

‘It is a bad look’

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Abstract

That was the way a senior ATO officer characterised the ATO’s refusal to remit outstanding general interest charge (GIC) owing in *Pintarich v DCT* [2018] FCAFC 79. It is hard to disagree. The saga began when the Australian Taxation Office (ATO) issued assessments to Mr Pintarich for some AUD 1.1 million including some \$300,000 of GIC. In December 2014, after some earlier exchanges, the ATO sent Pintarich a computer-generated letter which on its face appeared to indicate that the ATO had agreed to remit the outstanding GIC and that payment of some \$839,000 would finalise the whole dispute. The ATO letter was unsigned, but contained the Deputy Commissioner’s name printed in the signature block. The relevant ATO officer had not been able to proof-read the final version of the letter before it was sent to Pintarich because of limitations within the ATO system. Based on the ATO letter, the ANZ Bank lent Pintarich some \$839,000 which he used to pay the ATO debt. However, in May 2016, the ATO wrote again to Pintarich, stating that:

- the 2014 letter had been ‘issued in error’;
- Pintarich had been ‘erroneously advised’ (by the ATO);
- the ATO had decided not to remit the GIC; and
- Pintarich was required to pay some \$361,000 in GIC within 14 days.

Pintarich took legal action, but a majority of the Full Federal Court held (Kerr J dissenting) held that the December 2014 letter did not reflect a ‘decision’ by the ATO to remit GIC, because the ATO officer had not engaged in the (essential) mental process of actually considering the request for remission of GIC prior to sending the letter. The ATO argued that the subsequent 2016 letter therefore embodied the only ATO ‘decision’ (ie not to remit most of the GIC).

The High Court refused special leave to appeal on the basis that the appeal had insufficient prospects of success.

While the ATO position may have been technically correct, it seems harsh in all the circumstances for the ATO to refuse to exercise its discretion to remit when the problem was caused by an internal ATO error to which Pintarich had not – so far as appears from the case report – contributed and which led Pintarich and the ANZ Bank to act to their significant detriment.

It may be going too far to say that taxpayers and their advisers will not in future be able to accept ATO documentation at face value, but certainly taxpayers (and advisers) should not be required to speculate on whether an ATO document does or does not actually represent an ATO ‘decision’ on a particular issue.

Cases such as *Pintarich* illustrate some of the emerging problems generated by the ongoing computerisation of ATO functions, as ‘analogue’ legal doctrines try to deal with an increasingly digital world. This dissonance risks creating taxpayer and adviser uncertainty and a consequent loss of trust in the ATO, especially as – contrary to the views of the Federal Court majority – such issues seem likely to become more common and significant as the ATO moves increasingly to a computerised mass decision-making system in which human involvement is progressively reduced.

The outcome in *Pintarich* might also suggest that the ATO sometimes focuses on ‘winning’ at the expense of broader issues of fairness and the ATO’s intended role.** Accordingly, while there has been much written on the technical question of whether the ATO letter evidenced a ‘decision’ by the ATO to remit the GIC, this article focuses on whether the ATO’s actions were fair and reasonable.

Key words: Algorithmic decision-making, Artificial intelligence and the law, Automated decision-making, Computer generated correspondence, General Interest Charge, Judicial Review, Law and technology, Model litigant obligations, Misleading correspondence, Settlement of disputes with the ATO, When is a ‘decision’ not a decision.

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** Indeed, some years ago (in a different context), the then Inspector-General of Taxation (IGT), David Vos, suggested that the ATO’s approach to litigation meant that ‘... community perceptions that at times the ATO has a “win at all costs” approach to litigation are justified’: Inspector-General of Taxation, *Review of Tax Office Management of Part IVC Litigation – A Report to the Minister for Revenue and Assistant Treasurer* (28 April 2006), Key Findings 4.1, 4.2.

1. INTRODUCTION

The Australian Taxation Office (ATO) is a very large¹ public agency which is responsible for the effective operation of the Australian taxation system and is tasked with collecting the correct amount of tax from taxpayers. Given that taxation provides the vast bulk of the funding which supports Federal government programs, it is crucial that the ATO is able to operate effectively to collect the tax owing.

To enable it to carry out its functions, the ATO is given extremely wide powers to investigate, assess and then to collect tax and penalties owing. While these powers (and, on the other hand, wide powers to remit or reduce penalties and interest which may be owing) are essential in order to enable the ATO to perform effectively, the ATO could not possibly examine closely the affairs of every taxpayer (nor would the taxpaying public accept this). Accordingly, the ATO's ability to function effectively depends in large measure on the ongoing support and voluntary cooperation of taxpayers.

Overall, the ATO quite rightly enjoys a very good record and, generally, public confidence. For example, some 90 per cent of small business tax is paid voluntarily by small businesses,² based largely on the trust which the public has in the taxation system and its administration. This trust is important, because the system depends heavily on voluntary compliance by (most) taxpayers. However, trust is a fragile commodity, and as Campbell has pointed out, '... taxpayers potentially losing trust in the ATO's decision-making processes undermines the integrity of the whole system'.³

If the ATO is to enjoy the continued support of taxpayers, it must therefore be seen to operate fairly and appropriately and must ensure that it does not overreach in the exercise of its powers.

It is therefore somewhat worrying to find that, in discussing the outcome of *Pintarich v Deputy Commissioner of Taxation*,⁴ a senior ATO officer stated before a Senate Committee hearing that the case was 'a bad look' for the ATO.⁵

¹ As at 30 June 2019, the ATO reported a workforce of 17,191 ongoing staff: Commissioner of Taxation, *Annual Report 2018-19* (2019) 71, 'Workforce Management' Table 4.2.

² See, for example, ATO, 'ATO Reveals Almost 90% of Income Tax Paid by Small Business Is Paid Voluntarily', *media release* (27 August 2019), <https://www.ato.gov.au/Media-centre/Media-releases/ATO-reveals-almost-90--of-income-tax-paid-by-small-business-is-paid-voluntarily/> (accessed 22 February 2020).

³ Sam Campbell, 'A Clayton's Decision Denied High Court Special Leave', *Sladen Legal* (22 October 2018), <https://sladen.com.au/news/2018/10/22/sliden-snippet-pintarich-a-claytons-decision-denied-high-court-special-leave> (accessed 21 October 2020). In a somewhat different context, Professor Ross Parsons many years ago observed that a 'tax will not have respect, and will not deserve respect, unless it is coherent in principle and has a claim to fairness': Ross W Parsons, 'Income Taxation – An Institution in Decay?' (1986) 3(3) *Australian Tax Forum* 233, 258; (1986) 12(3) *Monash University Law Review* 77, 99.

⁴ [2018] FCAFC 79; 108 ATR 31 – special leave to appeal to the High Court refused: *Pintarich v Deputy Commissioner of Taxation* [2018] HCASL 322.

⁵ Statement of Mr Robert Ravanello, Deputy Commissioner of Taxation, Debt, in Senate Economics Legislation Committee Estimates hearing, Australian Parliament, 24 October 2018, Committee Hansard p 105, reported as a comment by Second Commissioner Neil Olesen in Nassim Khadem, 'ATO Executive Admits Letter Automation Error "A Bad Look"', *ABC News online* (24 October 2018), <https://www.abc.net.au/news/2018-10-24/ato-admits-automation-error-at-senate-estimates/10423830>. See also Anna Huggins, 'Automated Processes and Administrative Law: The Case of Pintarich', *Australian Public Law* (14 November 2018), <https://auspublaw.org/2018/11/the-case-of-pintarich/> (accessed 22 October 2020).

While a great deal of attention in relation to *Pintarich* has been focused on the technical question of whether a 'decision' made by use of automated computer procedures is technically a 'decision' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (and perhaps other purposes)⁶, this article concentrates on the moral or ethical issues arising from the ATO's actions in its endeavours to recover income tax and penalties from Mr Pintarich.

That is, in this article, the emphasis is on *should* rather than *could*. The question being explored is not whether the ATO has the *legal* right to take certain actions, but whether it *should* have taken those actions.

2. THE CONTEXT – THE FACTS IN *PINTARICH*

The facts in *Pintarich* have been well rehearsed, but it is useful to set out the basic elements.⁷ The ATO was involved in a dispute with Joseph Pintarich in relation to Pintarich's taxation affairs, with the ATO seeking to recover some AUD 1,156,787 from him, comprising primary income tax of approximately \$821,000 and General Interest Charge ('GIC') of approximately \$335,000.

In an attempt to settle the dispute, the tax agent representing Pintarich (Mr Smith) wrote to the ATO on 24 November 2014, requesting full remission of the GIC component of the debt. The file was allocated to an ATO officer in the Hobart office (Mr Celantano).

