SEARCH POWERS OF THE TAXATION COMMISSIONER

By

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The Commissioner's powers to investigate a taxpayer's affairs are basically dependent on two provisions of the Income Tax Assessment Act — namely s.263 and s.264. The main difference between the two sections was stated by Mason J. in *F.C. of T. & Ors* v. *The ANZ Banking Group Ltd; Smorgan & Ors* v. *F.C. of T. & Ors.*[1]

> ... sections 263 and 264 serve two different purposes. Section 263 is a general provision giving the Commissioner a right of access. It makes lawful that which would otherwise be unlawful, e.g. entry upon premises, examination of a document. (s.264) ... arms the Commissioner with inquisitorial and coercive powers.

However it is arguable that as the s.264 written notice "requires reasonable time to be allowed for such information to be sought from the person, thus minimising the element of surprise, s.263 is the preferred power used by the Commissioner."[2]

This paper will examine the operation and effects of both sections together with a discussion of the Commissioner's search powers under s.10 of the Crimes Act (C'th) and the relevance to each of these sections of legal professional privilege.

Section 263

The Commissioner's power to conduct an investigation into a taxpayer's affairs has been greatly strengthened by the amendments to s.263 which became effective as of *June 5 1987.* The amendments involved the addition of sub-sections (2) and (3) — the former dealing with authorised entry, the latter with assistance to officers.

The section in full now reads as follows:—

> Section 263 Access to Books, etc.
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> 263(1) [Authorised access] The Commissioner, or any officer authorized by him 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.
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> 263(2) [Production of written access authorisation] 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.
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> 263(3) [Facilities and assistance to officers] 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.
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> Penalty for a contravention of this subsection: $1,000.

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1. 79 ATC 4039 at 4052.
2. B. Richards 'Taxman has additional powers: Section 263 as amended.' Butterworths Weekly Tax Bulletin No. 28 July 1987 at 327.

Before dealing with the substance and probable effect of the two new subsections this paper will examine the position prior to the amendments, because it is submitted it was the courts narrow interpretation of s.263 (now s.263(1)) which had the effect of frustrating the conduct of an investigation by Taxation Department officers, thus promoting the need for amendment.

Section 263 gives the Commissioner the right to examine but not to seize. Section 263(1) states the Commissioner has a right of full and free access to all buildings, places, books, documents and other places for the purposes of the Act. Prior to the 1987 amendments this section was not supported by any statutory duty on the part of any other person to assist an officer exercising the right. However, even standing alone the original s.263 appeared to give a very broad right of access to the Commissioner. In fact it appeared to give a power to enter and search which exceeded police powers. Arguably this is the reason why the courts interpreted s.263 in such a way as to restrict its literal interpretation. Moreover in practical terms Taxation Department officers were frequently frustrated in their s.263 investigatory task by e.g. refusal to allow them to use photocopiers, desks, chairs or even electricity. All of these tactics were legitimately within the prerogative of the occupiers of the building.

A leading case on s.263 prior to the amendments is *O'Reilly & Ors* v. *Commrs of State Bank of Victoria & Ors.*[3] The dispute in this case resulted from an attempt by taxation officers to gain access to records kept by a bank, for the purpose of inspecting documents relating to the income affairs of a taxpayer. The bank staff took the following stance — they would not prevent access to the building but they would not unlock the door of the records room which was normally kept locked, nor would they provide any active assistance to the tax officers. However, the latter did not ask for the key to the door, and the bank manager did not inform the officers of its whereabouts.

The main issues to be determined by the Full High Court were as follows:—

1. whether the Commissioner or his authorised officers had full and free access to the books, documents and other papers held at the bank;
2. whether the bank had an obligation to tell the officers exactly where the relevant documents were;
3. whether the bank had to physically deliver to the officers the documents and papers which they requested;
4. whether the bank had to take any *positive steps* to facilitate inspection by these officers.

All of these questions received a negative answer by the court. Their Honours held the fact the door of the records room was locked meant there was no full and free access to the documents, and that the officers were entitled to take whatever steps were "reasonably necessary and appropriate to remove any physical obstruction to that access ..."[4]

As stated by the commentators Woellner and Vella, this finding gave the officers the right of self-help, but they conclude —

> The steps taken must not be "excessive" in the circumstances of the particular case. Thus an investigator would only be justified in using the nominal amount of force "reasonably necessary" to remove the obstruction. In ordinary circumstances therefore, while an investigator would seem to be justified in breaking open a locked door, drawer, suitcase or the like, he would not be justified in using extensive force — such as demolishing or dynamiting the wall of a house to gain access.[5]

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3. 83 ATC 4156.
4. *Ibid.* 4160.
5. R.H. Woellner and T.J. Vella 'The Commissioner's Powers of Investigation under the Income Tax Assessment Act — The High Court examines s.263', Taxation in Australia, November 1983, at 517.

