STRIKING GOLD OFFSHORE WITH AUSTRALIA'S TAX INFORMATION GATHERING POWERS: ALCHEMY OR EVOLUTION?

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Included in the law introducing the first Commonwealth income tax in 1915 were provisions which conferred on the Commissioner of Taxation wide powers of investigation and to gather evidence. They were introduced at a time when Australia had no offshore investment and most foreign income was exempt. Despite the dramatic change in Australia's economy over the last 100 years these fundamental powers have broadly remained the same. However, recent media coverage of the Commissioner's successes in pursuing offshore tax evaders under the guise of Project Wickenby suggest there have been further developments that have converted these 'lead bullets' into gold. This paper explores whether that has occurred through 'tax alchemy' or through a quiet evolution. It does so by reviewing the development in the Commissioner's offshore information gathering powers over the last 21 years and briefly examining the emergence of multilateral treaties that have the potential to enhance the effectiveness of those powers further.

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AUSTRALIA'S TAX INFORMATION GATHERING POWERS

1. INTRODUCTION[3]

Included in the law introducing the first Commonwealth income tax in 1915 were provisions which conferred on the Commissioner of Taxation ('the Commissioner') the power:

- to have full and free access to building, places, documents, papers, etc;
- to compel persons to produce all books, papers, etc; and
- to compel persons to give evidence under oath.[4]

These information gathering powers were introduced at a time when '. . . there were virtually no Australian taxpayers who received an income from investments or business abroad,'[5] and much foreign source income was either not taxed or taxed lightly.[6] From an absence of offshore dealing a century ago the scale of domestic exposure to tax minimisation and evasion through the use of tax havens (low taxing jurisdictions) has grown dramatically, particularly in the last 20 years. This is

[3] This paper has been developed from: Michael Dirkis and Brett Bondfield, 'Striking Gold Offshore with Australia's Tax Information Gathering Powers: Alchemy or Evolution?' (Presentation to the 25th Annual Conference of the Australasian Tax Teachers Association, University of Auckland, 23 to 25 January 2013).

[4] Income Tax Assessment Act 1915 (Cth) (ITAA 1915), ss 55 and 56.

[5] Edwin R A Seligman, *Double Taxation and International Fiscal Cooperation* (Macmillan, 1928) 47. In fact Australia did not enter into a bilateral tax treaty until 29 October 1946 when it signed a treaty with the United Kingdom which was incorporated into the Third Schedule of the *Income Tax Assessment Act 1936* (Cth) (*ITAA 1936*) by *Income Tax Assessment Act 1947* (Cth).

[6] Allen Boxer, 'Tax Reform Revisited' (1985) 2 *Australian Tax Forum* 363, 373; Richard Fayle, 'Controlling Abusive Tax Shelters' (1985) 2 *Australian Tax Forum* 53, 64.

demonstrated by Australians sending an estimated AUD 16 billion to offshore tax havens in just one year (2008).[7]

With the trade in services outstripping the trade in goods and the communications revolution there is a reduced need for traditional physical linkages to tax jurisdictions.[8] These developments in this increasingly borderless world have given rise to concerns about the increase in the risk of cross border tax avoidance and evasion and the ability of revenue authorities to counter these activities.[9] The former Commissioner Michael D'Ascenzo noted the challenges of administering a tax system being 'generally structured around national jurisdictions but economic activity and the flow of people and finance is becoming increasingly global.'[10]

Despite the dramatic changes in Australia's economy the domestic information gathering powers in the income tax law have broadly remained unchanged for 98 years.[11] However,

[7] Assistant Treasurer (Cth), 'Anti-Tax Evasion Strategy Paying Major Dividends' (Press Release No 73, 20 October 2009) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/073.htm&pageID=003&min=njsa&Year=2009&DocType=0>.

[8] Michael Dirkis, *Is it Australia's? Residency and Source Analysed* (Research Study 44, Australian Tax Research Foundation, 2005), 21.

[9] Jeffrey Owens, Director of the Center for Tax Policy and Administration at the Organisation for Economic Co-operation and Development (OECD), testifying before the United States of America's Senate Finance Committee on Offshore Tax Evasion (May 2007) cited in Australian Taxation Office, *Tax Havens and Tax Administration* (October 2007), 6 <http://www.ato.gov.au/businesses/content.aspx?doc=/content/46908.htm>.

[10] Michael D'Ascenzo, 'Commissioner's Reflections on 2006 and Thoughts for the Coming Year' (2006), cited in Item 5 National Tax Liaison Group (NTLG) minutes (20 March 2007).

[11] Section 55 of the *ITAA 1915* was reproduced as s 96 in the *Income Tax Assessment Act 1922* (Cth) (ITAA 1922). Section 56 was recast as s 97, which included a new express requirement in s 97(1)(a) of 'to furnish him with such information as he may require'. In 1936, ss 96 and 97 ITAA 1922 were inserted in the *Income Tax Assessment Act 1936* (*ITAA 1936*) as the current ss 263(1) and 264. In 1987, in response to the dicta *O'Reilly v Commrs of the*

recent media coverage of the Commissioner's successes in pursuing offshore tax evaders under the guise of Project Wickenby[12] suggest there have been further developments that

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State Bank of Victoria (1983) 153 CLR 1, s 263 was amended to introduce the positive assistance requirements in ss 263(3) and the proof of authority requirements in s 263(2) by *Taxation Laws Amendment Act (No 2) 1987*.

[12] The Project Wickenby taskforce was established in 2006. Its Terms of Reference state that:

The overall objective of Project Wickenby is to make Australia unattractive for tax fraud and evasion, as both promoters and potential participants perceive the risk/benefit ratio as weighing heavily against them. To achieve this objective, four primary goals have been identified:

a. Reduce international tax avoidance and evasion on the Australian taxation system

b. Enhance strategies and capabilities of Australian and international agencies to collectively deter detect and deal with international tax evasion

c. Improve community confidence in Australian regulatory systems, particularly confidence that the Australian Government addresses serious non-compliance with taxation laws

d. Reform administrative practice, policy and legislation.

Project Wickenby Terms of Reference (2006) <http://www.ato.gov.au/General/Tax-evasion-and-crime/In-detail/Tax-crime/Project-Wickenby/?anchor=Project_Wickenby_terms_of_reference#Project_Wickenby_terms_of_reference>.

It is led by the Australian Taxation Office (ATO) and its membership includes the Australian Crime Commission (ACC), the Australian Federal Police, the Australian Securities and Investments Commission, the Attorney-General's Department, the Commonwealth Director of Public Prosecutions, and the Australian Transaction Reports and Analysis Centre.

Operation Wickenby, led by the ACC, was established in 2004 to develop intelligence on; investigate; and prosecute promoters and participants who facilitate and profit from abusive tax haven arrangements. It also provided for the application of the ACC's investigative and intelligence resources in close collaborations with agencies including the ATO and the Australian Federal Police (see Australian Crime Commission, 'What is the difference between Project Wickenby and Operation Wickenby?' <http://www.crimecommission.gov.au/node/108>.

have converted these aged powers ('lead bullets') into 'golden bullets'.[13]

This paper explores whether that has occurred through 'tax alchemy' or through quiet evolution. It does so by reviewing the development in the Commissioner's offshore information gathering powers over the last 21 years. In order to highlight the magnitude of these developments the paper:

- briefly describes the historical domestic and treaty information gathering powers (the lead bullets) and their limitations, focusing upon those limitations that impact on offshore information; then
- explores recent developments (the golden bullets) in the context of the drivers that underlie those developments.

