FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Donoghue [2015] FCAFC 183

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| Citation: | Commissioner of Taxation v Donoghue [2015] FCAFC 183 |
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| Appeal from: | Donoghue v Commissioner of Taxation [2015] FCA 235  Donoghue v Commissioner of Taxation [2015] FCA 291 |
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| Parties: | **COMMISSIONER OF TAXATION v GARRY JOHN DONOGHUE**  **COMMISSIONER OF TAXATION v GARRY JOHN DONOGHUE**  **DEPUTY COMMISSIONER OF TAXATION v GARRY JOHN DONOGHUE** |
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| File numbers: | QUD 110 of 2015  QUD 128 of 2015  QUD 129 of 2015 |
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| Judges: | **KENNY, PERRAM & DAVIES JJ** |
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| Date of judgment: | 17 December 2015 |
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| Catchwords: | **TAXATION** – whether notices of assessment issued to taxpayer liable to be set aside – whether use of documents by the Commissioner which were said to be privileged constituted conscious maladministration for purposes of ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth) – whether penalty assessments infected by same alleged maladministration  **ADMINISTRATIVE LAW** – whether notices of assessment affected by jurisdictional error – whether conscious maladministration established – relevance of tort of misfeasance in public office to conscious maladministration  **PRIVILEGE** – whether documents could be said to be privileged – whether use of privileged documents could constitute conscious maladministration – nature of common law privilege  **EQUITY** – breach of confidence – whether documents used possessed necessary quality of confidence – whether the Commissioner could be enjoined from using documents |
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| Legislation: | *Evidence Act 1995* (Cth) ss 118, 119  *Income Tax Assessment Act 1936* (Cth) ss 166, 175, 177(1), 263, 264  *Judiciary Act 1903* (Cth) s 39B  *Taxation Administration Act 1953* (Cth) Sch 1 s 284-75(3)  *Federal Court Rules 2011* (Cth) r 36.24 |
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| Cases cited: | *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348  *Australian Securities and Investments Commission v Lindberg* (2009) 25 VR 398  *Awad v Commissioner of Taxation* (2000) 104 FCR 106  *Baker v Campbell* (1983) 153 CLR 52  *Barnes v Commissioner of Taxation* (2007) 242 ALR 601  *Coco v AN Clarke* (*Engineers) Ltd* [1969] RPC 41  *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501  *Commissioner of Taxation of the Commonwealth of Australia v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499  *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434  *Coulton v Holcombe* (1986) 162 CLR 1  *Cowell v British American Tobacco Australia Services Ltd* [2007] VSCA 301  *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543  *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412  *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303  *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146  *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233  *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd* (1993) 45 FCR 445  *Health Insurance Commission v Freeman* (1998) 88 FCR 544  *Kennedy v Wallace* (2004) 142 FCR 185  *Lord Ashburton v Pape* [1913] 2 Ch 469  *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73  *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475  *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1  *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64  *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481  Neave M and Weinberg M, “The Nature and Function of Equities (Part II)” (1979) 6(2) University of Tasmania Law Review 115 |
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| Date of hearing: | 4-5 November 2015 |
|  |  |
| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 117 |
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| Counsel for the Appellant: | Mr N Williams SC, Mr M O’Meara and Mr G Del Villar |
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| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr M Robertson QC, Mr P Bickford and Mr M Henry |
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| Solicitor for the Respondent: | Bourke Legal |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 110 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| JUDGES: | KENNY, PERRAM & DAVIES JJ |
| DATE OF ORDER: | 17 December 2015 |
| WHERE MADE: | SYDNEY (HEARD IN BRISBANE) |

THE COURT ORDERS THAT:

1. Appeal allowed.
2. Set aside the orders made on 17 March 2015 and 24 March 2015 in proceeding QUD 353 of 2012 and in lieu thereof order that:
   1. The amended originating application be dismissed.
   2. The applicant pay the respondent’s costs as taxed or agreed.
3. The respondent pay the appellant’s costs as taxed or agreed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 128 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| JUDGES: | KENNY, PERRAM & DAVIES JJ |
| DATE OF ORDER: | 17 December 2015 |
| WHERE MADE: | SYDNEY (HEARD IN BRISBANE) |

THE COURT ORDERS THAT:

1. Appeal allowed.

2. Set aside the orders made on 17 March 2015 and 24 March 2015 in proceeding QUD 360 of 2013 and in lieu thereof order that:

1. The originating application be dismissed.

2. The applicant pay the respondent’s costs as taxed or agreed.

3. The respondent pay the appellant’s costs as taxed or agreed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 129 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DEPUTY COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| JUDGES: | KENNY, PERRAM & DAVIES JJ |
| DATE OF ORDER: | 17 december 2015 |
| WHERE MADE: | SYDNEY (HEARD IN BRISBANE) |

THE COURT ORDERS THAT:

1. Appeal allowed.

2. Set aside the orders made on 17 March 2015 and 24 March 2015 in proceeding QUD 727 of 2013 and in lieu thereof order that:

1. The respondent pay the applicant’s costs of the hearing on 17 March 2015 as taxed or agreed.

2. Stand over the applicant’s application for summary judgment dated 26 April 2013 to a date to be fixed by the docket judge.

3. The respondent pay the appellant’s costs as taxed or agreed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 110 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 128 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 129 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DEPUTY COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| JUDGES: | KENNY, PERRAM & DAVIES JJ |
| DATE: | 17 DECEMBER 2015 |
| PLACE: | SYDNEY (HEARD IN BRISBANE) |

**REASONS FOR JUDGMENT**

# KENNY AND PERRAM JJ:

## 1. Introduction

1. On 21 December 2011 the Commissioner of Taxation issued Mr Donoghue with notices of assessment for income tax for the financial years ending 30 June 2005, 30 June 2006 and 30 June 2007. Each of the notices was a default notice, that is to say, each was issued in the absence of any return having been filed. Mr Donoghue had not filed returns in those years because he took the view that he was not an Australian resident for tax purposes. It appears the Commissioner took a contrary view and it was this that led to the issue of the notices. At the same time that the notices were issued, the Commissioner also issued a departure prohibition order, the effect of which was to prevent Mr Donoghue from leaving Australia. Simultaneously, the Commissioner imposed administrative penalties in relation to each year and levied the general interest charge on both sets of exactions.
2. On 10 February 2012 a Deputy Commissioner sued Mr Donoghue in the Supreme Court of Queensland to recover as a debt the amounts owing under the notices of assessment. We shall refer to this as the ‘Enforcement Proceeding’. The amounts which were claimed in that proceeding were as follows:

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| Income Year | Tax | GIC | Penalty | GIC | Total |
| 2005 | 5,992,852.64 | 6,935,007.84 | 4,494,639.45 | 12,859.20 | 17,435,359.13 |
| 2006 | 1,807,100.04 | 1,624, 190.90 | 1,626,390.00 | 4,653.12 | 5,062,334.06 |
| 2007 | 1,617,137.44 | 1,068,361.66 | 1,455,423.70 | 4,163.98 | 4,145,086.78 |
| **Total** |  |  |  |  | 26,642,779.97 |

1. On 17 February 2012 Mr Donoghue lodged notices of objection in respect of each of the assessments.
2. After the assessments had been issued Mr Donoghue came to suspect that documents belonging to him which might be the subject of a claim for legal professional privilege had come into the possession of the Australian Taxation Office (‘the ATO’) and had been used by it in preparing the notices of assessment issued to him. Early in 2012 he instructed a firm of solicitors, Nyst Lawyers, to investigate this and to make a claim for privilege on his behalf. Following correspondence between the ATO and Nyst Lawyers, Mr Donoghue eventually commenced proceedings against the Commissioner of Taxation in this Court seeking orders that the allegedly privileged documents be delivered up to him. These proceedings were commenced on 13 July 2012. Shortly after their commencement a judge of this Court granted an interlocutory injunction to Mr Donoghue restraining, on an interim basis, the Commissioner from further using the allegedly privileged material: *Donoghue v Commissioner of Taxation* (2013) 92 ATR 289. By that time, of course, he had already used them to generate the notices of assessment. It is useful to refer to this second proceeding as the ‘Injunction Proceeding’.
3. On 19 April 2013 the Commissioner disallowed Mr Donoghue’s notices of objection. On 26 April 2013, which was the following week, the Deputy Commissioner applied for summary judgment on the notices of assessment in the Enforcement Proceeding in the sum of $30,462,739.21. Before that was dealt with, the Enforcement Proceeding was transferred to this Court pursuant to s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).
4. On 27 June 2013 Mr Donoghue commenced another proceeding in this Court seeking orders quashing by certiorari each of the notices of assessment and also seeking declaratory relief. He also challenged the departure prohibition order. The gravamen of that suit was that by using the allegedly privileged material in the audit process (which had led to the issue of the notices of assessment) the Commissioner had engaged in conscious maladministration of the assessment process and had acted in bad faith in the exercise of his decision-making powers. We shall refer to this third proceeding as the ‘Judicial Review Proceeding’.
5. Each of the Judicial Review Proceeding, the Injunction Proceeding and the application for summary judgment in the Enforcement Proceeding raised the same common issue, namely, whether the various notices of assessment were valid. The Judicial Review Proceeding was tried before a judge of the Court in the middle of 2014. On 17 March 2015 the learned primary judge resolved the Judicial Review Proceeding in favour of Mr Donoghue and concluded that the notices of assessment were invalid and should be quashed. His Honour also set aside the departure prohibition order: *Donoghue v Commissioner of Taxation* [2015] FCA 235; (2015) 323 ALR 337. On the same day that he delivered judgment in the Judicial Review Proceeding he heard argument in the Enforcement Proceeding. In ex tempore reasons his Honour dismissed that proceeding: *Deputy Commissioner of Taxation v Donoghue* [2015] FCA 291. As a matter of formality his Honour did not dismiss the summary judgment application. A week later, on 24 March 2015, the primary judge heard further argument on the Injunction Proceeding and made orders on that day requiring the Commissioner to deliver up to Mr Donoghue’s solicitors his privileged documents and to destroy any copies in the Commissioner’s possession: *Donoghue v Commissioner of Taxation* [2015] FCA 301. These orders were stayed pending this appeal.
6. It is from the learned trial judge’s conclusion in the Judicial Review Proceeding that the notices of assessment were invalid that the Commissioner now appeals. He also appeals in the Injunction and Enforcement Proceedings.