Whether what the bank did or did not do constituted obstruction or hindrance was not decided by the Court. It was held "The case stated does not ask the Court to answer that question, and its consideration could be affected by facts which are not disclosed in the case."[6] But this question is relevant under s.8X of the Taxation Administration Act (formerly s.232 I.T.A.A.), that is, if a person obstructs or hinders a tax official in exercising his right of access that person may be guilty of an offence. However, the court did make a distinction between obstruction which was penalised by s.232 and failure to provide assistance which would not give rise to a penalty. The Court did intimate that if a person took active steps to prevent an officer entering a building or inspecting documents e.g. hiding a key to a locked room, that person would be guilty of an offence under s.232 (now s.8X as above).

With the addition of s.263(3) which requires positive steps to be taken to assist the officers it is submitted it will now be easier for the Commissioner to establish such obstruction or hindrance.

However, in *O'Reilly's case* arguably the most restrictive holding by the High Court from the Commissioner's point of view was that there was *no obligation on anyone to take positive steps* to assist the Commissioner to gain access i.e. in practical terms the bank did not have to tell the investigating officers exactly where the documents were or take them to the documents, nor did the bank staff have to unlock the door of the records room.

It is submitted the 1987 amendment via the addition of s.263(3) is a direct attempt at overcoming this finding, as sub-section (3) now imposes a mandatory duty on the occupiers of a building to give positive co-operation.

Kerrison's Case: Access to Safe Deposit Boxes

In a recent decision of the Supreme Court of South Australia Bollen J. in *Kerrison* v. *Federal Commissioner of Taxation*[7] took the point made in *O'Reilly's case* about the Commissioner's right of "self-help" to its logical conclusion.

In that case two investigating officers went to a bank in Adelaide and sought access to two boxes held in the bank's plate room. The officers were accompanied by two locksmiths. The owners of the boxes (the Kerrisons) were also in attendance and had been advised not to provide the investigators with a key to the boxes. The bank did not have a key for either box. As the Kerrisons refused to open the boxes the investigators left the bank and returned with a screwdriver, a jemmy and a crowbar. They advised the Kerrisons they were acting within their rights to break open the boxes but the taxpayers sought a declaration to the contrary from the Supreme Court.

Justice Bollen found for the Commissioner on all of the issues in dispute. The main holdings were as follows:

1. The tax officers were acting for the purposes of the Act i.e. they were investigating the Kerrison's tax affairs.
2. The investigators had a reasonable belief that the boxes contained the material relating to the assessment of the taxpayers. It did not matter whether their suspicions were correct, and as stated by the commentator D.M. MacLean — "This conclusion is difficult to doubt."[8]
3. While the safe deposit boxes did not come within the term "a place" for the purposes of s.263, the banks premises were; and it could not be argued that the investigators had full and free access to the bank building if two locked boxes are found in the bank and were not opened for them.

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6. *Supra* n.4.
7. (1985) 17 ATR 388.
8. D.M. MacLean 'Some Aspects of s.263' (1986) 15 ATR 152 at 154.

4. The Kerrisons had not granted full and free access.
5. The bank which had no keys had offered no hindrance to the tax officers, and therefore it had offered full and free access.
6. The Commissioner was entitled to take all reasonable steps to obtain access. He was entitled to remove with the assistance of the tradesmen the existing physical obstruction to such access.
7. Section 263 entitled the officers to photograph any of the contents of the boxes, not just books documents or papers.

1987 Amendments to Section 263

Since these decisions were handed down sub-sections (2) and (3) have been added to s.263 by the 1987 amendments. I submit that sub-section (3) is the more important as it has strengthened the Commissioner's investigatory powers by making it mandatory for the occupier of a building to provide the officer with "all reasonable facilities and assistance". There is a penalty for contravention of $1,000.

One may think a $1,000 fine is a small price to pay for rebellion, but in practise what would often prompt co-operation with the taxation officer is that refusal to co-operate would likely result in the issue of a s.264 notice and as has been noted:—

> The potential issue of a formal s.264 notice with its attendant likehood of greatly increased formality and inconvenience to the taxpayer and the possibility of significantly wider and more searching inquiries, is often sufficient to pursuade a taxpayer in such circumstances to comply voluntarily with an investigator's request for access under 2.263.[9]

Section 263(2) - Authorities

Taxation officers should be aware from this provision that if they do not show proof of their authority they are advised to leave the premises immediately because although the section itself does not provide a penalty for non compliance no doubt the officers could be found guilty of trespass.

However even where an officer holds the requisite authority, in the 1988 decision *Citibank Limited* v. *F.C. of T.*[10] Lockhart J. held that in his view a further prerequisite is required, that is, an authorisation under s.263 must identify on its face and with sufficient particularity the premises to which access is sought and the books, documents or class of documents to be searched for and copied. In his view nothing short of that adequately protects the occupier of the premises. He did concede however, that the practical application of these requirements would vary from case to case. Where, for example, an urgent search would be required to prevent a blocking tactic of moving documents from place to place then more general descriptions would suffice. The authorities relied on by the Commissioner in the *Citibank* case were couched in general terms only, referred to a plurality of statutes and their only limitation was as to the extent of their duration. His Honour concluded that these particular authorities were bad for want of specifity and particularity. He held the analogy with the requirements of a warrant under s.10 of the Crimes Act was particularly close.[11]

However this approach can be contrasted with that of Pincus J. in *Allen Allen and Hemsley*

9. Woellner & Vella *supra* n.5 at 525.
10. 88 ATC 4714.
11. *Ibid.* at 4725.

v. *D.F.C. of T. & Ors.*[12] (It should be noted that both of these judgments of the Federal Court were handed down on September 2 1988 and both are currently on appeal at the time of writing.)