There were discussions in early December 2014 between the taxpayer, the tax agent and the ATO officer, with the parties giving slightly different versions of these discussions.

Pintarich's version was that Celantano had said that:

if you make sure you can pay it by February 2015 ... it will all be over and done with,

to which Pintarich allegedly replied:

... put it in writing so I can take it to the bank.

⁶ See, eg, among many others Tim Brookes and Mitchell Bazzana, 'Automated Correspondence Not Necessarily a "Decision" Which Can Be Relied On', *Ashurst Artificial Intelligence Update* (26 November 2018):

<https://www.ashurst.com/en/news-and-insights/legal-updates/automated-correspondence-not-necessarily-a-decision-which-can-be-relied-on/> (accessed 21 October 2020); Will Bateman, 'Algorithmic Decision-making and Legality: Public Law Dimensions' (2020) 94(7) *Australian Law Journal* 520; Christopher Bevan, 'Difficulties in Settling Disputes with the Commissioner of Taxation' (2019) 54(1) *Taxation In Australia* 31, esp 32-37; Kalmen Datt, 'Taxpayer Rights in Australia? Hope Springs Eternal' (2019) 34(3) *Australian Tax Forum*, 445; Claire Hall, 'Challenging Automated Decision-making by Public Bodies: Selected Case Studies from Other Jurisdictions' (2020) 25(1) *Judicial Review* 8.

⁷ Mr Pintarich is not the only taxpayer to face such problems – the taxpayers in *Caratti v Commissioner of Taxation* [2017] FCA 70, 104 ATR 891, [42]-[61] (Robertson J) and *Bazzo v Commissioner of Taxation; Caratti v Commissioner of Taxation* [2017] FCAFC 139 (Dowsett, Pagone and Davies JJ) also (unsuccessfully) raised arguments that their settlement deeds meant that their payout to the ATO included all general interest charge (GIC) outstanding. While those cases lacked the unusual features found in *Pintarich*, the documentation was not crystal clear, and the decisions indicate that ATO deed drafting (and – especially – private sector reviewing) could be improved.

The ATO's officer's version (as recorded in Mr Celantano's contemporaneous phone notes) was that what he had said to the taxpayer and his agent over the phone was to the effect that:

... We require the primary tax of \$821,762.75 [to be] paid in full whilst we consider the remission of general interest charge currently \$344,216.13.⁸

Subsequently, the tax agent (Smith) telephoned the ATO officer and the ATO officer's notes recorded a similar conversation and response by Celantano to the tax agent. The ATO officer's notes recorded that he had then:

Provided payment arrangements conditions and disconnected. Inputted lump sum payment in ICP [the ATO Integrated Core Processing system] of \$821,762.75 due 30 January 2014 [sic – 2015] as 31st is a bank day (Saturday).

This indicated that the ATO officer had keyed information into an ATO computer-based template 'bulk issue letter'. Internal ATO processes then generated the crucial letter which was ultimately sent on 8 December 2014 by (a different part of) the ATO to Pintarich. There was no dispute that the ATO intentionally sent the letter (ie, there was no suggestion in the Full Court that the letter as such had been sent by mistake⁹) – though there was a dispute as to the intent and effect of the letter.

The letter was unsigned, but contained the (first) Deputy Commissioner's name and details in a 'signature block'.¹⁰

The letter was headed 'Payment arrangement for your Income Tax Account debt' and stated, *inter alia*, that the ATO:

... agree to accept a lump sum payment of \$839,115.43 on or before 30 January 2015.

This payout figure is inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015.

⁸ Quoted by Tracey J at first instance, *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, [12], point (h) and on appeal accepted by Kerr J (dissenting on other issues) at [16] and the majority at [139], *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79.

⁹ At least before the Full Federal Court – the ATO withdrew a defence based on mistake after the first instance hearing: Kerr J at [27]-[28]; nor did the ATO raise a defence based on '*non est factum*': see for example Charles Y C Chew, 'The Application of the Defence of Non Est Factum: An Exploration of Its Limits and Boundaries' (2009) 13 *University of Western Sydney Law Review* 83.

¹⁰ The fact that the letter was actually unsigned did not matter in this case, as reg 45(2) of the (former) *Income Tax Regulations 1976* (then in force) provided that 'A document bearing the name (however produced) of a person who is, or was at any time, the Commissioner, a Second Commissioner, a Deputy Commissioner or a delegate of the Commissioner in the place of the person's signature is taken to have been duly signed by the person, unless it is proved that the document was issued without authority ...' (see also former reg 45(3), (4)).

The ATO officer had not been able to proof-read the letter before it was sent out,¹¹ but stated that he had never decided to remit GIC¹² and had not intended to include the sentences set out above (which he said 'did not accord' with the conversations which he had had with Pintarich and Smith). However, he was unable to explain how the crucial wording came to be included in the letter.

Upon receipt of the letter, Pintarich used it to obtain a loan of \$839,115.43 from the ANZ Bank and used that borrowed money to pay the amount of \$839,115.43 to the ATO on 30 January 2015.

Despite this payment, the ATO continued to send Pintarich a series of statements of account from 11 December 2014 to 14 January 2015, with each statement showing an increasing GIC debt.

In response to these GIC statements of account,¹³ Pintarich's tax agent wrote to the ATO officer on 23 February 2015, attaching a copy of the ATO letter of 8 December 2014 and stating *inter alia* that:

... The \$839,115.43 that was paid to the ATO is as per the attached letter which refers to the payment being inclusive of GIC.

The ATO officer replied by email on the same day, saying:

We're currently reviewing your application for remission of GIC previously made. The agreement was to pay the primary debt which is \$821,762.75 which your client has made.

This provoked a prompt response from the tax agent stating:

Can you please advise on the letter we received which stated a different figure. The reality is my client has absolutely no capacity to borrow any further funds and the ANZ bank were only willing to allow Mr Pintarich to borrow further funds of [sic] the back of the letter received from the ATO.

¹¹ The ATO advised in its Decision Impact Statement on *Pintarich* (issued 4 April 2019) that '[t]he letter was prepared by a process under which the ATO officer entered specific variables relevant to the agreed payment arrangement – however the system generated letter did not allow the officer to customise either the text or the GIC calculation, nor otherwise view or alter the letter before it issued': ATO, 'Decision Impact Statement – *Pintarich v Deputy Commissioner of Taxation* (TAD 41 of 2017 H3/2018)' (4 April 2019).

¹² The officer stated that he had believed he could not remit the GIC anyway as he thought (wrongly) that his authority to remit was limited to AUD 75,000.

¹³ The ATO relied on these statements of increasing GIC amounts (quoted in the majority judgment at [116]) as, in the ATO's eyes, the running account balances '... advised of accruing GIC amounts with a total debt of \$1,166,902.00. This would have been an indication to you [ie, Pintarich] that the GIC component had not been satisfied and was still outstanding'. However, it seems possible (though pure speculation) that the taxpayer and his tax agent (who gave every indication of believing that the 'payout figure' included the (full) GIC liability) may have thought that any increase in GIC was covered by the 'payout figure' to be paid on 30 January 2015 – particularly as the ATO letter stated that 'This payout figure [\$839,115.43] is inclusive of an estimated ... (GIC) amount calculated to 30 January 2015', suggesting perhaps that the ATO had in fact decided to remit most of the GIC. Certainly Kerr J (dissenting) [2018] FCAFC 79, [17] indicated that he proceeded on the basis that 'there was nothing that should have put the taxpayer on notice that no such decision had been made'.

The matter was escalated to a (second) Deputy Commissioner, who wrote back to Pintarich some three months later on 15 May 2015, indicating that Pintarich's request for remission had been denied and that payment in full of the outstanding GIC (\$344,604.90) was required within 14 days.¹⁴

On 17 June 2015, the tax agent provided the ATO with a detailed summary of Pintarich's financial position and previous dealings, and asked that the decision to refuse to remit GIC be reconsidered.

The (second) Deputy Commissioner duly replied on 18 August 2015 that the taxpayer's application for remission had been refused and that the outstanding GIC (then \$361,222.47) remained due and outstanding. The Deputy Commissioner's August letter stated that:

... We wish to advise you that the letter issued by the Deputy Commissioner of Taxation... dated 8 December 2014... was issued in error. The outstanding amount... in the letter did not include the entire amount of GIC which had accrued... up to and including 8 December 2014.