2. LEAD BULLETS – THE SCOPE OF INFORMATION GATHERING POWERS IN 2000

2.1. The Domestic Powers

As alluded to in the introduction, since 1915 the Commissioner has possessed two broad statutory powers to collect information in respect of income tax. They are currently a general power of access to information under s 263 of the *ITAA 1936* and a power to gather information and evidence under s 264 of the *ITAA 1936*. The following provides a brief overview of their scope and limitations.[14]

[13] See, eg, Mark Dunn, 'Wealthy Battle Operation Wickenby Tax Probe', *Herald Sun* (online), 5 June 2009, <http://www.heraldsun.com.au/news/wealthy-battle-operation-wickenby-tax-probe/story-0-1225721980979>.

[14] A full consideration of their scope is beyond the scope of this paper. There are numerous articles on the scope of these powers. Some recent articles include: Angela Lee, 'The Commissioner's power to obtain foreign bank account details under s 264' (2012) 47 *Taxation in Australia* 331; Ken Lord, 'International Tax Cooperation: Recent Trends and Challenges (Part 1)' (2010)

2.1.1. Section 263

Broadly, s 263 authorises the ATO to have access to buildings and documents where that access is for the purposes of the income tax legislation.[15] An authorised ATO officer[16] has full and free access to buildings and documents and may make copies of documents[17] and the occupier of any building is obligated to provide reasonable facilities and assistance.[18] A prior warning and specific authorisation is not required for s 263 actions,[19] and the Commissioner has right to use reasonable force to gain access under s 263.[20] The purposes for s 263 access have been broadly interpreted and permit wide ranging, even fishing type inquiries.[21]

However, there are some limitations. Section 263(1) can be used only 'for the purposes of the Act' (ie, the *ITAA 1936*).[22] It does not permit 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,

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13 *The Tax Specialist* 272; Robin Woellner, 'Section 263 Powers of Access – Why Settle for Second-best?' (2005) 20 *Australian Tax Forum* 365.

[15] A similar access power also is available under s 353-15 of the *Taxation Administration Act 1953* (Cth) (*Tax Administration Act*). Section 353-15 is used mainly in regard to goods and services tax (GST) matters but it is also relevant to the administration of the *Minerals Resource Rent Tax Act 2012* (Cth).

[16] *ITAA 1936*, s 263(2).

[17] *ITAA 1936*, s 263(1).

[18] *ITAA 1936*, s 263(3).

[19] *FCT v Citibank Ltd* (1989) 20 ATR 229. Though, as set out in below n 23, there is a practical limitation in so far as s 263 cannot be used to access documents that attract legal professional privilege.

[20] *O'Reilly v Commrs of the State Bank of Victoria* (1983) 153 CLR 1.

[21] *Industrial Equity Ltd v DCT (NSW)* (1989) 20 ATR 754.

[22] Chief Justice Barwick in *South Western Indemnities Ltd v Bank of New South Wales and Federal Commissioner of Taxation* (1973) 4 ATR 130, 134 stated that 'the sole limitation or qualification is that the access should be sought "for the purposes of the Act"'.

documents or papers accessed. As s 263 does not empower the Commissioner to interrogate taxpayers it is not limited by the privilege against self-incrimination, which applies only to oral evidence or information given in response to questions posed.[23] Nor is it subject to contractual secrecy rules.[24] However, s 263 is subject to legal professional privilege.[25]

2.1.2. Section 264

Section 264 authorises the Commissioner to require persons to furnish information or attend and give evidence and/or produce books or documents if necessary.[26]

Under s 264(1)(a) the Commissioner is empowered to require, by a notice in writing, any person to furnish him with such information as he may require. Although the plain wording of the provision indicates that its scope is extremely wide,[27] it is limited to information which is required for the purposes of the

[23] *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs (Vic)* (1985) 59 ALR 254.

[24] Justice Murphy in *Smorgon v Federal Commissioner of Taxation* (1979) 9 ATR 483, 497 *(Smorgon 3)* concluded that contractual or fiduciary confidentiality does not limit the scope of the section.

[25] The Full Federal Court in *Federal Commissioner of Taxation v Citibank (Citibank 2)* (1989) 20 ATR 292, 301 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.' For a more detailed analysis of the operation of s 263 see Woellner, above n 14 and Michael Dirkis, '1984 Revisited? – Review of the Commissioner of Taxation's powers under section 263 of the *Income Tax Assessment Act 1936*' (1989) 12 *Adelaide Law Review* 126.

[26] A similar information gathering power also is available under s 353-10 of the *Tax Administration Act*. Section 353-10 is used mainly in regard to Goods and Services Tax (GST) matters but it is also relevant to a range of income tax matters, including PAYG withholding and PAYG instalments as well as the administration of the *Minerals Resource Rent Tax Act*.

[27] In *Smorgon 3*, above n 24, 497 Murphy J observed, '...the power to require information contained in para (l)(b) is not ... limited.'

Act,[28] and to requesting information only.[29] It does not authorise the Commissioner to request books, documents or papers, nor does it authorise him to request information which amounts to the full contents of such books, documents or papers.[30] It enables the Commissioner to discover the existence of documents in order to enable a request under s 264(1)(b) to be made.[31]

Under s 264(1)(b) the Commissioner is empowered to, by notice in writing, require any person to attend and give evidence concerning his or any other person's income or assessments and to require the production of documents under his custody or control. From the plain wording of s 264(1)(b) appear two separate powers (limbs): the power to compel attendance to give evidence and a power to require documents.[32]

Under the first limb of s 264(1)(b) the Commissioner is empowered to request a person to appear before him or an authorised officer to give evidence concerning his income or assessment. The provision also empowers the Commissioner to compel a taxpayer to give evidence concerning a third party's income or assessment. A notice can only be served upon a natural person.[33] Although the information requested is limited

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[28] *Ceosam Investments Pty Ltd v Australian and New Zealand Banking Group Ltd and Anors* (1979) 9 ATR 836 (*Smorgon 4*).

[29] *Walsh v Deputy Commissioner of Taxation (NSW)* (1981) 12 ATR 470, 476 (Leslie DCJ).

[30] *Smorgon 4* above n 28, 837.

[31] In ibid 837, Gibbs AJ stated that the provision could be used to obtain a description of books, documents and papers to enable him to identify its contents.

[32] This interpretation of s 264(1)(b) was advanced by Stephen J in *Smorgon v Australian and New Zealand Banking Group Ltd and Federal Commissioner of Taxation* (1976) 6 ATR 690 *(Smorgon 1)*. Justice Stephen stated at 696 that '[t]he repetition there of the words "may require", first used in the first line of s 264(1), gives to the whole subsection two distinct limbs, each describing distinct powers possessed by the Commissioner to require certain conduct on the part of the other.'

[33] Ibid 696.

to the income or assessment of a person, the scope of the provision is still extremely wide. There are also implicit limitations imposed in relation to the form of the notice (eg, the time limit for compliance with the notice must be reasonable in the circumstances[34] and the place for attendance must be specified[35]).