## 2. The Issues in the Appeal

1. The central feature in the appeal is the fact that a disgruntled former law clerk (a young law student called Simeon Moore) employed by Mr Donoghue’s solicitors provided to the ATO documents alleged to be the subject of a claim by Mr Donoghue for legal professional privilege. These documents were used by the ATO auditor, Mr Main, in producing the reasons for decision which, in turn, led to a Deputy Commissioner issuing the notices of assessment. The trial judge found that the documents were privileged but that the auditor, whilst cognizant of what he regarded as a small risk that the documents might be privileged, did not know that they were and had not acted in bad faith. Nevertheless, his Honour concluded that the auditor had acted with reckless disregard for Mr Donoghue’s right to claim privilege over the documents. Consequently, he concluded that this was sufficient to constitute conscious maladministration. Applying *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 157 [25] and 164-165 [55] (‘*Futuris*’), his Honour reasoned that notices of assessment issued as a result of conscious maladministration were invalid. There the Court said:

‘25. But what are the limits beyond which s 175 [of the *Income Tax Assessment Act 1936* (Cth)] 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.

…

55. 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 power may commit the tort of misfeasance in public office in accordance with the principles outlined earlier in these reasons. Members of the Australian Public Service are enjoined by the *Public Service Act* (s 13) to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest. These considerations point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms.’

1. The issues put forward by the parties for resolution on the appeal are:

### First Issue: Maladministration

1. The Commissioner contended that, even assuming the documents in question were privileged, legal professional privilege was no more than a common law immunity against being required to produce documents or information under compulsion. It was beside the point in circumstances where the ATO had obtained the documents from a third party without the use of any compulsory powers. The trial judge had erred, therefore, in thinking that the common law principles concerning legal professional privilege had been breached by the ATO; they were irrelevant. The true position was that the only right Mr Donoghue could have had to prevent the use of the documents lay in an action for breach of confidence. The trial judge had made no findings about that action and this was because no such case had been run before him. In any event, such a claim could not have been maintained against the Commissioner, so it was said, because the confidential nature of the information was never established before the trial judge and because s 166 of the *Income Tax Assessment Act 1936* (Cth) (‘the 1936 Act’) cast upon the Commissioner a statutory obligation to use ‘any other information in the Commissioner’s possession.’ The Commissioner submitted that this Court’s decision in *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412 at 433-434 [81] (‘*Denlay*’) held that s 166 operated to authorise the Commissioner to use information that might otherwise attract obligations of confidence. Further, even if that were not so, there was no rule of law or equity which prevented Mr Main using the information. At best, Mr Donoghue would have had a mere equity to seek to protect the confidential nature of the information. Quite apart from those difficulties there would have been serious discretionary considerations warranting the refusal of relief in any such suit: there were questions about whether Mr Donoghue could be seen as coming to equity with clean hands and, in any event, s 166 exhibited a general policy favouring the accuracy of assessments over private rights to confidence. It followed from all of this that nothing unlawful had occurred and there could not be any form of maladministration, still less conscious maladministration.

### Second Issue: Bad Faith

1. Next the Commissioner submitted that even if he were wrong about the first issue, the trial judge’s factual findings did not permit the finding of conscious maladministration which he had, in fact, made. The trial judge found that Mr Main had acted honestly and not in bad faith and did not know that the documents were privileged. Nevertheless, his Honour concluded that there had been conscious maladministration because Mr Main had acted in reckless disregard of Mr Donoghue’s right to claim legal professional privilege. The Commissioner submitted that a finding of conscious maladministration required a finding of bad faith, that the trial judge had explicitly found that Mr Main had not acted in bad faith and that that was the end of the matter citing *Denlay* at 433 [76] for the proposition that what was required was actual bad faith and ‘not … some form of “constructive” bad faith’.

### Third Issue: Reckless Indifference

1. The trial judge had reasoned that the House of Lords’ decision in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 established that reckless indifference was sufficient to ground an action in tort for misfeasance in a public office. His Honour implicitly reasoned that the High Court had stated in *Futuris* at 164-165 [55] (supra) that a notice of assessment would be invalid if produced in circumstances which involved the commission of that tort. Hence, reckless indifference on Mr Main’s part would suffice to establish that the notices were invalid. The Commissioner submitted that whether that was right or wrong it was not possible on the facts as found by the trial judge to establish conscious maladministration.

### Fourth Issue: Conflation

1. It was Mr Main who the trial judge had found had used the allegedly privileged documents in the course of completing his audit and preparing the reasons for the decision. He had sent the draft reasons to his supervisor, a Ms Jay, who, acting under the authority of a Deputy Commissioner, had issued the notices of assessment. The trial judge did not find that Ms Jay was aware that Mr Donoghue’s privileged material had been used in preparing the assessments when she exercised the Deputy Commissioner’s power to issue the notices. His Honour reasoned that what was involved in issuing the assessments was a process culminating in her actions but also including Mr Main’s actions. The fact that Ms Jay had not personally engaged in conscious maladministration did not mean, therefore, that the decision was not affected by the legal consequences of Mr Main’s acts of conscious maladministration. The Commissioner criticised this reasoning. He submitted that conscious maladministration was a concept which was focussed on the exercise of the decision-making power under challenge, here Ms Jay’s decision. Mr Main was not exercising any decision-making power when he produced his draft statement of reasons for Ms Jay’s approval and it was impermissible to conflate his state of mind with hers.

### Fifth Issue: Privilege

1. The trial judge reasoned that all of the documents provided by Mr Donoghue to Simeon Moore from at least August 2010 were created for the dominant purpose of obtaining legal advice or for assistance or use in legal proceedings. The trial judge concluded that it followed from the *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 508, 544, 571-572 and 589-590 (‘*Propend*’) that all of the documents provided by Simeon Moore to the ATO must also have been privileged. The Commissioner submitted that the first step in the trial judge’s reasoning was erroneous for four reasons. First, some of the documents dated from a period before Simeon Moore’s father, a solicitor, was retained, at which time Simeon Moore appears to have been providing legal advice to Mr Donoghue as a law student on his own account. Secondly, at least two of the documents on their face could not be privileged as it was plain that they had been created for reasons unrelated to the provision of legal advice to Mr Donoghue or the litigation in which Mr Donoghue was involved (such as loan agreements). Thirdly, some of the material only repeated evidence which had been given in various proceedings and such recitations of public evidence could not be privileged. Finally, the Commissioner contended that the trial judge’s blanket finding of privilege was unsustainable in light of the lack of specific evidence from Mr Donoghue about the purpose for which each document in Simeon Moore’s possession was created.

### Sixth Issue: Mr Donoghue’s Bad Faith Argument

1. The trial judge countenanced the possibility that Mr Main had acted in bad faith with some care but concluded, on balance, that he had not. By notice of contention, Mr Donoghue challenged this finding. He submitted that on the balance of probabilities Mr Main did know that the documents were privileged. Accepting the high standard governing appellate factual review, Mr Donoghue submitted that this was the overwhelming inference flowing from Mr Main’s evidence at trial.

### Seventh Issue: Penalty Assessments

1. Mr Donoghue submitted that the penalty notices were not protected by s 175 of the 1936 Act so that the scope for review of them was broader. He also submitted that the Commissioner’s argument that s 166 of the 1936 Act afforded a complete answer to any claim for breach of confidence could not be correct in relation to the penalty assessments because they were not notices of assessment within the meaning of s 166.
2. For the reasons which follow, the appeals will be allowed with costs. The orders of the trial judge in each of these proceedings will be set aside. The Injunction and Judicial Review Proceedings will be dismissed with costs. In the Enforcement Proceedings the Deputy Commissioner is entitled to have the proceedings restored and to have his costs before the trial judge. This will nevertheless leave unresolved the Deputy Commissioner’s summary judgment application. That application was not before this Court and will need to be dealt with in the ordinary course consistently with this Court’s reasons.

