What to do when the ATO asks for information from you or your clients

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Abstract: When seeking information, the Australian Taxation Office correctly prefers the informal approach, at least initially, but can and does back it up with extensive and coercive statutory powers of entry, search and examination. Those statutory powers are under constant analysis and explanation, both by the courts and in the ATO's own Access Manual. This article examines the ATO's powers and its practice, at both the informal and formal levels, and provides detailed commentary about how to respond to and deal with an approach by the ATO, including the assertion of client professional privilege, the accountants' concession, and the difficult question of offshore inquiries. The author recommends the preparation of a corporate communications strategy and a manual for dealing with ATO visits, and provides a checklist of the matters which such a manual might contain.

Introduction

The ATO is at the door. You have a contract with a customer that says even the existence of your deal is confidential. You ring your lawyer, while the ATO's generator powers up their portable photocopier.

Of course, nowadays, the ATO or AFP is more likely to arrive with disk drives and cables. We will deal with both the physical realm of documents and the ephemeral realm of electronic data.

We will deal only with the difficult issues, working on the assumption that we all have a working knowledge of the access powers.

Dealing with informal requests

At the end of this article, I have a suggested checklist for dealing with a visit. That checklist is equally applicable to an informal visit and a formal exercise of coercive power. However, it is understood that many requests for documents are dealt with in correspondence. Much the same paper trail should be generated and the same considerations apply to dealing with such requests, but there is some greater opportunity to obtain advice, and to consider the position.

Why an informal request?

The Commissioner prefers to obtain information informally.[1] This is proper. Coercive powers should not be used unless necessary. The checks and balances required before deploying coercive powers are meant to keep a proper limit on their deployment to those cases where it is necessary.

If the recipient of the informal request is later in a position where a penalty must be considered, it would be helpful to be able to say that no obstruction was offered.[2]

Difficulties posed by informal requests

Difficulties for the revenue

An informal request can of course be declined. Whether that then amounts to obstruction, for the purposes of the penalty provisions, is another matter. But, plainly, the citizen can tell the executive to mind its own business.

The Access Manual contemplates refusal of an informal request for access to premises, and states that the officer should ask the reason rather than simply then exercising the formal powers.[3] This is commendable guidance, and undoubtedly correct both in terms of long-term perceptions of the use of informal access, and plain good manners. There might be some very good reason why it is presently unsuitable for the officer to attend or continue in attendance.

Nevertheless, the attendance can become a formal matter[4] and for reasons that are obvious, such as a fear that documents are not going to be kept safely, or other break-down in trust.

The idea that a claim for legal professional privilege immediately justifies the use of coercive powers (Access Manual, para 1.2.11) is unexplained, but doubtless if the Commissioner ever uses that as the sole or main ground for invoking coercive powers the matter can be tested in court.

Difficulties for the citizen

I leave aside practical difficulties in giving the Commissioner proper attention and assistance at a particular time or place. This can be dealt with by negotiation.

The Access Manual counsels the officer about attempting to arrange visits at times that better suit, such as outside times of peak workflows.[5] Unannounced visits should be avoided, unless there are exceptional circumstances.[6] Perhaps arrangements can be made to secure any records.[7]

A graver difficulty for the citizen lies in any obligations owed to others.

Example from practice

(1) Two decades ago, the Commissioner sought from a broker a summary of certain classes of deals on which he had acted as broker.

(2) The broker had agreed to keep those details secret as part of his retainer with the land owners.

(3) The broker politely advised the Commissioner that he was willing to cooperate so far as he was able, but that he felt bound to maintain the secrecy of the deals as required by his retainer. He did not understand the letter from the Commissioner to be a formal notice, but asked the Commissioner to advise if he was mistaken in that belief.

(4) The Commissioner issued a formal notice, and access was gained.

The Access Manual anticipates this kind of difficulty nowadays, and advises the officer

to seek formal access whenever seeking documents from a third party.[8]

Obligations of confidentiality, duty to maintain confidence

The Access Manual thus anticipates, and largely avoids, a collision between the interests of the Commissioner in obtaining information and documents, on the one hand, and the third party's obligation to maintain a duty of confidence. Nevertheless, the example above is from life, and it is therefore important to recognise where an obligation of confidence is reposed and the confidee's duties in that regard. As we see below (under the heading "Various offshore enquiries"), the problem can be acute where foreign law imposes a duty of confidence not overcome by an Australian exercise of coercive power.

Lawyers and accountants are bound to observe the confidence of their clients' affairs. For example, the *Legal Profession (Solicitors) Rule 2007* (Qld), which is subordinate legislation, provides by r 3:

> "A solicitor must never disclose to any person, who is not a partner or employee of the solicitor's law practice, any information which is confidential to a client and acquired by the solicitor or by the solicitor's law practice during the client's retainer, unless:
>
> - the client authorises disclosure;
> - the solicitor is permitted or compelled by law to disclose;
> - the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that the law would compel its disclosure to that person, whether or not a client makes a claim of legal professional privilege or confidentiality; ..."

There is in r 3.3 an acknowledged interaction between the rule about confidentiality and the separate topic of client professional privilege. I will deal with client professional privilege below, and briefly. Similar rules, albeit with different qualifications, exist for barristers[9] and for legal practitioners in other states.

APES 110, entitled *Code of Ethics for Professional Accountants*, para 140, also imposes constraints on disclosure. This is very intricately drafted, and perhaps a lawyer would not agree with everything in it,[10] but it primarily promotes an ethical duty of confidentiality.

Aside from ethical standards — including those now given force of law in Queensland, for solicitors and for barristers — one would expect that there is a duty of confidence imposed:

(1) at common law by contract, whether by an express term or an implied term;[11] and

(2) by equity, where, by reason of the circumstances in which the information was imparted, it is shown that the confider placed trust and confidence in the confidee.[12]

In *Parry-Jones*, the Court of Appeal gives examples of other working relationships where there is often an implied duty of confidence:

(1) doctor and patient;

(2) banker and customer; and

(3) as we have seen, accountant and client.

There has been recent debate as to whether the duty of confidence owed by the banker to his customer lies in contract or in equity. This nice, and not wholly impractical, point can be resolved another day. The duty plainly exists.