Justice Pincus rejected the argument that the same degree of particularity is required for a s.263 authority as is required, for example for a search warrant. The authorities under s.263 given to the taxation officer in this case were also only in a general form, that is, they did not refer to particular premises but only to sections of the Income Tax Assessment Act. Justice Pincus made an analogy with *O'Reilly's* case where the authorities in question were similarly couched in general terms and said although the point was not argued in *O'Reilly's* case the Court assumed the validity of such a general authority. His Honour therefore concludes:

> It is enough that the officer has "an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section" ... Had Parliament intended the authority to state something more elaborate it surely would have said so.[13]

Justice Pincus accordingly found the general term authorities to be valid. Pending the outcome of the appeals it is submitted that Pincus J's approach is the correct one. Justice Lockhart's determination was arguably a reaction to the extreme circumstances surrounding the *Citibank* case — namely a "raid" of bank premises by 37 taxation officers instructed to complete their task in two hours. It was the largest operation of entry and search ever undertaken by the Commissioner, generated a lot of attendant publicity and Lockhart J. throughout his judgment showed particular concern for the need to protect the individuals right to privacy and confidentiality as opposed to the exercise of unlimited bureaucratic powers.

Section 263(3)

As explained this section requires the occupier to provide the tax officer with all reasonable facilities and assistance.

The Treasurer's Memorandum accompanying the Bill stated as follows:-

> An authorised taxation officer will thus be entitled to to *reasonable* use of photocopying, telephone and light and power facilities and of work space and facilities to extract relevant information stored on computer. In addition the officer will be entitled to reasonable assistance in the form of for example, advice as to where relevant documents are located and the provision of access to areas where such documents are located.[14]

A number of points can be made here.

1. The anomolies in the *O'Reilly* decision from the Commissioner's point of view should be overcome.
2. The officers should not now need to come armed with screwdrivers and crowbars as in *Kerrison's case.*
3. As to what is reasonable use or assistance will obviously be a question of fact in each case, but it has been suggested by one commentator that "a temporary denial of immediate use or unreasonable use will be permitted."[15]

In *Swan* v. *Scanlan*,[16] on attending the taxpayer's business premises taxation officers

12. 88 ATC 4734.
13. *Ibid.* at 4747.
14. Taxation Laws Amendment Bill (No.2) Explanatory Memorandum at 106.
15. B. Richards *supra* n.2 at 328.
16. 13 ATR 420.

demanded access to certain documents under s.263. The taxpayer refused access on the ground he wished to obtain legal advice. He was subsequently convicted by a Magistrate under s.232 I.T.A.A. for obstructing an officer in the discharge of his duty. However, on appeal Helman D.C.J. allowed the appeal saying a temporary and reasonable denial of access could not amount to obstruction within s.232. His Honour stated:—

> I am not satisfied beyond a reasonable doubt that the appellant acted otherwise than from a genuine desire to be advised as to his legal rights and duties before a further step was taken by the officers.[17]

Moreover, in the *Citibank* case two senior executives of the bank requested the tax officers engaged in the search of the banks premises, for a delay for the purposes of obtaining legal advise. That request was refused. Lockhart J. held this refusal was unreasonable particularly as the bank would have in its possession documents to which a claim for legal professional privilege may properly attach. His conclusion was that the banks request should not have been denied.

4. It has been suggested that the new sub-section (3) while allowing the officer full and free access to books, papers and premises:

> does not ... go so far as to include a requirement to answer questions of a fundamental nature concerning a taxpayers affairs. That type of questioning is only permitted where the provisions of s.264 have been complied with.[18]

However, despite this inadequacy the amended s.263 is certainly a more useful and powerful weapon for the Commissioner than it was prior to June 1987.

Section 263 Legal Professional Privilege

In the *Citibank* case Lockhart J. held that s.263 does not override legal professional privilege. Even prior to this decision, although there was no case which dealt specifically with s.263 on this issue, it was accepted that in view of the decision of the High Court in *Baker* v. *Campbell*[19] that s.10 of the Crimes Act (C'th) did not abrogate such privilege then the proper view is nor does s.263.[20] This paper however will deal with the topic of legal professional privilege after the discussion on s.264.

Contempt of Court

Similarly s.263 does not give the Commissioner power to engage in conduct which would constitute contempt of court i.e. by improperly interfering with a judicial proceeding. This point was dealt with in *Commercial Bureau (Australia) Pty Ltd* v. *Allen, Lee & Owen ex parte F.C.T.*[21] In this case the Commissioner had sought access to documents which were held in the possession of the Federal Court while litigation between the main parties to the case was in progress. The said document had been seized by the Federal Police and the Commissioner sought access as part of his investigation of the taxpayers affairs. On the facts the court held there was no contempt of court.