The second limb of s 264(1)(b) empowers the Commissioner to require, by a notice in writing, a person to produce all books, documents and other papers whatever in his custody or under his control relating thereto. The power can be exercised independently of the power contained in the first limb of s 264(1)(b), as it is a self-contained provision.[36] Thus, a person does not have to be called to give evidence before the power can be exercised. As with the other information and evidence gathering powers discussed, the wide ambit of the powers under the second limb of s 264(1)(b) is subject to similar express and implicit limitations (eg, time limit for compliance with the notice must be reasonable in the circumstances and the place for attendance must be specified). The privilege against self-incrimination does not apply in respect of s 264[37] nor do contractual or legislative secrecy rules.[38] However s 264 is subject to legal professional privilege.[39]

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[34] *Walsh v Deputy Commissioner of Taxation (NSW)* (1981) 12 ATR 470.

[35] *Ganke v Deputy Commissioner of Taxation* (1975) 5 ATR 292.

[36] *Smorgon 1*, above n 32, 696.

[37] *Deputy Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 confirmed in *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37 with the High Court refusing the taxpayer's application for special leave to appeal this point: *Binetter v Deputy Commissioner of Taxation* [2013] HCA Trans 32.

[38] It is clear from the decision in *Smorgon 3*, above n 24, 488 that contractual arrangements, which purport to restrict the parties from disclosing information or releasing documents, cannot be relied upon to resist compliance with a s 264 notice, as such contracts do not limit the scope of s 264. Whether s 264 overrides secrecy provisions in state or federal government Acts has not been judicially considered. State laws are probably overridden due to s 109 of the Constitution. Given that s 264(1) authorises the service of a notice on 'any

2.1.3. Search Warrants

For completeness it is important to mention that as neither s 263 nor s 264 authorises the seizure of documents, the Commissioner has sought the assistance of search warrants issued by a Court to the police under s 3E of the *Crimes Act 1914* (Cth). They have been used to search premises and seize documents where there is evidence of a tax law crime. A warrant will be issued only if there are reasonable grounds, supported by credible facts and circumstances, for believing an offence has been committed. The mere suspicion of wrong doing will not be sufficient to enable a warrant to be issued.[40] However, as the search warrant process is not an express power exercised by the Commissioner further discussion of their scope is beyond the scope of this paper.

2.2 Historical Limitations where information is held offshore

As mentioned above, the Commissioner's domestic powers to gather information, when first formulated in 1915, were an audit tool in the context of an Australian tax system focused on the taxation of Australian source income. It was only in 1930

officer employed in or in connexion with any department of a Government or by any public authority,' it is arguable that s 264 expressly purports to bind the Crown and overrides Commonwealth secrecy provisions.

[39] *Holmes and Others v Deputy Commissioner of Taxation (NSW) (No 1)* (1988) 19 ATR 1278. For a more detailed analysis of the operation of s 264 see Michael Dirkis, 'An Orwellian Spectre - A review of the Commissioner of Taxation's powers to seek information and evidence under section 264 of the *Income Tax Assessment Act 1936* and under section 10 of the *Crimes Act 1914* (Cth)' (1989) 12 *Adelaide Law Review* 63.

[40] *Crowley v Murphy* (1981) 34 ALR 496, 515.

that the Commonwealth[41] and some states[42] introduced the residency basis of taxation. Therefore, despite the breadth of ss 263 and 264, it is not unexpected that they would be ineffective where information was located offshore.[43]

2.2.1. Section 263

The first problem is that the general access power under s 263 relies on the documents or person being located in Australia. Therefore, it is inapplicable where the materials or persons are located offshore.[44]

A second problem arises from the construction of s 263. It appears that if a request for access under s 263 is made for purposes of the *International Tax Agreements Act 1953* (Cth) (*International Tax Agreements Act*), that request is beyond the Commissioner's power. This arises as s 263 has not been effectively incorporated by s 4 of the *International Tax*

[41] A definition of 'resident', similar to the current 'resident' definition in s 6(1) of the 1936 Act, was introduced via s 2(i) of the *Income Tax Assessment Act 1930* (Cth).

[42] Although the source basis of taxation continued for all states (except for Tasmania), residency based taxation was adopted in respect of specific categories of income. For example, a residency basis of taxation of dividends was introduced in South Australia via s 4 of the *Taxation Act 1931* (SA), and ex-Australian income was partially taxed in New South Wales (income from non-investment trade or business) and Western Australia (export income).

[43] Paul Keating, Commonwealth, *Taxation of Foreign Source Income: An Information Paper* (1989). As regards their use within double tax treaties see B L Jones, 'The Use of the Commissioner's Formal Powers and Requests for the Exchange of Information under Double Tax Agreements' (2001) 30 *Australian Tax Review* 39.

[44] In *Denlay v Commissioner of Taxation* (2011) 193 FCR 412, the Full Federal Court (Keane CJ, Dowsett and Reeves JJ) noted at [83] and [84] '. . . we think, something to be said for the taxpayers' argument that, if specific legal authority were necessary to make access to the information provided by Mr Kieber lawful in the overseas location where that occurred, then s 263 did not provide it ... It is difficult to attribute to the Parliament an intention by s 263 of the *ITAA 1936* to command the obedience of residents of foreign countries in those countries.'

Agreements Act due to the fact that operation of s 263 is expressly limited to being used for purposes of the *ITAA 1936* (ie, 'this Act').[45] The 'ineffectively incorporated' argument is based on the decision of Lockhart J in *Amalgamated Television Services Pty v Australian Broadcasting Tribunal*.[46]

The facts before Lockhart J were that the Australian Broadcasting Tribunal (ABT) sought financial information from the applicant regarding the *Television and Stations Licence Fees Act 1964* (Cth) ('*Licence Fees Act*'). But like the *International Tax Agreements Act*, the *Licence Fees Act* did not have its own information gathering powers. The ABT was, however, empowered by s 106(4)(b) of the *Broadcasting and Television Act 1942* (*Broadcasting Act*) to request '... any other information ... relevant to the operation of this Act'. Section 3 of the *Licence Fees Act* stated that the *Broadcasting Act* 'is incorporated and shall be read as one with this Act'. The ABT relied on s 106(4)(b) of the *Broadcasting Act* to require the applicant to supply information.[47]

Justice Lockhart observed that, although provisions like s 3 of the *Licence Fees Act* were common, care must be taken when reviewing their operation.[48] They cannot be used to, in effect, amend the provisions of an earlier Act which is to be read as one with the later Act. A provision for reading two Acts together cannot cause expressions in the earlier Act to be construed as meaning and having always meant something which, in their original context, they were not fairly capable of meaning. He held that the ABT, by relying on s 106(4)(b) of the *Broadcasting*

[45] This analysis draws upon the earlier work by Michael Dirkis, 'Limitations on the Use of s 263, Where Access is Sought to Satisfy the Commissioner's Obligations under Double Tax Agreements' [1993] *Butterworths Weekly Tax Bulletin* [158]. See also Jones, above n 43.
[46] *Amalgamated Television Services Pty v Australian Broadcasting Tribunal* (1984) 1 FCR 409.
[47] Ibid 413.
[48] Ibid.