Discussions continued, and as suggested by the ATO, the tax agent lodged a further request for remission of the GIC on 16 October 2015. The (first) Deputy Commissioner replied some seven months later on 13 May 2016, advising the taxpayer that only partial remission of the GIC owing would be granted¹⁵ and that:

You were erroneously advised that the sum of \$839,115.43 would satisfy the outstanding debt and was a 'payout figure'. This lead [sic] to you borrowing funds to pay the tax amounts within two months. Although the 'payout figure' may be construed as misleading, a Notice for Income Tax and Running Account Balance issued on 11 December 2014... advised of accruing GIC amounts, with the total debt of \$1,666,902. This would have been an indication to you that the GIC component had not been satisfied and was still outstanding...

That is, in its responses to Pintarich, the ATO conceded that:

- the letter of 8 December 2014 had been issued by the ATO in error,
- the taxpayer had been 'erroneously advised' by the ATO in relation to repayment of GIC,
- the taxpayer had been given information which 'may be construed as misleading' and
- in reliance upon that erroneous and misleading advice, the taxpayer had been led to borrow monies from the ANZ Bank.

Nevertheless, the ATO declined to remit (most of) the GIC owing.

¹⁴ A remission of the portion of GIC which had accrued from 2 January to 29 March 2015 was granted because of the 'delay in responding to [the taxpayer's] request' (majority judgment, [2018] FCAFC 79, [108]).

¹⁵ Based on the delays which had occurred and the fact that Pintarich had borrowed funds to pay the amount owing.

Pintarich then took action in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), alleging that because the ATO had already made a 'decision' in its letter of 8 December 2014 to accept the payment of \$839,115.43 in full discharge of all primary tax and GIC owing, the subsequent 'decision' of the (first) Deputy Commissioner on 13 May 2016 purporting to remit only a small part of the GIC was of no effect.

The ATO argued the reverse – that the letter of 8 December 2014 had been issued 'in error', and that there had been no 'decision' made on 8 December 2014 because the ATO officer had not engaged in any mental process of deliberation, assessment and/or analysis, and therefore the decision of 13 May 2016 (to only partially remit the GIC) was the only operative decision.

The judge at first instance and a majority in the Full Federal Court found for the ATO, and held that the balance of accrued GIC could be recovered from Pintarich.

Others can explore the fascinating question of whether the events of 8 December 2014 amounted technically to a 'decision' for ADJR Act (or other) purposes. This article focuses on the ethical issues.

It should be noted that, as the court decided the case on the technical basis that the letter of December 8 did not constitute a "decision" for ADJR Act purposes, the judges' observations on issues such as whether the terms of the letter were misleading are arguably *obiter*. However, in context, it is submitted that this does not detract from the thrust or weight of their Honours' comments.

3. THE DECISION AT FIRST INSTANCE IN *PINTARICH*¹⁶

Tracey J held at first instance that, while the ATO letter of 8 December 2014 might provide evidence that a decision had been made, 'the letter is not, itself, that decision'.¹⁷ Indeed, in his Honour's view, only a 'strained' reading of the 8 December 2014 letter might support the contention that it recorded a decision that the Australian Taxation Office would accept the sum of \$839,115.43 on or before 30 January 2015 as full and final settlement of all Mr Pintarich's tax debts and interest charges owing on that day.¹⁸

In His Honour's view 'the preferable construction' of the December letter was that:

... a more natural reading of the text, when understood against the background of the previous week's exchanges, is that this figure was made up of the \$821,762.75 which was Mr Pintarich's primary debt on 8 December 2014 together with anticipated interest accruing between then and 30 January 2015. This calculation is supported by the interest charges recorded in the statements of account issued to Mr Pintarich on 7 and 14 January 2015. The latter notice, for example, contained a GIC of \$2,198.15 which had accumulated between

¹⁶ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944.

¹⁷ [2017] FCA 944, [45] (Tracey J).

¹⁸ [2017] FCA 944, [47] (Tracey J).

2 and 8 January 2015. There was no specific mention, in the letter, of interest which had accumulated prior to 8 December 2014.¹⁹

His Honour went on to observe that he was 'not unmindful' of the (second) Deputy Commissioner's view that the 8 December 2014 letter had been 'issued in error', and that the figure of \$839,115.43 in the 8 December 2014 letter, 'did not include the entire amount of GIC which had accrued on the entire amount of outstanding debt up to and including 8 December 2014'.²⁰

His Honour saw these comments by the (second) Deputy Commissioner as 'an implicit recognition, by the Australian Taxation Office, that the language used in the 8 December 2014 letter might be open to [the construction put forward by the taxpayer]',²¹ and that this recognition was 'also implicit in Mr Celantano's acknowledgment that the terms of the 8 December 2014 letter did not reflect the outcome of his respective discussions with Messrs Pinarich and Smith'. In his Honour's view, a 'more explicit acknowledgement' of this interpretation appeared in the ATO letter of 13 May 2016, where the first Deputy Commissioner stated that the 'payout figure' in the 8 December 2014 letter 'may be construed as misleading'.

Despite these points, in Tracey J's view, while the 'lack of clarity [in the 8 December letter] may explain the consternation and uncertainty which followed the issue of that letter ... it does not, necessarily, evidence the making of a decision to waive all accumulated GIC'²² because a 'decision' would have required the ATO officer to undertake a process of deliberation, assessment and/or analysis with a view to deciding whether or not to grant the application for waiver of the GIC. His Honour found that this had not occurred – rather:

... The 8 December 2014 letter was intended to confirm Mr Celantano's appreciation of what had been agreed. Unfortunately, its final draft was not reviewed by Mr Celantano before it was despatched and did not employ language that he might, in retrospect, have preferred to use to record the agreement. The letter was not and did not purport to be the communication of a decision relating to the GIC waiver application. Even if it be construed in the manner contended for by Mr Pinarich, the surrounding circumstances did not evidence the making of such a decision by Mr Celantano or any other person.²³

From that decision at first instance, Pinarich appealed to the Full Federal Court.

4. THE FULL FEDERAL COURT DECISION IN *PINTARICH*

On appeal,²⁴ the Full Federal Court held 2-1 in favour of the ATO, the majority comprising Moshinsky and Derrington JJ, with Kerr J dissenting. In order to capture the

¹⁹ However, Tracey J conceded that it was 'conceivable' that Pinarich and his advisers had understood Mr Celantano to be referring to Pinarich's total liability, which included the full amount of GIC owing: [2017] FCA 944, [14].

²⁰ [2017] FCA 944, [48] (Tracey J).

²¹ [2017] FCA 944, [48] (Tracey J).

²² [2017] FCA 944, [48], [56] (Tracey J).

²³ [2017] FCA 944, [56]-[57].

²⁴ *Pinarich v Deputy Commissioner of Taxation* [2018] FCAFC 79. Bevan, above n 6, esp at 32-37, provides a persuasive critique of perceived errors in the majority judgment.

essence of the judges' reasoning, it is useful at key points to quote the judges' actual words.

4.1 The views of the majority (Moshinsky and Derrington JJ)

The majority of the Full Federal Court upheld Tracey J's decision on the technical issue, taking the view that there was no decision made on 8 December 2014 because (relying largely on *Semunigus v Minister for Immigration and Multicultural Affairs*²⁵) the ATO officer had not undertaken the necessary 'mental process' of actually considering whether or not to remit the GIC.²⁶

Again, the analysis of that intriguing technical issue can be left for others to undertake.

On the ethical or fairness issue, it is important to remember that:

1. A key contributing factor to the misleading nature of the December letter appears to have been the inability (because of ATO system limitations)²⁷ of the ATO officer to proof-read the final version of the letter before it was completed and sent out through the ATO's automated correspondence processes.
2. While finding on the technical legal point that there was no 'decision' made on 8 December 2014, the majority observed that:

... In our view, there is some force in the taxpayer's position as to the correct construction of the December 2014 letter. However, even if that construction is accepted, we do not consider that the taxpayer has established any error in the primary judge's conclusion, namely that no decision was made, on or about 8 December 2014, to remit GIC. ... In our opinion, the natural reading of the letter, in the context in which it was written, is that the Deputy Commissioner agreed to accept the payment of the lump sum amount on or before 30 January 2015 in full discharge of the taxpayer's primary tax and GIC liabilities ... This construction is supported by the following aspects of the letter:

²⁵ *Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240; 96 FCR 533, [11], [55], [101] (Full Court of the Federal Court: Spender, Higgins and Madgwick JJ), each of the members of the Court accepting a statement on that point by Finn J at first instance, *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422, [19]. His Honour's statement was also cited with approval in – among others – *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131, [25] (Buchanan J; Logan J [33] and Barker J [50] agreeing generally); *He v Minister for Immigration and Border Protection* [2017] FCAFC 206, [79] (Siopis, Kerr and Rangiah JJ); *Dunstan v Higham* [2016] ACTCA 20, [71]-[74] (Murrell CJ, Penfold and Rangiah JJ). However, Bromwich J in *Grass v Slattery* [2018] FCA 1719, [199]-[200] noted that *Semunigus* may not be applicable in all circumstances, and the majority of the Full Federal Court in *Pintarich* at [143] conceded that 'the issue considered in *Semunigus* was different from the issue' that arose in *Pintarich*. Nevertheless, the majority considered, at [2018] FCAFC 79, [143], that the statement by Finn J [at first instance in *Semunigus*] did 'accurately capture the elements that are generally involved in the making of a decision'. Contrast Bevan, above n 6.