Before concluding the discussion of s.263 it should be noted that the section's application is not limited to the affairs of a person who is in receipt of assessable income. This was held by Barwick C.J. in *Southwestern Indemnities Ltd* v. *Bank of NSW and F.C.T.*[22] where

17. *Ibid* at 423.
18. B. Richards *supra* n.2 at 328.
19. (1983) 57 ALJR 749.
20. And nor does s.264 see Connolly J. in *Re Packer* (1984) 15 ATR 651 and on appeal in *Packer* v. *DCT* (1984) 15 ATR 1038.
21. (1984) ATR 468.
22. 47 ALJR 600.

he held "Such an investigation cannot be limited to buildings, books etc. of a person who is liable to taxation, but must extend to any person."[23] His Honour held that the Commissioner could use his power under s.263 to get access to bank ledger cards of a company incorporated in Norfolk Island despite the fact that the company argued it had no liability to Australian taxation.

Section 264

Section 264 Department to Obtain Information and Evidence

264(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 him with such information as he may require; and

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

264(2) [Oath] The Commissioner may require the information or evidence to be given on oath and either verbally or in writing, and for that purpose he or the officers so authorized by him may administer an oath.

264(3) [Expenses] The regulations may prescribe scales of expenses to be allowed to persons required under this section to attend.

It can be seen that s.264 contains two quite distinct powers namely (1) the power to require a person to attend and give evidence (2) the power to require a person to produce documents. Therefore the section gives the Commissioner a wide power to obtain information *from any person* whether a taxpayer or not.

Also it is not necessary that a dispute should be in existence between a taxpayer and the Commissioner. The section allows the latter to "fish" for information to enable him to determine the taxable income of any person. This was a finding in *Smorgan's case*. Moreover the power to issue a s.264 notice is not confined to the Commissioner or Deputy Commissioner. The section allows the later to "fish" for information to enable him to

As a preliminary point it should be noted that the High Court in *Smorgan's Case* rejected an argument that the power of giving a s.264 notice was conditional on a prior attempt to use the s.263 full and free access powers. Mason J. said:—

> The power conferred on the Commissioner by Section 264 ... enables him to obtain information and inspect documents when the full and free access given by section 263, for whatever reason, is inadequate to enable him to inspect documentary records, though *I see no reason why the exercise of the power should be restricted to these circumstances.*[24]

This view was also approved by Lockhart J. in the *Citibank* case.[25]

Practical Application of a s.264 Notice

In normal practise the notice will require production of documents etc. at the office of the Deputy Commissioner issuing the notice. In Ruling I.T. 2072 (Feb. 1983) the Commissioner has indicated that in his view the notice could nominate an alternative venue,

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23. *Ibid. at 602.*
24. *Supra* n.1 at 4054 (the underlining is that of the author).
25. *Supra* n.10 at 4731.

but it would have to be convenient to the Department and the party involved would have to prove co-operative with respect to inspection of documents and copying etc.[26]

The type of documents which the Commissioner can require to be produced are those relating to the income or assessment of some person and it is necessary that that person be named or otherwise indicated under the s.264 notice. Also the notice has to identify with sufficient clarity the documents which the Commissioner is requesting. The C.C.H. Reporter gives the following example as a guide.

> ... a notice would be invalid if it simply required a bank to produce *all* the documents in a safe deposit box without showing these documents related to the income or assessment of any person. However, a notice requiring a taxpayer to produce his books of account would be sufficient; *Smorgan & Ors* v. *F.C.T. & Ors*, *Snow* v. *Keating* (D.C.T.) W.A.[27]

As s.264 places a positive obligation on persons any refusal or neglect to comply with the Commissioner's requirements is made an offence by s.8C and s.8D of the Taxation Administration Act (formerly s.224 *I.T.A.A.*), and on conviction the court has the power to order the person to do that which he has neglected or failed to do. (See s.8G Taxation Administration Act — (formerly s.225 I.T.A.A.)).

The following *qualifications* apply however.

1. **Time**

The person in receipt of the s.264 notice must be given a *reasonable time* to furnish the information required. This was the effect of the decision in *Ganke* v. *F.C. of T.*[28] Simply, failure by the Commissioner to allow this reasonable time will preclude a prosecution under s.8C and 8D Taxation Administration Act. What is reasonable time is obviously going to vary depending on the facts of each case; but in another case involving Ganke, *Ganke* v. *D.C.T. (N.S.W.)*[29] Yeldham J. of the N.S.W. Supreme Court held that fourteen days was not a reasonable time for compliance where the taxpayer was expected, as a company director, to arrange the lodgment by that company of returns of income for each of seven (7) years. The amount of work involved here would obviously make two weeks inadequate.

