

1984 REVISITED? REVIEW OF THE COMMISSIONER OF TAXATION'S ACCESS POWERS UNDER SECTION 263 OF THE INCOME TAX ASSESSMENT ACT 1936

Introduction

The recent litigation between the Commissioner of Taxation and Citibank, Industrial Equity Ltd and Allen, Allen and Hemsley concerning the scope of the Commissioner's access and investigatory powers, has resulted in headlines like 'Green light for Boucher's Raiders'¹ and 'Boucher infringed judicial power in seeking papers'.² These articles reflect the fears held by sections of the community about the impact of these powers on personal privacy. Even the accounting profession has expressed fears about the effect of these powers on their ability to advise clients.³

In light of these concerns it is important to examine the scope and limitations on the Commissioner's access and investigatory powers. As I have examined the scope of the Commissioner's powers under s264 of the Income Tax Assessment Act 1936 and his use of search warrants under s10 Crimes Act 1914 (Cth) in a recent article entitled 'An Orwellian Spectre',⁴ I will be restricting my examination to the Commissioner's access powers under s263 of the Income Tax Assessment Act. Also, it is necessary in light of current litigation in this area, to state that this examination is based on the law as it stood on 1 October 1989.

The Commissioner's Access Powers

Since the inception of Commonwealth Income Tax legislation, access provisions have existed. The current provisions are based upon these early provisions. Section 263 of the Income Tax Assessment Act 1936, specifies the Commissioner's access powers under this Act as well as being the access provision for the purposes of the Trust Recoupment Tax Assessment Act 1985 and the Taxation (Unpaid Company Tax) Assessment Act 1982. Other Acts administered by the Commissioner have their own access provisions, for example, s127 Fringe Benefits Tax Assessment Act 1986, s12E Sales Tax Procedure Act 1934, s4 Estate Duty Assessment Act 1914, s68 Payroll Tax (Territories) Assessment Act 1971, s58 Bank Account Debits Tax Administration Act 1982, s97 Australian Capital Territory Taxation (Administration) Act 1969, s13F Taxation Administration Act 1982, s41 Tobacco Charges Assessment Act 1955 and s90 Wool Tax (Administration) Act 1964. These provisions are identical in effect to s263. However they differ in that the access authorised by the provisions, is only available at reasonable times.

* BEc (ANU), LLB (Adel), LLM (Comm) (Adel), GDLP (SAIT).

1 *Business Review Weekly* (Australian) 15 September 1989, 42.

2 *Financial Review* (Australian) 27 September 1989, 7.

3 'Boucher canvasses crazy idea' *Financial Review* (Australian) 19 September 1989, 5.

4 (1989) 12 Adel LR 63.

For the purpose of this paper I will only consider the Commissioner's access powers under s263. Section 263 specifies the following:

'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.

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.

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.

Penalty for a contravention of this subsection: \$1,000'

Scope of the Access Powers

Subsections (2) and (3) were enacted by Act No 62 of 1987 and were effective from 5 June 1987. Prior to this enactment, the Commissioner's access powers were contained solely in the current ss(1). Subsection (1) is still the major provision. I now propose to examine the major elements of this provision in order to indicate the scope of these powers and its limitations.

(a) Who is authorised to exercise the power

Subsection 263(1) authorises the Commissioner, or any other officer authorised by him to exercise the access powers. The Commissioner may delegate this power, via an instrument of delegation, to a Deputy Commissioner or any other person under ss8(1) of the Taxation Administration Act 1953 (Cth). However, it is not practical for the Commissioner to delegate these powers to every officer needing them. Also, the Deputy Commissioners are stopped from delegating their powers by the maxim 'delegatus non potest delegare' (ie he who himself is a delegate of a certain power cannot further delegate the exercise of that power to a sub delegate). To overcome these problems and to ensure efficient administration, a procedure has been adopted, whereby a Deputy Commissioner authorises certain officers to exercise the powers on his behalf. This authorisation procedure received judicial approval by the Full High Court in *O'Reilly v State Bank of Victoria (No 2)*.⁵ Mason, Murphy,

⁵ (1983) 14 ATR 64.

Brennan and Deane JJ stated, when referring to the investigating taxation officers,

'[t]hey were so authorised by the Deputy Commissioner to whom the Commissioner, pursuant to s8 of Taxation Administration (Cth), had delegated the exercise of certain powers and functions, including those arising under s263 and s264.'⁶

However, this authorization procedure has been questioned by the Full Federal Court in *Sharp and Anor v Deputy Commissioner of Taxation (NSW) and Anor*.⁷ The Court found an arguable case existed, that in order for a taxation officer to exercise the access powers under s263, the authorization must be given personally by the Commissioner. The argument arises from the wording of ss263(2) which states that in order for a taxation officer to remain in any building, he must produce an authority in writing 'signed by the Commissioner'. The authorities in this case were signed by the Deputy Commissioner. The court stated that:

'... the authorities approve as a method of signing a document, the writing of the signatory's name by another person who is authorised to do so. They do not approve, as a method by which one person may sign a document, the placing upon it of the sole signature of another person.'⁸

A similar argument was raised before Lockhart J in *Citibank v Federal Commissioner of Taxation* (Citibank 1).⁹ The Taxation officers seeking access carried letters of authorizations signed personally by the Commissioner. However, Citibank argued that when asked to produce authorizations in accordance with ss263(2), the officers produced identification wallets signed by the Deputy Commissioner. As these 'faulty' authorizations were produced by the officers, they were unable to continue to remain on Citibank premises and exercise the powers under ss263(1). Lockhart J rejected this argument concluding that

'... the Commissioner may delegate his power to grant and to sign authorities under s263, pursuant to s8 of the Taxation Administration Act 1953, and the Deputy Commissioners of Taxation, Melbourne and Sydney, had authority to sign the wallet authorizations in issue in this case.'¹⁰

On appeal, the Full Federal Court in *Federal Commissioner of Taxation v Citibank* (Citibank 2)¹¹ agreed with Lockhart J finding that the authorizations need not be in writing. French J concluded that

'[i]t is difficult, with respect, to see why s263(2) should not be read in the light of s8... and the signing there contemplated regarded as a function which may be delegated like any other.'¹²

Despite concluding that the authorization procedure was valid, Lockhart J found that there had been an invalid exercise of the access powers as the authorizations were too general. He stated that a valid authority needs to

6 Ibid at 69.

7 (1988) 19 ATR 1045.