²⁶ Majority at [2018] FCAFC 79, [140]. Contrast the view in *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129, [154] – albeit in relation to a different situation, where Ward CJ in Equity at [154] (after referring to *Pintarich*) stated that '... The question of the validity of the notice is to be addressed by reference to the content of the notice rather than the subjective state of mind of the person who issued or received it. Subject to any contrary indication ... the content of a notice is ordinarily to be assessed by reference to what it would convey to a reasonable reader in the recipient's position'.

²⁷ See n 11, above.

- (a) The heading of the letter was: 'Payment arrangements for your Income Tax *Account* debt' (emphasis added [in the judgment]). This linked the letter to the statement of account dated 10 November 2014 (headed 'Income Tax Account'). [This indicated that the] statement of account covered both primary tax and GIC.
- (b) The reference in the first sentence of the letter to the taxpayer's recent promise to pay his 'outstanding account' also linked the letter to the statement of account.
- (c) The second sentence of the letter ['We agree to accept a lump sum payment of \$839,115.43 on or by January 2015'] suggested that, if the taxpayer paid the lump sum by the date referred to in the letter, this would fully discharge the debt identified in the statement of account. This was further supported by the lump sum being described as a 'payout figure' in the following sentence of the letter.
- (d) The statement in the first sentence of the second paragraph that the payout figure was 'inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015' suggested that the payout figure covered *all* GIC up to 30 January 2015... [emphasis in original].²⁸

This analysis is compelling. The majority also noted that:

- the December letter referred to GIC (by '... stating that the payout figure was "inclusive of an estimated general interest charge ... amount calculated to 30 January 2015". This indicates that the subject matter of GIC was comprehended by the letter';²⁹ and
- the statements by Mr Celantano on 4 or 5 December that the ATO would require the primary tax to be paid in full while the ATO considered the remission of GIC, and that the ATO would agree to the taxpayer's offer to pay the primary tax in full were 'merely stating a position and [need] to be seen in the context of the conversation as a whole, which contained some ambiguity ... [and] may have been taken to suggest that payment of the primary tax liability would be accepted in full discharge of the taxpayer's primary tax and GIC liabilities ...'.³⁰

The majority noted that, if the preferable reading of the December 2014 letter was as their Honours had indicated (above), 'it would follow that the [December ATO] letter

²⁸ [2018] FCAFC 79, [137]-[138]: in contrast to the view of Tracey J at first instance, Moshinsky and Derrington JJ in the Full Court took the view that the fact the December letter did not expressly refer to GIC did not detract from their interpretation in points (c) and (d) above.

²⁹ [2018] FCAFC 79, [138]

³⁰ [2018] FCAFC 79, [139] (Moshinsky and Derrington JJ). Their Honours went on to observe that Celantano's contemporaneous note [of his conversation with Pintarich's tax agent] recorded that they had discussed 'obtaining payment in full of the primary tax component of \$821,762.75 whilst we reviewed the request for remission of GIC' – see n 8 above.

communicated that a decision had been made to remit all GIC payable by the taxpayer ..., if the taxpayer paid the lump sum on or before the specified date...'.³¹

That is, while the majority considered on the technical point that the lack of a mental process of reaching a conclusion to remit GIC meant that there had been no relevant 'decision' made in December 2014,³² for present purposes, they agreed with Kerr J that the ATO December letter was misleading.

As an aside, the majority were fortified in their conclusion on the technical issue by their view that the impact of their decision would be quite limited because '... the circumstances of this case are quite unusual [and]... this type of situation is unlikely to arise very often...'.³³ However, this seems counter-intuitive – as automation increases and spreads across mass decision-making systems such as the ATO, the potential for such situations (and associated unfairness) to occur seems more likely to increase than decrease³⁴ – and, as the Robodebt saga illustrated, problems in such mass decision systems have the potential to adversely affect not just one or two – as in *Pintarich* – but thousands of people.³⁵

Again, exploration of this issue can be left to others.

³¹ Except for the relatively small amount of GIC referred to in the letter: [2018] FCAFC 79, [140].

³² [2018] FCAFC 79, [153] (Moshinsky and Derrington JJ).

³³ [2018] FCAFC 79, [152] (Moshinsky and Derrington JJ).

³⁴ See, for example, Simon Elvery, 'How Algorithms Make Important Government Decisions – And How That Affects You', *ABC News online* (21 July 2017), available at: <https://www.abc.net.au/news/2017-07-21/algorithms-can-make-decisions-on-behalf-of-federal-ministers/8704858> (accessed 26 February 2020). The Elvery article includes an embedded list of 29 legislative clauses (as at July 2017) that explicitly enable government officials to authorise computers to make decisions on their behalf. See also Monika Zalnieriut, Lisa Burton Crawford, Janina Boughey, Lyria Bennett Moses and Sarah Logan, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making' [2019] University of New South Wales Law Research Series 30, 4-6; Hon Justice Melissa Perry, 'iDecide: Digital Pathways to Decision' [2019] Federal Judicial Scholarship, 3; Makoto Hong Cheng and Hui Choon Kuen, 'Towards a Digital Government: Reflections on Automated Decision-making and the Principles of Administrative Justice' (2019) 31(2) *Singapore Academy of Law Journal* 875, 880-883; Katie Miller, 'Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79: Accidents in Technology-Assisted Decision-Making' (2018) 25(4) *Australian Journal of Administrative Law* 201, 202. Huggins, above n 5, suggests that (as at 2018) the Australian Government has developed a 'whole-of-government vision for digital transformation, which aims to use automated systems to eliminate almost all manual processing and case management'; see also Brookes and Bazzana, above n 6. In *Hemmett v Market Direct Group Pty Ltd (No 2)* [2018] WASC 310, Vaughan J observed that '... Technology alters how decisions may be made; it ought to be accepted that aspects of decision-making may, in appropriate circumstances, occur independently of human mental input'.

³⁵ The 'Robodebt saga' was created by the Federal Government's 1996 automated Online Compliance Intervention system ('OCI') which used a flawed debt collection computer algorithm which (inaccurately) converted and compared a welfare recipient's annual income as determined by the ATO to their fortnightly income as declared to Centrelink, and automatically issued a debt notice where it appeared (wrongly in many cases) that a recipient had earned more income than they had disclosed to Centrelink. These incorrect debt notices caused great distress to recipients and – it has been suggested – contributed to a number of suicides. In 2020, the Federal Government terminated the Robodebt programme and settled a class action against it by agreeing to pay a total of AUD 1.2 billion to some 400,000 welfare recipients who had been wrongly issued with debt notices. See, eg, Vincent Barry and Vivian Duong, 'The Beginning of the End of the "Robodebt" Saga', *ANU Jolt* (28 September 2020), <https://anujolt.org/post/675-the-beginning-of-the-end-of-the-robodebt-saga>, and references cited therein; and Ronald Mizen, 'Robodebt Debacle Ends with \$1.2b in Compensation', *Australian Financial Review* (16 November 2020), <https://www.afr.com/politics/federal/government-settles-robodebt-class-action-for-510-million-20201116-p56ex7>.

Significantly, however, in relation to the ethical aspects of the decision, the majority commented that:

- '[w]e accept that there may be some perceived unfairness in the circumstances of this case ... if the Deputy Commissioner is able to go back on what was conveyed by the letter...';³⁶ and
- '[i]t may also be said that the outcome is productive of administrative uncertainty, in the sense that taxpayers [or] others dealing with government may not be able to rely on letters from government agencies communicating decisions...'.³⁷

4.2 The dissent by Kerr J

His Honour disagreed with the majority's technical analysis because, in his view, the concept of a 'decision' for legal purposes (specifically the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) could not remain 'static' – it had to adapt to the (increasingly computerised) times or 'risk rapidly becoming an artefact of the past'.³⁸

Of more relevance for the issue of ethics and unfairness was the fact that, in the course of his dissent on the technical issue, Kerr J made a number of significant observations.