Where the duty asserted lies in contract, the common law provides a remedy in damages for breach of contract. Damages might not be an adequate remedy, so equity in its so-called *auxiliary jurisdiction*[13] will assist in vindicating the legal right to see the confidence kept, principally by restraining disclosure.[14]

Where the complaint is put only in equity, an injunction will lie but also remedies such as account and an order for delivery up.[14]

Again, the technicalities need not detain us. These are serious remedies, tailored to deter or to prevent any (or any further) dissemination of the confidence.

If you have breached your duty to a third party by handing over confidential information, the third party has a remedy against you, at least in damages. There is also reputational risk.

What privilege may be claimed: informal visit

On an informal visit, there is technically no necessity to answer any question or admit the visitor. The visitor can be asked to leave.

Privileges and immunities really do not come up, in the sense that the citizen can invoke them simply by withdrawing permission for the visitor to stay. However, naturally privileges and immunities remain at the forefront of thinking. Then what is to be done?

It is important not to mislead a taxation officer. That is an offence under s 8K TAA. Rather than quibble over the existence or nature of a privileged document, either claim the privilege or tell the visitor to leave. In either case, it appears from the Access Manual that the officer may then invoke coercive powers.[15]

Dealing with formal requests

There is something of a suggested checklist at the end of this article.

Obligations

Access to books etc

For the sake of familiarity, I will discuss this in the context of s 263 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).[16]

The officer is to have at all times full and free access to all buildings, places, books, documents and other papers for any of the purposes of the income tax laws,[17] and for that purpose may make extracts from or copies of any such books, documents or papers.

The provision means what it says. First, it means all buildings, places, books etc. Thus, it was legitimate to obtain affidavits from the Family Court registry (despite legislation about the privacy of those proceedings)[18] and a trustee in bankruptcy (to obtain transcripts of a public examination, where the bankrupt had no right to refuse to answer on the basis of self-incrimination).[19]

It is only on request by the occupier of a building that the officer need show written authority to exercise this power, signed by the Commissioner.[20] In practice, the Access Manual directs the authority to be shown (para 1.3.11).

The officer is to be provided all reasonable facilities and assistance for the effective exercise of the powers under s 263 ITAA36.[21] The officer is thus entitled to ask, and be told, where records are located and how they might be accessed.[22] It is best to illustrate the scope of this obligation to assist by reference to the pre-existing law. Before s 263(3) ITAA36 was enacted, it was found that a bank had been within its rights under the then s 263 to provide an investigator with no assistance to find records and with no key to a locked door (behind which records were stored).[23]

The Commissioner was left in *O'Reilly* with the unedifying prospect of breaking the door to the records room.[24] The right to full and free access implicitly gave a right to

take bona fide steps to take proportional steps to remove an obstruction.

The High Court of Australia did not determine whether, and I do not see it alleged that, the failure by the bank manager to mention he had a key at hand, or the retention of the documents in a locked room, amounted to obstruction of the Commissioner, in terms of an offence provision.[25] There is a presumption of innocence, which I encourage you to observe.

In sum, the Commissioner can take proportional and *bona fide* steps to remove an obstruction. But there is now an obligation on the occupier of the building or place to provide all reasonable facilities and assistance for the effective exercise of the powers.

Furnish Commissioner with information

I will now consider s 264(1)(a) ITAA36. This power is exercised by written notice to a person (including a third party who is not the taxpayer being investigated).[26] The obligation is to furnish the Commissioner with information he requires. It is a broader power than the next two that are considered, contained in s 264(1)(b).

Attend and give evidence

I now consider s 264(1)(b) ITAA36.[26] This and the next power are constrained because the obligation is to attend and give evidence concerning his or any other person's income or assessment. Naturally enough, it is a power directed only to a natural person.[27] This stands in contrast to the second limb of s 264(1)(b), about the production of books, which can be directed to a corporation.[28]

There is a deal of law about such attendances, but it is simply necessary to say that the Commissioner is,[28] and the attendee may be,[29] entitled to counsel. Counsel for the attendee is entitled to say little (except insist that questions are put intelligibly and fairly,[30] and to assert client professional privilege).[31]

It should also be noted that it is no answer to a criminal charge that the witness refused to answer a question on counsel's advice.[32] Thus, counsel appearing for the witness on such an examination has tremendous responsibilities — including a high level of responsibility to the Commissioner's officers[33] — and little power. Much of what I have to say about other coercive powers also applies to this power.

> "… counsel appearing for the witness … has tremendous responsibilities … and little power."

Produce books etc

This power, exemplified by the second limb of s 264(1)(b) ITAA36,[34]allows the Commissioner to give a notice requiring a person (including a corporation) to produce all books, documents and other papers whatever in his custody or under his control relating to his or any other person's income or assessment.

The provision does not allow the Commissioner to demand a copy be brought into existence.[35] This is a limitation, in a cognate state law, which the Commissioner of State Revenue in Queensland has long failed to appreciate in (for example) demanding production of a valuation, when what he really means is that he would like a valuation commissioned and a copy provided.

In truth, the powers conferred by s 264 cover a range of ways of obtaining information, whether it is documented or not. It is simply a matter of choosing a method which is suitable.

As the power to require production of books etc is a simple power to exercise, and I guess the most exercised of these powers, I will spend some time over this, under the following subheadings.

Excuses for non-compliance

Failure to comply is an offence, at least under one of ss 8C and 8D TAA. These are offences of absolute and strict liability, respectively. But it is an excuse if the accused proves on balance that he was not capable of compliance.[36]

Briefly, it is no excuse for non-compliance that:

(1) there was a contractual obligation of confidence or, I imagine, an equitable obligation of confidence;[37] and

(2) the provision of the information, the giving of evidence, or the production of books might tend to incriminate the person asked.[38]

Client legal privilege may be claimed in answer to an exercise of coercive power.[39]

It is also a serious matter if the deployment of coercive powers tends to prejudice the administration of justice or amount to a contempt of court.[40]

Preserving and asserting client legal privilege

I deal with the topics of client legal privilege and the accountants' concession separately. One is a matter of law, the other a concession which may potentially raise a relevant consideration for the decision maker in seeking to exercise coercive power.

I use the expression "client legal privilege" rather than the misleading "legal professional privilege", following the example of Pt 3.10, Div 1 of the *Evidence Act* 1995 (Cth).