8 Ibid at 1051.

9 (1988) 19 ATR 1479.

10 Supra n 9 at 1482.

11 (1989) 20 ATR 292.

12 Ibid at 317.

specify the identity of the premises, books and documents which are sought to be accessed.¹³

However in *Allen, Allen and Hemsley v Federal Commissioner of Taxation*,¹⁴ which was delivered on the same day as the Lockhart J's decision, Pincus J found that authorities under s263 do not need to be as particular as search warrants. All the authority must do is comply with the terms of the section.

The Full Federal Court in *Citibank 2*¹⁵ settled the issue by rejecting Lockhart J's view. Despite this finding Bowen CJ and Fisher J considered '...that it is unfortunate that such a degree of specificity was not a mandatory obligation ...' as they believed that such a requirement would '...ensure that an occupier is not denied the opportunity by lack of notice to make a claim for legal professional privilege'.¹⁶

In conclusion, s263 authorizations only have to comply with the plain wording of the section to be valid.

(b)What can be accessed and when?

The width of the Commissioner's access powers are specified in ss263(1) by the phrase '...shall at all times have full and free access to all buildings, places, books, documents and other papers ...' The ambit of the powers granted to the Commissioner by this phrase is best indicated by interpreting each element of the phrase. I will adopt this approach.

(i) 'shall' — Gibbs CJ, Wilson and Dawson JJ in the *Lawson 2* case, stated that 'The words 'shall have' in the section obviously cannot indicate more futurity; they are used to confer a right'.¹⁷

(ii) 'at all times' — Barwick CJ in *South Western Indemnities Ltd v Bank of New South Wales and Federal Commissioner of Taxation*¹⁸ concluded that the phrase 'at all times' indicated that there is no limitation in respect of the time of access or the buildings accessed. Thus the word 'all' qualifies both the times access is available and what the Commissioner has access to. It emphasizes the width of access granted by the section.

(iii) 'full and free' — Mason, Murphy, Brennan and Deane JJ in the *Lawson 2* case concluded that,

'[t]he express provision that the Commissioner ... shall have 'full' access prima facie conveys, at the least, that the availability of entry or examination to which the Commissioner ... is entitled extends to any part of the relevant place or building and to the whole of the relevant books, documents and other papers. The express provision that the access shall be 'free' conveys at the least, that the access is to be without physical obstruction'.¹⁹

13 Supra n 9 at 1482.

14 (1988) 19 ATR 1462.

15 Supra n 11.

16 Ibid at 297.

17 Supra n 5 at 72.

18 (1973) 4 ATR 130, 134.

19 Supra n 5 at 72.

(iv) 'access' — the word 'access' was interpreted in the *Lawson 2* case to mean

'[a]s a matter of ordinary language access to buildings and places involves availability of entry to them: access to books and documents involves availability of examination of their contents.'²⁰

Gibbs ACJ in *Smorgon v Federal Commissioner of Taxation (Smorgon 3)*²¹ further stressed the width of the access by stating that '... it is not expressed to be subject to the production of any warrant or authority, or to be limited in any way'. Although this view indicates the width of potential access, it is not currently accurate due to the enactment of s263(2) which states that a written authority must be produced if requested by a taxpayer.

(v) 'all buildings, places' — the meaning of the words 'buildings' and 'places' would seem fairly self explanatory and free from controversy (ie means 'anything built' and a 'spot or location'; respectively). However, despite this apparent simplicity, the words have been subject to judicial consideration.

Bollen J considered the scope of the word 'place' in *Kerrison and Banich Management Pty Ltd v Federal Commissioner of Taxation*.²² He was not prepared to classify a safety deposit box in a bank to be a 'place' within the terms of s263. Despite this finding, he did find that the boxes formed part of the building and a denial of access to the boxes amounted to a denial of access to part of a building.

A building located on Norfolk Island was held by Barwick CJ in the *South Western Indemnities Case*²³ to be a 'building' for the purposes of s263. He found this despite the fact that territorial source income derived by territorial residents was exempt, under the Income Tax Assessment Act 1936. This decision does not mean that s263 has extra-territorial application. Rather, it means that the investigatory powers of the Commissioner apply even if the taxing provisions have been excluded by the Act.

Northrop J in *Commercial Bureau (Australia) Pty Ltd v Allen: Ex parte Federal Commissioner of Taxation*²⁴ held that under s263 the Commissioner was entitled to access documents held by the Federal Court Registry. He concluded that,

'[t]he fact the documents sought to be inspected happened to be situated in the place in which a court sits does not by itself prevent the Commissioner exercising power conferred by s263. Court buildings do not of themselves provide a latter day sanctuary for documents.'²⁵

However, this decision was not universally accepted. The reasoning of Northrop J was criticised by a Mr Sweeney.²⁶ He stated:

'[t]he Federal Court is the master of the administration of its

20 Ibid.

21 (1979) 9 ATR 483, 490.

22 (1986) 17 ATR 338.

23 Supra n 18.

24 (1984) 15 ATR 468.

25 Ibid at 473.

26 'Revenue Note' (1985) 59 ALJ 114.