Kerr J shared the majority's conclusion that the December letter was misleading.³⁹ In his view, the more natural reading of the December letter – in the context in which it was written (ie, shortly after the conversations between Pinarich, Smith and Celantano concerning the taxpayer's tax liability) – was that the ATO had agreed to accept payment of the specified lump sum amount by 30 January 2015 as fully discharging Pinarich's liability for the primary income tax and GIC.

Kerr J observed that:

- it would 'undermine fundamental principles of administrative law' if a decision-maker could renounce as 'not a decision' something which they had 'manifested by an overt act taking the form of a decision' simply by asserting that their mental processes did not match the 'expression of those mental processes in the overt act ...'. This could apply, for example, to an assertion that a decision-maker had not considered relevant issues, and therefore had not made a 'decision', even if they had taken concrete steps to implement that 'non-decision';⁴⁰
- it would be 'productive of administrative uncertainty and confusion' to allow a person to deny that a document which 'on its face, appears to the world to be a decision – at least where the officers have ostensible and actual authority and

³⁶ [2018] FCAFC 79, [151].

³⁷ [2018] FCAFC 79, [152].

³⁸ [2018] FCAFC 79, [45] (Kerr J); see also [49].

³⁹ [2018] FCAFC 79, [30] (Kerr J), noting also at [32] that it was 'common ground' among all the judges in the Full Court that Tracey J had 'erred as to the correct construction' of the ATO December letter.

⁴⁰ [2018] FCAFC 79, [55], [63]-[64] (Kerr J). As his Honour pointed out, the position would have been the same had the ATO officer dictated a (paper) letter stating his conclusions, then signed and sent it without checking to discover the error.

nothing occurs to put the recipient on notice that a letter they have received in the Deputy Commissioner's name is not the decision it seems to be';⁴¹ and

- there was a 'high degree of artificiality' in the ATO arguing that some parts of its December 8 letter should be disregarded but the balance of the letter should be relied upon.⁴²

Perhaps the most significant observation on the ethical implications of the decision, however, was the point raised by Kerr J in relation to the involvement of the innocent third party ANZ Bank. His Honour noted that:

[a]lthough no party in these proceedings ... drew attention to the position of the bank which lent Mr Pintarich the funds required to make the lump sum payment he did, the unfairness that the majority refers to may not necessarily be confined to him. On the facts before the primary judge it was not put in issue that the bank had lent those funds after Mr Pintarich had supplied it with a copy of the letter of 8 December 2014 to assure the bank that that was the extent of his liability. The consequences of treating the Deputy Commissioner's letter as of no account may be that the bank lent money which otherwise it would not have. The effect of the decision that the majority affirms in this instance may be to permit the Deputy Commissioner to put the ATO's interests above that of a third party...⁴³

This is an important point. While there was no actual evidence either way in the court judgments on the ANZ's actions or motivations in granting the loan to Pintarich, it seems reasonable to infer that the ANZ Bank, as an arms-length third party with an incentive to limit its commercial exposure, would have lent the funds to Pintarich in a commercial transaction on the basis of its interpretation of the ATO December letter that payment of the amount set out in the ATO letter by 30 January 2015 would absolve Pintarich of all liabilities for income tax and GIC.⁴⁴ If so, as Kerr J noted, the effect of treating the ATO December letter as not creating a 'decision' and the ATO's subsequent decision to continue seeking payment by Pintarich of the full amount of GIC might, if Pintarich genuinely had no capacity to raise additional funding, result in the ANZ bank being unable to obtain repayment of some (or perhaps all) of the funds it had lent. Thus, as Kerr J indicated, the result would seem to be that the interests of the ATO, which created the problem, would be preferred over the interests of the innocent bank which relied on the statements in the ATO December letter.

4.3 The rejection of new grounds of appeal

The Full Court raised with Pintarich's counsel the question of whether Pintarich would seek to argue the case on alternative formulations based on contract or estoppel which had not been raised in its original pleadings.

⁴¹ [2018] FCAFC 79, [65] (Kerr J). As noted in n 13 above, his Honour had earlier stated that he was proceeding on the basis that there was 'nothing that should have put the taxpayer on notice that no such decision had been made': [17] and see [71].

⁴² [2018] FCAFC 79, [67] (Kerr J).

⁴³ [2018] FCAFC 79, [77] (Kerr J).

⁴⁴ An interpretation which would have matched that of all three Full Court justices.

Pintarich's counsel accordingly sought leave to argue on these alternative bases. Leave was granted to file an application to amend the notice of appeal to include these additional grounds, but the Court then refused leave to argue these grounds.

As the Court noted, the principles that apply to the question of when new grounds can be raised on appeal are well established⁴⁵ and all three judges in *Pintarich* agreed that the present case was not an appropriate one to allow new grounds to be heard.⁴⁶

The ATO had argued against the introduction of the new grounds. This was understandable, because facing the new grounds would no doubt have caused considerable dislocation to the ATO's preparation and presentation of its case. Perhaps the problem of dislocation could have been overcome by an appropriate order for adjournment and costs – and the Full Court would presumably have refused to allow the new grounds in any event.

It is relevant in this context to note that, as a federal government department, the ATO is required to conduct its litigation as a 'model litigant'. The responsibilities of model litigants are contained in Appendix B to the Legal Services Directions 2017 (made under section 55ZF of the *Judiciary Act 1903* (Cth)).⁴⁷ In brief, while the obligations do not prevent the Commonwealth and its agencies from 'acting firmly and properly to protect their interests' [Note 4], some key elements of the responsibilities include⁴⁸:

- Not undertaking appeals unless the agency believes it has reasonable prospects for success or the appeal is justified in the public interest, and apologising where the agency is aware that its lawyers have acted wrongfully or improperly [2(h),(i)]; and
- Not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement [2(g)].

The obligations are expanded by the Notes to Appendix B, which provide that 'being a model litigant requires that ... agencies ... act with complete propriety, fairly and in

⁴⁵ [2018] FCAFC 79, [158] (Moshinsky and Derrington JJ) – ie, new grounds will not be permitted where, if the issues had been raised in the court below, evidence could have been given which would have definitively prevented the point from succeeding: [158]-[162], citing *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *O'Brien v Komesaroff* (1982) 150 CLR 310 (Mason, Murphy, Aickin, Wilson and Brennan JJ).

⁴⁶ [2018] FCAFC 79, [158]-[164] (Moshinsky and Derrington JJ); Kerr J agreeing at [78].

⁴⁷ See, for example, ATO, 'Conduct of ATO Litigation and Engagement of ATO Dispute Resolution', PS LA 2009/9, [13]-[14]; Rule of Law Institute of Australia, 'The Model Litigant Rules: Key Facts and Issues', available at: www.ruleoflaw.org.au; Eugene Wheelahan, 'Model Litigant Obligations: What Are They and How Are They Enforced?', Federal Court of Australia, Ethics Seminar Series (5 March 2016), available at: <https://www.fedcourt.gov.au/digital-law-library/seminars/ethics-seminar-series/20160315-eugene-wheelahan> (accessed 22 February 2020); Amy Granger and Dan Trindade, 'The State as Model Litigant: Reading Between the Guidelines', Clayton Utz Knowledge (21 July 2016), available at: <https://www.claytonutz.com/knowledge/2016/july/the-state-as-a-model-litigant-reading-between-the-guidelines> (accessed 23 February 2020); see also such cases as – among many others – *Morley v ASIC* [2010] NSWCA 331; *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* (2015) VSC 294 (Croft J).

⁴⁸ See, for example, the Inspector-General of Taxation, *Review into the Taxpayers' Charter and Taxpayer Protections* (December 2016) ch 5, 'Model Litigant Obligation'; Zac Chami, 'The Obligation To Act As A Model Litigant', (2010) 64 *ALAL Forum* 47; Nassim Khadem, 'Government Agencies Are No Model Act Inquiry Told', *Sydney Morning Herald online* (13 June 2018), available at: <https://www.smh.com.au/business/the-economy/government-agencies-are-no-model-act-inquiry-told-20180517-p4zf8.html> (accessed 22 February 2020).

accordance with the highest professional standards' [Note 2], which 'may require more than merely acting honestly, and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations' [Note 3].

In terms of Clause 2(g) and Notes 2 and 3, could the ATO's opposition to the adding of new grounds be seen as a 'technical' defence which should not be relied on by a model litigant?