Act, was in fact doing just this.[49] Section 106(4)(b) was restricted to operate for purposes of 'this Act'. It could not be read as if it meant 'this Act and the *Licence Fees Act*'.

As access under s 263 of the *ITAA 1936* is also expressly restricted to 'any of the purposes of this Act', the effect of Lockhart J's decision is to exclude using s 263 for purposes of the *International Tax Agreements Act*. However, the reasoning underlying his decision is that a provision for reading two acts together cannot cause expressions in the earlier act to be construed as meaning and having always meant something which, in their original context, they were not fairly capable of meaning. But in *Amalgamated Television Services Pty*, Lockhart J was not asked to consider the effect of the incorporation on a section in its original context; rather, he was considering the operation of the incorporated provision in its new context. It is arguable that, in the circumstances of the case, there was no question of a retrospective amendment as s 106(4)(b) would operate in accordance with its tenor in its new context. By analogy, it is submitted that, in the context of s 263 and the *International Tax Agreements Act*, s 263 would operate in accordance with its tenor in its new context. This seems to be consistent with the purpose of such incorporating clauses.

Despite these arguments, Lockhart J's view remains the only direct authority on this issue. Thus, as s 263 appears not to be effectively incorporated, a request for access for purposes of an exchange of information could be refused. It would be expected that the Commissioner will vigorously defend any such claim given the perceived loss of power it would represent.[50] As

[49] Ibid 415.

[50] In the absence of 'unequivocal judicial authority' the Commissioner advised the Australian Parliament's Standing Committee on Finance and Public Administration on 21 May 1993 that the ATO will continue to treat s 263 as operative in this context; see Michael Dirkis, 'Tax Office Access to Information: Double Tax Treaties [1993] *Butterworths Weekly Tax Bulletin*, [642].

the issue of the validity of incorporation into the *International Tax Agreements Act* does not arise in respect of s 264 (as it is not subject to an express restriction), any challenge to s 263 will merely gain a taxpayer time and inconvenience the Commissioner.

2.2.2. Section 264

Where persons are located offshore jurisdictional barriers exist in serving and compelling those persons to submit to an oral examination under s 264(1)(b). Similar problems arose with the Commissioner's powers to compel production of documents under s 264(1)(b). These powers are based on the presumption that the person served with a s 264 notice has control of the documents. Even though the High Court has held that s 264 'is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce: it is concerned with the ability of the person to whom the notice is addressed to produce the documents',[51] it is often difficult to establish who has control in complex commercial structures.[52] Nevertheless, it has been held that a s 264 notice can be effective in accessing information held domestically that relates to a foreign jurisdiction, even where it is the subject of bank secrecy rules in that foreign jurisdiction.[53]

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[51] *Federal Commissioner of Taxation v Australia & New Zealand Banking Group Ltd* (1979) 143 CLR 499, 520 (Gibbs ACJ).

[52] For a detailed discussion on the international limitations of Australia's information gathering powers see Michael Dirkis, 'Foreign Income: Out of sight: not out of mind' (1992) 1 *Taxation in Australia Red Edition* 26.

[53] *Australia and New Zealand Banking Group Limited v Konza* (2012) 206 FCR 450. The Full Federal Court partially upheld the appeal against Lander J's decision in *Australia and New Zealand Banking Group Limited v Konza* [2012] FCA 119, holding that one of the two notices was invalid for the uncertainty of the information it required ANZ to furnish and that that uncertainty so infected the notice that the invalidity could not be cured by severance of the offending parts. In particular, the notice referred to 'officers' or 'officer' of the customer, who were not readily identifiable by ANZ. However, the Full Federal Court upheld the validity of the other notice, despite

2.3. The 1991 Domestic Response to the Limitations Regarding Offshore Information

To overcome limitations with ss 263 and 264 when the powers were applied to international transactions, s 264A was introduced in 1991.[54] It was not without controversy with the then Senator Watson in the Senate Standing Committee on Finance and Public Administration[55] and in the Senate debate[56] on s 264A, expressing the view that s 264A was not needed. He felt that the Commissioner merely needed:

> to use his existing powers more skilfully ... there is the capacity for the Commissioner to get the information that he requires without taking away taxpayer's rights and providing new, novel and perhaps draconian measures.[57]

In general, s 264A empowers the Commissioner to issue an 'offshore information notice' to a taxpayer requiring the taxpayer to produce information in the manner specified, to deliver documents or to make and produce copies of documents in a specified period.[58] It applies to the taxpayer not third

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the taxpayer's arguments that disclosure would be a breach of the law of Vanuatu. See also Lee, above n 14.

[54] *Taxation Laws Amendment (Foreign Income) Act 1991* (Cth).

[55] Senate Standing Committee on Finance and Public Administration, Parliament of Australia, Canberra, 14 December 1990, 41 (Senator Watson).

[56] Commonwealth, *Parliamentary Debates*, Senate, 19 December 1990, 5976 (Senator Watson).

[57] Above n 55, 55. Similar concerns were expressed by Gyles J in *Pilnara Pty Ltd v FCT* [1999] FCA 945, [28] who in noting its width remarked that '[t]o construe the section to enable the Commissioner to request what amounts to, in effect, a general audit of a foreign corporation, and then apply s 264A(10) may have drastic effects.'

[58] *ITAA 1936*, s 264A(1). For a detailed discussion on the scope of s 264A see Michael Dirkis, 'Australia: Over there, but Undeclared – Offshore Information' (1995) 49 *Bulletin for International Fiscal Documentation* 466-71.

parties,[59] the information or documents sought must be 'relevant to the assessment of the applicant as a taxpayer' and 'to enable the Commissioner to perform his or her functions under the Act'.[60] The notice must identify the particular taxpayer and that the documents are in an offshore jurisdiction. There needs to be a proper factual basis disclosed in the notice to ground a reasonable belief in the existence of all of the information and documents which are sought.[61]

The failure to comply with a notice is not an offence nor is the notice a request for the purposes of the Act or any provision of the *Tax Administration Act*. The failure or a refusal to comply will trigger evidentiary exclusionary sanctions that deny the admission of information that was the subject of the notice (or secondary evidence of that information) in proceedings where the taxpayer challenges their assessment. However, the Commissioner can consent to its admission.[62] A failure occurs even where the taxpayer is unable to find the information,[63] and the non-disclosure of privileged information would be prima facie a failure to comply.[64]

The privilege against self-incrimination is unlikely to apply in respect of s 264A as the failure to comply with a notice is not an offence[65] nor is the notice a request for the purposes of the Act or any provision of the *Tax Administration Act.*[66] Section 264A is not subject to legislative secrecy rules.[67] It also not likely that s 264A would to be subject to any contractual secrecy

[59] *FH Faulding and Co Ltd v FCT* 94 ATC 4867, 4917.
[60] Ibid, 4903.
[61] *Pilnara Pty Ltd v FCT* [1999] FCA 945, [30].
[62] *ITAA 1936*, s 264A(10).
[63] *ITAA 1936*, s 264A(16).
[64] *ITAA 1936*, ss 264A(10) and (16).
[65] *ITAA 1936*, s 264A(22).
[66] *ITAA 1936*, s 264A(21).
[67] In fact *ITAA 1936*, s 264A(12) requires the Commissioner to ignore the consequences of any relevant foreign secrecy law when considering whether to waive the evidential sanction.

rules, [68] however, based upon the litigation in respect of s 264, s 264A is likely to be subject to legal professional privilege.[69]

As the evidentiary sanction is only available where the taxpayer seeks to challenge an assessment issued by the Commissioner, s 264A's coercive impact may also be limited in cases where the requested information, if provided, is considered by the taxpayer likely to increase their liability. Similarly, the provisions are not practical to use to initiate a tax investigation.[70]

2.4. Exchange of Information Articles in Australia's Bilateral Comprehensive Tax Treaties

Parallel to the domestic information gathering provisions is a series of exchange of information articles contained within Australia's bilateral comprehensive tax treaties (Double Tax Agreements (DTAs)).[71] The exchange of information articles are generally based upon Article 26 of the various the OECD Model Conventions that have existed since 1963.[72] Burns and Woellner

[68] This view is based upon judicial decisions in respect of *ITAA 1936*, s 264 discussed in section 2.2.2 of this paper.