As this privilege remains, a client is entitled to assert it during a search or an answer to a notice of exercise of coercive power.

Opportunity to assert client legal privilege

The person who is the subject of the search must be given an adequate opportunity to assert privilege. Despite the best will in the world, a large-scale search involving many officers over several levels of the building can go awry. This poses real difficulties both for the Commissioner and the subject of the search. The famous search on 15 June 1988 of Citibank's Sydney office, despite the planning involved, nevertheless was found to have gone too far. Lockhart J (88 ATC 4714 at 4733) said:

(1) the person who planned the search turned his mind to client legal privilege, deciding that each team of officers should have appointed to it competent, experienced officers who were to consider questions of privilege;

(2) the person who planned the search ordained that if a claim for privilege was made by an employee of Citibank, the documents were to be put into an envelope

to be sealed so that a court or some third party could rule on the claim;

(3) while in some circumstances, measures of this kind "would be sufficient to justify a decision to make a search where the possibility for claims for legal professional privilege would arise", the measures were found to be inadequate;

(4) this was because the premises to be searched were those of a large bank looking after the affairs of many clients. There were numerous documents of various kinds that would be inspected. Some would be susceptible to claims of immunity on the grounds of client legal privilege. Leaving a decision to officers wanting for any legal qualification, where the visit was made by 37 officers instructed to complete their task within two hours, "was in fact to pay little more than lip service to the recognition of the possibility of the claim being made"; and

(5) Lockhart J went on to say:

> "It must be remembered that once a document has been inspected and copied by officers of the Australian Taxation Office, for all practical purposes a claim for privilege in any subsequent legal proceedings would be largely valueless, especially where a necessary party to any litigation involving Citibank or any of its clients would be the Commissioner or a Deputy Commissioner."

Lockhart J did not attempt to spell out the kinds of precautions that could have been built into the search, but did suggest that (once access had been gained), notice be given to appropriate employees of Citibank so they could obtain either in-house counsel or external counsel to assist in any assertion of a claim for privilege. His Honour also suggested that if there were there, in a particular case, a fear that documents might be moved, adequate and sensible safeguards could have been adopted to prevent that fear being realised.

Claim for client legal privilege

No particular form of words is necessary, so long as the language used is capable of being reasonably understood as invoking the privilege.[41]

It is obviously insufficient for a party merely to assert in its claim for privilege that a document was brought into existence solely or for the dominant purpose of giving or receiving legal advice. The affidavit material put on by the party bearing the onus of showing that the communication is privileged must reveal the reasoning process (in terms of the factual steps that lead to the conclusion).[42] Simply using some form of words such as a bald assertion that the communication was for the dominant purpose of giving or receiving legal advice does not assist the Court.

This could obviously be a time consuming exercise. Nevertheless, the Access Manual at paragraph 6.6.50 sensibly recognises that a person might refuse access to documents "until they have been reviewed to ascertain whether they are subject to [client professional privilege]". The guidance given here is that the officer should work with the claimant to develop a timetable, and that this is not regarded as a "blanket claim" for privilege in terms of the Access Manual.

Where there are large numbers of documents to be considered, or there remain contentious documents, the Access Manual also sensibly recognises that arrangements can be made for the storage of those documents by a neutral, such as AGS, pending resolution of a dispute.

Where there remains dispute, relief should be sought, perhaps by way of a declaration in a superior court. In the meantime, the documents can be stored by the neutral party who can be expected to give an undertaking not to examine or release the documents until the matter is resolved.

Accountant's concession

This concession has no basis in the substantive law, and finds its best expression in Chapter 7 of the Access Manual and associated Guidelines.

The Commissioner has identified three categories of documents:

(1) source documents — records of transactions;

(2) restricted source documents — advice documents shedding light on transactions; and

(3) nonsource documents — other advice documents.

The guidelines apply only to documents prepared by external professional accounting advisors who are independent of the taxpayer (para 7.1.5). Thus, the guidelines are more restrictive than client professional privilege, which can potentially apply to advice given by an inhouse lawyer.

Description of the types of documents

In the "Guidelines to accessing professional accounting advisors' papers", the Commissioner describes each of the classes of documents. I will assume some familiarity with those descriptions, but note the following about each class.

Source documents are described as including papers "prepared in connection with the conception, implementation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement".

Tax working papers are considered to be source documents. Documents created and maintained for the purpose "of satisfying any record retention requirements of the selfassessment system" are regarded as tax working papers.

Generally the Commissioner will access source documents.

Restricted source and nonsource documents will however not be sought except in "exceptional circumstances". At heading 7.2 of the Access Manual, a procedure is set out for obtaining access. Some commentary is also given as to what constitutes "exceptional circumstances". Frankly, not much is required for there to be "exceptional circumstances.

Before going through the process by which access might be gained or the Commissioner might be persuaded not to seek access, it is necessary to discuss the nature of these two types of documents.

Restricted source documents are defined in the Guidelines as advice prepared by an external professional accounting advisor "solely for the purpose of advising a client on matters associated with taxation". Note that this is a higher test than client legal privilege, in the sense that they must be prepared for the sole purpose of giving such advice.

Nonsource documents are defined in the Guidelines at heading 2.3 as "other advice and advice papers" such as advice provided "after a transaction has been completed where the advisings did not affect the recording of the transaction or arrangement in the books of account or tax return". They might also provide advice about transactions the taxpayer did not enter into and thus not materially contribute to an understanding of what the taxpayer did.

Like being half-pregnant — an impossibility.

It is true that the existence of this accountant's concession does raise a legitimate expectation that the Commissioner will consider following the Guidelines when seeking access to such records.[43] Precisely how far this gets the taxpayer is illustrated by *ONE.TEL Ltd v*

DCT,[44] where it was held that the possible application of a general antiavoidance provision could properly be seen as constituting exceptional circumstances within the terms of the Guidelines, thus providing good grounds to the Commissioner to disappoint the legitimate expectation that the Guidelines would otherwise be enforced.

Despite the fact that these Guidelines amount to no more than words, it is now implicit in the duty of a professional advisor to explore whether the accountants' concession might be applicable, and raise with the Commissioner whether the Commissioner should seek access to particular documents covered by the concession.

There is no reason why the Commissioner ought not to agree to a process, similar to that involved with a claim for client legal privilege, for the storage and inspection of documents pending decision.