The ATO is of course closely conversant with the Model Litigant obligations,⁴⁹ and generally complies with these obligations, though issues in relation to Model Litigant obligations⁵⁰ and broader issues⁵¹ do arise from time to time.

There is no doubt that the ATO was legally entitled to oppose the introduction of new grounds. However, in light of its obligations as a Model Litigant and moral exemplar, could it perhaps be argued that a more appropriate stance in *Pintarich* would have been for the ATO, in search of the legally correct result rather than a 'win', to have remained neutral, leaving the decision to the Court (it seems likely that the Court would have declined to hear the new grounds in any event)?

While peripheral to the focus of this article, argument on the additional grounds might have been interesting, as Kerr J noted that, in his view, these grounds (particularly

⁴⁹ ATO, 'Our Obligations As A Model Litigant' (25 October 2018), available at: <https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/model-litigant/> (accessed 22 October 2020); ATO, 'Litigation – Our Policies', available at: <https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Litigation---our-policies/> (accessed 22 October 2020); and the ATO submission (February 2018) to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017, [14], https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/JudiciaryAmendment.

⁵⁰ See Inspector-General of Taxation, *Review into the Taxpayers' Charter and Taxpayer Protections*, above n 48, [5.70]-[5.71], [5.73] and compare Inspector-General of Taxation, *Review of Tax Office Management of Part IVC Litigation – A Report to the Minister for Revenue and Assistant Treasurer* (28 April 2006), Appendix 7, 'Examples of Possible Breaches of the Model Litigant Guidelines Raised in Submissions', available at:

<https://www.igt.gov.au/news-and-publications/reports-reviews/review-tax-office-management-part-ivc-litigation> Robin Woellner, 'Is the ATO a Law Unto Itself?' (paper presented at the 2007 Australasian Law Teachers' Association Conference), available at: https://researchonline.jcu.edu.au/3046/1/3046_Woellner_2007.pdf.

⁵¹ See n 49, – and for other examples of situations where a range of broader issues have arisen in relation to ATO activities, see, eg, *Commissioner of Taxation v Cassanati* [2018] FCAFC 212 (Greenwood, Logan and Steward JJ): inadequate notice by ATO of new ground of 'recent invention'; *Skourmallas v Commissioner of Taxation* [2019] AATA 5535 (Olding SM); *Denlay v Federal Commissioner of Taxation* [2011] FCAFC 63 (Keane CJ, Dowsett and Reeves JJ); *Commissioner of Taxation v Donoghue* [2015] FCAFC 183, [2016] HCASL 131; *Deputy Commissioner of Taxation v Anglo American Investments Pty Ltd* [2016] NSWSC 975 (Button J – not considered on appeal); *Deputy Commissioner of Taxation v Shiu (No 3)* [2019] FCA 945 (Steward J): use of stolen information in formulating assessments; *Binetter v Federal Commissioner of Taxation* [2016] FCAFC 163, [42]-[43] (Siopis J dissenting); *Nguyen v Commissioner of Taxation* [2016] AATA 1041 (O'Loughlin SM): effectively unchallengeable ATO opinion that fraud or evasion exists, which opens up unlimited time to amend assessments; *Binetter v Commissioner of Taxation* [2016] FCAFC 163: inadvertently misleading submissions to the AAT; *Hawkins v Commissioner of Taxation* [2019] FCA 627 (Logan J).

estoppel⁵²) were ‘not without potential merit’.⁵³ However, that is a discussion for another time and place.

5. SPECIAL LEAVE REFUSED BY THE HIGH COURT

In October 2018, the High Court refused Pintarich special leave to appeal, on the basis that the appeal had insufficient prospects of success.⁵⁴

The High Court’s decision confirmed that the ATO position was legally correct.

However, the High Court was dealing in legal doctrine, not fairness or ethical issues, and the refusal to grant special leave therefore says nothing about the fairness of the situation.

6. THE ATO’S DECISION IMPACT STATEMENT

The ATO subsequently⁵⁵ released a Decision Impact Statement, which discussed the outcome in *Pintarich*, and raised some contentious issues.

For example, the DIS included the following statements (as set out in italics in each case – with citations removed) that:

- *‘On 5 December 2014, the ATO and the taxpayer reached an agreement whereby the taxpayer would pay the primary tax debt ... whilst the ATO considered a full remission of the GIC.’*

With respect, that was the ATO’s argued position.⁵⁶ However, as discussed in section 2 above, so far as appears from the Court reports, the taxpayer did not at any stage concede that he had reached ‘an agreement’ to pay only the primary tax, leaving the bulk of the GIC outstanding. To the contrary, as noted above, the taxpayer argued throughout the case that the ATO letter of 8 December meant that all tax and GIC would be satisfied by the 30 January payment of \$839,115.43 (an interpretation which all judges in the Full Court deemed reasonable).

In light of the ATO’s comment, it is important to set out at length precisely what the various Judges said about this matter.

At first instance, Tracey J observed that:

⁵² Compare [2018] FCAFC 79, [160] (Moshinsky and Derrington JJ) – Kerr J agreeing at [78].

⁵³ [2018] FCAFC 79, [78] (Kerr J).

⁵⁴ [2018] HCASL 322 (Gageler and Keane JJ).

⁵⁵ The DIS was issued on 4 April 2019.

⁵⁶ A view repeated in the letter of 9 November 2018 by Andrew Mills (ATO Second Commissioner, Law Design and Practice) to the Taxation Institute, <https://www.taxinstitute.com.au/news/regarding-senior-tax-counsel-s-report-pintarich-a-case-that-should-never-have-been-run>, taking issue with the column ‘Pintarich – A Case That Should Never Have Been Run!’ by Professor Robert Deutsch in *TaxVine* 40 (19 October 2018), <https://insights.taxinstitute.com.au/2018/10/pintarich-case-that-should-never-have.html> (accessed 3 March 2020). Mills argues in the letter that Professor Deutsch’s column did not give sufficient attention to the interactions between the taxpayer, agent and ATO officer before and after the ATO December letter.

... Subject to one matter, there were no material differences between [the accounts given by Pintarich and Celantano] ...⁵⁷

... The matter on which, on one view, the accounts of the applicant and Mr Celantano differed related to the scope of the 'arrangement'. Mr Celantano said that he had told the applicant that the Australian Taxation Office required that the primary tax debt owing be paid in full 'whilst we consider the remission of general interest charge'. Mr Pintarich deposed that Mr Celantano had told him that 'if you make sure you can pay *it* by February 2015 then *it* will be all over and done with' (emphasis added). The first 'it' clearly refers to the agreed amount. The second 'it' begs the question of what would be 'all over and done with' ... The two accounts are reconcilable if the second 'it' refers to the dispute over the non-payment of the primary taxation liability to which Mr Celantano said he was referring. It is, however, conceivable that the applicant understood Mr Celantano to be referring to the applicant's total liability which included interest charges...⁵⁸

On appeal, Kerr J (dissenting on other matters) observed that:

... The taxpayer does not challenge the primary judge's findings regarding what was said by [Messrs Pintarich, Smith and Celantano in their conversations in early December 2014] ... nor, in the case of the conversation that took place between the taxpayer and Mr Celantano, their differing understandings of what had been said. ... the primary judge accepted that it was conceivable that the taxpayer had understood Mr Celantano to have conveyed to him that if he made the lump sum payment he had agreed to make before February 2015 'it [the taxpayer's total liability which included interest charges] will be all over and done with'. There is thus no basis for suggesting that the taxpayer had reason to have apprehended that the letter he later received dated 8 December 2014 was other than the outcome of his discussions with Mr Celantano ...⁵⁹

The majority (Moshinsky and Derrington JJ) essentially repeated Kerr J's comments, other than the last sentence quoted above.⁶⁰

With respect, as the above material indicates, despite accepting that Celantano's recorded statements had been made to Pintarich and Smith, neither Tracey J at first instance nor the Full Court judges on appeal, made a finding that Pintarich or Smith had agreed on 5 December (or any other time) to pay only the primary tax while the GIC remained owing.⁶¹

⁵⁷ [2017] FCA 944, [13] (Tracey J).

⁵⁸ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, [14]; see also nn 19-23 above.

⁵⁹ [2018] FCAFC 79, [16]; see also nn 13, 41

⁶⁰ [2018] FCAFC 79, [97]; see also nn 28-32 above.

⁶¹ It might be observed also that it would be a somewhat strange use of language to say that anything would 'all be over and done with' if Pintarich paid only the primary tax, leaving the GIC still owing and the taxpayer (allegedly) therefore facing bankruptcy (see above).

