an assessment issued by the Commissioner to tax the plaintiff's substantial proceeds of crime was issued in bad faith. However, Einfeld J, in his minority judgment, would have been prepared to allow the matter to proceed on the basis of 'at least an arguable case that the assessment was motivated by a factor unrelated to the determination of the tax due.'<sup>69</sup> Further, Einfeld J formed the view that 'the appellant has pointed to sufficient evidence of conscious if not wilful misuse of power as to raise a real question to be litigated regarding knowledge.'<sup>70</sup> Nevertheless history will record *Madden* as yet another failure of a taxpayer to establish a misfeasance claim against the Commissioner.

It is conceded that *Donoghue* is different to the previous authorities in that Logan J was able to point to specific written evidence where Mr Main conceded from the outset that 'some of the documents in Mr Moore's possession may be subject to legal professional privilege'<sup>71</sup> and yet this suspicion was not followed through by Mr Main seeking advice from superiors or seeking external advice to establish with certainty whether the documents in question were privileged or not.

This is, arguably, the 'smoking gun' absent in previous misfeasance claims against the Commissioner's officers. However, this falls short of a concession of certainty that the documents were privileged. In fact, Logan J expressly concedes that 'Mr Main did not deliberately use material which he knew definitely to be privileged.'<sup>72</sup> As already noted, resolving this matter occupies significant space in Logan J's judgment in the case, indicating that the matter was certainly open to reasonable debate.

However, on the basis of the evidence put before His Honour, Logan J was prepared to impute on the ATO auditor, Mr Main, a subjectively dishonest intent (although not framed in those specific terms) sufficient to constitute recklessness and, as a

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<sup>69</sup> Above n, 66 116.

<sup>70</sup> Ibid.

<sup>71</sup> *Donoghue*, above n 2, [90].

<sup>72</sup> *Donoghue*, above n 2, [112].

consequence, a misfeasance in public office. The following passage provides the best insight into Logan J's reasoning: '...[W]hat he [Main] did was deliberately not pursue or cause to be pursued inquires which would have quelled an apprehension, always present, which he had that the documents and information...were subject to legal professional privilege.'<sup>73</sup> His Honour points to a number of likely reasons for Mr Main behaving in this way, including the potential to jeopardise the confidentiality of the ATO audit of Mr Donoghue by alerting him to its existence and the potential for Mr Donoghue to, consequently, escape the jurisdiction.

It is inappropriate to challenge these conclusions of Logan J as to reasons for Main's behaviour without seeing the all of the evidence presented in the case. However, in the wake of *Donoghue*, tax officials are now arguably burdened with a positive duty to enquire whether documents may be subject to legal professional privilege where they form a reasonable apprehension that this might be the case. Failing to do so will have far-reaching consequences – and this is the real significance of the *Donoghue* decision.

According to Logan J's reasoning in *Donoghue*, such behaviour constitutes reckless behaviour, exposing the Commissioner to claims of maladministration via the tort of misfeasance in public office and rendering any assessment decision vulnerable to a successful challenge via judicial review proceedings. Further, though, and perhaps more concerning for the Commissioner, the classification of such behaviour as reckless means the mental requirements of the tort of negligence would also clearly be satisfied in such a case. To date there has been no reported case of a successful negligence claim against the Commissioner in any Australian court of record.<sup>74</sup> In *Donoghue*, Logan J may have inadvertently slightly opened the door for such a claim in future.

All of this may also have unintended ramifications for tax official behaviour and tax administration practices in future – and not all of them positive. For example, as noted

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<sup>73</sup> *Donoghue*, above n 2, [112].

<sup>74</sup> For a detailed examination of the relevant case law and principles see J Bevacqua, 'A Detailed Assessment Of The Potential For A Successful Negligence Claim Against The Commissioner Of Taxation' (2008) 37 *Australian Tax Review* 241.

above, the apparent ‘smoking gun’ in *Donoghue* was Main’s placing on the record of his concerns about the information about the taxpayer’s affairs being subject to legal professional privilege. Faced with similar concerns in future, a tax official in Main’s situation, might be inclined to dismiss those concerns without putting them on the record. Unless the privileged nature of the documents is obvious, a successful claim misfeasance would be unlikely in those circumstances. Alternatively, the fear of litigation faced by a tax official in Main’s situation may result in the diversion of significant ATO resources to seeking to resolve any possible legal uncertainty, adding to costs, delay and potential unnecessary settlement of claims in favour of the taxpayer.