[69] It is clear following a number of Federal Court decisions in the late 1980s ending with *Perron Investments v DCT* (1989) 20 ATR 1299 that legal professional privilege does apply to limit the scope of documents that can be requested under administrative access provisions like s 264A.

[70] Lord above n 14, 280.

[71] Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hungary, India (but not the 2011 Protocol*), Indonesia, Ireland, Italy, Japan, Kiribati, Republic of Korea, Malaysia, Malta Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Romania, Russia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland (not the 2013 revised treaty*), Taipei, Thailand, Turkey*, United Kingdom, United States of America and Vietnam (*indicates that the tax treaty is not yet in force); Treasury (Cth), 'Australian Tax Treaties' <http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties>.

[72] They have been an essential element of most DTAs. An exchange of information clause was part of the 1928 League of Nations model convention and included as Article XIII of Australia's first DTA with the United

note that the scope of these exchange of information articles could be historically classified as ranging from a narrow or limited exchange model (such as the Swiss DTA), a United Kingdom colonial model (such as 1968 United Kingdom and 1969 Japan DTAs), the 1977 and 1992 OECD models (the modern models) and a compulsion model (the 1982 United States DTA).[73]

The historical express limitations on the exchange of information articles that were in place in treaties prior to the current Article 26 being adopted by the OECD in early 2003[74] include:

- the fact that the information requested can only relate to taxes to which the agreement applies. For example, a request for GST information need not be complied with by the foreign State, if GST lies outside the agreement.[75]
- That a Contracting State is not obliged to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade

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Kingdom. The DTA was signed on 29 October 1946 and incorporated into the Third Schedule of *ITAA 1936* by the *Income Tax Assessment Act 1947* (Cth).

[73] Lee Burns and Robin Woellner, 'Bilateral and Multilateral Exchanges of Information' (1989) 23 *Taxation in Australia* 656, 658. Under Australia's current DTA policy a number of earlier existing DTAs would not be negotiated as the countries do not have robust internal information gathering powers and bank secrecy rules operate (e.g. the Philippines and Indonesia).

[74] Article 26 was adopted by the OECD on 28 January 2003 following the OECD report, *The 2002 Update of the Model Convention* (OECD, 2002). The history and operation of Article 26 is briefly explained on the OECD website at <http://www.oecd.org/ctp/taxtreaties/article26oftheoecdmodeltaxconventiononincomeandcapital.htm>.

[75] OECD, *Model Double Tax Convention on Income and on Capital, Report* (1977), 184. The current Article 26 expressly allows the exchange of information outside the taxes dealt with by the relevant DTA (discussed at 3.2 below).

process, or information the disclosure of which would be contrary to public policy.

- That the exchange of information articles may be limited by the Convention and by any other '. . . subsequent agreement or practice of the parties or relevant rules of international law'.[76] However, the extent to which the treaties limit the operation of such articles will depend upon their incorporation into Australian law.[77]

There are three fundamental principles which underlie the use of these articles: secrecy, necessity and reciprocity.[78] However, due to the undermining of these three fundamental principles by governments, practical limitations have historically arisen. In many jurisdictions revenue authorities' access powers can be extremely limited by domestic judicial restraint and/or their having a narrow scope (ie, specific categories of information being exempted) and/or by local laws (ie, bank secrecy and privacy laws).[79]

How the treaty powers are used is the other practical limitation on the effectiveness of DTAs to obtain information held offshore. Often governments and tax administrators will have a strong arsenal of information gathering and exchange

[76] Article 31(3) of the *Vienna Convention on the Law of Treaties.* This follows from the acceptance by the High Court in *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 356 that the *Vienna Convention on the Law of Treaties* could be used in interpreting Australian treaties,

[77] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 275.

[78] Burns and Woellner, above n 73, 660.

[79] Some specific examples of these protected categories are that the papers of a tax adviser or statutory appointed auditor are safe from disclosure in the United Kingdom and in the United States the Internal Revenue Service is only given limited access to Church papers. Similar limitations also occur in Australia where the information sought on behalf of a Contracting State is subject to legal professional privilege.

powers but are either incapable or unwilling to use them. Examples of operational weakness in the international context could include:

- the reluctance of some governments to provide information;
- the lack of power to ensure that the treaty partner provides timely information; and
- that some revenue offices may not pursue information from third parties.

2.5. Summary

From the foregoing it is demonstrated that Australia's domestic and bilateral treaty information access powers, despite the introduction of s 264A, are subject to major limitations when information is held in other jurisdictions.

The limitations on Australia's domestic information gathering powers are, however, not unexpected. While, in theory, public international law does not impose any limitations on a government's power to tax, under private international law sovereign nations as a matter of public policy do not enforce the laws of foreign governments in a home jurisdiction to collect taxes levied in a foreign country,[80] except where formal

[80] Eg, see United Kingdom precedent (*In re Visser* [1928] 1 Ch 877, 884, *Government of India v Taylor* [1955] AC 491), in Ireland (*Peter Buchanan Ld v McVey* [1954] Ir R 89) and in Australia (*Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324 and *Foreign Judgments Act 1991* (Cth) (*Foreign Judgments Act*), ss 3(1) and 5(4)). The origins of these rules can be traced to a series of 18th century judgments (eg, *Holman v Johnson* (1775) 1 Cop 341, 343 and *Plache v Fletcher* (1779) 1 Doug 251, 253). The *Hague Convention on Foreign Judgments in Civil and Commercial Matters* (1971) in Article 1 of Chapter 1 excludes decisions for the payment of any customs duty, tax or penalty from the scope of the Convention. For a detailed examination of these issues see Lord, above n 14, 273, 274.

reciprocal enforcement agreements exist between states.[81] This creates a substantial limitation on the ability of revenue authorities to exercise the essential taxation administrative processes (such as information gathering) needed to counter cross border tax avoidance and evasion.[82]

The solution clearly lies in reform to both the international rules and ensuring compliance with those rules by all the jurisdictions submitting themselves to those rules. The following sections of the paper explore the developments in tax information exchange since 2000 and the drivers of those significant changes.