- *'The reference to GIC in the 8 December 2014 letter was to GIC accruing on the primary tax debt of \$821,762.75 from the date of the letter to the expected date of payment of that primary tax amount on 30 January 2015. It was not a reference to GIC that had accrued prior to 8 December ...'*

Again, this was the ATO's interpretation/intention, but not one that was supported by the judges in the Full Court.

- *'... on 11 December 2014, 7 January 2015, 14 January 2015 and 5 February 2015 the taxpayer received statements for his income tax account which showed that no amount of GIC had been remitted.'*

This was correct (the statement issued on 5 February 2015 can be discounted, as it was after the 30 January payment), and the ATO relied heavily on this point.

The issue was not explored in the judgments, so that any suggestions are mere speculation, but one possibility may be that the taxpayer presumed that any remission of GIC was conditional on his making the 30 January payment, and might not, therefore, have expected to see any reduction/remission in GIC until payment was actually made.

- *'While the majority of the Full Court said that it would follow from "the natural reading of the letter" that "the letter communicated that a decision had been made to remit all GIC payable by the [appellant]", the majority also acknowledged that the letter did not expressly deal with the application to remit GIC and the letter was susceptible of more than one interpretation.'*

This is correct, but cold comfort for the ATO, since the Full Court held that the letter created the clear impression that the full balance of GIC was included in the 'payout figure' (see above),⁶² and the fact that the ATO December letter was 'susceptible of more than one interpretation' was what caused the problem in the first place.

- *'In fact, at first instance, the primary judge considered that only a "strained reading" of the 8 December [letter] would support the taxpayer's contentions.'* (adding the emphasis to the quote of the primary judge without acknowledgement.)

While this interpretation was certainly open on the facts, Tracey J was the only judge who preferred this interpretation. As noted above, on appeal, the Full Court judges – while disagreeing on the technical issue – agreed that the most natural interpretation of the wording of the 8 December letter was that put forward by the taxpayer (and opposed by the ATO).

- *'Whilst concerns about the fairness of the majority's conclusion were expressed in the judgment of Kerr J in dissent, the majority's decision did no more than express what has long been the proper operation of the law ...'*

⁶² The majority indicated that in any event, in their view, the fact that the December letter did not expressly refer to GIC was outweighed by the factors (discussed above in section 4) linking the GIC to the December letter.

With respect, as noted above, while the majority disagreed with Kerr J on the technical question of whether a 'decision' had been made in the letter of 8 December 2014, the tenor of their judgments on the meaning and misleading character of the letter was in line with that of Kerr J.

- '... on appeal ... the taxpayer did not challenge any of the primary judge's findings of fact.'

This is perhaps not surprising, as the scope to challenge findings of fact on judicial review or under the ADJR Act is limited – eg, essentially to a finding of fact which involves an error of law.⁶³

The ATO was clearly of the view that its actions in *Pintarich* were appropriate, and no doubt the ATO staff faced difficulties in the context of a mass decision-making tax system utilising new technology. However, for the reasons outlined above, examining the situation 'from the outside', some of the ATO's actions seem harsh and arguably unfair or unreasonable.

Certainly, the ATO is charged to collect the 'correct' amount of tax – but not at all costs or at the expense of fairness. The power of remission given to the Commissioner by section 8AAG (specifically in relation to the GIC penalty) and section 298-20 of Schedule 1 (in relation to penalties generally) of the *Taxation Administration Act 1953* (Cth) is a clear indication that there are circumstances where recovering less than the absolute amount of tax or penalties owing is appropriate.

The ATO accepted in its DIS that 'a taxpayer should be able to rely on the accuracy and clarity of any communication with the ATO, whether written or verbal' and noted that 'in its quest for continual improvement' (and to reduce the likelihood of similar issues reoccurring), the ATO had 'replaced the former unclear language in the template with language that is more appropriate for all circumstances when this template is issued ... [and] has reviewed its procedures and communication to staff in relation to the entering of payment arrangements to ensure appropriate letters are used'. The ATO also noted that in the longer term, it proposes to undertake a 'complete review of all payment plan letters with a view to expanding the range of scenarios incorporated in its automatically generated letters'.

These are important positive and welcome steps forward, though experience suggests that it is likely that problems will continue to arise from time to time in such a rapidly developing area.

7. WHERE ARE WE NOW?

The legal position is clear, if controversial.⁶⁴

⁶³ See for example *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J); Administrative Review Council, 'The Scope of Judicial Review' (Discussion Paper, 2003) Part I, [1.8]-[1.11], [1.13]-[1.30], available at: <https://www.ag.gov.au/sites/default/files/2020-03/judicial-review.pdf> (accessed 22 October 2020); cf *Administrative Decisions (Judicial Review) Act 1977* (Cth), see ss 5, 6, 7; and for example *Kioa v West* (1985) 159 CLR 550, 576 (Mason J).

⁶⁴ Interestingly, as noted above, n 26, in the subsequent case of *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129, Ward CJ In Eq (citing *Pintarich*) held that on the facts there, the validity of the notice in question was to be addressed 'by reference to the context of the notice rather than the subjective state of mind of the person who issued or received it. Subject to any

The ethical position is less clear – but no less controversial.

By way of context, it is useful to note that various commentators have suggested that:

- the decision in *Pintarich* ‘... will have implications for the reliance that Australian taxpayers can place on computer-generated correspondence from the ATO’;⁶⁵
- public trust and confidence in government decision-making ‘will be undermined if public officials are able to retract “decisions” communicated in computer-generated correspondence, and if individuals are therefore unable to rely on this correspondence ...’;⁶⁶
- taxpayers ‘want to know that they can rely on the wording of the correspondence that’s issued to them by the ATO, especially in circumstances where the ATO is relying more and more on automated processes’;⁶⁷
- a taxpayer should be able to rely on written or verbal communications from the ATO being accurate. Accordingly, ‘[p]utting the onus on the taxpayer to determine what was the decision of the Commissioner even in the face of clear correspondence’ can be taken at face value and accurately reflects decisions taken is not only ‘troubling’, but also ‘creates uncertainty for the Commissioner in opening the door to taxpayers arguing a decision that appears to be clear on its face is not the decision because it fails to take into account all relevant material in a particular case’;⁶⁸ and
- at the very least, the decision in *Pintarich* ‘... leaves taxpayers ... in an understandably perplexed and confused state when they receive correspondence from the ATO ... [it is] a highly unsatisfactory situation, especially as we move more and more into an automated world where taxpayers should have a quite legitimate expectation that plain words emanating from the ATO – even if not falling within the technical requirements of the law – can be relied on with certainty’.⁶⁹

At first glance these might seem extreme reactions, but given that reliance on automation by the ATO and other government bodies is likely to increase exponentially in frequency and scope in the future (contrary to the assumption of the majority in

contrary indication ... in the relevant statute, the content of a notice is ordinarily to be assessed by reference to a reasonable reader in the recipient’s position’.

⁶⁵ Huggins, above n 5.

⁶⁶ Ibid: arguing also that the *Pintarich* decision ‘highlights the impact of unreviewable errors in automated processes on public trust and confidence in government decision making and the challenges of using administrative law to scrutinise such processes’.

⁶⁷ Keith Swan (Partner, KPMG), quoted in Nassim Khadem, ‘Tax Office Computer Says Yes, Federal Court Says No’, *ABC News online* (5 October 2018), available at: <https://www.abc.net.au/news/2018-10-05/tax-office-computer-says-yes-federal-court-says-no/10341548> (accessed 23 February 2020).

⁶⁸ Sam Campbell, ‘ATO Decision Impact Statement On Pintarich – Troubling Views On When A Decision May Not Be A Decision’, Sladen Legal (16 April 2019), available at: <https://sladen.com.au/news/2019/4/16/ato-decision-impact-statement-on-pintarich-troubling-views-on-when-a-decision-may-not-be-a-decision> (accessed 22 October 2020). See also Huggins, above n 5.

⁶⁹ Robert Deutsch, quoted in Khadem, ‘Tax Office Computer Says Yes, Federal Court Says No’, above n 67.

Pintarich),⁷⁰ and given the unfortunate experience with other automated systems such as OCI Robodebt,⁷¹ these comments may merit closer consideration.

Certainly, the decision in *Pintarich* and the ATO's approach will create a measure of uncertainty among advisers and sophisticated taxpayers, who may have a nagging doubt in future about whether correspondence coming from the ATO can be taken at face value, particularly whether the ATO author had considered the relevant issue and intended the correspondence to issue in the form in which it appeared.⁷²

Taxpayers and their advisers should not have to puzzle over the origin and provenance of correspondence issuing from the ATO, or undertake a course in Administrative Law in order to try to determine – or guess – whether the ATO officer creating the correspondence had actually turned their mind to the operative issues or not. This is particularly important where the taxpayer has no practical way of determining the answer to such questions short of making enquiries of the ATO officer (assuming they can be identified) – in a context where – if *Pintarich* is a guide – a reply might take months to arrive, during which time GIC owing will continue to grow.