Registry. In the course of this control, it has made rules of court which limit the rights of persons to have access to documents in its Registry. Either these provisions are overridden by s263 or they are not. If they are overridden, then s263 operates to restrict the ability of the Federal Court to control its own Registry's procedure and thereby limit the power of the Federal Court to exercise the judicial power conferred upon it.²⁷

With respect, I disagree with Mr Sweeney. The rules of court which limit the rights of persons to access documents held in a Federal Court Registry were created to ensure fairness in the litigation processes and that the privacy of the individual is preserved. In permitting the Commissioner to access documents held in the Court's registry, the Federal Court is creating a public policy exception to its own rules. Such a decision is a valid exercise of the Court's power and cannot be described as amounting to the Court limiting its judicial power. In fact the Commissioner's rights of access are fettered. Where the access sought amounts to contempt of court, the right of access is denied.

Northrop J's decision was based upon precedent and must be seen as good law. He relied upon the decision of the High Court in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*.²⁸ In this case, the Trade Practices Commission sought access to documents held by the Federal Court Registry, via the exercise of access powers similar to those contained in s263. The Commission was not a party to the action before the Court. In permitting access, Gibbs CJ eluded to situations where the exercise of such access powers would amount to a contempt of court. He concluded that he was

'... inclined to think that if the power was used to assist a party in proceedings already pending, in a way which would give such a party advantages which the rules of procedure would otherwise deny him, there would be a contempt of court.'²⁹

Thus, on balance, given the above arguments and judicial authority, Mr Sweeney's assertion that s263 has no application to the premises of a court or to court documents or other documents in the court's possession or custody carries little weight and merits dismissal.

Whether s263 would give access to state court registries or to state or federal government buildings is not certain. Further uncertainty arises where departments or statutory bodies, which work within such buildings, are operating in accordance with Acts, which contain secrecy provisions which purport to deny all access. I will examine this issue in more detail later in this paper. What is clear from the above discussion is that the Commissioner has, prima facie, unfettered access to all buildings and places regardless of their location and regardless of their status (ie the status arising from the functions performed by the body within the building eg a court, AISO etc).

(vi) 'books, documents and other papers.' As I reviewed the meaning of this phrase in detail in my article 'An Orwellian Spectre',³⁰ I do not propose

27 Ibid at 115.

28 (1982) 57 ALJR 1.

29 Ibid at 4.

30 Supra n 4.

to re-examine it in detail. The plain meaning of these words is that they catch within their scope written accounts, diary and notebook entries, file cards and other records in written form. Hard copies of computer printouts, telexes and other electronically stored information would also be caught (*Baker v Wilson*³¹).

As the balance of judicial authority suggests that a wide interpretation of the word 'document' (ie anything which conveys information) is favoured,³² electronically stored information would also be caught by the phrase 'books, documents and other papers' and able to be accessed by the Commissioner.

But as Mr Cohen in a recent article,³³ pointed out,
 '... it is highly doubtful whether information on computer stored media which is in object state (ie machine readable form) will be something which is capable of providing information.'³⁴

Thus without the assistance of the taxpayer, the Commissioner may have practical problems in accessing the information in a useful form.

In the Tax Liaison Group meeting held on 2 June 1988, Mr M Carmody, Second Commissioner stated that s25A of the Acts Interpretation Act 1901 (Cth) may assist the Commissioner, as it specifies that where a person is required to supply information, the information must be produced in a written, understandable form.³⁵ However, it is unlikely that this provision can assist the Commissioner by itself as s263 only allows the Commissioner to access documents. It does not require taxpayers to produce anything. The solution to this problem for the Commissioner probably lies in ss263(3). Subsection 263(3) specifies that the taxpayer has a positive duty to lend reasonable assistance to the Commissioner. Thus, it is arguable that a taxpayer will have to supply a password or operate the computer to supply the Commissioner with readable information. I propose to discuss the ambit of ss263(3) and the reasonable assistance requirement later. Despite the potential problems of translating electronically stored information, the Commissioner is thus granted access to a wide range of records by the phrase 'books, documents and other papers'. The records to which the Commissioner has access can be in either paper or electronic form.

The above dissection of the phrase '... shall at all times have full and free access to all buildings, places, books, documents and other papers ...' reveals that the Commissioner has extremely wide access powers. Prima facie, he can access any documents or papers wheresoever situated. However this seemingly wide, even draconian provision is subject to limitations. In order to reveal the true ambit of the Commissioner's access powers it is necessary to examine these limitations.

Limitations on the Access Powers

Subsection 263(1) contains its own limitation on the powers contained therein ie the phrase 'for the purposes of the Act'. Further limitations on

31 [1980] 2 All ER 81.

32 Supra n 4 at 68.

33 Cohen 'The Commissioner's Powers of Investigation and Collection' (1984) *Taxation Institute of Australia (NSW) Conference Papers* 13.

34 Ibid at 19.

35 *Butterworths Weekly Tax Bulletin* (1988) No 411 Para 635.

the Commissioner's access powers have been imposed by the courts. I propose to examine both the statutory and judicially imposed limitations in order to reveal that the Commissioner's access powers are not as all encompassing as many commentators believe.

(a) 'For the purposes of the Act'

Barwick CJ in the *South Western Indemnities* case³⁶ stated that '... the sole limitation or qualification is that the access should be sought 'for the purposes of the Act''. Although the phrase is not the sole limitation on the Commissioner's access powers, it does impose an apparent restriction upon those powers. If the Commissioner attempts to exercise the access powers for an improper purpose, that decision can be challenged and the action reviewed. Thus, the phrase protects the public from unauthorised invasions of their privacy by the Commissioner or an authorised officer.

The courts have considered what conduct is prohibited by the phrase and what conduct is permitted. Clearly where the Commissioner seeks access during an '... investigation into whether a person is or has been in receipt of assessable income'³⁷ the access would be 'for the purposes of the Act'. The access is not limited to the affairs of a particular taxpayer. Morling J concluded in *Clyne v Deputy Commissioner of Taxation (NSW)*³⁸ that it was legitimate for the Commissioner to exercise his power under s263 in order to inspect documents in the custody of a person, for the purposes of determining the tax liability of another person.