Onerous, vague, ambiguous or uncertain request for information

Particularly where a notice for the provision of information or documents is given under s 264 ITAA36, the recipient of the notice comes under an obligation to decide for itself what information is to be provided and what document.

The following points, generally all leading to judicial review of the notice, can be made:

(1) a reasonable time must be allowed for compliance with the notice;[45] and

(2) the notice must be sufficiently clear "to convey to the addressee what information is sought".[46] The test here is objective in the sense that one considers whether "a reasonable man in the position of the addressee of the notice can fairly comply with it and not be exposed to the possibility of penalty for noncompliance having regard to the manner in which the notice is formulated".[47]

In *Fieldhouse*, Hill J does however warn that the question of the validity of a notice will not be approached "carpingly by engaging in a narrow analysis of each word in an attempt to find some latent ambiguity".

In practice, a litigation lawyer should be engaged to frame set-up correspondence to the Commissioner inviting the Commissioner to deal with specific issues highlighted in that letter (eg timing, difficulties in description or compliance etc) by withdrawing the present notice and issuing a new notice accommodating the practical problems highlighted by the letter. The letter will generally point out the costs consequences if the matter has to go to court.

Unless there is prompt response, proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) must be commenced quickly, and urgent interlocutory relief sought staying the operation of the notice.

> "… a litigation lawyer should be engaged to frame set-up correspondence …"

Various offshore enquiries

Some context

It has been reported in the press that the ANZ and the Commissioner of Taxation are seeking court resolution of a question about access to information about ANZ's customers in Vanuatu who have links to Australia.[48]

What follows is my summary of the four press reports which are footnoted. I have no independent knowledge of these proceedings.

It was reported that the ANZ had, on 23 December 2010, sought court orders blocking ATO's access to 13,000 customer records of the ANZ's Vanuatu operation.

The *Herald Sun* report indicates there were two notices:

> "[The Commissioner] has demanded, under the first of two notices, information about ANZ customers in Vanuatu who fit one or more of four criteria, including Australian nationality or domicile, a residential or business address in Australia, or an account recorded in Australian dollars.
>
> The information sought from the ANZ's "global information warehouse" relates to the period July 1, 2008, to November 30 [2010].
>
> It includes the account number, any identifiers of the customer, nationality and domicile, and the tax file number or Australian business number of the customer or signatory.
>
> Under the second notice, the ATO is targeting similar information from ANZ customers with accounts kept in any currency other than the vatu, Vanuatu's currency. The ATO notices mention 17 different types of accounts, but are not limited to those accounts, or to accounts held in Vanuatu."

It was reported in *The Australian* that the court documents argue that the Commissioner was engaged in a fishing expedition. Further, it is reported that the statement of claim mentions two notices of 17 December 2010 which "seek open access to customer data, would breach Vanuatu criminal law and put its [ANZ] licence to operate in the Pacific Island nation at risk".[49] The statement of claim also says that each of the notices is "uncertain and/or oppressive".[50]

The Australian quotes an ANZ officer as saying that ANZ had been working with the Commissioner to resolve the matter for more than 18 months. The ANZ is said to have cooperated "as much as possible with the ATO's request while meeting our obligations under Vanuatu law".[51]

The Australian also noted that in April 2010, the Commissioner had "demanded that 57 financial institutions, including the four major banks, hand over the records of clients with offshore bank accounts held between July 2005 and June [2009]".[52] A later report in *The Australian* says that the other major Australian bank in the Vanuatu market, Westpac, has also been in discussions with the Commissioner, but had no proceedings on foot.[53]

The matter came on for a preliminary court hearing on 17 February 2011. The following points are made in the report in *The Australian Financial Review*:

(1) it was reported that the bank submitted that the Commissioner's demands for documents "must be overturned because they would force the bank to breach Vanuatu's laws guaranteeing confidentiality between banks and customers", and that "ANZ's banking licence in Vanuatu was also at stake";

(2) the court was also reported to have heard that the Commissioner and

ANZ "had been discussing the bank's Vanuatu business for about 15 months".

It was reported that the Commissioner was "seeking information on each customer in Vanuatu whose nationality is Australian, has a residential or business address in Australia, or whose account is recorded in Australian dollars". There seemed to be some point about the ANZ either putting on evidence about, or making submissions about, Vanuatu law.

Note that, without any criticism being intended of the journalists involved, neither of the reports to which I have referred has the kind of precision about it that would enable one to decide the rights or wrongs of what is evidently a matter of strong contention between these two parties. Indeed, it is difficult to work out quite what is in issue. All that can be said is that there are reports of issue of a notice within Australia requiring either information or documents from an Australian bank, in circumstances where the Australian bank sees potential for conflict between its obligations under Australian and Vanuatu law. Unsurprisingly, this is not a new situation.

TIEAs

Australia has entered into a number of tax information exchange agreements (TIEAs) with nations which are not part of the present network of double tax agreements (DTAs). It is understood that the Commissioner faces one practical difficulty in exercising rights under those TIEAs. Specifically, unless the Commissioner can identify a particular taxpayer, the subject of an information exchange request, there is no obligation on the other nation's officials to comply.

Let us, for example, take the prospective TIEA that was recently entered into between Australia and Vanuatu, which still has not commenced. It would require Australia (by its competent authority) to provide "the identity of the person under examination or investigation" to Vanuatu when making a request for information. Thus, these TIEAs cannot serve the same purpose as the more broadly drafted double tax agreements.

It is understood, for example, that Australia has regular bulk exchanges of information with certain other nation States in purported compliance with the respective double tax agreements. For example, under the United Kingdom DTA, the exchange of information under Article 27 is hardly restricted at all:

> "such information as is foreseeably relevant to the administration or enforcement of the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which this Convention applies in so far as the taxation under those laws is not contrary to this Convention."

Thus, it is perfectly possible for the competent authority in Australia to request of the foreign competent authority under the DTA bulk information, such as dividends and interest.

Unable thus to obtain bulk information under TIEAs, the Commissioner in Australia not unnaturally turns his attention to the local emanations of financial institutions.

Conflict of laws

The recipient of such a notice is in a difficult position. Again, to make this concrete, I quote from s 39 of the *International Banking Act* (Vanuatu).