3. THE ALCHEMY – THE EVOLVING INTERNATIONALISATION OF TAX ADMINISTRATION[83]

3.1 Background

The challenge has been met, in part, through the internationalisation of the relationships between revenue authorities, which has aided in the internationalisation of domestic taxation information gathering powers through multilateral and bilateral treaties. These initiatives are discussed

[81] Eg, see *The Foreign Judgments Act 1991, Part 4* and *Hunt v BP Exploration Co. (Libya) Limited* (1979) 144 CLR 565. See also *Re State of Norway's Applications (Nos 1 and 2)* [1990] 1 AC 723, where the House of Lords held that a 'civil and commercial matter' within the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970) would include tax matters. For a detailed examination of this issue see Lord, above n 14, 281 and 282.

[82] For a detailed discussion on the international limitations of Australia's information gathering powers see Dirkis, above n 52, 26-33 and Dirkis, above n 58.

[83] This part of the paper draws upon earlier work by Michael Dirkis, 'Looking Beyond Australia's Horizon: The Internationalisation of Australia's Domestic Taxation Information Gathering and Debt Collection Powers' in Michael Walpole and Chris Evans (Eds) *Tax Administration: Safe Harbours and New Horizons* (Fiscal Publications, 2009) 79.

in the following sections of this paper after a brief description of current international trends in responding to offshore tax evasion through transparency and information exchange.

3.2 Overview of the Growth in International Co-operation Focused upon Exchange of Information

Australia's active involvement in international forums and bodies seeking to deal with tax administration issues raised by trans-border transactions can be traced back to 1919.[84] Since 1971 Australia has been a member of the OECD, which since the mid 1990's has been the most active international organisation in the area of transparency and tax information exchange. This work has been directed by the OECD Committee on Fiscal Affairs (CFA) through the various forums, sub groups, technical advisory groups and working parties on specific taxation topics.[85]

The recent focus on exchange of information started with the release in April 1998 of the OECD report on harmful tax competition entitled *Harmful Tax Competition: An Emerging Global Issue*.[86] The report was prepared following a request by the OECD countries to 'develop measures to counter the distorting effects of harmful tax competition on investment and

[84] In 1919 the then Dominions of Australia (represented by Mr GH Knibbs CMG (Commonwealth Statistician)), Canada, India, New Zealand and South Africa participated in a sub-committee of the United Kingdom's *Royal Commission on the Income Tax* to discuss their views on double taxation within the empire – see Commonwealth, Royal Commission on Taxation, *Reports* (1920-24) 32, Edwin RA Seligman, *Double Taxation and International Fiscal Cooperation* (1928) 47-50, and United Kingdom, *Report of the Royal Commission on the Income Tax* Cmd 615 (1920).

[85] For a detailed discussion of these forums see Dirkis above n 83 and Jan Farrell, 'Current Cross Border Arrangements with Revenue Authorities' (paper presented at the Taxation Institute of Australia's NSW Corporate Intensive, 2 November 2007).

[86] OECD, *Harmful Tax Competition: An Emerging Global Issue*, (1998) located at URL: http://www.oecd.org/tax/transparency/44430243.pdf on 26 January 2013.

financing decisions and the consequences for national tax bases.'[87] Following the endorsement of the Report by OECD Ministers in May 1999 the CFA established the Forum on Harmful Tax Practices.

In 2002 the CFA undertook a comprehensive review of the exchange of information Article in the OECD Model Tax Convention on Income and Capital (the Model Convention). Both the Model Agreement on Information Exchange on Tax Matters and the 2000 report on the ideal standard of access to bank information[88] were used by the Working Party on Tax Evasion and Avoidance as a basis for revising Article 26. A new Article 26 was adopted on 15 July 2005.[89]

The new Article 26 attempts to enable the exchange of information to the widest possible extent adopting a foreseeable relevance test, allowing for the exchange of third party information and allowing the exchange of information outside the taxes dealt with by the convention (ie, including indirect taxes).[90] To provide practical assistance to officials dealing with exchange of information for tax purposes the CFA approved a new Manual on Information Exchange on 11 May 2006. The Manual, developed with the input of both member and non-member countries, is also intended to assist in designing or revising national manuals.[91]

[87] Jeffrey Owens, 'Curbing harmful tax practices' *OECD Observer* (OECD, January 1999) 215.
[88] OECD, *Improving Access to Bank Information for Tax Purposes* (2000) <http://www.oecd.org/tax/exchange-of-tax-information/2497487.pdf>.
[89] OECD, *The 2005 Update to the Model Tax Convention* (OECD, 2005). It had its basis in a Report (entitled OECD, *Changes to Articles 25 and 26 of the Model Convention* (2004)) adopted by the CFA on 1 June 2004.
[90] The history and operation of Article 26 is briefly explained on the OECD website, above n 74.
[91] The Manual on Information Exchange can be found at <http://www.oecd.org/ctp/eoi/manual>.

The CFA in 2000 also established the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes[92] (formerly the Global Forum on Taxation).[93] The Forum consists of some 122 countries drawn from OECD countries and non-OECD members (referred to as committed jurisdictions) plus the European Union and 12 international organisations as observers. Its objective is the creation of a global level playing field based on high standards of transparency, effective exchange of information in tax matters and removing limitations such as excessive bank secrecy.[94]

A major outcome has been the development of the internationally accepted standards of transparency and exchange of information across tax issues through the publication of the Model Agreement on Exchange of Information on Tax Purposes (TIEAs) in 2002.[95] The Model Agreement was developed by the OECD in co-operation with non-OECD countries and endorsed by G20 Finance Ministers at their Berlin Meeting in 2004, then by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting.

The Model Agreement is not a binding instrument; rather it is a guide countries can use in their bilateral negotiations. It covers information exchange upon request for both civil and criminal tax matters.[96] The Model Agreement incorporates

[92] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes website: <http://www.oecd.org/tax/transparency>.

[93] Treasurer (Cth), 'Treasurer Opens 2005 Global Forum on Taxation' (Press Release No 98, 15 November 2005) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2005/098.htm&pageID=003&min=phc&Year=2005&DocType=0>.

[94] OECD, above n 92.

[95] OECD, *Model Agreement on Exchange of Information on Tax Purposes* (2002) <http://www.oecd.org/ctp/exchangeofinformation/2082215.pdf>.

[96] The Model Agreement specifically provides that information must be provided even where the requested country itself may not need the information for its own tax purposes. Contracting parties further agree that their competent authorities must have the authority to obtain and provide information held by

important safeguards to protect the legitimate interests of taxpayers (ie, disclosure can be declined if the information would disclose a trade or business secret or if the information is protected by legal professional privilege) and the information exchanged has to be treated as confidential.[97] Since 2008 more than 1,100 exchange of information relationships have been established to provide for the exchange of information in tax matters to the international standard.[98]

In 2005 the Global Forum issued a paper setting out the standards for the maintenance of accounting records.[99] In 2009, as part of a reform and strengthening process the Forum gained independent funding and a dedicated secretariat. In September 2009 Australia was elected for a two year term as the inaugural chair of the reformed Global Forum.[100] The main work of the Forum currently is to ensure that the standards of transparency and exchange of tax information are met through a robust peer review process conducted by teams of expert, independent assessors and overseen by a 30 member Peer Review Group.[101]

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banks and other financial institutions. However, countries are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a specific taxpayer, a requesting country needs to demonstrate the foreseeable relevance of the information requested – see OECD, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* (OECD, 2004) at 13.