Similarly, Einfield J in *Industrial Equity Ltd and Others v Deputy Federal Commissioner of Taxation and Others*³⁹ found that an investigation to seek verification of a taxpayer's income is 'for the purposes of the Act', even where the investigation arose from a policy of auditing the top 100 companies. Further, it did not matter that the Commissioner only held a belief that the subject documents would be of assistance.

Bollen J in *Kerrison's* case⁴⁰ concluded that in order for the access to be 'for the purposes of the Act', the Commissioner or an authorised officer can only exercise the powers under s263 when there is a reasonable belief that the materials to be found will relate to income or the assessment of income tax. However, this view seems contrary to that expressed by Murphy J in the *Smorgon 3* case,⁴¹ where he stated that '[s]ection 263 enables the Commissioner to 'fish' for information'.⁴² This view has to be taken to support the contention that mere suspicion of the existence of relevant documents indicating wrong doing is sufficient to enable the Commissioner to seek access. But, Lockhart J in the *Citibank 1* case⁴³ disagrees. He stated '... a search cannot be used for a general fishing expedition of a person's documents'.⁴⁴

From these seemingly conflicting judicial opinions, it is possible to deduce a majority view. The authorities seem to support the principle that

36 Supra n 18.

37 Ibid.

38 (1985) 16 ATR 938, 941.

39 (1989) ATC 4864.

40 Supra n 22.

41 Supra n 21.

42 Ibid at 504.

43 Supra n 9.

44 Ibid at 45.

the Commissioner can 'fish' for information, but disagree upon the degree of suspicion or belief required for the access to be for the purposes of the Act. Mere speculation is probably not sufficient. A degree of certainty is required, but what is an adequate level, will depend upon the facts in each case.

In order to fulfill his statutory duties, particularly in respect of revenue collection, the Commissioner will initiate proceedings outside the Act. Examples of these proceedings are sequestration proceedings under Part IV of the Bankruptcy Act 1966 (Cth); liquidation proceedings under Part XII of the Companies Act 1981 (ACT); and other debt recovery proceedings in the Local or District Courts or in the Supreme Courts. What is clear from the preceding discussion is the Commissioner is not authorised to exercise his powers under s263 in order to access information required for proceedings initiated by him outside the Act, as the access would not be 'for the purposes of the Act'. Morling J in the *Clyne* case⁴⁵ stated that although the Commissioner cannot use his access powers to gain information to assist proceedings outside the Act, the Commissioner is not prevented from using any information gleaned from a valid access for those other proceedings. Lockhart J in the *Citibank 1* case⁴⁶ approved of this type of opportunist accessing of information, accessed as a bi-product of an investigation, but thought that it only applies to information which is relevant to the Act. He stated that

'... once the power conferred by s263 has been properly involved and the search is conducted and other documents come to light that fall outside that specific purpose, generally speaking I see no reason why they should not be copied or extracts made from them provided they have relevance to the Act . . .'⁴⁷

It can be argued that Morling J's view is not strictly correct as it enables the Commissioner to access documents outside the scope of his express powers. Although his view probably recognises the reality of a search situation (ie whilst searching for relevant documents it is possible that a number of unrelated documents will be examined), the judiciary should not be giving de facto legality to illegal access. Despite the public policy rationale, the courts should be attempting to protect the privacy of the individual by restricting all forms of illegal search. The alternative argument is that Morling J is correct. The phrase 'for the purposes of the Act' merely qualifies the reason for the access, rather than qualifying the sort of documents accessed as the Commissioner is authorised to have access to 'all' documents. Of these two arguments the latter one is probably the more correct. From a practical view point, the taxpayer may be able to limit the Commissioner's access to irrelevant documents in the search situation by filing documents separately and editing some documents, provided the editing does not alter the meaning of the document.

The phrase 'for the purposes of the Act' is therefore ineffective in limiting the Commissioner's wide access powers under s263. This is highlighted by the fact that all litigation, except for the *Citibank 1* case, found that the powers exercised were within the Commissioner's powers under s263.

45 Supra n 38.

46 Supra n 9.

47 Ibid at 46.

'Further, since the proper purpose for which the power may be used is the pursuit of information in relation to the assessable income of any person, it is difficult to envisage circumstances in which it could be demonstrated that the Commissioner sought to exercise the power for a purpose other than a relevant purpose.'⁴⁸

Both these arguments ignore the deterrence effects created by such a limitation. The Commissioner will be loathe to risk a lengthy and costly investigation by seeking access for an improper purpose. Further, the lack of taxpayer success in challenging the Commissioner's exercise of his access powers only indicates that the Commissioner exercised his powers in accordance with the Act in those particular cases. Also, in many cases, the taxpayers had other reasons for challenging the decisions rather than a real belief that the Commissioner had exceeded his powers. These reasons included the need to obtain a time delay and the need to avoid potential litigation for breach of confidentiality resulting from the Commissioner seeking access to custodial documents.

(b) Rights of Seizure and Interrogation

Subsection 263(1) neither permits the Commissioner to seize nor remove any books, documents or papers from the premises being accessed, without the consent of the custodian. All the Commissioner is authorised to do is to make extracts from or copies of the books, documents or papers accessed.

Similarly, the Commissioner does not have the power under s263 to compel a taxpayer to produce any documents, books or papers. The subsection does not give the Commissioner the power to require taxpayers to answer specific questions concerning the content of documents nor answer questions in relation to specific transactions or conduct. But taxpayers may be required, under ss263(3) to answer questions in order to render reasonable assistance to the Commissioner to enable the effective exercise of his access powers. Thus, I believe taxpayers should be made aware of these limitations on the Commissioner's access powers. Only with this knowledge are they in the position to make informed decisions to allow the authorised officers to take documents away or answer any questions posed.