> "39. Disclosure of protected and other information generally
>
> (1) Subject to subsection (2), a person must not disclose protected information or any other information relating to:
>
> (a) the international banking business of a licensee; or
>
> (b) a depositor or other customer of the licensee.
>
> (2) Subsection (1) does not apply to a disclosure if:
>
> (a) the disclosure is required or authorised by a court; or
>
> (b) the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act; or
>
> (c) the disclosure is made as part of a suspicious transaction report under the Financial Transactions Reporting Act [Cap. 268]; or
>
> (d) the disclosure is made to the Reserve Bank; or
>
> (e) the disclosure is made to a law enforcement authority in Vanuatu and the person making the disclosure believes on reasonable grounds that the disclosure is reasonably necessary for the investigation or prosecution of a criminal offence; or
>
> (f) the disclosure is made with the express or implied consent of the licensee or person concerned; or
>
> (g) the person making the disclosure does so as a witness summoned to give evidence or produce documents; or
>
> (h) the disclosure is made as required by or under a warrant; or
>
> (i) the information disclosed is or has been available to the public from another source; or
>
> (j) the information disclosed is in a form of a summary or in statistics expressed in a manner that does not enable identification of any depositor or other customer of a licensee; or
>
> (k) the disclosure is otherwise required or authorised by or under any law of Vanuatu.
>
> (3) If information is disclosed to a person in accordance with any paragraph of subsection (2), that person may disclose that information, subject to any applicable restrictions on further disclosure contained in any law, for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act.
>
> (4) If a person contravenes a provision of this section, the person is guilty of an offence punishable on conviction:
>
> (a) if an individual, by a fine not exceeding $50,000 or imprisonment for a term not exceeding 2 years, or both; or
>
> (b) if a body corporate, by a fine not exceeding $250,000.
>
> (5) Subsection (1) does not apply to the Reserve Bank or any other person referred to in section 38(1).
>
> (6) In this section, "protected information" means:
>
> (a) whether or not a person has an account with a licensee; or
>
> (b) the name in which an account of a depositor or other customer of a licensee stands; or
>
> (c) the balance of any such account; or
>
> (d) the amount of any individual transaction undertaken by any licensee for a depositor or other customer of the licensee."

So, for a bank regulated under this Act, it is an offence to reveal protected information. And on my reading of ss 11 and 16, this can lead to revocation of the licence. No matter which country is involved, serious issues arise. I have simply used Vanuatu as a convenient example.

Not only are there difficult questions about Australian law, but perhaps the most difficult question is the extent to which

some principle of comity might apply. The extent to which there is actual content to the phrase "comity of nations" is itself in doubt.[54] Nevertheless, there is a substantial body of precedent.[55]

In *US v First National City Bank*, the bank was ordered to comply with a Grand Jury subpoena despite the evidence that the bank might be subject to "a possible prospective civil liability flowing from an implied contractual obligation between [the bank] and its customers".[56] There was no allegation that the bank would be subject to the criminal law or sanctions substantially equivalent to criminal penalties. Relevantly, the court did say:[57]

> "In any event, under the principles of international law, 'A state having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.' Restatement (2d), Foreign Relations Law of the United States, 39(1) (1965). It is not asking too much however, to expect that each nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behavior. Id. at § 39(2). Compare Report of Oral Argument, 25 U.S.L.W. 3141 (Nov. 13, 1956), Holophane Co. v. United States, 352 U.S. 903, 77 S.Ct. 144, 1 L.Ed.2d 114 (1956). Where, as here, the burden of resolution ultimately falls upon the federal courts, the difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs. See, e.g., Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948). Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case."

In *Strauss v Credit Lyonnais SA*,[58] the United States District Court, New York, found that one of the factors to be taken into account in deciding whether to order disclosure of documents held abroad was "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located".[59]

The problem has arisen in the English Courts. In *R v Grossman*,[60] Denning MR explained the problem (and its solution) with typical clarity:

> "Here the Revenue authorities seek to inspect the books of Barclays Bank in the Isle of Man so as to get discovery of the entries for use in the prosecution in Wales. How far should this be done?
>
> We now know that the courts in the Isle of Man take a strong view against their process being used to compel bankers' books there being inspected so as to help legal proceedings in England. In this very case, after the order was made by Skinner J. on February 12, 1981, the Deemster in Douglas, Isle of Man, made an order granting an injunction against Barclays Bank there, restraining them from disclosing or permitting inspection of their books relating to that very account number 50783064.
>
> The Revenue authorities seek to overcome the difficulty by asking for an order—not against the branch of Barclays Bank in the Isle of Man—but against Barclays Bank at 54 Lombard Street here in London. They say the case comes under the Bankers' Books Evidence Act 1879. It is a personal order just like the old subpoena ducestecum. It is a personal order against the head office: and so it is no answer for the head office to say that they would have difficulty in getting the books from the Isle of Man.
>
> ... But on reflection I think that the branch of Barclays Bank in Douglas, Isle of Man, should be considered in the same way as a branch of the Bank of Ireland or an American bank, or any other bank in the Isle of Man which is not subject to our jurisdiction. The branch of Barclays Bank in Douglas, Isle of Man, should be considered as a different entity separate from the head office in London. It is subject to the laws and regulations of the Isle of Man. It is licensed by the Isle of Man government. It has its customers there who are subject to the Manx laws. *It seems to me that the court here ought not in its discretion to make an order against the head office here in respect of the books of the branch in the Isle of Man in regard to the customers of that branch.* It would not be right to compel the branch—or its customers—to open their books or to reveal their confidences in support of legal proceedings in Wales.
>
> Any order in respect of the production of the books ought to be made by the courts of the Isle of Man—if they will make such an order. It ought not to be made by these courts. *Otherwise there would be danger of a conflict of jurisdictions between the High Court here and the courts of the Isle of Man. That is a conflict which we must always avoid.* From a practical point of view, it seems to me that, in order to have inspection of the books of a bank in England or Wales, an application should be made under the 1879 Act here: and that for inspection of the books and entries in the Isle of Man the application should be made under the Isle of Man statutes. This case does not come under the Isle of Man statutes. It is no good going there. *It seems to me that, although this court has jurisdiction to order the head office here to produce the books, in our discretion it should not be done.*" (emphasis added)

But it has not been plain sailing in England for the banks. See also *Mahme Trust Reg and Others v Lloyds TSB Bank Plc.*[61]

In sum, one can see that it is at least a relevant consideration for the Executive, in issuing a notice under s 264 ITAA36, to consider the extent to which compliance with the notice might:

(1) subject the recipient of the notice to penalties and disadvantages abroad; and

(2) interfere with friendly relations with a foreign State.