[97] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Restoring Fairness to the Tax System* (*Information Brief April 2013)*, (OECD) <http://www.oecd.org/tax/transparency>.

[98] Ibid.

[99] Joint Ad Hoc Group on Accounts, *Enabling Effective Exchange of Information: Availability Standard and Reliability Standard* (OECD, 2005) <http://www.oecd.org/tax/transparency/keypublications.htm>.

[100] Assistant Treasurer (Cth), 'Australia Elected Chair of Global Forum' (Media Release 58, 24 August 2009) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/058.htm&pageID=003&min=njsa&Year=&DocType>.

[101] Global Forum on Transparency and Exchange of Information for Tax Purposes, above n 97.

Since 2009, 126 peer reviews have been launched, 100 peer review reports have been completed and published and 652 recommendations have been made for jurisdictions to improve their ability to cooperate in tax matters. More than 68 jurisdictions have already introduced or proposed changes to their laws to implement the standard.[102]

3.3. Multilateral Tax Information Exchange and Avenues for Information Exchange Outside Bilateral Tax Treaty Arrangements

Formal bilateral agreements are not the only avenue available for Australia to access tax related information from other jurisdictions. Developments in information exchange and the use of multilateral treaties to permit information exchange have also been evolving. These developments are the Convention on Mutual Administrative Assistance in Tax Matters and to a lesser extent, the development of intergovernmental agreements with the United States in response to the *Foreign Account Tax Compliance Act* (FATCA).

3.3.1. Convention on Mutual Administrative Assistance in Tax Matters

A major development outside of the Model Convention occurred in the late 1980s, when the OECD and the Council of Europe jointly developed a Convention on Mutual Administrative Assistance in Tax Matters.[103] The Convention was opened for signature on 25 January 1988 and entered into force in 1995. It covers all taxes and allows exchange of information, multilateral simultaneous tax examinations and assistance in tax collection. It provides extensive safeguards to protect the confidentiality of the information exchanged.

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[102] Ibid.

[103] The Convention and explanatory materials can be found at <http://www.oecd.org/ctp/exchangeofinformation/Convention_On_Mutual_Administrative_Assistance_in_Tax_Matters_Report_and_Explanation.pdf>.

Consistent with the evolution of international cooperation in the exchange of tax information there was an expansion aimed at global coverage of the Convention, and active recruitment of new parties to it. In April 2009, the G20 called for action 'to make it easier for developing countries to secure the benefits of the new cooperative tax environment, including a multilateral approach for the exchange of information.'[104] In response the OECD and the Council of Europe developed a Protocol that came into effect on 1 June 2011[105] amending the multilateral Convention on Mutual Administrative Assistance in Tax Matters. The Protocol made the Convention consistent with the international standard on exchange of information for tax purposes developed by the Global Forum and opened it up to all countries (previously membership was limited to members of the OECD and of the Council of Europe).[106]

Australia has become a signatory to the Convention on Mutual Administrative Assistance in Tax Matters. It has lodged its instrument of ratification with OECD with the Convention to enter for Australia on 1 December 2012.[107] In August 2012 the

[104] Referenced on the OECD website <www.oecd.org/ctp/eoi/mutual>.

[105] The amended Convention can be found at <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm>.

[106] As at 1 March 2013 there were 43 signatories to the amended Multilateral Convention: Albania Argentina, Australia, Belgium, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Denmark, Finland, France, Georgia, Germany, Ghana, Greece, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Lithuania, Malta, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovenia, South Africa, Spain, Sweden, Turkey, Tunisia, Ukraine, United Kingdom, and United States. Information located at <http://www.oecd.org/ctp/exchange-of-tax-information/albaniaconventiononmutualadministrativeassistance.htm>.

[107] Assistant Treasurer and Minister Assisting for Deregulation (Cth), 'Australia Ratifies Multilateral Tax Cooperation Agreement' (Press Release No 114, 5 October 2012) <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/114.htm&pageID=003&min=djba&Year=&DocType>.

Joint Standing Committee on Treaties had recommended the Convention be ratified.[108] In doing so the Committee noted that the Convention will 'complement Australia's network of comprehensive tax treaties and TIEAs by providing an additional tool for detecting and preventing tax evasion as well as recovering outstanding tax debts.'[109] It was further noted that no new legislation was required to implement the obligations imposed by the Convention.[110]

3.3.2. US Foreign Account Tax Compliance Act 2010 (FATCA)

FATCA was passed in March 2010 to improve compliance with US tax laws by imposing certain due diligence and reporting obligations on non-US financial institutions. The Act imposes a 30% withholding on US source payments to foreign financial institutions that do not participate/cooperate by supplying account information to the US Internal Revenue Service (IRS).

Intergovernmental agreements[111] (developed with France, Germany, Italy, Spain and the United Kingdom) may be entered into with the US in which the partner country agrees to require

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[108] Joint Standing Committee on Treaties, Parliament of Australia, Canberra, *Report 127 Review into Treaties tabled on 20 March and 8 May 2012*, tabled 15 August 2012 <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/20march2012/report.htm>.

[109] Ibid [4.36].

[110] Ibid [4.28]: 'Australia is able to fulfil its obligations under the Convention under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953* in respect of exchange of tax information. Similarly, Division 263 of Schedule 1 to the *Taxation Administration Act 1953* applies to any agreement in force between Australia and a foreign country that contains an article relating to assistance in collection of foreign tax debts.'

[111] US Treasury, 'Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden' (Press Release 26 July 2012) <http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx>.

local financial institutions to report information on US account holders to local tax authorities. Under Model Agreements[112] local tax authorities will send information to the IRS *automatically*. If this is agreed, financial institutions in the partner country are deemed compliant with FATCA and will not suffer nor make withholdings. To date there have been six such bilateral agreements signed by the US with the UK, Denmark, Mexico, Ireland, Switzerland and Norway.[113] The Treasurer has announced that Australia has entered into discussions with the US to negotiate an Intergovernmental Agreement.[114] Under the negotiated UK/US agreement and the Model Agreements there is a commitment to enhance and expand automatic exchange of information.

3.4. Summary

It is apparent from the foregoing that the evolving cooperation between the various tax authorities has led to internationalised, as well as institutionalised, responses to tax evasion focussed on transparency and tax information exchange. Such a response could not be achieved through domestic law change alone.

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[112] There are two types of Model Intergovernmental Agreement: Reciprocal and Non-Reciprocal and they are located respectively on the US Treasury website at <http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf> and <http://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf>.

[113] The US Treasury, FATCA Treaty Resource Center <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> contains links to these agreements. The UK agreement was entered into on 12 September 2012 followed by: Denmark (19 November 2012), Mexico (19 November 2012), Ireland (23 January 2013), Switzerland (14 February 2013) and Norway (15 April 2013).

[114] Deputy Prime Minister and Treasurer (Cth), 'Australia and the US commence discussions on Foreign Account Tax Compliance Act' (Press Release No 110, 7 November 2012) <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/110.htm&pageID=003&min=wms&Year=&DocType=0>.