(c) Administrative review arguments

When challenging the exercise of the Commissioner's access powers, taxpayers have advanced a number of administrative law arguments which are claimed to limit the Commissioner's powers under s263. I propose to examine the three major arguments advanced and determine whether they limit the Commissioner's access powers under s263.

(i) Natural Justice

It has been argued that when deciding to exercise his powers under s263, the Commissioner is required to comply with the principles of natural justice. However, this argument was rejected by Pincus J, in the *Allen, Allen and Hemsley* case.⁴⁹ He concluded that the Commissioner is under no obligation to consult with anyone in issuing an authorisation, nor is the

⁴⁸ Keane 'Investigations and Rights of Access' (1983) 18 *Taxation in Australia* 405, 417.

⁴⁹ *Supra* n 14.

Commissioner or an authorised officer obliged to consult with anyone when having access. His decision was based upon the fact that natural justice does not apply to s264⁵⁰ and that the English Court of Appeal in *Norwest Holst Ltd v Secretary of State for Trade*⁵¹ found that natural justice did not apply to an administrative access provision similar to s263. Taxpayers are wasting their time and money in raising the natural justice argument as it does not limit the Commissioner's access powers under s263.

(ii) Good Faith

Murphy J in the *Smorgon 3* case⁵² addressed the issue of whether the Commissioner in exercising his power under s263 is required to act in good faith. In particular he stated in referring to s263, that

'[l]ike all powers, it must be exercised in good faith, for the purposes for which it was conferred, and having regard to those affected by its exercise . . . These implied limitations on the power in s263 serve to safeguard the extremely important social value of privacy which must be balanced against the necessities of administration of the revenue laws. They moderate what would otherwise be a power capable of oppressive use. The Commissioner of Taxation is not only expected, but bound to observe those limitations on the power.'⁵³

However, despite Murphy J's pronouncement, it has been argued that the 'good faith' limitation is not an effective limitation on the Commissioner's access powers. Its lack of effect is demonstrated by the fact that in ' . . . any particular case it would be almost impossible to challenge any exercise of the power by the Commissioner on the grounds of bad faith'.⁵⁴ The difficulties facing a taxpayer are evident when the case law is examined. In *Clyne v Deputy Commissioner of Taxation (NSW)*⁵⁵ Mr Clyne claimed that the only reason why the Commissioner exercised his powers under s263 was because of a vendetta against him. He submitted a lengthy affidavit recounting the details of a 'war' of some twenty six years between himself and the Commissioner. Despite recognising that a twenty six year conflict had existed between the taxpayer and the Commissioner, Morling J rejected Mr Clyne's assertions finding that the Commissioner had not abused the powers vested in him by the Act in order to pursue a personal vendetta. The Commissioner had exercised his access powers in good faith. A similar decision was handed down in the *Citibank 1* case⁵⁶ where Lockhart J rejected Citibank's assertion that the authorised officer had exercised the access powers in bad faith as he wished to punish Citibank for not assisting the Taxation Office. Hence, the above cases do indicate that the taxpayer has a heavy burden in proving that the Commissioner acted in bad faith. Nevertheless, the requirement that the Commissioner must exercise his powers under s263 in good faith, is an important limitation on those extremely wide powers even if it only fulfills a deterrent role.

50 *Sixth Ravini Pty Ltd v Deputy Commissioner of Taxation (Vic)* (1985) 16 ATR 499.

51 [1978] 1 Ch 201.

52 *Supra* n 21.

53 *Ibid* at l 503.

54 *Supra* n 48.

55 *Supra* n 38.

56 *Supra* n 9.

(iii) Reasonableness

The taxpayer in the *Allen, Allen and Hemsley* case⁵⁷ raised the argument that although the Commissioner's decision to seek access to trust account records was competent, it was so unreasonable that no reasonable person would have made it and as such, the Court should declare the exercise of the power as invalid. This argument is based upon the reasonableness test laid down in *Associated Provincial Picture House Limited v Wednesburg Corporation*.⁵⁸ Pincus J accepted that s263 was subject to a reasonableness test, but rejected any suggestion that the Commissioner had acted unreasonably in the circumstances.

What is evident from the decision in the *Allen, Allen and Hemsley* case is that although reasonableness is prima facie a limit on the Commissioner's access powers under s263, the taxpayer faces a difficult task in proving a case. Because the rights of access under s263 are very broad and general, it is almost impossible to prove that a decision was unreasonable.

Although some administrative law rules do prima facie limit the powers of the Commissioner under s263, due to the wide scope of the access powers and the heavy burdens imposed, it would be extremely difficult for a taxpayer to succeed using these arguments, unless the Commissioner's failures were grossly evident. The remedies are a 'legal' deterrent rather than being a strictly practical one.

(d) Statutory Secrecy Provisions

As mentioned previously, a legislative conflict occurs where the Commissioner attempts to exercise his powers under s263 against a government department (or authority or agency) that operates under, or administers, a statute (state or federal) which contains a secrecy provision preventing the department from disclosing information. It is not certain whether s263 overrides these secrecy provisions as the issue has not been subject to judicial consideration. Accordingly, I propose to evaluate the various arguments advanced.

Where s263 is being exercised in respect of a state government department which is regulated via a statute containing a secrecy provision, inconsistency results ie it is impossible to obey both laws. In such a case the two provisions are only inconsistent to the extent that the state statute seeks to restrain the access sought under s263. Section 109 of the Constitution was applied to resolve a similar conflict in *Clyde Engineering Co v Cowburn*⁵⁹ and would be applicable in the current circumstances. Section 109 states, that

'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

Thus, prima facie, s263 would override state secrecy provisions.

However, where the inconsistency arises from the conflict between a federal statute's secrecy provision and s263, s109 is of no assistance. In order to resolve this conflict, it is necessary to examine and apply the rules of statutory interpretation.