## 3. Relevant Facts

1. Mr Donoghue is a businessman in the international telecommunications industry. In January 2010, Mr Donoghue was introduced by his daughter to Simeon Moore, both of whom were then students at Bond University. The introduction occurred at a social function. At that time, Mr Donoghue was involved in several disputes including two in the Supreme Court of New South Wales known as the Lava proceeding and the Saree proceeding. These proceedings involved a Ms Leanne Avery with whom Mr Donoghue had a personal relationship. The proceedings were related to the enforcement of loans and included claims for possession of certain premises. Over several conversations in January 2010 Simeon Moore told Mr Donoghue that he could assist him with these disputes. In or around late January 2010, Mr Donoghue asked Simeon Moore for advice as to what he should do in relation to the two proceedings. On 28 January 2010, Simeon Moore sent Mr Donoghue an email which enclosed a document entitled ‘Analytical Report’ which he had written and an invoice recording payment by Mr Donoghue of $1,000 with a $360 credit balance. This was done under a letterhead which bore the name of Simeon Moore’s personal vehicle, ‘Scientes Research & Strategy’ (‘Scientes’). Simeon Moore was not, of course, a lawyer.
2. On 12 February 2010, or thereabouts, Mr Donoghue retained a law firm, Moore & Associates, to act for him in the Lava and Saree proceedings. Shortly afterwards he received a costs agreement from Moore & Associates signed by Mr Peter Moore. Mr Peter Moore is Simeon Moore’s father.
3. Much of the work done for Mr Donoghue by Moore & Associates was performed by Simeon Moore under the supervision of his father. It is apparent that Moore & Associates billed Mr Donoghue for its services and that Mr Donoghue paid these accounts. Simeon Moore described his role variously as that of consultant or lay associate. By 21 April 2010, Mr Peter Moore was on the record as the solicitor acting for Ms Avery in the proceedings. The trial judge was satisfied that throughout this period Simeon Moore was working for Moore & Associates.
4. Despite that it appears that Simeon Moore continued to send invoices to Mr Donoghue under his own ‘Scientes’ letterhead for the work he was doing. One such invoice was dated 7 April 2010.
5. Towards the middle of 2010, the amount of work being done on the Lava and Saree proceedings increased. This corresponded with a motion to set aside an order for possession of premises in the Lava proceeding in July 2010 and the trial of both proceedings before Slattery J in the Supreme Court of New South Wales on 26-29 July and 2-6 August 2010. In or around the middle of July, but certainly before that trial, Simeon Moore moved to Sydney. At around the same time, Mr Peter Moore ceased leasing the premises from which he practised and practised instead from his home. Shortly after that occurred, Simeon Moore and Mr Donoghue attended Mr Peter Moore’s home for the purpose of collating a complete set of documents for use in the Saree and Lava proceedings. These were then conveyed to Simeon Moore’s residence at St Ives in Sydney. This occurred before the commencement of the trial on 26 July 2010.
6. On 5 August 2010, Simeon Moore sent Mr Donoghue a tax invoice on his own ‘Scientes’ letterhead purporting to be for work done between 30 January 2010 and 5 August 2010. The amount claimed was $753,174.62. The trial judge described the invoice as ‘a fantasy document’.
7. Various conversations then took place between Mr Donoghue and Simeon Moore on 5 August and 11 August 2010. In one of these discussions, Mr Donoghue testified to the trial judge, and his Honour accepted, that Simeon Moore had said to him words to the following 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. A family friend is an Assistant Commissioner and I’ve reported people to him before and he’s taken them down. There’s no doubt he’ll look at you and take everything from you and the Donoghue Family Trust. If you don’t want that to happen, pay up what you owe.’

1. On 11 August 2010 Simeon Moore emailed Mr Donoghue and told him that he had passed material on to the ATO. This would appear to have been incorrect. The evidence did not suggest that Simeon Moore carried out his threat until sometime in January 2011, several months later. Before that occurred, Moore & Associates had ceased to act in September 2010.
2. Meanwhile an informant had contacted the ATO about Mr Donoghue on or about 17 October 2010. The trial judge was satisfied that this informant was not Simeon Moore. On 17 October 2010, an audit was commenced by the ATO into Mr Donoghue’s taxation affairs. It was a covert audit and Mr Donoghue was not aware that it was underway.
3. After that audit had been on foot for several months, Simeon Moore finally carried out his threat. On 28 January 2011, he contacted an officer in the ATO, Mr Wabeck, by email and provided some general information about Mr Donoghue. Another officer who examined this information, Mr Smith, said that ‘he could not do anything with the information as there were no specifics provided’.
4. Starting in January 2011, Simeon Moore appears, over a period of about nine months, repeatedly to have told Mr Wabeck that he would soon deliver documents about Mr Donoghue but always failed to do so.
5. In April 2011, Mr Main was assigned to the audit of Mr Donoghue’s affairs. Mr Main was an auditor within the Commissioner’s Serious Non-Compliance team. By October 2011, Mr Main had analysed the information which had been gathered in the course of the audit and had prepared a draft document entitled ‘Reasons for Decision’. The trial judge observed that this draft dealt only with the 2005 income year, made no mention of either of the Saree or Lava proceedings and did not refer to the Donoghue Family Trust. The potential relevance of these features of the draft will appear shortly.
6. Within a week of Mr Main finalising his draft reasons for decision, Simeon Moore began, on 1 November 2011, a series of disclosures to the ATO which involved delivery of increasingly large quantities of Mr Donoghue’s documents. On 1-2 November 2011 he sent eight emails to Mr Wabeck with a number of attached documents. These documents or the emails enclosing them included headings such as ‘Dramatis Personae’ and ‘Overview’. They shortly found their way to Mr Main who had by then, however, already sent his draft Reasons for Decision to his supervisors, Ms Jay and Ms Wilshire.
7. Mr Main then reviewed these initial documents. On 8 November 2011, he sent an email to another officer within the Serious Non-Compliance team, a Mr Clark, suggesting that the ATO should proceed cautiously with its use of the material. The relevant portions of this email were as follows:

‘While Mr Moore should be given the opportunity to submit documents to us, the ATO should provide the opportunity cautiously. The ATO needs to be cautious because:

(1) we are conducting a covert audit and this should not be jeopardised;

(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.

In order to manage these issues, could SNC Intel contact Mr Moore, thank him for providing information to the ATO, and ask that he provide the documents which substantiate his allegations?’

1. Mr Clark, having received this email, called Simeon Moore on 9 November 2011 seeking further information. He was careful not to disclose to him that Mr Donoghue was already under covert audit. During that call it seems that Mr Clark was told by Simeon Moore that he would shortly deliver two laptop computers containing further information about Mr Donoghue.
2. This he did. On 14 November 2011, Mr Clark met with Simeon Moore who handed over a 127 page statement he had prepared detailing in a rambling and discursive fashion the interstices of Mr Donoghue’s financial and domestic affairs, a bundle of documents and the promised two laptop computers.
3. At this point, Mr Clark sent Mr Main his notes of his interview with Simeon Moore together with the 127 page statement and the bundle of documents. He sent the two laptops to a section of the ATO which extracts information from computers.
4. As events transpired, only one of the laptops could be accessed. Mr Main was told of the process of extraction and the difficulty it had encountered in respect of one computer. The documents which were recovered from the single laptop were then uploaded into a system known as NUIX and Mr Main perused the documents which had been extracted on that system. He printed off those which he regarded as relevant to the audit and placed them on the audit file on 6 December 2011.
5. The trial judge found that the information provided to Mr Main caused him to abandon his earlier draft reasons for decision which he had forwarded to his superiors on 25 October 2011. He provided another set of reasons for decision on 20 December 2011 to Ms Jay and Ms Wilshire. Two key differences between the earlier version and the more recent draft were that:
6. the more recent draft now proposed the issue of notices of assessment for the 2006 and 2007 income years, rather than just the 2005 year, and did so on the basis that Mr Donoghue was a beneficiary of the Donoghue Family Trust; and
7. the more recent draft included additional reasons for concluding that Mr Donoghue was an Australian resident in the 2005 year (and also in the 2006 and 2007 years), namely, the existence of the domestic relationship with Ms Avery exposed in the Lava and Saree proceedings and the existence of a child of that relationship.
8. Although we do not need to resolve this issue, we record, in passing, the Commissioner’s submission on the appeal that another explanation for the addition of the 2006 and 2007 years related to the additional time afforded to Mr Main to produce the draft reasons as a result of the need to consider Simeon Moore’s recent disclosures. The suggestion, as we understood it, was that all three years had always been under consideration but it had only been possible to deal with the 2005 year by the end of October 2011 when Mr Main produced his first set of draft reasons. This mattered because it suggested that the addition of the 2006 and 2007 income years in the more recent draft may not have been, as the trial judge thought, the direct consequence of Simeon Moore’s documents, but instead the result of the additional time which was afforded to Mr Main to prepare the draft reasons. We do not need to resolve this issue.
9. Ms Jay gave evidence that she acted on what Mr Main had said in his draft reasons for decision and adopted them. On 21 December 2011, she issued the notices of assessment in the name of a Deputy Commissioner, a Mr Duffus. These are the notices referred to above at [1] of these reasons.
10. It is convenient then to turn to the issues which arise.

## 4. Consideration

### First Issue: Maladministration (Notice of Appeal Grounds 4, 7, 8 and 12, Proposed Amended Notice of Contention Ground 3(c))

1. The principal issue to be determined at the trial of the Judicial Review Proceeding was whether the notices of assessment were valid. The validity of notices of assessment is protected by a privative clause in ss 175 and 177(1) of the 1936 Act which provided:

‘175 Validity of assessment

The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

177 Evidence

(1) The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.’

1. The effect of these provisions was explained in *Futuris* at 157 [25] and 164-165 [55] (supra) as not applying to assessments which have been produced as a result of conscious maladministration. Elsewhere in the judgment it is clear that the underlying concept which will take an assessment beyond the protection afforded by ss 175 and 177 is, in essence, a want of good faith in the process of assessment: see especially at 164-165 [55] and 165-166 [60]. The Full Court in *Denlay* observed (at 433 [76]) in relation to *Futuris* at 165-166 [60]:

‘Those observations highlight that their Honours were concerned, in their reference to conscious maladministration, with bad faith in the exercise of the decision-making power under challenge and the need for proof of an allegation of bad faith against the Commissioner or his officers. Their Honours were concerned with actual bad faith, not with some form of “constructive” bad faith established by unwitting involvement in an offence.’

In that circumstance, conscious maladministration is an instance of the absence of good faith. There may well be others. This is not to say that a taxpayer may not dispute a notice of assessment on other grounds (besides want of good faith or that the supposed assessment was provisional or tentative only) but rather that any such review must take its course through the ordinary channels provided for review under the provisions of Pt IVC of the *Taxation Administration Act 1953* (Cth) and will not go to validity. The Judicial Review Proceeding was brought under s 39B of the *Judiciary Act 1903* (Cth), which would have ordinarily permitted this Court to review a decision of the Commissioner on the full range of judicial review grounds. The effect of s 175 and the High Court’s decision in *Futuris,* however*,* is that the only ground of review available to challenge a notice of assessment in a case such as the present is a want of good faith such as conscious maladministration. The correctness of these observations was not in dispute before the trial judge or in this Court.