Of course, there is also the prospect of *Donoghue* bringing about positive and desirable behavioural responses and changes within the ATO – such as the creation of a climate within the ATO which is more cognisant of the need to respect taxpayer rights and the establishment of better internal checks and balances to ensure that situations such as those which occurred in *Donoghue* do not arise again in future.

There is certainly scope for the ATO to respond in this way with Logan J specifically criticising ATO processes, explaining that the situation arose in this case in part due to the Mr Main not having had the benefit of relevant supervision and guidance from an engaged experienced supervisor.<sup>75</sup> Encouragingly, too, there is research to suggest that more often than not, public authorities respond to adverse judicial review determinations such as that in *Donoghue* in a positive way – viewing such determinations as ‘valuable and instructive.’<sup>76</sup> Time will tell how the ATO responds on this occasion.

## PART V - CONCLUSION

The overall picture that emerges from the preceding examination is that, in the wake of *Donoghue*, the tort of misfeasance in public office is worth considering by taxpayers

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<sup>75</sup> *Donoghue*, above n 2, [99].

<sup>76</sup> This was the finding of Creyke and McMillan in the only comprehensive Australian study of government body responses to adverse judicial review determinations. See See R Creyke and J McMillan, ‘The Operation of Judicial Review in Australia’ in Mark Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact - International and Interdisciplinary Perspectives* (2004).

aggrieved by a tax official wrong. Specifically, in the wake of *Donoghue*, the necessary deliberate mental intent necessary to demonstrate misfeasance (which has proved a virtually impossible hurdle to surpass in previous taxpayer claims) now seems surmountable. Consequently, a misfeasance action may now be worth considering alongside or instead of a judicial review action seeking to challenge a tax assessment decision of the Commissioner.

Of course, the significance of the taxpayer's success in *Donoghue* should not be overstated. As noted above, *Donoghue* is different from most cases in that there was written evidence of a clear apprehension of potential unlawfulness in the form of Mr Main's concerns about the potential privileged nature of the documents in the possession of the ATO. This clear insight into and formal record of the subjective state of mind of a decision-making tax official is not usually evident.

Nevertheless, the real significance of *Donoghue* is the number of tangible options it now puts on the table for a taxpayer aggrieved by an ATO decision. A taxpayer's ability to use recklessness as a basis for challenging a tax assessment is now not simply a theoretical possibility flagged by the High Court in *Futuris*. It is now an option with proven potential. At the same time, *Donoghue* signals a real potential for successful taxpayer tortious claims against the ATO – not just for misfeasance in public office, but in negligence.

The hurdles that remain in the way of taxpayers wishing to exploit this potential cannot be overstated – and not simply because of the unique nature of the facts in *Donoghue*. Even in those future cases where the substantial challenges posed by the mental elements of the tort of misfeasance in public office might be capable of being met in the wake of *Donoghue*, there still remain many substantial difficulties standing in the way of a potential successful tortious claim. These include the need to demonstrate causation and quantifiable damages which are not too remote from the complained of activity. These were issues which Logan J in *Donoghue* was not required to address given the taxpayer made no compensation claim in tort. The difficulties such requirements pose for taxpayer

is evident from developments in jurisdictions such as Canada where there is a much richer recent history of tortious claims against tax officials.<sup>77</sup>

For the time being, however, it is safe to conclude that *Donoghue* at least signals a shift from the tort of misfeasance in public office from the realms of mere normative taxpayer right to a potentially practical avenue for taxpayer relief. To what extent this potential is ultimately realised remains to be seen.

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<sup>77</sup> For a comprehensive discussion see J Bevacqua, “Suing Canadian Tax Officials for Negligence: An assessment of Recent Developments” (2013) 61(4) *Canadian Tax Journal* 893.