57 Supra n 14 at 1473.

58 [1948] 1 KB 223.

59 (1926) 37 CLR 466.

The first relevant rule is 'leges posteriores priores contraries abrogant' ie a later enacted Act repeals the earlier inconsistent Act. As most federal legislation which contains secrecy provisions was enacted after s263, the rule suggests that s263 would not override federal secrecy provisions. However, the rule does not apply automatically. The court must be satisfied that the two provisions cannot stand together as they are so inconsistent that the court has no alternative but to imply that the prior enactment has been repealed. Thus it is arguable that s263 is not implicitly repealed by these secrecy provisions, rather it is inoperative in respect of that federal legislation. This approach was mooted by Griffith CJ in *Goodwin v Phillips*⁶⁰ who stated

'... if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.'⁶¹

The second relevant rule is 'generalalia specialibus non derogant' ie a general provision does not impliedly repeal a specific provision. Thus, s263 being a general provision, arguably it is incapable of overriding a specific secrecy provision.

A further argument against s263 overriding either state or federal secrecy provisions is that s263 does not expressly state that it binds the Crown in right of either the Commonwealth nor any of the States. This argument is based on the maxim 'Roy n'est lie par ascun statute si il nesoit expressement nosme' ie no statute binds the Crown unless the Crown was expressly named therein. Lord Du Parcq in *Province of Bombay v Municipal Corporation of the City of Bombay and Anor*⁶² cited an exception to this maxim which prima facie could negate this argument. Lord Du Parcq stated that where

'... it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named.'⁶³

However, it would be difficult to draw this inference in respect of s263 as the legislature has stated elsewhere in the Income Tax Assessment Act that certain provisions bind the Crown, but choose not do so in respect of s263. Moreover, the existence of these express provisions adds additional weight to the argument that because the section is expressed in general terms, it cannot bind the Crown.⁶⁴

Although the issue of whether s263 overrules the secrecy provisions of state or federal statutes has not been judicially considered, it is therefore evident from the above discussion that it is very unlikely that s263 will override such provisions. Despite this limitation on the Commissioner's powers under s263, the Commissioner may still be able to obtain the information in other ways. Firstly, he could utilise his powers under s264, which purports to bind the Crown. An alternative method is to utilise the

60 (1908) 7 CLR 1.

61 Ibid at 7.

62 [1947] AC 58, 61.

63 Ibid.

64 See *Bradken Consolidated Ltd v The Broken Hill Pty Co Ltd* (1979) 145 CLR 107.

exception provisions which are contained in many Acts. These provisions enable the Minister responsible to permit release of information where it is in the public interest to do so (eg s130(3)(a) Health Insurance Act 1973) (Cth).

(e) Contempt

The Commissioner's access powers are further limited where their exercise gives rise to contempt of court. Contempt occurs where the exercise of the access powers amounts to interference with the administration of justice or where the powers were exercised in order to obtain an advantage, denied by the rules of procedure.⁶⁵ In order to define the scope of the limitation, I will examine two situations where an exercise of the access powers under s263 may lead to a contempt of court.

The first situation where contempt may occur, is where the Commissioner, not being a party to the litigation in progress, seeks access to documents held in the court's registry. It is clear from earlier in discussion that s263 enables the Commissioner to access documents held in the Federal Court Registry, without fear of contempt, provided that the exercise of the access powers does not interfere with the Court's processes.⁶⁶ However, in the absence of judicial consideration it is not clear whether s263 enables the Commissioner to access information held in state court registries. Due to the limitations on this paper and the complexity of constitutional and separation of powers issues which arise from the potential interference with the internal procedures of state courts, it is not possible to adequately consider this issue.

The second situation where contempt may occur, is where the Commissioner, being a party to the litigation in progress, seeks to exercise his access powers against the other party in order to obtain information to lay before the Federal Court (or State Supreme Court exercising Federal jurisdiction). If the information sought under s263 would not be available under the applicable rules of procedure (eg it could not be discovered etc), then the access would be a contempt of court⁶⁷ as it would confer an unfair advantage on the Commissioner. However, Northrop J in *Saunders v Federal Commissioner of Taxation (No 2)*⁶⁸ concluded that in identical circumstances before the Administrative Appeals Tribunal, it would be inappropriate to find contempt. His decision is based upon the fact that no provisions exist concerning the use of pleadings, discovery or interrogatories in proceedings in the Tribunal. Thus it was not possible to say that the Commissioner had gained an unfair advantage as a result of the use of his powers. If procedures did exist, the Commissioner would have been in contempt as he would have accessed materials outside these established procedures. Finally, where the Commissioner seeks access to materials for other proceedings or purposes, (eg the Commissioner seek information from the other party to proceedings in order to assist in his investigation of the affairs of a third person, not a party to the litigation), it is unlikely that the access will give rise to contempt.

⁶⁵ *Commercial Bureau case* supra n 24.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ (1988) 19 ATR 1289.

The Commissioner's access powers are limited where the access sought gives rise to contempt of court. However, the circumstances in which access amounts to contempt are fairly limited.

(f) Contract/Copyright

In an attempt to limit the Commissioner's powers under s263, taxpayers have raised arguments that s263 operates subject to contractual arrangements and that copyright materials are excluded from its scope. However, both these arguments have failed. Murphy J in the *Smorgon 3* case⁶⁹ concluded that contractual or fiduciary confidentiality does not limit the scope of the section. Similarly, Rath J in *Corporate Consultants International v Federal Commissioner of Taxation*⁷⁰ rejected the taxpayer's argument that s263 was unconstitutional (being contrary to s51(xxxi) of the Constitution) as it authorised an acquisition (via the extraction and copying process) of property without just terms. Thus, contractual confidentiality and copyright do not restrict the Commissioner's access rights under s263.