Further it was held in *Clarke and Kann* v. *D.F.C. of T.*[30] that the Commissioner's decision to refuse a request for an extension of time for compliance with a s.264 notice is reviewable under the Administrative Decisions (Judicial Review) Act 1977.[31]

2. **Claim for Privilege against Self Incrimination**

IN *Scanlan (D.C.T. Qld)* v. *Swan*[32] Swan was issued with a s.264 notice and failed to attend at the office of the Taxation Department. As a defence he claimed that if he did attend and answer questions those answers would probably incriminate him. However, the Supreme Court of Queensland on appeal confirmed the Magistrates decision, and held this claim did not excuse a person from failing to attend and give evidence as directed by the notice. It was held Swan's rights *only* arose *at the particular time when the questions were asked.*

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26. Butterworths Australian Income Tax Law & Practice Reports at 4392.2.
27. CCH Australia Federal Tax Reporter at 53,449.
28. (1975) 5 ATR 292.
29. (1982) 13 ATR 440.
30. 83 ATC 4764.
31. As is the decision to issue the notice itself.
32. (1983) 14 ATR 21.

3. **Legal Professional Privilege**
Documents which are covered by legal professional privilege will not have to be produced. This area will be dealt with in detail later.

4. **Injunctive Relief**
Despite the fact that there is a remedy provided by s.8G of the Taxation Administration Act (formerly s.225 I.T.A.A.) it was held in *Attorney-General & Anor* v. *Thomas*[33] that the Commissioner is still entitled to injunctive relief to compel a person to comply with a s.264 notice. In granting the injunction Derrington J. noted that the defendant in disregarding the s.225 order that he comply with the notices was only subject to a small pecuniary penalty as a result, and that the defendant was wilfully flouting the law and contemptuous of the penalties in a situation where a substantial amount of tax may have been avoided.

Substance of Section 264

The leading case or cases on s.264 have been aptly described as the Smorgan Saga,[34] because there are a number of cases which resulted from the Commissioner in 1976 seeking to exercise his s.264 powers in relation to the affairs of Mr Samuel Smorgan, his relatives and associates and many hundreds of companies and trusts most of which were associated with the Smorgan family. Notices were served on Smorgan and the ANZ Bank requiring the production of certain papers and Smorgan was required to produce the contents of two safe deposit boxes. He failed to comply with the notice and sought injunctions to restrain the Commissioner from acting on the notices and to restrain the bank from complying with them. Stephen J. made the following findings:

1. The term assessment where used in s.264(1)(b) refers to the whole process involved in the determination of a taxpayers assessable income, of his allowable deductions, of his taxable income and of the amount of the tax payable.
2. The Commissioner's power under s.264(1)(b) to require attendance before him to give audience only relates to a *natural person*, therefore the section did not give the Commissioner power to require a corporation (as distinct from its officers) to attend and give evidence.
3. The second limb of s.264(1)(b) is quite independent of the first limb. Therefore the Commissioner could require a person to provide documents irrespective of whether he has been required to attend and give evidence. Accordingly though a corporation cannot be required to give evidence, it can be required to produce documents.
4. The bank cannot rely on a claim that it has a contractual duty of confidentiality with its clients not to produce the documents. The s.264 notice overrides this contractural duty owed to the customer and the notice can validly require the bank to produce documents contained in its safe deposit boxes. In this regard the relationship between a solicitor and his client was not comparable.
5. In the s.264 notice to the ANZ Bank some particularity was required in the nature of the document required to be produced. There the requirement to produce papers etc. "concerning the said matters which are in your custody" was too vague. However, this requirement could be separated from other specific requirements which the bank could be expected to comply with.

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33. 83 ATC 4071.
34. See B.J. Low 'The Powers of the Commissioner to Take Actions', Paper presented March 1986 to Queensland Division The Taxation Institute of Australia.

6. Regarding the s.264 notice directed to Mr Smorgan the Commissioner was entitled to refer in general terms to the documents etc. required to be produced.
7. The fact that the person who is required to attend and give evidence is not aware of what precise topics will be enquired into is irrelevant, because he can only be expected to answer questions which are within his unrefreshed memory and he will suffer no penalty as a result of failure to recall, or for lack of knowledge.
8. The failure to refer to the penalties which will be invoked in the event the notice was not complied with is irrelevant in the determination of whether or not it was properly granted.

The second episode in the saga unfolded before Stephen J. in the High Court. By this time the Commissioner had served new notices on the bank and members of the Smorgan family. The documents which were the subject of the notices were contained in safe deposit boxes maintained by the bank at its Stock Exchange Branch in Melbourne. The bank held one key to the boxes, the depositor the other, and the bank had a duplicate of the depositor's key. On this occasion Stephen J. held the contents of the safe deposit boxes were *NOT* within the control of the bank, and therefore the bank could not be required to produce the contents. However his Honour took a different view with respect to the owner of the box.

In the third episode the Commissioner appealed to the High Court from Stephen J's decision relating to the liability of the bank while the Smorgan's appealed against the decision on their liability.

The Commissioner's appeal was allowed. It was held the bank did have custody and control of the contents of the safe deposit box — this being exemplified by the fact the bank held both keys necessary to open the boxes.

The Smorgan's appeal was dismissed by the majority (Gibbs A.C.J. Jacobs and Murphy J.J. — Mason J. dissenting). They held the Commissioner was limited to documents etc. that would assist in assessing the taxation liability of a taxpayer, not necessarily the one who owned the box or had its custody and control. As noted previously two of the members of the court indicated the Commissioner was entitled to go on 'fishing expeditions' and it is submitted that as it is highly unlikely that the Commissioner knows what is in the safe deposit boxes, this must be necessarily inherent in the decision.