Whether comity of nations actually goes much further in the present context is another issue. Unlike the decisions cited above, this is not a question of whether the court's process should reach documents, but rather a question of whether the Executive is empowered (after taking these considerations into account) to issue a coercive notice.

Particular difficulties with computer records

The courts are not unused to dealing with computer records, for example, in making an *Anton Pillar* order (a civil search warrant is one analogy)[62] or orders for discovery relating to computer records (including their examination by experts).[63]

Perhaps the best known instance of inspection of computers, in the tax sphere, was the raid on JMA Accounting on 5 and 6 May 2004. This spawned decisions:

(1) about the raid itself, by Dowsett J and the Full Court on appeal;[64] and

(2) about the release of the seized data to the liquidator of the firm (noting here that the liquidator was an independent, insolvency professional whose reputation is beyond reproach), in circumstances where the Federal Court was informed of the AFP's intention then to execute a search warrant and examine the disks.[65]

Many things might be said about the conduct of the search. We should hope there will never be anything quite like it again. The idea that the Commissioner's officer could "take control" of the firm, deny the staff access to computer records, seal the building overnight, and specify when

staff could attend for work the next morning, does seem odd. As the Full Court said:

> "[2] Various options were available to deal with this situation. The least satisfactory was chosen. The taskforce decided to exercise the powers conferred by s 263 ITAA 1936 to enter JMA's offices and search for and take copies of relevant documents. The taskforce leader... also wanted to restrict JMA's access to the documents while the taskforce conducted its search. In a co-ordinated operation which began at 9 am on 5 May 2004, ATO officers entered both JMA's offices and took control of all documents located there, including those on computer databases. JMA staff were denied access to the documents for work or other purposes. The officers spent 2 full days copying onto computer disks most of the documents under their control. At the end of the first day the taskforce locked JMA's offices and JMA staff were not allowed to enter the premises.
>
> [3] ... Whatever the outer limits of the power conferred by s 263 may be, the section did not permit the taskforce to take control of JMA's offices and deny its staff access to the computer records."

Nevertheless, it is possible to feel some sympathy for the officers involved. I encourage a careful study of this raid, and balance in any criticism of the handling of the raid.

In the Full Federal Court, the two most important points decided were:

(1) the perhaps unilateral decision by the Commissioner to copy substantially all the electronic documents was defensible in terms of providing an adequate opportunity to claim privilege, provided (as occurred) the disks were then delivered to AGS with a reasonable interval allowed to claim privilege (FCAFC [23]); and

(2) the search was unreasonable. Files were copied indiscriminately. No or little attempt was made to discern what files were of relevance (FCAFC [33]). Everyone remembers this case for the fact that even the file "JMA Birthdays" was copied (Dowsett J, [32]).

If after reading the two 2004 decisions about the raid itself you consider that the obligations on the Commissioner are onerous, you would be correct. But no one has ever said that collecting tax is either a simple or a popular pursuit.

Custody and control

One final point that cannot really be discussed at any length here is the extent to which s 264(1)(b) ITAA36 is limited by a requirement that the documents required to be produced be in the recipient's custody or under his control.

Essentially a factual enquiry

The short and unsatisfying answer is that things within the legal possession of a person, though outside his custody, fall within this description. Things within the actual custody of a person (albeit that he has no legal possession) also fall within this description. The expression "control" is not limited to physical control, so that legal control is sufficient. Perhaps somebody who has wrongfully taken physical control of a document might also be susceptible to such a notice.[66]

There is a line of Canadian authority which also deals with whether, for example, a wholly owned Canadian subsidiary nevertheless may be obliged to produce documents held offshore by an offshore parent. I do not know that the law of Australia goes that far yet, but the cases offer a fascinating perspective.[67]

How might this play out?

Let us say to begin that documents are located in a safe deposit box to which there is a bank and customer key. The bank has no contractual right to use the customer key unless the customer requires assistance (having lost his own key). Nevertheless the bank has custody of the document, albeit no legal entitlement to access it. The bank can also be required to use the spare key, under the amendments to s 263 ITAA36.

Let us say then that a bank stores customer data onshore related to an offshore operation of the bank. Assuming that the bank simply acts as a data warehouse for the offshore operation. Immediately the enquiry becomes essentially fact-driven:

(1) Is the offshore operation conducted by a wholly owned subsidiary? Or is it a branch of the Australian bank? Or is the offshore operation actually the holding company or a sister subsidiary of the Australian banking operation?

(2) Does the Australian end of the operation have the necessary pass codes to look at the data or provide it to someone in Australia?

(3) What happens to a foreign employee who gives the Commissioner or an Australian employee any necessary pass codes? Can the foreign employee go to gaol?

Nevertheless, presumably the physical server is in the actual possession of the Australian bank. Difficult questions might arise about whether strongly encrypted data held on servers in Australia can truly be said to be in the possession of a person, but to me that begins to smack of the metaphysical.

If a notice to produce pass codes elicits the response that pass codes are not within the custody or control of the onshore bank, and a notice to supply information elicits a response that the pass codes are unknown onshore, the Commissioner is presumably still not at the end of the road. But what the Commissioner might then do with strongly encrypted data is a matter for him.

Checklist

Preparation

Some things can be done in advance. In a moment, I suggest a manual for dealing with a visit. But beforehand, have a corporate communications strategy in place, so that your flack can provide an anodyne but truthful answer even if they have not heard of the visit. Corporate Australia is in constant dialogue with the Commissioner, and although the flack does not yet have any details of the visit a journalist has rung about, it is corporate policy to cooperate with all lawful enquiries by the Commissioner. (Doubtless your flack can put it even better.)

Your own manual

I do suggest there be a brief manual on the shelf — also electronically available to staff, but actually on the shelf as well — to deal with unexpected visits.

You will have to consider what best suits your business, but the following brief steps might be mentioned:[68]

(1) Be cooperative and polite.

(2) Ask to see the identity tag and authorisation of the visitor.