1. In his statement of claim in the Judicial Review Proceeding, Mr Donoghue alleged that the Commissioner had received his documents from Simeon Moore knowing, or in circumstances in which he ought to have known, that they were confidential and also the subject of legal professional privilege. It was said in the pleading that it was, therefore, wrongful for the Commissioner to have used the documents in the course of producing the assessments. It was then alleged that this conduct amounted to conscious maladministration.
2. Before the trial judge, the explicitly pleaded case that conscious maladministration was to be proved by demonstrating that the Commissioner might have been liable in an action for breach of confidence was abandoned. This left the allegation of conscious maladministration resting only on the notion that it was unlawful for the Commissioner to use privileged documents which had come into his possession in the process of preparing a notice of assessment.
3. In this Court, it was disputed by Mr Donoghue that the case based on confidentiality had, in fact, been abandoned. However, we have no doubt that it was. At paragraph [25] of Mr Donoghue’s written submissions in the Court below, this statement was made:

‘Turning to the second issue raised by the respondent, namely that the documents were not confidential documents, the respondent mis-states the legal principles. Legal professional privilege may apply to documents that are not confidential, if they are provided to the solicitor for the purposes of seeking legal advice. They are privileged in the hands of the solicitor. They may not be confidential in the hands of the client, and may be disclosable or discoverable in the event of litigation, but the fact that a copy has been provided to the solicitor for the seeking of legal advice renders the information the subject of privilege in the first instance.’

1. Counsel for Mr Donoghue on the appeal submitted that this did not constitute an abandonment of a case based on confidentiality and that this passage was to a degree ambiguous. It may be doubted whether this is so but it is, in any event, immaterial. The final address of junior counsel for Mr Donoghue at the trial put the matter beyond doubt following an exchange with the primary judge in which the precise question was raised:

‘His Honour: What looking at 81 and 82 provokes is the thought about whether one needs to go into equitable duties of confidence which – in other words, if there is, to use the term there, the purpose of vindicating the public law of the Commonwealth, upholding lawful conduct – does there need to be a cause of action for an equitable duty of confidence breach if what is established by Mr Donoghue is an unlawful – unlawful conduct by the Commissioner.

Mr Peden: No. We don’t need to go so far as that. We just need to focus on the legal professional privilege point.

His Honour: And the exercise of an assessing power in a way that would violate that privilege.’

1. It is, therefore, clear that the breach of confidence case was not being pursued at trial although it had certainly initially appeared in the pleadings. Consistent with its abandonment, there are to be found in the written submissions at trial none of the arguments which it would have been necessary to advance if a claim for breach of confidence had actually been pursued. There are, for example, no submissions from Mr Donoghue about which of the documents was confidential nor any explanation of whence the necessary quality of confidentiality in those document might have arisen. As will appear later in these reasons, there are problems with the contention that all of the documents which Simeon Moore handed over to the ATO could be the subject of a claim in respect of confidential information. For example, the documents included material such as loan documents and other transactional documents which are not generally thought to have the necessary quality of confidence. Although there is no need for us to express a concluded view on this issue, it is possible that the abandonment of the case based on confidentiality reflected a sober appreciation on the part of Mr Donoghue’s advisers of the problems which attended the pursuit of such a case.
2. By the end of the trial Mr Donoghue’s case, therefore, hinged entirely upon the legal proposition that it was unlawful for the Commissioner to have used the documents he received from Simeon Moore because they were the subject of legal professional privilege. This case the trial judge accepted.
3. The trial judge’s conclusion was that conscious maladministration was demonstrated by Mr Main’s use of documents which were privileged. His Honour’s reasoning is well illustrated by a passage at paragraph [113]:

‘Faced with the choice of using material relevant to the audit which may be privileged and compromising confidentiality Mr Main deliberately chose not to make or cause to be made inquiries. 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 which to complete his audit. That the material did not obviously convey legal advice was Mr Main’s way of rationalising both this choice and a view that the risk it was privileged was “low”. 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.’

1. It is clear that the law the trial judge had in mind was the law of privilege. The only reference to confidentiality is in the first sentence and it is a reference to Mr Main’s desire to maintain the confidentiality of the covert audit, rather than the confidentiality of Mr Donoghue’s documents. That this was so appears in several parts of the judgment. For example, at [134] the trial judge observed that s 166 of the 1936 Act (infra) did not ‘authorise him to use information in his possession which is the subject of legal professional privilege…’. And, at [137], he said, ‘…neither s 166 nor s 263 of the [1936 Act] authorises the use of or access to material which is subject to legal professional privilege…’. Similar statements appear at [138] and [145].
2. This is, of course, consistent with the way in which the case was run before his Honour. Some effort was made in this Court to argue that his Honour had dealt with a claim for breach of confidence, at least implicitly. We reject that submission. There was no occasion for his Honour to consider such a case and we do not read his reasons as doing so. There is no reference to an action for breach of confidence in the reasons for judgment.
3. With respect to the trial judge, whilst it is easy enough to see why privilege might be viewed as a bar to inspection this was not a correct view. The common law of legal professional privilege operates as an immunity from the exercise of powers requiring compulsory production of documents or disclosure of information. It is not a rule of law conferring individual rights, the breach of which may be actionable. Consequently, no action lies against a party who receives documents which are privileged merely because those documents are privileged. Gummow J explained the matter this way in *Propend* at 565-566:

‘At common law, and in the absence of any statutory indemnity or other protection against liability, an officer who executed a search warrant in excess of the authority conferred by it, incurred a liability for damages in tort for trespass to land or goods, false imprisonment or for other misfeasance. However, the privilege itself is not to be characterised as a rule of law conferring individual rights, breach of which gives rise to an action on the case for damages, or an apprehended or continued breach of which may be restrained by injunction.

It is true that if the use of privileged documents by the defendant is, or is a consequence of, a breach of confidence owed the plaintiff, then there may be an equity to protect that confidence. In *Lord Ashburton v Pape*, it was decided that the client whose privileged documents, being letters written to his solicitor, had fallen into the hands of a third party by a trick, might obtain injunctive relief requiring the return of the documents and restraining the third party from making use of them. On the other hand, in *Calcraft v Guest*, the defendant was permitted to adduce as secondary evidence copies of proofs of witnesses, with notes of the evidence, in a previous action brought in 1787 by the plaintiff’s predecessor in title and concerning the true boundary of the plaintiff’s fishery. The original documents remained privileged but the defendant, having obtained copies of the privileged documents, was not precluded by that privilege from tendering them as secondary evidence. It was held that the question of provenance of the documents tendered was a collateral issue.

The distinction between these authorities may be seen to lie in the character of the privilege as a bar to compulsory process for the obtaining of evidence rather than as a rule of inadmissibility. The effect of the authorities has been identified as follows:

“All that *Calcraft v Guest* decided was that when a privileged document was no longer in the hands of those entitled to claim immunity from production, there was nothing to prevent its use in evidence. Of course, a person who has a right to confidence in a document can enforce his right by injunction, and this is what lay behind *Ashburton v Pape*.”’

(footnotes omitted)

1. Four judges of the High Court adopted the same reasoning in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552-553 [10]. It follows that the common law of privilege is silent when the question which arises does not concern compulsory production. It is, no doubt, apt to confuse that the statutory law of privilege which governs the admissibility of privileged documents in Court proceedings is not a rule which operates as an immunity. Instead, provisions such as ss 118 and 119 of the *Evidence Act 1995* (Cth) operate as a prohibition on the adduction of evidence of privileged communications. That is not a matter, however, which can distract from the true nature of common law privilege as an immunity.
2. On the other hand, as Gummow J noted in *Propend*,privileged documents will often be confidential in the sense that a court of equity will restrain their publication under the principles outlined by Megarry J in *Coco v AN Clarke* (*Engineers) Ltd* [1969] RPC 41 at 47 (‘*Coco*’):

‘In my judgement, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must “have the necessary quality of confidence about it.” Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. I must briefly examine each of these requirements in turn.

First, the information must be of a confidential nature. As Lord Greene said in the *Saltman* case at page 215, “something which is public property and public knowledge” cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components. Mr. Mowbray demurs to the concept that some degree of originality is requisite. But whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some product of the human brain which suffices to confer a confidential nature upon the information: and, expressed in those terms, I think that Mr. Mowbray accepts the concept.’

1. Thus, as was held in *Lord Ashburton v Pape* [1913] 2 Ch 469, a person who comes into possession of another’s privileged documents may be restrained in equity from using or publishing them. This result, however, follows not from their status as privileged documents but from the fact that they have the necessary quality of confidentiality in the sense discussed in *Coco*.
2. Swinfen Eady LJ explained the matter this way in *Lord* *Ashburton v Pape* (at 475):

‘…The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the disclosure of confidential information, but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession that confidential information has come from themselves in turn divulging or propagating it.’