The final episode in this lengthy affair was an application by the taxpayers for an injunction to restrain the bank from disclosing the contents of the boxes to the Commissioner. This application was denied by Gibbs J. in *Goesam Investments Pty Ltd* v. *The ANZ Banking Group Ltd, F.C. of T. and D.F.C. of T.*[35]

Costs[36]

An interesting question from the practitioners point of view arises when parties are served with a s.264 notice and then bring an action to determine if the documents are protected by legal professional privilege. Who should bear the costs? This question arose before Shepherdson J. in *Re Kirby and D.C.T.*[37]

The facts were basically that officers from the A.T.O. in Brisbane contacted the applicant who was a partner in a firm of city solicitors to arrange inspection of a clients documents. Prior to permitting the inspection the firm wished to obtain advice as to whether the documents were protected by privilege. Section 264 notices were then issued on the firm, and the latter brought an action to determine whether privilege applied. It was held it did,

35. (1979) 9 ATR 836.
36. For a detailed analysis of this area see 15 QLSJ at 339.
37. (1985) 16 ATR 785.

and Shepherdson J. held in relation to the costs that where the privilege does apply, in order that it can be claimed quickly and cheaply where a s.264 notice has been issued, the *Commissioner* should pay the cost of the action.

His Honour stated:

> It is I believe high time so long as s.264 remains in its present form, for the Australian Government to legislate to provide a proper forum which legal professional privilege can be claimed quickly and cheaply in respect of s.264 notices.[38]

Legal Professional Privilege

In *O'Reilly's case* the High Court by a majority of 3:1 decided that legal professional privilege was irrelevant in the context of a s.264 notice because the privilege had no application outside judicial or quasi-judicial proceedings. However, less than 12 months later the High Court in *Baker* v. *Campbell* decided that the privilege is *NOT* restricted to these proceedings; and therefore in this respect *O'Reilly's case* has been overruled. The majority approved the case of *West-Walker*[39] and cited with approval a number of Canadian and other overseas decisions in support of this broad view of privilege.

In *Baker* v. *Campbell* by a majority of 4:3 the Court held that s.10 of the Crimes Act (C'th) does not authorise the seizure of documents covered by legal professional privilege. As this privilege can only be abrogated by express words or necessary implication the decision therefore held such express words or necessary implication were absent from s.10. In addition all the commentators seem to agree that s.263 and s.264 fall into this same category.[40] As stated by the commentator S.L. Doyle "Notwithstanding that *Baker* v. *Campbell* did not deal with s.264 Notices clearly the decision extends to such Notices (as indeed was assumed in *Packer* v. *D.C.T.*)."[41] Moreover in the recent Federal Court decision in the *Cibibank* case Lockhart J. held that s.263 does not override legal professional privilege.

The Scope of Legal Professional Privilege in Australia

In the case of *Grant* v. *Downs*[42] it was held the privilege only attached to documents brought into existence *solely* for the purpose of getting or giving legal advice, or for use in existing or anticipated litigation. This sole purpose test was expressly approved in *Baker* v. *Campbell* (see the judgment of Dawson J. at p.4646), also in *Nickmar Pty Ltd* v. *Preservatrice Skandia Insurance Ltd*[43] and by Pincus J. in the *Allen, Allen & Hemsley* case.

Therefore it can be adduced that the privilege does *NOT* appear to apply to the following:

1. Documents which merely evidence transactions such as contracts or accounts, even if they are delivered to a solicitor for advice or use in litigation.
2. Documents which are not confidential.
3. Communications which involve participation in a crime or fraud.
4. Communication in the presence of third parties.
5. Internal reports and memorandum.
6. Communications lodged with a legal adviser for the purpose of getting immunity from production (see Deane J. in *Baker* v. *Campbell*).
7. Solicitors trust account ledgers per se are not the subject of the privilege. This was the

38. *Ibid.* at 793.
39. [1954] NZLR 191.
40. D.F. Castle 'Legal Professional Privilege Revisited' Taxation in Australia, September 1984 at 294.
41. S.L. Doyle 'Legal Professional privilege & s.264 Notices' February 1986 QLSJ 29 at 36.
42. (1976) 135 CLR 674.
43. (1985) 3 NSWLR 44.

issue in *Packer & Ors* v. *D.F.C. of T.* where Connolly J. held the trust account of the firm of solicitors was not eligible for the privilege and that therefore it was available for examination by taxation officers. This decision was confirmed by the Full Court of the Supreme Court as they said the ledgers did not reveal the nature of any advice given by the solicitors to the clients. In this case the view that a solicitors bill of costs would automatically be protected was rejected. However, if a detailed bill of costs disclosed the nature of the advice sought or given then the privilege would attach.