  (a) Read it. Does the authorisation actually authorise the visit?

  (b) Make an immediate note of what you have read. (You will not be allowed to photocopy it.)[69]

(3) As soon as possible, refer to a principal who will handle initial discussions and then delegate to a sole point of contact (see below).

(4) Find out what the purpose of the visit is.

(a) Ask whether it is informal access, or exercise of coercive power of entry.

(b) If possible get a list of issues or a list of documents sought.

(c) If the documents or files relate to a third party, consider whether they are secret. If so, only produce if not privileged and then only in answer to a formal exercise of coercive power.

(d) Work through the list systematically, so the visit can be concluded as rapidly and efficiently as possible.

(5) As soon as possible, assign someone as the sole point of contact between the visitor and your organisation.

(a) Instruct other staff not to disturb the visitor.

(b) Instruct other staff to refer all queries from the visitor to the sole point of contact.

(c) Ask the visitor to refer all queries to the sole point of contact.

(d) The sole point of contact should keep a list of queries made, and information and documents provided.

(6) Have the receptionist or other early points of contact make a note of their contact. The sole point of contact should then make a contemporaneous note of all contacts.

(7) Provide a working area for the visitor where the visitor has facilities and will not be disturbed.

(8) The sole point of contact is to obtain the document or file, as requested by the visitor.

(9) Keep copies of all documents or files provided.

(10) Make proper claims for client legal privilege.

(a) You are entitled to a reasonable opportunity to assert privilege.

(b) The claim for privilege should be over particular classes of documents or files.

(c) You may be asked to complete a questionnaire. Do not divulge so much by its completion that you waive privilege.

(11) Gain permission from the visitor, if possible, to contact any third party the subject of the enquiry, so that the third party can take the carriage of any challenge to the visit.

(12) Advise your PR people that there is a visit. Deploy your pre-set corporate communications strategy, with any nuances from the specific facts of this visit.

I understand that not all visits can be as carefully managed as this.[70] But you owe it to yourself, and your clients or customers, to take some care to make sure the visitor is who she says she is; that she has the power she claims; and that a focussed visit, dealing with the issues of interest to the visitor, can be concluded quickly.

There are separate guidelines, including the LCA's negotiated with the Federal

Police, for execution of search warrants on lawyers' premises. If you are a law firm, these guidelines should also be in your own manual.[71]

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An earlier version of this article was presented at The Tax Institute's *26th National Convention* held in the Brisbane on 3-4 March 2011.

References

1 *Access and Information Gathering Manual*, paras 1.1.13, 1.1.15 and 1.2, accessed at www.ato.gov.au on 25 January 2011. I refer to the manual as the Access Manual.

2 There is an uplift in administrative penalty by 20% for obstruction. See, for example, s 284-220(1)(a) and (2)(a) of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA). There are also provisions about voluntary disclosure which can ameliorate penalty, but by the time the Commissioner is asking the kinds of questions we deal with here, the moment to be thinking about reduction of a base penalty amount might have passed.

3 Para 1.2.10.

4 Para 1.2.11.

5 Para 1.2.16, example 2.

6 Para 1.2.17.

7 Para 1.1.14.

8 Para 1.2.1.

9 R 109 of the *2007 Barristers Rule* (Qld).

10 For example, a change to cl 140.7 (effective 1 July 2011) would permit a disclosure "permitted" by law, not just a disclosure "required" by law. This might surprise the client.

11 *Parry-Jones v Law Society* [1969] 1 Ch 1 at 7 per Denning MR, at 9 per Diplock LJ (Salmon LJ agreeing with both).

12 *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51.6 per Mason J. Walmsley, Abadee and Zipser, *Professional Liability in Australia,* 2nd ed, incorrectly read *Parry-Jones*, above, as referring to an obligation in equity (p 426). For present purposes, it is unnecessary to take this further.

13 Meagher, Gummow and Lehane, 4th ed, para 41-135. The inexactness of the distinction between concurrent and auxiliary jurisdiction is, however, commented on in paras 1-090 to 1-110.

14 Meagher, Gummow and Lehane, 4th ed, para 41-135.

15 Para 1.2.11.

16 There are other provisions exercised, including s 353-15 in Sch 1 TAA (indirect tax laws and TAA).

17 Here, there is used a defined term, "this Act", which under s 6 includes the Income Tax Assessment Act 1997 (Cth) (ITAA97), Sch 1 TAA, and Pt IVC TAA, so far as relating to the Assessment Acts and Sch 1 TAA.

18 *Atkinson v FCT* 2000 ATC 4332. To similar effect was *Commercial Bureau (Aust) Pty Ltd v Allen; Ex parte FCT* (1984) 1 FCR 202 as to access to documents in the custody of the registrar of the Federal Court under consent orders pending determination of a question as to the validity of search warrants executed by the Federal Police.

19 *Clyne v Commissioner of Taxation* (1985) 8 FCR 130 per Morling J.

20 S 263(2) ITAA36.

21 S 263(3) ITAA36.

22 Access Manual, para 1.3.24. This seems to be correct, in light of the reason for enacting s 263(3), as discussed now.

23 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 39.

24 (1983) 153 CLR 1, 48.

25 (1983) 153 CLR 1 at 49-50. See now s 263(3) ITAA36 which provides an offence.

26 See other provisions, such as s 353-10(1)(a) in Sch 1 TAA (indirect tax laws and TAA).

27 *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475.

28 *Grant v FCT* (2000) 104 FCR 1 (FCAFC).

29 The Access Manual denies such a right (para 4.2.2). This does seem inconsistent with *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524 at 529 per Sheppard J. The true position is that there is a deal of equivocation on the issue: Forbes, *Justice in Tribunals*, 2nd ed, ch.11. The Access Manual sensibly indicates that usually representation will be permitted, except perhaps by someone involved with the examinee in an investigated transaction.

30 As to the fairness of the questioning, I mean only that the witness not be demeaned, and truly be able to understand what he is asked.

31 The role of counsel in asserting privilege, and indeed in assisting the Commissioner in understanding the issues about privilege, is well put in *Dunkel*, above. As to requiring that questions be put intelligibly, so that the witness knows what he is asked to answer — this is simply an aspect of procedural fairness.