1. Accordingly, it is orthodox that where privileged documents are disclosed to third parties the right to restrain their use or to compel their return is grounded in equity rather than the common law of privilege. This has been affirmed in several decisions of intermediate appellate courts and is not in doubt: see *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64 at 70-71 [11]-[16] per Doyle CJ, at 80 [78]-[79] per Debelle J, at 100-101 [172]-[173] per White J; *Cowell v British American Tobacco Australia Services Ltd* [2007] VSCA 301 at [32]-[34] per Warren CJ, Chernov and Nettle JJA; *Australian Securities and Investments Commission v Lindberg* (2009) 25 VR 398 at 406-409 [43]-[51] per Mandie JA (Warren CJ and Neave JA agreeing); *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at 362-365 [69]-[83], 371 [102], 373 [109] and 383-386 [155]-[162] per Campbell JA (Macfarlan JA and Sackville AJA agreeing) (appeal allowed on other grounds: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303).
2. It follows that the act of maladministration identified by the trial judge – breach of the common law of legal professional privilege – cannot, with respect, be correct. At best the law of privilege afforded Mr Donoghue an immunity against being compulsorily required to disclose communications with his attorneys. Where the Commissioner did not use any such power to obtain the documents in question, whether they were privileged was of no moment.
3. Of course, the authorities do not mean that a person in Mr Donoghue’s position is without remedy. In this case, Mr Donoghue could have brought a suit against Simeon Moore immediately after he sought to blackmail him in order to restrain him from carrying out his threat. Even after the documents were delivered to the ATO it may perhaps have been possible, at least before the information in them became assimilated via the assessment process, to have sued the Commissioner under the principle in *Lord* *Ashburton v Pape* for the return of the material (we express no concluded view on that matter although we discuss it more fully below). However, all of these claims would have been in equity to enforce a claim for confidentiality and it was a case of this kind which was, as we have explained, abandoned before the trial judge.
4. The situation then is that the case advanced by Mr Donoghue before the primary judge, and accepted by him, could not be correct. Subject to what follows, this must lead, inevitably, to the appeal being allowed.

*Attempts to revive the breach of confidence case on appeal*

1. During the hearing of the appeal it became clear, for the reasons which have just been given, that it was vital to Mr Donoghue’s interests to pursue a claim for breach of confidence before this Court. This end was pursued in reliance upon two arguments. The first was that although it was, in a sense, technically correct to distinguish the nature of a claim for privilege as an immunity from production from the equitable principles governing the protection of confidential information, in substance they were to be seen as cut from the same cloth. If that were so then the fact that the primary judge dealt with the claims for privilege at trial should be taken as being a sufficient treatment of the issue of confidence even if the primary judge did not use that appellation himself.
2. We reject this argument. The distinction between the two sets of principles is not merely technical, it is substantial. One is an immunity which gives rise to no rights which can be breached; the other a right to approach a court of equity for discretionary relief. One is a fundamental common law right; the other an incident of the law of intellectual property. It is, therefore, not the case that by dealing with the claim for breach of privilege his Honour must have dealt with the claims for breach of confidence by a fortuitous side-wind. Issues which arose for consideration in a claim for breach of confidence which did not arise in considering a claim for privilege included the need for evidence about the confidential nature of the material in issue and the various discretionary reasons which might exist for refusing relief. The latter included, at least, significant questions about public policy and clean hands.
3. The second argument conceded that the question of breach of confidence had not been dealt with at trial and now sought to raise it as a fresh issue on the appeal. This required Mr Donoghue to submit that the trial judge’s reasoning might be supported on grounds other than those relied upon by his Honour. It was therefore necessary for any such argument to be pursued by notice of contention: r 36.24 of the *Federal Court Rules 2011* (Cth). On the second day of the appeal, Mr Donoghue sought to file an amended notice of contention including a ground 3(c) to the effect that the orders made by the Court below could be supported on the basis of an argument that Mr Main had committed conscious maladministration because he had used Mr Donoghue’s confidential information. At the time, we permitted the matter to be argued in full and reserved the issue of whether leave to file the amended notice of contention should be granted.
4. Leave should not be granted. A pleaded case based on confidentiality was alive in the pleadings but it is apparent that that case was abandoned at trial. This is not a case where the issue is whether this Court should permit a fresh argument to be raised which was not pursued in the Court below. This is a case where the point had been initially pursued and then given up. As the High Court explained in *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483:

‘It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.’

1. See also *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8. A fortiori, where the proposed fresh argument was abandoned. Quite apart from that difficulty, there is not the material before this Court which would allow any assessment of the claim that the documents had the necessary quality of confidence: cf. *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443 per Gummow J (FC); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 at 87 per Gummow J; *Coco* at 47 per Megarry J.

*The Necessary Quality of Confidentiality*

1. The observation in the preceding paragraph is not an idle one. A cursory consideration of the material handed over to the ATO by Simeon Moore reveals that many of the documents collected by him from his father’s house and taken to his own residence at St Ives cannot have been confidential in the sense discussed in *Coco*. For example, one of the documents was a loan agreement and another was a letter authorising a third party to transfer some shares. Furthermore, it appears to us that the documents in question are likely to have included correspondence passing between the parties in the Lava and Saree proceedings, together with affidavits and other documents on the Supreme Court’s file. The latter could not conceivably be confidential.
2. Counsel for Mr Donoghue sought to overcome that difficulty by submitting that all of the documents taken by Simeon Moore from his father’s house must have been confidential because they were all necessarily privileged. We would reject this argument. It is true that the trial judge accepted that all of the documents must have been privileged even if they were copies of non-privileged documents. This was because his Honour concluded that, as copies, they had all been created for the dominant purpose of assisting in the conduct of the Supreme Court litigation: cf. *Propend* at 508, 544, 571-572 and 589-590.
3. Without deciding at this stage, whether that conclusion by the primary judge was, as the Commissioner submitted, erroneous because it was not shown that all of the documents held by Simeon Moore were copies created for that purpose, it does not, in any event, justify the conclusion for which Mr Donoghue contends, viz. that the documents must have been confidential in the *Coco* sense as well. This is because, whilst we accept that a communication passing between a lawyer and client needs to be confidential before it can be privileged, it does not follow that the subject matter of the confidential communication need itself have about it the necessary quality of confidence. It may be accepted, applying *Propend*, that if a client creates a copy of a non-confidential and unprivileged document she has in her possession for the dominant purpose of providing it to her lawyer to assist in the conduct of litigation, the copy so created will be privileged. An example of such a document which was explored in argument on the present appeal was a map illustrating where an accident occurred. It would be true, in such a case, that the communication of the copy to the lawyer would be a confidential communication and the copy would be immune from production by way of compulsory process. But it does not follow, contrary to Mr Donoghue’s submissions, that the information contained in that copy would thereafter have about it the necessary quality of confidence within the meaning of *Coco*, simply because it had been contained in a communication which was itself confidential. 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 information in the copy of the map would not be confidential and it could not have become confidential simply because the copy was provided to a lawyer.

*Conclusions on Privilege and the Appeal*

1. Once that point is reached, there is nothing before this Court upon which it could decide the merits of a claim for a breach of confidence. In those circumstances, it is inevitable that the appeal must be allowed. The 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*. No case for breach of confidence being pursued before the trial judge or this Court, it is not possible to conclude that Mr Main acted contrary to law. That conclusion has the consequence that there can have been no maladministration by Mr Main in using the material. If there were no maladministration there can have been no conscious maladministration within the meaning of *Futuris* at 157 [25] and 164-165 [55]. The Judicial Review Proceeding should have been dismissed and the trial judge erred in not doing so.

*Additional observations on the action for breach of confidence*

1. Even if Mr Donoghue had run a case based on breach of confidence, such a case would have been, so it seems to us, confronted with significant difficulties. Here we assume in Mr Donoghue’s favour that he could surmount the difficulty of proving that the material provided by Simeon Moore had the necessary quality of confidence and, further, that it was this information which Mr Main used in producing his draft Statement of Reasons (although we note for completeness that the Commissioner was critical of both of those assumptions).
2. The difficulty is that any such case would have been defeated by s 166 of the 1936 Act. It provided:

‘166 Assessment

From the returns, and from any other information in the Commissioner’s possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income (or that there is no taxable income) of any taxpayer, and of the tax payable thereon (or that no tax is payable).’

1. It has been held, albeit in somewhat different circumstances, that s 166 permits the Commissioner to use information in his possession which might be the subject of a claim for breach of confidence: *Awad v Commissioner of Taxation* (2000) 104 FCR 106 at 112-113 [22]-[24] (‘*Awad*’). There is a material distinction between that case and this in that in *Awad* the confidential information had come innocently into the hands of the Commissioner as the result of the execution of warrants which were later quashed on constitutional grounds; that is to say, at the time the Commissioner received the documents he did not know or suspect that a claim for confidentiality could be made. In this case, we are prepared to assume in Mr Donoghue’s favour that it would have been reasonably obvious to Mr Main that some, perhaps many, of the documents supplied by Simeon Moore could have been subject to a claim for confidentiality.
2. However, we do not accept that s 166 is confined in its operation merely to permitting the Commissioner to have access to confidential information which he has received without notice of its confidential nature. Such a limited scope for the operation of s 166 was expressly rejected by the Full Court of this Court in *Denlay* at 433-434 [81]-[82]:

‘81 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.

82 We are also unable to see that such a qualification is necessary in order to ensure that the Commissioner’s officers are discouraged from disobeying the law in carrying out their functions under the ITAA 1936. One may confidently say that, in carrying out their investigations, the Commissioner’s officers are subject to the law of the land; if they transgress the law of the land, then they will suffer the consequences. It is an entirely different thing to say that the interest of the Australian community in the making of taxation assessments based on the most accurate information available, an interest embodied in s 166 of the ITAA 1936, should be defeated by a default on the part of the Commissioner’s officers which has no bearing on the accuracy of the assessment. Thus, the desirability of encouraging officers of the executive government to abide by the law of the land affords no reason to confine the operation of s 166 of the ITAA 1936 by subjecting it to the limitations urged by the taxpayers.’