Solicitors Trust Account Ledgers:

Allen, Allen & Hemsley V *D.F.C. OF T. & ORS*

The basic facts of this case are that in October 1987 a taxation officer sought access to the trust account records of the said firm of solicitors. The solicitors raised questions of legal professional privilege and other matters, with the result that implementation of the decision to have access was delayed. The solicitors successfully obtained an interim injunction to stop the officer accessing the 1981 trust account records pending the hearing of proceedings under the Judicial Review Act. The solicitors' principal argument was that to fulfill their obligations to their clients they would have to conduct a careful examination of each entry in the ledger (over 11,000 payments were recorded) to see if it was the subject of legal professional privilege. They argued that this examination would take so long that the taxation officers desire to examine the records was unreasonable.

Justice Pincus rejected this argument however, referring at one point to the wording of s.263 itself — namely that the Commissioner "shall at all times have full free access ..." and he determined that "the results have not been favourable to those who would argue for a narrow reading".[44] He concluded that the taxation officers request for access was therefore not unreasonable in the relevant sense.

Furthermore he found that only in the most unusual case would an entry in a trust account ledger be privileged. He said any document could have a memorandum of legal advice written on it where that advice had been given or was to be sought, so that in that sense a particular entry might in that sense be privileged. Similarly such entries might be found in the clients own financial records. However, His Honour concluded that did not produce the result that the client was, in general entitled to refuse access to his financial records under s.263, nor that the solicitor was so entitled.

This view it is submitted accords with the approach taken by the Full Court of the Supreme Court in *Packers* case.

Citibank Limited v. *F.C. of T.*: Legal Professional Privilege

However, in the *Citibank* case Lockhart J. it is submitted took a more restricted view of the powers of taxation officers when legal professional privelege is in issue.

The facts of the case are that in June 1988, 37 taxation officers entered the premises of Citibank in Sydney for the purpose of examining and copying documents relating to an alleged tax avoidance scheme involving the use of redeemable preference shares. They were instructed to conduct the search within two hours. It could easily be called a "raid", being the largest operation of entry and search of private premises ever undertaken by the Commissioner relying on his s.263 powers.

Citibank filed an application in the Court challenging (i) the decision of the relevant taxation officer to exercise his s.263 access powers (ii) the conduct of the taxation officers

44. *Supra* n.12 at 4746.

as to the manner in which the search was carried out and (iii) the validity of the authorities which the officers were given to carry out the search.

In interlocutory proceedings Citibank obtained interim orders preventing the officers from coming back to the premises using the authorities in dispute, and requiring the Commissioner to deliver all copies of the documents taken to the Australian Government Solicitor.

Justice Lockhart gave judgment for Citibank. On the issue of legal professional privilege he held that the taxation officer who ordered the search of the premises should have regard to legal professional privilege in deciding how the particular search was to be conducted. He concluded that the measures taken by the said officer were inadequate

> For a decision to be made leaving the question of a determination of legal professional privilege to officers who were competent and experienced, but who did not necessarily have any legal qualification, in circumstances where the visit was made by some 37 officers who were instructed to complete their task within a maximum of two hours, was in fact to pay little more than lip service to the recognition of the possibility of the claim being made.[45]

He concluded the failure to pay proper regard to the question of legal professional privilege in this case vitiated the decision to conduct the search.

Although the *Citibank* and *Allen, Allen and Hemsley* decisions at first glance appear to be at loggerheads it is submitted they can be reconciled. Although Lockhart J. gave judgment for Citibank he was obviously heavily influenced by the nature of the raid itself, by no less than 37 taxation officers. He repeatedly refers to the Commissioner's failure to take account of the *circumstances of the particular search,* and the rights of privacy of the individual from undue invasion into his premises and documents.

Even Pincus J. in the *Allen, Allen & Hemsley* case seems to concede that 'in some circumstances' the purported exercise of a s.263 power could be "bad for unreasonableness".[46] It is doubtful if there could be any circumstances more extreme than those existent in the *Citibank* case which is evident from the amount of publicity generated from the "raid".

Both decisions are currently on appeal, so the final outcome is yet to be determined at this point.

Documents Brought into Existence by a Third Party

These types of documents were the subject of review in the 1987 decision of *Macedonia Pty Ltd* v. *C. of T.*[47] before White J. His Honour pointed out that these types of documents had recently been reviewed by Wood J. in the Supreme Court of N.S.W. in the *Nickmar Pty Ltd case.*

In that case Wood J. applied the case of *Wheeler* v. *Le Marchant*[48] where it was held that documents requested by a client from third parties and subsequently delivered to a legal adviser enjoy a greater or lesser degree of privilege depending on the relationship between the third party and the solicitor's client. It is summed up as follows:

1. where the third party is an agent of the client the documents are privileged if they are delivered to the solicitor for the purpose of either anticipated litigation or obtaining advice;
2. where the third party is NOT an agent of the client the documents are privileged if

45. *Supra* n.10 at 4733.
46. *Supra* n.12 at 4747.
47. Unreported, no. 2119 of 1986. Judgment delivered 16th June 1987.
48. (1881) 17 Ch D 675.

they are delivered to the solicitor for the purposes of anticipated litigation.[49]

By way of conclusion it should be noted that under this doctrine of legal professional privilege the privilege belongs to the *client* and not the solicitor. Therefore only the client can waive it. Therefore a solicitor should withhold the particular document from the taxation officer if he has any doubt as to whether the documents are privileged.