(g) Privilege Against Self Incrimination

The privilege against self incrimination means that

'... no one is bound to answer any questions if the answer thereto would... have a tendency to expose the deponent to any criminal charge penalty or forfeiture...'⁷¹

As the privilege against self-incrimination only applies to oral evidence or information given in response to questions posed, it is unlikely that it applies to s263. Section 263 only authorises the Commissioner to seek access to documents and does not empower him to interrogate taxpayers.

Support for this view is found in the High Court decision in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs (Vic)*,⁷² where the majority stated that the privilege,

'... has no application to the seizure of documents or their use for the purpose of incrimination provided they can be proved by some independent means. The privilege is not a privilege against incrimination: it is a privilege against self-incrimination.'⁷³

Thus, the privilege against self incrimination does not apply in respect of s263.

(h) Legal Professional Privilege

Legal professional privilege means that a person is protected from disclosing

'... oral or written confidential communications, between himself and his solicitor or barrister, made or brought into existence for the sole purpose of seeking or giving advice or for the sole purpose of use in existing or anticipated litigation... It is privilege of the client and protects him from being compelled to make such disclosure of such

69 Supra n 21 at 505.

70 (1980) 11 ATR 395.

71 *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 25.

72 (1985) 59 ALR 254.

73 Ibid at 257.

communications either in testimony or by the production of documents . . .⁷⁴

The issue of whether legal professional privilege limits the Commissioner's powers under s263 was determined by the Full Federal Court in *Citibank 2*.⁷⁵ They determined that the Commissioner's powers ' . . . to search and to make copies of documents should be read as not referring to documents to which legal professional privilege attaches'.⁷⁶

Thus the Commissioner cannot use his powers under s263 to access documents, where the document has been brought into existence for the sole purpose of being submitted to legal advisors for advice or for the use in legal proceedings. Access would also be denied to copies of privileged documents made for record-keeping purposes.⁷⁷ The Commissioner is still obliged, when seeking access, to ensure that the taxpayer has adequate opportunity to make claims for privilege.⁷⁸

As the privilege only applies to communications between a lawyer and client, it does not extend to other confidential arrangements, like that of an accountant and client.⁷⁹ Whether the privilege extends to communications brought into existence by a 'in-house' solicitor for the purpose of obtaining or giving legal advice, is an issue which has not been conclusively determined, although Williams J in *Deputy Commissioner of Taxation (Qld) v Citibank Ltd*⁸⁰ stated that it did. Further, privileged communications remain privileged in the hands of a third person, provided the third person is bound by a confidential arrangement (eg an accountant).

Despite this, it is arguable that where a document has come into the possession of a third person, outside the lawyer/client relationship, in the absence of a confidential arrangement, that document is no longer privileged. Thus the Commissioner can seek access to it under s263.

This argument is based upon the decisions in *Calcraft v Guest*⁸¹ and *R v Tompkins*⁸² where secondary evidence of privileged communications was admissible, as the communications had ceased to be confidential in the hands of the third person. The fact that the communications were obtained illegally or wrongfully does not prevent the Commissioner from seeking access.⁸³ However, the Commissioner may be prevented from tendering or relying on such information by the rules of evidence (in particular hearsay) or on equitable⁸⁴ or public policy grounds.⁸⁵

Where the communication is created as part of an 'entrepreneurial' scheme⁸⁶ or is created in the normal course of a lawyer's business (like trust

74 *Baker v Campbell* (1983) 153 CLR 52, 114 per Deane J relying on *Grant v Downs* (1976) 135 CLR 674.

75 *Supra* n 11.

76 *Ibid* at 301.

77 *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652.

78 *Supra* n 11 at 303.

79 *O'Reilly v Commissioner of the State Bank of Victoria (Lawson 1)* (1982) 13 ATR 706.

80 (1988) 19 ATR 1847.

81 [1898] 1 QB 759.

82 (1978) 67 Cr App Rep 181.

83 *Ligertwood Australian Evidence* (1988) Butterworths, 167.

84 *Lord Ashburton v Pape* [1913] 2 Ch 469.

85 *Bunning v Cross* (1978) 19 ALR 641.

86 Horsnell 'The Commissioner's investigatory powers including legal professional privilege' (1988) University of Adelaide Taxation Administration lecture paper, 5.

account records⁸⁷) the privilege is not available, as the communication was not created for the sole purpose of being submitted for advice. Similarly, the privilege will only protect communications sought for bona fide reasons. Documents created for an illegal purpose or in the furtherance of an illegal activity⁸⁸ will not be protected, nor will documents lodged with a legal advisor for the purposes of obtaining immunity from production.⁸⁹

Legal professional privilege, although narrow in application, thus limits the scope of the Commissioner's access powers. In situations where legal advice has been sought to create a complicated, artificial tax avoidance scheme, the Commissioner's ability to seek the required information will be dramatically affected by the privilege. Taking a wider perspective, in the majority of cases the effect of the privilege will be minimal.

(i) Summary

As can be seen from the above discussion, the expansive powers of access granted to the Commissioner under s263 are subject to legislative and judicial limitations. The limitations are imposed in order to balance the competing public policy arguments (ie the need to facilitate the revenue's administration on one hand and the need to protect the privacy of the individual on the other). However, as the purpose of s263 is to enable the Commissioner to seek access for the purposes of the Act encroachment of personal liberty is a necessary bi-product. I believe the limitations imposed ensure that the encroachment is kept at acceptable levels.

Reasonable Assistance Requirement

The High Court in the *Lawson 2* case⁹⁰ stated that on a proper construction of s263 there is nothing in the words of the section which implies a positive duty on the part of any person to actively assist the Commissioner or his authorised officer in the exercise of the right of access granted by the section. This meant that an occupier of a building was under no obligation to tell an investigation officer where a key to a locked door or where relevant files were located. The investigating officer could be denied use of the occupier's photocopier or even the use of electricity required to operate his own machine. This non-assistance by occupiers resulted in inconvenience and delays in completing investigations.