1. This requires the conclusion that s 166 not only permits but requires the Commissioner to act upon the information which he has in his possession regardless of how he came to have it. Section 166 exhibits a policy which explicitly privileges the need to have accurate assessments made on the information available over other private law rights. It did not matter in *Denlay* that the information might have been unlawfully obtained by the Commissioner’s officers (although that was not the finding); all that mattered was that it had come into the Commissioner’s possession. The combined effect of *Denlay* and *Awad* is that the Commissioner is not only entitled, but obliged, to use information which is in his possession even if he knows it is subject to a claim for breach of confidence and even if he knows it is privileged.
2. The trial judge conceptualised Mr Donoghue’s claim for privilege as giving rise to a right in Mr Donoghue to prevent the use of the documents and a correlative duty on the part of Mr Main not to use them. As we have explained, this was erroneous. It was with that misconception, no doubt persuasively urged by counsel for Mr Donoghue at the trial, that his Honour then approached the question of the proper construction s 166. At para [133] he reasoned, in an apparently orthodox fashion, that s 166 would not be interpreted in a way which infringed legal professional privilege without clear words or necessary implication: cf. *Daniels* and *Baker v Campbell* (1983) 153 CLR 52. Correctly, with respect, he concluded that such clarity of expressed intention could not be located in the text of s 166.
3. The incorrectness of this otherwise impeccable reasoning emerges because the issue of privilege could only arise in the context of a power of compulsory production and s 166 is not such a power. Section 166 does not empower the Commissioner to obtain any material by compulsion. Rather, it imposes a duty on him to use information which is in his possession. Not being a power to require production, there was no basis for reading s 166 as not applying to information which was privileged.
4. Once that is brought to account, the debate then necessarily turns to the question of how s 166 would have interacted with a claim for breach of confidence. The answer to that question was definitively provided by the passage we have set out above from *Denlay*: it would have defeated it. The trial judge sought to distinguish *Denlay* on this basis:

‘I am bound, of course, to follow the law as stated by the Full Court. *Denlay* arose against the background of the theft abroad by a third party of confidential banking and financial information which came into the possession of officers of the Australian Taxation Office and was then used by the Commissioner. Neither the Commissioner nor any of his officers nor any other officer of the Commonwealth was a party to that theft. The Full Court, in turn, was bound by what had been said in *Futuris*. The statement made in *Denlay* with respect to s 166 was made in respect of facts which did not give rise to conscious maladministration, as explained in *Futuris*, on the part of the Commissioner and his officers. The passage quoted from *Denlay* is not and was not intended to be an endorsement of the proposition that s 166 gives the Commissioner *carte blanche* consciously to maladminister the ITAA36 in the process of making an assessment. It was also a feature of *Denlay* that the Full Court was not called upon to consider whether recklessness might supply the element of knowledge necessary to establish “conscious maladministration”.’

1. Accepting that these are differences they do not seem to us to be relevant ones. Further, it is apparent that his Honour regarded s 166 as operating in the domain of privilege when, in truth, it did not.

*Mr Donoghue’s argument that s 166 does not apply to confidential information*

1. Before this Court, Mr Donoghue advanced an additional argument that s 166 did not authorise the use of confidential information in the Commissioner’s possession. Necessarily this implicitly constituted an invitation to depart from the conclusion in *Awad* that s 166 does authorise the use of confidential information. The invitation should be declined.
2. The argument had as its point of departure s 263 of the 1936 Act. Sections 263 and 264 provided:

‘263 Access to books etc.

1. The Commissioner, or any officer authorized by the Commissioner in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
2. An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.
3. The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.

Penalty: 30 penalty units.

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

264 Commissioner may require information and evidence

1. The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority:

(a) to furnish the Commissioner with such information as the Commissioner may require; and

(b) to attend and give evidence before the Commissioner or before any officer authorized by the Commissioner in that behalf concerning the person’s or any other person’s income or assessment, and may require the person to produce all books, documents and other papers whatever in the person’s custody or under the person’s control relating thereto.

1. The Commissioner may require the information or evidence to be given on oath or affirmation and either verbally or in writing, and for that purpose the Commissioner or the officers so authorized by the Commissioner may administer an oath or affirmation.

(3) The regulations may prescribe scales of expenses to be allowed to persons required under this section to attend.’

1. There is no doubt that s 264 can be used to require the production of documents which contain information which might otherwise be subject to a proper claim that they were confidential: see, for e.g., *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 489 per Stephen J (‘*Smorgon*’). The reasoning of Stephen J was concerned with s 264 but it is plain from Stephen J’s treatment of the topic that he regarded s 264 as operating in that fashion, in part, because that was how s 263 operated (‘Just as s. 263 gives to the Commissioner full and free access to “all buildings, places, books…” so s. 264 is expressed in no less wide and emphatic terms…’). In *Commissioner of Taxation of the Commonwealth of Australia v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 535 (‘*ANZ*’), Mason J observed, consistently with what Stephen J had said in *Smorgon*, that s 263 ‘makes lawful that which otherwise would be unlawful, e.g. entry upon premises, *the examination of a document*.’ (our emphasis). Taken together these authorities establish that s 263 does, indeed, authorise the Commissioner to have access to books and documents which may be subject to a proper claim that they contain confidential information.
2. The next step in Mr Donoghue’s argument was the further contention that s 263 not only permitted the Commissioner to access confidential information but also permitted him to use the information thus accessed in the process of preparing an assessment. The third step was to observe that it was established that s 263 could not be used to obtain access to information which was subject to legal professional privilege. The final step was then to submit that s 166 should not be read as permitting use of information which was confidential because this work was done by s 263. On this view, the Commissioner fell between two stools. Because the documents held by Simeon Moore were privileged the Commissioner could not have obtained them compulsorily under s 263. Because they were confidential he could not use them under s 166, which was the consequence of his submission that access to confidential material could occur only ever under s 263.
3. This argument fails at two points. First, s 263 is not the source of power for the Commissioner, having obtained access to information, then to use that information. Section 263 says nothing about using information produced under it in the process of preparing an assessment. Mr Donoghue’s argument is without any foundation in the words which actually appear in s 263.
4. Secondly, since s 263 does not operate in the manner suggested by Mr Donoghue, there is no warrant for construing s 166 so as to prevent it being read as authorising the use of confidential information.
5. Consequently, Mr Donoghue’s submission that s 166 could not be the source of the Commissioner’s entitlement to use documents which are confidential cannot be accepted.
6. That conclusion is most likely fatal to Mr Donoghue’s ability to bring any action for breach of confidence. Even assuming such a claim could otherwise be made out in equity, s 166 would supply statutory authority to the Commissioner to use the information in the documents to produce an assessment. Indeed, it would not only permit him to do so, it would – as was pointed out in *Denlay* – require him to do so. As such, it would appear to afford a complete answer to any allegation that Mr Main was somehow acting in breach of a rule of equity.

*Related Problems*

1. That conclusion assumes that equity would actually have imposed an obligation on the Commissioner not to use the information. The Commissioner contested the correctness of that assumption submitting that, leaving aside s 166, no rule of equity prevented him from using such information and, at best, Mr Donoghue would have had a mere equity which needed to be perfected by a suit to enforce it. Complex issues arise from that submission which our previous conclusions make it unnecessary to resolve: cf. Neave M and Weinberg M, “The Nature and Function of Equities (Part II)” (1979) 6(2) University of Tasmania Law Review 115 at 124.
2. During the course of argument on the hearing of the appeal, a further question arose as to whether an action for breach of confidence could have been maintained against the Commissioner during the period of time after which Simeon Moore had provided the documents to the ATO but before Mr Main had read them and so became aware of their contents.
3. The debate proceeded upon an assumption that a distinction could be drawn between the Commissioner’s possession of a document and his possession of the information contained in that document. That distinction, if valid, may be of significance because the obligation placed upon the Commissioner by s 166 is an obligation to use ‘information’ in his possession. If the distinction is sound then there may be an argument that s 166 does not operate until such time as the Commissioner has read privileged or confidential documentation which has come into his possession. It was suggested that, if that view were correct then it might mean that s 166 would not be available as a defence to an action for breach of confidence at the time before the information in the confidential documents had been obtained by the Commissioner by reading them.
4. There are limitations, however, on what can usefully be said about this. It suffices to say that no case for breach of confidence was run at trial and the matters arising if we were to explore the issue further are not straightforward or capable of ready resolution. There is no need to comment further.

*Section 263?*

1. At trial, there was a debate between the parties as to whether s 263 provided an additional basis upon which the Commissioner might have obtained access to the information in the documents handed over by Simeon Moore. On this view, he was simply accessing documents located on his own premises. In the Court below it was the Commissioner who submitted that s 263 permitted such a course and Mr Donoghue who denied its application. In this Court, their positions were reversed. To buttress his argument that s 166 did not apply to the current circumstances, Mr Donoghue now submitted that s 263 did and, concomitantly, the Commissioner, in response, denied the correctness of that which he had himself asserted at trial.
2. The correct position is that s 263 has no application to the Commissioner’s own premises. The requirement in subs (3) that the occupant of premises provide the Commissioner with reasonable assistance is meaningless where the occupant is the Commissioner. So too, and perhaps more importantly, as *Smorgon* and *ANZ* show, s 263 is concerned to make lawful that which would otherwise be unlawful. The Commissioner requires no such protection to obtain access to material already in his possession, suggesting that the reading of s 263 now proposed by Mr Donoghue (and formerly advanced by the Commissioner) results in subs (1) being otiose. This is not a preferable way of interpreting a statute: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

*The Commissioner and Privileged Documents*

1. Lest there be any doubt, it is useful to emphasise the consequences of the matters we have discussed above. Where the Commissioner is provided with a taxpayer’s privileged documents and uses them in the process of assessing the taxpayer’s assessable income in a given income year, this will not involve conscious maladministration under *Futuris* and the notices of assessments will be valid. The common law of privilege has nothing to say in such a circumstance and any claim for a breach of confidence involved in the process of assessment cannot withstand the operation of s 166.