The fact that most 'ordinary' taxpayers will remain blissfully ignorant of the entire debate is little consolation if tax intermediaries, advisers and sophisticated taxpayers cannot feel confident when receiving ATO correspondence (or conducting oral discussions with ATO staff) and begin to lose confidence in the system.⁷³

8. WHERE SHOULD WE BE NOW?

As a preliminary point, the *Pintarich* case may be a useful illustration of the fact that, while automation offers very significant benefits in tax and other areas, it can equally create significant problems.⁷⁴

Looking incrementally at the elements in *Pintarich*:

1. The letter itself was sent out intentionally by the ATO. The content might not have been wholly intended, but there was no suggestion that the letter somehow 'escaped' the ATO system and was sent out by mistake.⁷⁵

⁷⁰ See Huggins, above n 5.

⁷¹ For an explanation of the 'Robodebt saga', see above, n 35. As several commentators have noted, there are many potential sources of error in automated systems, including not only a *Pintarich*-like situation, but also, eg, the inherent difficulty in coding complex legal principles and rules with precise accuracy. See for example the discussion in Elvery, above n 34; Hong and Hui, above n 34, 880-882; Huggins, above n 5; Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When Is a Decision a "Decision"?' (2019) 26(1) *Australian Journal of Administrative Law* 21, 23.

⁷² Selwyn Black (Partner, Carroll & O'Dea), quoted in Khadem, 'Tax Office Computer Says Yes, Federal Court Says No', above n 67.

⁷³ Cf Campbell, 'Pintarich – A Clayton's Decision Denied High Court Special Leave', above n 3.

⁷⁴ See Ng and O'Sullivan, above n 71, 21-24.

⁷⁵ Perhaps surprisingly, the ATO disavowed reliance on the defence of mistake (and – less surprisingly – did not plead *non est factum*) before the Full Federal Court in *Pintarich*, leading Kerr J to comment at [27]-[28] that '[t]he Deputy Commissioner did not seek to uphold the later remission decision on the basis that his delegate Mr Celantano had made a mistake on or about 8 December 2014 such that what had the appearance of a decision was merely a purported decision invalid for jurisdictional error... It is unprofitable to speculate as to the reasons for the Deputy Commissioner's forensic decision not to rely on that premise. They may well have been sound. In any event, [notwithstanding the acknowledgment of mistake in the

2. One of the few things on which the majority and minority judges in the Full Court agreed was that the letter was misleading,⁷⁶ even the ATO appeared to concede this as a possibility.⁷⁷
3. The letter was misleading, partly it seems, because the automated ATO internal system did not permit the officer to proof read it before it was sent out.⁷⁸
4. Pinarich acted to his detriment in reliance on the ATO letter.
5. The ANZ Bank also acted in reliance on the ATO letter, to its potential detriment.

Whatever the legal position, the above elements seemed to make a strong case for the ATO to remit the full GIC on ethical or fairness grounds. The better view is that the problems were created (unintentionally) by the actions of the ATO staff member in relation to the ATO internal automated processes, and an appropriate response arguably might have been for the ATO to acknowledge that its December letter was ambiguous and that it had caused people to act to their detriment, and to remit the outstanding GIC.⁷⁹

However, the ATO insisted on payment of (the balance) of the GIC. It seems clear that the ATO took this approach because, as noted above, it believed it had acted correctly at all points (or that Pinarich had not done so).⁸⁰

It needs to be borne in mind in this context that the ATO itself acknowledged in its May 2016 letter that Pinarich had been 'erroneously advised' by the ATO in its December letter that payment of \$839,115.43 would satisfy the [whole] outstanding debt and that the payout figure 'may be construed as misleading' – a view endorsed by the Full Court.

Under these circumstances, there would seem to be a strong case on fairness or moral grounds for remission of the outstanding GIC. On this aspect, the key ethical criterion should be the fair treatment of all taxpayers – whether Mr Pinarich (or others) are paragons of (tax) virtue or the reverse – the moral imperative on the ATO as a model litigant to act fairly remains the same (though as noted below, that does not mean that the result of the fair application of the law to compliant and non-compliant taxpayers will always necessarily be the same).

ATO correspondence] it is not open to this Court to find in the Deputy Commissioner's favour in respect of a ground he has disowned ...'

⁷⁶ [2018] FCAFC 79, [116] (Kerr J); [137], [140] (Moshinsky and Derrington JJ).

⁷⁷ The first Deputy Commissioner's letter to Pinarich on 13 May 2016 (quoted by the majority at [2018] FCAFC 79, [116]) stated (inter alia) that 'you were erroneously advised that the sum of \$839,115.43 would satisfy the outstanding debt and was a "payout figure" ... [which] ... may be construed as misleading ...'

⁷⁸ As noted above, n 11, the ATO Decision Impact Statement (issued 4 April 2019) stated that '[t]he letter was prepared by a process under which the ATO officer entered specific variables relevant to the agreed payment arrangement – however the system generated letter did not allow the officer to customise either the text or the GIC calculation, nor otherwise view or alter the letter before it issued'. It is to be hoped that the underlying system (as well as the actual wording of correspondence) has – as stated by the ATO – subsequently been upgraded adequately, as the system in operation in *Pinarich* seemed to create a real risk of errors.

⁷⁹ See Huggins, above n 5; Campbell, 'Pinarich – A Clayton's Decision Denied High Court Special Leave', above n 3; Khadem, 'Tax Office Computer Says Yes, Federal Court Says No', above n 67.

⁸⁰ Based on the public statements by ATO officers noted above.

Overall, as Professor Robert Deutsch has suggested,⁸¹ *Pintarich* is a case that probably should never have been run.

At the very least, it seems reasonable to agree with Deputy Commissioner Ravello that the *Pintarich* saga is indeed a 'bad look' for the ATO.

9. CONCLUSION

The ATO faces a difficult task in administering the Australian taxation system so as to ensure that all taxpayers comply with the taxation laws and pay the correct amount of tax and penalties. Not all taxpayers are compliant.

However, the ATO is given extremely broad powers to enable it to carry out its role. These powers give the ATO a very considerable advantage over most taxpayers, and the ATO, as a model litigant and moral exemplar with no personal stake in the outcome of any case, therefore needs to be scrupulous to ensure that it uses its powers fairly and reasonably and upholds the expected high standards of fairness and integrity in relation to all taxpayers, whether compliant or non-compliant.⁸²

Equally important, the ATO must be careful to avoid creating any *perception* that the ATO is acting unfairly or unreasonably, particularly if the ATO's actions are seen (rightly or wrongly) as at times reflecting a 'win at all costs' approach. Public and professional support – on which the ATO depends to enable it to operate effectively – is fragile and easily damaged.

Of course, it is easy to pontificate on such matters from the sidelines, but much harder to maintain standards in the heat of battle.

In this context, the *Pintarich* case is an important symbolic decision.

The broader aspects of the events in *Pintarich* might be dismissed as merely an example of the sort of issues that arise inevitably from time to time in an organisation as large and dispersed as the ATO, dealing with a complex area of the law involving millions of diverse taxpayers. However, the decision is important, because whatever the technical outcome, the broader aspects of the case create a 'bad look' for the ATO, and it is hard to disagree with Professor Deutsch's view that *Pintarich* is a case which probably should never have been run.⁸³

As noted, it is essential that the ATO, as a 'moral exemplar' and model litigant with no 'personal' stake in the outcome of cases, upholds at all times the highest standards of fairness and integrity in relation to all taxpayers – good or bad, compliant or non-compliant. The health and effectiveness of the taxation system depends on this.

The ATO cannot afford too many scenarios like *Pintarich*.

⁸¹ Professor Robert Deutsch, in 'Pintarich – A Case That Should Never Have Been Run!', above n 56, commented that: 'If ever there was a case that should not have been pursued [by the ATO], this was probably it'.

⁸² That does not mean, or course, that the *result of the fair application* of the law to compliant and non-compliant taxpayers will necessarily be the same.

⁸³ Professor Deutsch, in 'Pintarich – A Case That Should Never Have Been Run!', above n 56, also observed that '... the legal niceties of whether or not a decision had been made, while intellectually engaging, is practically of no help in the administration of a modern taxation system ...'.