To overcome these problems, ss263(3) was enacted by the Taxation Laws Amendment Act (No 2) 1987. Subsection 263(3), which was effective from 5 June 1987, requires the occupier of a building or place to provide reasonable facilities and assistance for the effective exercise of powers under s263. Whether the amendment overcomes the problems of non-assistance will depend upon the interpretation of the terms 'reasonable facilities' and 'reasonable assistance'.

87 *Packer v Deputy Commissioner of Taxation (Qld)* 15 ATR 1038 and *Allen, Allen and Hemsley* case supra n 14.

88 *Cox v Railton* (1984) 14 QBD 153.

89 Supra n 74.

90 Supra n 5.

As the provision has not been subject to judicial consideration, the Explanatory Memorandum⁹¹ does give assistance in interpreting these terms. The Memorandum states,

'An authorised taxation officer will thus be entitled 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.'⁹²

Thus, if correct, the Memorandum suggests that the subsection will overcome the non-assistance problem.

But, Mr Leibler⁹³ suggests that the Memorandum contradicts the plain meaning of the subsection. He argues that the memorandum attributes far greater powers to the Commissioner than would be reasonably inferred from the wording of s263(3). In reply, Mr Boucher, the Commissioner⁹⁴ rejects these concerns stating that the Explanatory Memorandum does not deviate from the legislation. 'It contains practical examples of the new legislative requirements that are consistent with the policy intentions.'⁹⁵

It could be argued that the 'practical examples' are more than illustrations of the application of ss263(3). Section 15AB Acts Interpretation Act (Cth) 1901 provides for the use of extrinsic materials, specifically including explanatory memoranda relating to the Bill, in the interpretation of an Act. Thus as these examples are specifically mentioned in the Memorandum, it could be argued that the legislature envisaged that the subject matter of the examples was intended to be covered by the legislation. And although the Explanatory Memorandum contains illustrations of what constitutes 'reasonable assistance' and 'reasonable facilities', what ultimately will be considered reasonable will depend upon the circumstances of each case.

Miscellaneous Issues

For completeness, I will briefly discuss the two remaining issues that arise from the application of s263. The issues are, the ability of the Commissioner to use force to effect rights of access; and the imposition of penalties resulting from the resistance by an occupier to access.

The High Court in *Lawson 2*⁹⁶ stated that the words 'full and free' access implied that a investigating officer could use reasonable force against objects or buildings to effect the statutory right of access. Bollen J in *Kerrison's case*⁹⁷ stated that the amount of force cannot be excessive ie the force should not be over and above that required in the circumstances. However, given the fact that this 'self-help' policy developed prior to the introduction of the reasonable assistance provisions it could be argued that

91 Explanatory Memorandum to Taxation Laws Amendment Bill (No 2) 1987.

92 Ibid at 106.

93 'Minutes of Tax Liaison Group Discussion on 25 November 1987' (1988) 22 *Taxation in Australia* 457, 461.

94 Ibid.

95 Ibid.

96 Supra n 5.

97 Supra n 22.

it is no longer relevant. Until the matter is judicially reconsidered, the Commissioner can continue to use force.

What is not clear from the authorities is whether the Commissioner is authorised under s263 to use force against a person ie to remove them if they are obstructing access. Despite some judicial support for the concept,⁹⁸ I feel the courts will not extend the self-help ruling to persons, on public policy grounds. The only force against the person that may be recognised, is that permitted under common law in respect of self defence. In any event, it appears that the Commissioner is reluctant to use force and will only use it as a last resort.⁹⁹

If the occupier of a building engages in obstructive activities in order to resist access, penalties can apply. If the actions amount to obstruction or hinderance in terms of s8X of the Taxation Administration Act 1953 (Cth), the occupier can be liable to a penalty of \$2,000 or imprisonment for six months or both. If the occupier wilfully obstructs a Commonwealth officer or by violence, threats or intimidation interferes with or harms the officer, s76 of the Crimes Act 1914 (Cth) imposes a penalty of imprisonment for two years. However, a mere failure to assist¹⁰⁰ or a temporary denial of access for the purposes of legal advice¹⁰¹ will not amount to obstruction or hinderance. But a failure to render reasonable facilities or reasonable assistance will result in a \$1,000 fine under ss263(3).

Conclusion

French J in *Citibank 2*¹⁰² noted that

'[s]ection 263 will plainly in some, if not all cases, operate to interfere with privacy, and in particular, that kind of privacy recognised by the rights to quiet possession of land and personal property which are protected by the common law'

Aware of this and community concerns, the Commissioner has responded by introducing preliminary 'access guidelines'¹⁰³ which attempt to ensure that tax officers respect taxpayers' rights. He has also been involved in discussions with the accounting professions on formalizing these guidelines.¹⁰⁴

Despite this self-regulation, the necessity for the courts to continue to exercise a supervisory role is illustrated by the way the power was exercised in the *Citibank* raid.¹⁰⁵ Their role is to ensure that the access powers are exercised for bona fide purposes and in terms of the legislation.

Thus, on reflection, I believe that the current legislative scheme, combined with judicial supervision, maintains the balance between the privacy of the individual and the competing needs of an efficient revenue collection service. The Commissioner's access powers are not an Orwellian manifestation descending upon an unsuspecting public.

98 *Fowler v Taylor* [1957] VR 593.

99 Woellner and Vella, 'The Commissioner's Powers of Investigation under the Income Tax Assessment Act — the High Court Examines Section 263' (1983) 18 *Taxation in Australia* 517, 525.

100 *Supra* n 5.

101 *Swan v Scanlon* (1982) 13 ATR 420.

102 *Supra* n 11 at 316.

103 *Butterworths Weekly Tax Bulletin* (1989) No 5 para 86.

104 Australian Taxation Office Medica Release No 89/56.

105 *Supra* n 11 at 316.