### Second, Third and Sixth Issues: Good Faith and Reckless Indifference (Notice of Appeal Grounds 2, 9, 10 and 11; Notice of Contention Grounds 3(a) and (b))

1. The trial judge found that Mr Main had acted honestly and not in bad faith, but that he had been reckless as to Mr Donoghue’s right to claim legal professional privilege. Nevertheless, he concluded that he had engaged in conscious maladministration because he had acted in a recklessly indifferent fashion. There may be something to be said for the view that not all of these mental states can be simultaneously held. Indeed, much of the argument put forward before this Court by both parties centred upon some of the contradictions potentially involved in the trial judge’s conclusions. For example, for the Commissioner it was said that reckless indifference involved bad faith and his Honour’s conclusion that Mr Main had acted in good faith meant his finding that he acted in a fashion that was recklessly indifferent could not stand. On the other hand, Mr Donoghue submitted that the primary judge’s conclusions about Mr Main’s allegedly deliberate decision not to consider the question of privilege showed that the finding that he had acted honestly could not stand. There were other permutations of similar arguments.
2. Ordinarily, it would be convenient to resolve these questions. However, it is impossible to do so in this case. All of the trial judge’s conclusions about the absence of bad faith, Mr Main’s honesty and his attitude of reckless indifference were premised upon an assumption that what was being assessed was Mr Main’s mental state in relation to an obligation not to use privileged material. As we have endeavoured to explain, however, that assumption about the operation of the law of privilege was incorrect. Although Mr Main was extensively cross-examined about what he thought the law of privilege required and how his own actions measured up against that standard, the underlying premise being put to him was erroneous. So too, the trial judge’s conclusion that Mr Main had acted with reckless indifference to Mr Donoghue’s right to make a claim for legal professional privilege miscarried because no such right existed and s 166 required the opposite conclusion. Even if it were relevant, it would not be possible, in that circumstance, to transmogrify the trial judge’s findings about Mr Main’s subjective attitude to the law of privilege into findings about his subjective attitude to the law of confidence. Not only is this so as a matter of logic, it is true as a matter of fairness. Mr Main was never cross-examined about what he thought in relation to an action for breach of confidence.
3. The fact remains, however, that it is clear from s 166 what the correct position was in relation to the way Mr Donoghue’s case was conducted. What this Court can say, therefore, is that the findings of the trial judge, carefully drawn and gently expressed as they were, cannot be left to stand. They are premised upon the wrong question. We would pay tribute to the trial judge’s careful and restrained assessment of all of the difficult material before him and the balanced manner in which he approached this most delicate case. That does not, however, relieve us of the obligation of observing that despite those matters, these factual findings must be put at nought. It follows, and Mr Main is, we consider, entitled to have it said, that we have detected nothing improper in Mr Main’s conduct of the audit process or in his dealings with the documents provided by Simeon Moore. He acted precisely as s 166 required him to do. There were no defaults in his conduct as a public servant. There was no maladministration, still less conscious maladministration. That he was persuaded into making concessions during his cross-examination about what he should have done in relation to privileged documents signifies nothing when it is realised the cross-examination was conducted on a legally erroneous assumption.

### Fourth Issue: Conflation (Notice of Appeal Grounds 3, 5 and 6)

1. Given that we have concluded that Mr Main did not engage in conscious maladministration, there is no utility in deciding whether the trial judge was correct in thinking that his state of mind could infect the exercise of power by Ms Jay when she issued the assessments in Mr Duffus’s name.

### Fifth Issue: Privilege (Notice of Appeal Ground 1)

1. We have concluded above that the question of whether the documents were privileged or not was the wrong question and that the correct question was whether they could be subject to a proper claim for confidentiality. The trial judge concluded that all of the documents in Simeon Moore’s possession were privileged. This appears to have been upon the basis that they had all been provided to him for the purpose of conducting the Lava and Saree proceedings and, hence, even if the underlying originals were not themselves privileged, the copies he held were because they had been created for the dominant purpose of the litigation: *Propend* (supra).
2. The Commissioner was critical of this reasoning. In light of our conclusions, this question does not arise. However, for completeness we do not think that the evidence was sufficient, with respect, to make the finding that the trial judge did. The files held by Mr Peter Moore no doubt included material which was privileged but just as obviously material which was not. This would have included, for example, his correspondence file and all of the evidence which the parties had served on each other. It is not clear to us whether the material that Simeon Moore removed from his father’s premises to his own premises at St Ives involved copying of the material held on Mr Peter Moore’s files or not. If it did not, then no copies were made to which *Propend* could attach and any unprivileged material would have remained unprivileged. If, on the other hand, the documents were copied by Simeon Moore and the copies then removed, we do not accept that this would have been sufficient to make the copies privileged if the originals were not. This is because Simeon Moore was employed by his father and any copies produced by him would not have constituted a communication between Mr Donoghue and the firm. Thus *Propend* would have had no application. In either case, the unprivileged documents in Mr Peter Moore’s possession did not become privileged once Simeon Moore took the collated set to St Ives.
3. Another category of document held by Simeon Moore consisted of the documents he himself had created prior to his father’s retainer. The Commissioner submitted that these could not be privileged because Simeon Moore was not a lawyer. It seems that where a client subjectively believes that the person giving legal advice has an entitlement to give legal advice then privilege will attach. This Court’s decision in *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd* (1993) 45 FCR 445 at 456 (FC) and its sequel *Health Insurance Commission v Freeman* (1998) 88 FCR 544 at 566-7 (FC) illustrate that point. However, as the Queensland Court of Appeal pointed out in *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 at 247 per Williams JA (with whom McPherson JA and Ambrose J agreed) that condition will not be satisfied where the client believes not that the person is entitled to give legal advice but instead that the communication is privileged only by reason of its legal nature.
4. In this case the evidence did not establish that Mr Donoghue erroneously thought that Simeon Moore was entitled to give legal advice. Indeed, to the contrary it established that Mr Donoghue knew that Simeon Moore was not a lawyer and was not employed, at that time, by a lawyer. In those circumstances, this is not one of those cases where advice given by an unqualified person may nevertheless attract privilege. This class of document was, therefore, another category which could not have been privileged.
5. Despite those conclusions, we have little doubt that much of the material held by Simeon Moore was likely to be privileged. However, its privileged nature could not be deduced from the mere fact of Simeon Moore having taken it from his father’s house. In that circumstance, it was necessary for Mr Donoghue to identify which of the documents in the possession of Simeon Moore were privileged and which were not and to do so by reference to detailed evidence explaining in the case of each document why it had been produced for the requisite purpose. The need for such detailed evidence has been repeatedly emphasised in this Court: *Barnes v Commissioner of Taxation* (2007) 242 ALR 601 at 605 [18] (FC); *Kennedy v Wallace* (2004) 142 FCR 185 at 189 [13] (FC). The evidence before the trial judge did not meet this standard and the claim could not be accepted in the blanket form in which it was advanced.

### Seventh Issue: Penalty (Proposed Amended Notice of Contention Ground 3(d))

1. At the hearing of the appeal, Mr Donoghue advanced an argument not advanced at trial. It was that assessments for penalty issued to Mr Donoghue were not assessments within the meaning of either s 166 or s 175. That submission should be accepted. The definition of ‘assessment’ in s 6(1) of the 1936 Act (which it is not necessary to set out) does not include any reference to an assessment for penalty. Consequently, s 166 does not itself provide the basis for the Commissioner’s entitlement to use the information in Mr Donoghue’s documents to produce the assessments for penalty and s 175 does not by itself protect any such assessment from judicial review.
2. Mr Donoghue suggested that this had two consequences. First, it meant that it was possible for him to advance ordinary grounds of judicial review to set aside the notices of assessment for penalty since s 175 did not apply, thereby avoiding the reasoning in *Futuris*. Secondly, it meant that the Commissioner had not been entitled to use the documents to generate the notices of assessment for penalty and that an action for breach of confidence would have been available to him because s 166 could not have been pleaded as a defence (it applying only to the process of assessment).
3. We reject the first argument. It is convenient to assume in Mr Donoghue’s favour, without deciding, that the *Taxation Administration Act 1953* (Cth) does not operate in relation to notices of assessment for penalty in the same way that ss 175 and 177 operate in relation to notices of assessment to income tax and, therefore, that a notice of assessment for penalty may be challenged on the basis of ordinary grounds of judicial review. The difficulty is that in Mr Donoghue’s statement of claim in the Judicial Review Proceeding the grounds of review advanced to set aside the notices of penalty assessment were precisely the same as those advanced to set aside the notices of assessment to income tax. In both cases it was said that the notices had been issued in circumstances of conscious maladministration and bad faith. Even if this point were soundly based, therefore, Mr Donoghue has not sought to advance any broader grounds of judicial review. And, indeed, on the hearing of the appeal he did not submit that the notices of penalty assessment might be set aside on the basis of some other ground of review. Any such attempt would have been met, of course, with the need to amend the pleading in the Court below, the notice of contention in this Court and the obvious objection that the case had never been run in this fashion until the appeal. In those circumstances, the question does not arise.
4. We also reject the second argument. Whilst it may be correct, without deciding, that s 166 does not authorise (or require) the Commissioner to use the information he has obtained to produce a notice of assessment for penalty, the argument conceals an assumption that the Commissioner either would ever need to do so or, in this case, that he had in fact done so. As to the former, Mr Donoghue became liable to an administrative penalty because of s 284-75(3) of Sch 1 of the *Taxation Administration Act 1953* which provided:

‘284‑75 Liability to penalty

…

(3) You are liable to an administrative penalty if:

(a) you fail to give a return, notice or other document to the Commissioner by the day it is required to be given; and

(b) that document is necessary for the Commissioner to determine a \*tax-related liability of yours accurately; and

(c) the Commissioner determines the tax-related liability without the assistance of that document.