Hallett, *Royal Commissions and Boards of Inquiry*, p 194, says this of the grant of leave to appear before such a Royal commission or inquiry: "Because Commissions and Boards have the task of eliciting information it is sometimes necessary that any examination of witnesses be in the nature of 'cross-examination', i.e. witnesses are interrogated, rather than examined in chief. If witnesses are 'cross-examined' by members of Commissions and Boards the proceedings could be seen to be hostile to witnesses and Commissions and Boards to be partisan. Permitting a witness legal representation lessens the likelihood of such a conclusion and reduces the chances of a witness being subjected to unwarranted hardship or unfairness. Counsel assisting at an inquiry cannot always protect a witness because it will frequently be his duty to examine witnesses vigorously to try and establish the true facts."

Hallett cites an article by Pearce "Inquiries by Senate Committee" (1971) 45 ALJ 652. At 654, Pearce says: "The desirability of permitting counsel to assist or represent witnesses before parliamentary committees is not a question on which general propositions can be readily formulated. Committees do not conduct adversary type proceedings. Indeed, it is one of the criticisms that can be levelled against the procedure of privileges committees that it calls as a 'witness' the person who is really the defendant to the charge. There will be many circumstances in which the presence of counsel would be of little or no assistance to a witness and might delay the proceedings of the committee. However, in cases where a committee is seeking evidence that could in some way involve the witness in criminal or civil proceedings, it seems desirable that the witness should have the assistance of counsel to advise him on the answers that he should give to questions. But 'advise' should mean just that. The counsel should not answer the questions for his client."

32 *Griffin v Marsh* (1994) 34 NSWLR 104 (CCA).

33 Again, see *Dunkel*, above.

34 See also, for example, s 353-10(1)(c) of Sch 1 TAA.

35 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187; *sub nomine: Perron Investments Pty Ltd v DFCT* 89 ATC 5038 (FCAFC).

36 *Griffin v Marsh* (1994) 34 NSWLR 104 (CCA), which characterises the offence under s 8D TAA, before the *Criminal Code* was passed, but which remains of some assistance here, if the decision is treated with due care.

37 *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) 134 CLR 475.

38 *Stergis v Boucher* (1989) 86 ALR 174; followed by *FCT v De Vonk* (1995) 61 FCR 564 (FCAFC).

39 As to s 263 ITAA36, refer *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403. As to exercise of the various coercive powers under s 264, see *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524, which concerned a requirement to appear before the Commissioner to give evidence.

40 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

41 This is to paraphrase the language of Gummow J in *Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466 at 480.8. His Honour was referring to the privilege against self-incrimination, but there is no reason in principle why the test as to a valid claim of privilege under another heading should be any different.

42 *Kennedy v Wallace* (2004) 142 FCR 185 at 189.

43 *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192.

44 (2000) 101 FCR 548.

45 *Clarke v DFCT* 89 ATC 4521 at 4528 per Spender J.

46 *Hart v DFCT* (2005) 148 FCR 198 at [22].

47 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 at 208.7.

48 *The Australian*, "ATO bid for ANZ tax haven accounts", 24 December 2010, p 1; *Herald Sun*, *"ANZ moves to block Australian Tax Office investigation"*, 24 December 2010, viewed at www.heraldsun.com.au; *The Australia*, *"ANZ one out in fight on-tax haven accounts"*, 27 December 2010, viewed at www.theaustralian.com.au; *The Australian Financial Review*, "ATO puts heat on ANZ", 18 February 2011, p 3.

49 *The Australian*, 24 December 2010.

50 *The Australian*, 24 December 2010.

51 *The Australian*, 24 December 2010.

52 *The Australian*, 24 December 2010.

53 *The Australian*, 27 December 2010.

54 North and Fawcett, *Cheshire & North's Private International Law*, 13th ed, p 5.

55 Summarised most ably by Antoine, *Confidentiality in Offshore Financial Law*, ch 10.

56 396 F.2d 897 (1968) at [9].

57 396 F.2d 897 (1968) at [2]-[3].

58 242 FRD 199 (2007).

59 396 F.2d 897 (1968) at [3]-[4].

60 (1981) 73 Cr App Rep 302 at 307-308 (CA).

61 [2004] EWHC 1931 (Ch) per Morritt V-C.

62 *Ecolab Pty Ltd v Textile Hygiene Services Pty Ltd* [2002] FCA 1421 per Gyles J.

63 *Idoport & Anor v National Australia Bank Limited & Ors; Idoport Pty Ltd and Market Holdings Pty Ltd v Donald Robert Argus; Idoport Pty Ltd "JMG" v National Australia Bank Ltd [29]* [2001] NSWSC 530 per Einstein J.

64 *JMA Accounting Pty Ltd v Carmody* (2004) 56 ATR 327; 57 ATR 365.

65 *JMA Accounting Pty Ltd v FCT* (2006) 64 ATR 537.

66 *Commissioner of Taxation v ANZ Banking Group Ltd* 79 ATC 4039 at 4044.

67 *Crestbrook Forest Industries Ltd v R* [1993] 2 CTC 9 (Federal Court of Appeal); *Monarch Marking Systems Inc v Esselte Meto Ltd* [1984] 1 FC 641 (Federal Court of Canada — Trial Division, Mahoney J); *Michelin North America (Canada) Inc v 9130-4550 Quebec Inc* 69 CPR (4th) 305 (2008); *HSBC Bank Canada v R* [2011] 1 CTC 2025 (Tax Court of Canada).

68 I owe something of a debt to the thinking of Ms Christina Demetriades, who worked with me at Feez Ruthning in Brisbane in the early 1990s. While I have been unable to discover whether she published a paper on steps to take on a search or audit, her work on the issue made an impression on me. As I am unable to check her ideas against my current thinking, might I simply say that she can take the credit for the good ideas, me the rest.

69 Access Manual, para 1.3.11.

70 The visit the subject of *Citibank v FCT* 88 ATC 4714 does seem to have got out of the control even of the senior officer who had planned it. See especially 4733-4734.

71 The Law Council of Australia's negotiated position with the Federal Police is at www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91AF89D1-1E4F-17FA-D26A-9795D08A9CEC&siteName=lca.

The Queensland Law Society's understanding of the Queensland Police Services' guidelines are in Appendix 2 to the *Legal Profession (Solicitors) Rule 2007*, which is found at the QLS website.