The *public policy* implications of this doctrine are important and have been described as follows:

> The majority decision in *Campbell's* case is a recognition by the High Court that legal professional privilege, like the related privilege against self-incrimination, is based upon a fundamental requirement of public policy. For legal professional privilege that requirement is that individuals are entitled to obtain confidential legal advice and to have that advice remain cvonfidential unless the legislature clearly decides otherwise. In a society subject to the rule of law any other result would be incongruous and unjust.[50]

Power to Search Records Held by or on Behalf of a Taxpayer by Obtaining a Search Warrant.

Section 10 of the Crimes Act (C'th) is relevant here and provides as follows:

> If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel or place —
> (a) anything with respect to which any offence against any law of the Commonwealth or Territory has been, or is suspected on reasonable grounds to have been committed;
> (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
> (c) anything as to which there is reasonable ground for believing that it it intended to be used for the purpose of committing any such offence;
> he may grant a search warrant authorizing any Constable named therein, with any such assistance as he thinks necessary, to enter at any time any house, vessel, or place named or described in the warrant, if necessary by force, and to seize any such thing which he may find in the house, vessel or place.

Generally in practise the use of this power is left to extreme cases e.g. there is a need to seize books and documents relating to a significant tax avoidance scheme, or where difficulties are encountered by the Commission in using his powers under s.263 and s.264 (e.g. s.263 only gives the right to examine but not to seize documents). The main element of s.10 are:

1. The need to satisfy a Justice of the Peace that there is a reasonable ground for suspicion.
2. That an offence has actually been conmitted, or is suspected on reasonable grounds to have been committed.
3. The possible use of force. (By Federal Police)

Such offence could have been committed by a taxpayer's refusal to grant full and free access under s.263 or to give information etc. as required by a s.264 notice. If this has occurred a taxation officer would provide the Justice of the Peace with information on oath, and if the J.P. is satisfied there are reaonsable grounds for suspicion then he can issue a search warrant to a specific constable. The warrant granted should be *specific* in nature in that it should not only name the constable authorised to search but also stipulate the place where the search can be conducted, and specify the offence committed.

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49. *Supra* n.43 at 45.
50. D.M. MacLean 'Campbell's Case and Legal Professional Privilege' [1984] Australian Taxation Review 17 at 19-20.

In the case of *Re Neil Forsyth*[51] Sweeney J. of the Federal Court held that a s.10 warrant purporting to authorize the search of a Q.C.'s chambers was bad on its face. His Honour made the following points:[52]

1. The warrant failed to identify the things which may be seized in a way which makes it practicable for the person whose premises are being searched to form an opinion as to whether the seizure of a particular thing is authorised by the warrant;
2. The warrant did not disclose with sufficient particularity the offences alleged to have been committed. This is often a problem with warrants;
3. The test laid down in the operative part of the warrant regarding the goods to be seized departed from the test set out in the recital of the warrant, and was so uncertain as to be invalid; and
4. It failed to give recognition and effect to the doctrine of legal professional.

It was held the warrant was defective. However, in *Parker & Ors* v. *Churchill & Ors*[53] review was sought under the Administrative Decisions (Judicial Review) Act challenging the validity of a s.10 warrant authorising Federal Police officers to seize documents relating to alleged income and sales tax offences. Burchett J. declined to set aside the warrant and made the following points:

1. The wrong citation of a section did not invalidate a warrant which disclosed the substance of the offence. (This is not necessarily inconsistent with Sweeney J's finding noted at point 2. above;
2. A defective paragraph in a warrant could be severed;
3. The warrant has to disclose the substance of an offence but the addition of some other detail such as the identity of the suspected criminal does *not* invalidate the warrant; and
4. "Reasonable grounds for believing" may validly comprise any relevant information obtained by an officer in briefings by other police or Taxation Department investigators.

Conclusion

Woellner and Vella in an article written in 1983 on the then s.263 power concluded after discussing *O'Reilly's case* (even more so had they had the advantage of reading *Kerrison's case* with its crowbars and screwdrivers) that investigators themselves can use reasonable force where appropriate; and although it is submitted this need to use force should be allieviated following the addition of s.263(3) the writer's conclusions are still valid in their general overtones *i.e.* "... the A.T.O. may be expected for policy as well as practical reasons, to be somewhat reluctant to permit its officers to actually use force in the course of their investigations."[54]

Therefore in any examination of the search powers of the Commissioner the warrant under s.10 of the Crimes Act which allows a Federal policeman rather than a tax officer to use force remains an important weapon for the Commissioner to use as a last resort. However at first instance the Commissioners powers to investigate a taxpayer's affairs will be based on a use of s.263 and 264 I.T.A.A. as discussed.

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51. Unreported Federal Court 26 November 1985.
52. These points are outlined in the CCH Australia Federal Tax Reporter at 53,442.
53. Unreported 15 November 1985 see CCH Australia Federal Tax Reporter at 53,443.
54. *Supra* n.5 at 525.