Note: You are also liable to an administrative penalty for failing to give the document on time: see Subdivision 286‑C.’

1. The only requirement created by this provision was for the Commissioner to be satisfied of the three specified matters. None of those matters required him to examine any of the documents provided by Simeon Moore. All that the Commissioner needed to know was that a return that should have been furnished was not, that Mr Donoghue’s returns were necessary to determine his tax liability accurately and that the Commissioner had determined Mr Donoghue’s liability without the benefit of his returns. It was not necessary for him to have recourse to any of the documents provided by Simeon Moore to answer those questions. Indeed they were legally irrelevant to those issues. Consequently, it appears unlikely that Mr Main had regard to material that was legally irrelevant to the task with which he was confronted. More importantly, no doubt because this argument was not run in the Court below, there was no finding by the trial judge that Mr Main had used the information in the documents to determine the amount of the penalty assessments.
2. Because these two arguments were not advanced at trial they require Mr Donoghue to proceed by way of notice of contention. His notice of contention, as filed, did not include these arguments. He therefore sought at the hearing of the appeal to include them by way of a proposed amended notice of contention. Leave to file that document should not be granted for two reasons. First, the argument has no prospects of success. Secondly, had the matter been raised at trial, evidence about what Mr Main had done in relation to the penalty assessments with the documents provided by Simeon Moore could have been led.

## 5. Conclusions

1. The appeal must be allowed in each of the matters. In the Judicial Review Proceeding and the Injunction Proceeding the trial judge’s orders must be set aside and each of the proceedings dismissed with costs. In the Deputy Commissioner’s Enforcement Proceeding the trial judge’s dismissal of the proceeding must be set aside with costs. That will leave on foot the Deputy Commissioner’s as yet unresolved application for summary judgment on the notices of assessment. This was not before this Court and there is no necessity for us to remit it to the trial judge for resolution. We will merely direct that it be listed before his Honour on a date to be fixed in consultation with his Chambers. The Deputy Commissioner is entitled to his costs of the short separate argument which took place on this issue on 17 March 2015, following the delivery of the primary judgment.
2. We would make the following orders

*In QUD 110 of 2015:*

1. Appeal allowed.
2. Set aside the orders made on 17 March 2015 and 24 March 2015 in proceeding QUD 353 of 2012 and in lieu thereof order that:

1. The amended originating application be dismissed.

2. The applicant pay the respondent’s costs as taxed or agreed.

1. The respondent pay the appellant’s costs as taxed or agreed.

*In QUD 128 of 2015:*

1. Appeal allowed.
2. Set aside the orders made on 17 March 2015 and 24 March 2015 in proceeding QUD 360 of 2013 and in lieu thereof order that:

1. The originating application be dismissed.

2. The applicant pay the respondent’s costs as taxed or agreed.

1. The respondent pay the appellant’s costs as taxed or agreed.

*In QUD 129 of 2015:*

1. Appeal allowed.
2. Set aside the orders made on 17 March 2015 and 24 March 2015 in proceeding QUD 727 of 2013 and in lieu thereof order that:

1. The respondent pay the applicant’s costs of the hearing on 17 March 2015 as taxed or agreed.

2. Stand over the applicant’s application for summary judgment dated 26 April 2013 to a date to be fixed by the docket judge.

1. The respondent pay the appellant’s costs as taxed or agreed.

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| I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny & Perram. |

Associate:

Dated: 17 December 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 110 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 128 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 129 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | DEPUTY COMMISSIONER OF TAXATION  Appellant |
| AND: | GARRY JOHN DONOGHUE  Respondent |

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| --- | --- |
| JUDGES: | KENNY, PERRAM & DAVIES JJ |
| DATE: | 17 DECEMBER 2015 |
| PLACE: | SYDNEY (HEARD IN BRISBANE) |

**REASONS FOR JUDGMENT**

# DAVIES J:

1. I agree with the reasons and conclusions of Kenny and Perram JJ that the appeals must be allowed and wish to add some further observations.
2. In *Federal Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146; [2008] HCA 32 the plurality stated at [25] that “conscious maladministration of the assessment process may be said … not to produce an ‘assessment’ to which s 175 [of the 1936 Act] applies.” Their Honours stated that deliberate failures to administer the law according to its terms "manifest jurisdictional error" outside the protection of s 175 of the 1936 Act and attract the jurisdiction to issue the constitutional writs under s 39B of the *Judiciary Act 1903* (Cth) (**“Judiciary Act”**).
3. The taxpayer’s case was that the assessments were vitiated by conscious maladministration because the Commissioner, in raising the assessments against him, had relied on privileged information that a third party had provided to the Commissioner in breach of the third party’s duty of confidence to the taxpayer and the taxpayer’s right to object to the disclosure of that information. The primary judge accepted that the exercise of the assessment power “was affected by conscious maladministration” on the basis that whilst s 166 of the 1936 Act imposes a duty on the Commissioner to make an assessment, “it does not authorise him to use information in his possession which is the subject of legal professional privilege in so doing” and the Commissioner’s officers had used the information to assess the taxpayer “in reckless disregard” of whether the taxpayer had the right to claim legal professional privilege over that information. His Honour held this was not a proper purpose of the assessment power.
4. However, it cannot be an improper purpose or maladministration of the assessment power, let alone conscious maladministration, for the Commissioner to use information in his possession for the purpose of raising an assessment against a taxpayer where the Commissioner has formed the view that the statute imposes a liability on the taxpayer upon the facts as they are known to the Commissioner. Where the information in the Commissioner’s possession discloses that a taxpayer has a taxable income, the Commissioner’s duty in the exercise of his assessment power is to determine and fix the amount of liability that the law operates to impose on the taxpayer: s 166 of the 1936 Act; *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.
5. In the present case, the Commissioner (through his officers) applied the law to the taxable facts known to him concerning the taxpayer’s affairs and raised assessments of the amount of tax payable based upon those taxable facts. The evidence did not show that the Commissioner’s officers acted with an absence of bona fides in the exercise of their statutory duty to make the assessments or that the use of the material was not for a legitimate purpose under the tax laws. His Honour refused to make the finding that the Commissioner had deliberately acted in bad faith, as urged by the taxpayer, and his Honour was, with respect, correct to hold that such a finding could not properly be made on the evidence. The primary judge found at [112] that the taxation officer concerned, Mr Main, did not pursue inquiries as to whether legal professional privilege attached to any part of the documents and information because Mr Main “believed that Mr Donoghue was subject to the tax liability which came to be created by the notices of assessment in respect of the 2005, 2006 and 2007 income years”, which belief was “influenced by his review of the material provided by Simeon Moore”, and that:

To have initiated inquiries which would have addressed, one way or the other, his apprehension, would in his view have compromised the confidentiality of an audit desirably kept confidential. At the same time as the assessments issued to Mr Donoghue, departure prohibition orders in respect of Mr Donoghue, based on the assessed indebtedness, were also issued. This was not a coincidence. A reason why the audit was considered desirably to be kept confidential was an apprehension that, with knowledge of it, Mr Donoghue either might not return to Australia or, if present, depart for abroad before assessment notification.

On those findings, the application under s 39B of the Judiciary Act should have been dismissed. The circumstances under which the information on which the assessments were based came into the possession of the Commissioner could not, and did not, alter the liability to tax which the law imposed on the taxpayer on the facts known to the Commissioner and the Commissioner’s reliance on that information to raise the assessments could not, and did not, constitute the exercise of power in bad faith nor a deliberate disregard of his duty to assess in accordance with the law.

1. I also wish to say something about the seventh issue, dealing with the taxpayer’s ground 3(d) in the proposed Amended Notice of Contention. The proposed ground was that the order of the primary judge quashing the penalty assessments should be affirmed on the additional ground, not advanced below, that:

the [primary] judge should have found that the penalty assessment was not an assessment within ss 166 and 175 of the [1936 Act] for the alternative reason that those assessments did not meet the definition of “assessment” in s 6(1) of the [1936 Act] for the purposes of s 175 of the [1936 Act].

1. The argument advanced by the taxpayer was that those assessments were invalid because there is no cognate provision in Div 284 of Sch 1 to the *Taxation Administration Act 1953* (**“TAA”**) to s 166 of the 1936 Act “authorising” the Commissioner to use the privileged material and no cognate provision in Div 298 to s 175 of the 1936 Act protecting the validity of the assessments. There are two further reasons why the proposed ground is hopeless and bound to fail.
2. First of all, the argument advanced in support of this ground relied on the same proposition that because the information was privileged and the taxpayer had not waived the privilege, the Commissioner could not use that information in raising assessments. For the reasons given in the joint judgment that proposition is erroneous. Secondly, and moreover, it is an erroneous proposition that the Commissioner required “authority” under s 166 of the 1936 Act or some cognate provision in Div 284 to use that information in the penalty assessment process. That is not correct. The taxpayer’s liability to a penalty under the provisions of Div 284 arose by operation of the law, and the Commissioner’s duty under s 298-30 of Subdiv 298-A of Sch 1 to the TAA was to make an assessment of the amount of the administrative penalty payable pursuant to those provisions. It is a false legal premise that the penalty assessments could be set aside on the basis that the Act did not “authorise” the Commissioner to use the relevant information in question in assessing the amount of penalty. It is not a matter of “authorisation” but, rather, a matter of the application of the penalty provisions to the taxpayer and the assessment of the liability imposed by the legislation. It cannot be a misuse of the provisions which impose the liability to penalties for the Commissioner to make a penalty assessment in reliance on the same information that he relied on for the exercise of his assessment power under s 166 of the 1936 Act where that same information shows that the taxpayer also has a liability to an administrative penalty under Div 284.

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| I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies. |

Associate:

Dated: 17 December 2015