4. LOADING THE GOLDEN BULLETS - INCORPORATION OF THE INTERNATIONAL EXCHANGE OF INFORMATION DEVELOPMENTS INTO AUSTRALIA'S TREATIES AND DOMESTIC LAW

The balance of the paper explores the extent to which these reforms have impacted on both Australia's domestic law and treaty policy.[115] In particular it seeks to explore Australia's adoption of the model TIEAs and the adoption of the new Article 26 in DTAs entered into since 2005. This discussion will examine whether this is a significant alchemy or just another step along the evolution of tax information exchange. The paper also discusses whether these initiatives should yield operational results.

4.1. Tax Information Exchange Agreements

Australia has concluded 34 TIEAs.[116] The countries with which these agreements have been made are small and many are

[115] John McLaren, 'The OECD's "Harmful Tax Competition" Project: Is it International Law?' (2009) 24 *Australian Tax Forum* 423 argues that a number of the projects facilitated by the OECD, such as the OECD Model Tax Conventions and the 1979 OECD report on Transfer Pricing and Multinational Enterprises, have been adopted to a large extent by the Australian Government and transformed into Australian domestic law.

[116] Treasury, 'Australian Tax Treaties', above n 71. These are:

- Bermuda (2005);
- Antigua and Barbuda and Netherlands Antilles (The former Dutch Caribbean colonies of Curacao and St Maarten became autonomous countries within the Kingdom of the Netherlands on 10 October 2010, in a change of constitutional status dissolving the Netherlands Antilles. The 2 joined Aruba, which in 1986 had already gained this status that maintains direct ties with the Netherlands, while 3 other islands, Bonaire, St Eustatius and Saba (the BES islands), became autonomous special municipalities of the Netherlands in the dissolution of the 56 year old Netherlands Antilles territory. As a result the TIEA is now listed as an agreement with two states: Curaçao and Saint Maarten on the OECD's table of tax treaties) (2007);
- British Virgin Islands (2008);
- Aruba, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey and Samoa

considered 'tax havens' (now referred to as 'low taxing jurisdictions'). However, these countries can be of significant economic importance to Australia. For example, in 2004 Bermuda was the fourth leading investor into Australia, investing AUD 2.2 billion.[117] In a recent speech, the then Commissioner noted that in the 2010-11 financial year, funds leaving Australia to low taxing jurisdictions had decreased since 2007-08 by 22%.[118] Coincidentally the first TIEAs came into force in 2007.

Initially there was a delay in the agreements coming into force with only two out of the 11 TIEAs signed as at 21 December 2009 in force.[119] As at 28 March 2013 only one signed TIEA was yet to come into force.[120] TIEAs have not been given domestic force by legislation and it is unclear whether such legislation is required. The Joint Standing Committee on Treaties has recommended in February 2006 and again on 13 June 2007 that binding treaty action should be undertaken,[121]

(2009);

- Anguilla, Bahamas, Belize, Cayman Islands, Dominica, Grenada, Marshall Islands, Mauritius, Monaco, Montserrat, San Marino, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Turks and Caicos Islands, Vanuatu (2010);
- Andorra, Bahrain, Costa Rica, Liberia, Liechtenstein and Macao (2011); and
- Uruguay (2012).

[117] See Joint Standing Committee on Treaties, Parliament of Australia, Canberra, *Report No 73* (2006) 31.

[118] Commissioner of Taxation (Cth), 'It's a Small World after All – Australia's Place in a Global Environment' (Speech to the Australia Israel Chamber of Commerce, Melbourne, 5 July, 2012) <http://www.ato.gov.au/Media-centre/Speeches/Commissioner/It-s-a-small-world-after-all---Australia-s-place-in-a-Global-Environment/>.

[119] Treasury, 'Australian Tax Treaties', above n 71.

[120] Uruguay (signed 10 December 2012).

[121] See Joint Standing Committee on Treaties, above n 117, 35, Recommendation 4 and Joint Standing Committee on Treaties, Parliament of Australia, Canberra, *Report No 87* (2007) 24, Recommendations 3 and 4.

while recognising that Australia's obligations under the agreements are met by the *International Tax Agreements Act*[122] (considered at point 4.3 below).

Nine of the TIEA negotiations resulted in a separate 'Additional Benefits Agreement' (ABA).[123] Even though ABAs are not part of the information exchange of a TIEA they are an integrated part of the TIEA negotiation process.[124] ABAs generally cover the allocation of taxing rights over certain income derived by retirees, government employees and students and provide a mechanism to help resolve transfer pricing disputes.[125] Unlike TIEAs, which are an information exchange mechanism, ABAs may limit Australia's ability to tax and legislation is required to give them effect,[126] which may explain why only seven are in force.

Under TIEAs, a primary obligation exists between Australia and the specific treaty partner to provide assistance through exchange information upon request[127] in respect of all Commonwealth taxes administered by the Commissioner and any taxes imposed domestically in the other jurisdiction.[128] There is no provision for the routine or voluntary exchange of information between the two parties. The information sought must be 'foreseeably relevant' to:

- the determination, assessment and collection of taxes;
- the recovery and enforcement of tax claims; or

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[122] Joint Standing Committee on Treaties, above n 117, 34 and Joint Standing Committee on Treaties, *Report No 87*, 23.
[123] Aruba, British Virgin Islands, Cook Islands, Guernsey, Isle of Man, Jersey, Marshall Islands, Mauritius, and Samoa.
[124] See Treasury, 'Australian Tax Treaties', above n 71.
[125] Eg, Treasury (Cth), 'Australia-Isle of Man Tax Information Exchange Agreement' (30 January 2009) <http://archive.treasury.gov.au/contentitem.asp?NavId=&ContentID=1467>.
[126] *International Tax Agreements Amendment Act (No 1) 2009* (Cth).
[127] Usually Article 5(1) of Australia's Agreements.
[128] Usually Article 3(1) of Australia's Agreements.

- investigation or prosecution of tax matters.[129]

All information is to be treated confidentially by all parties and cannot be disclosed to a third jurisdiction without the consent of the Requested Party.[130] Countries cannot engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of the specific taxpayer. However, it is irrelevant whether the conduct being investigated is a crime under the domestic law of each treaty partner.[131] Where the information available is insufficient to enable compliance with the request, each partner must use all relevant information gathering methods to furnish details to the other, even where it is not needed for domestic tax purposes.[132] The costs incurred in providing assistance are subject to agreement and arrangements vary in Australia's TIEAs.[133] Tax authorities may be permitted to enter the other jurisdiction to interview individuals and examine records with the consent of the persons concerned.[134]

A Requested Party cannot be required to obtain information:

- the Applicant Party would be unable obtain under its own laws;
- that would disclose any trade, business, industrial, commercial or professional secret or trade process;
- subject to legal professional privilege;
- where the disclosure would be contrary to public policy; or

[129] Usually Article 1 of Australia's Agreements.
[130] Usually specified in Article 8 of Australia's Agreements.
[131] Usually Article 1 of Australia's Agreements.
[132] Usually Article 5(2) of Australia's Agreements.
[133] Usually Article 9 of Australia's Agreements.
[134] Usually Article 6 of Australia's Agreements.

- where the it is to be used to enforce a law that discriminates against a national of the Requested Party.[135]

The Requested Party cannot refuse the information on the basis that the claim is being disputed.

As at 1 July 2012 the ATO had made 53 exchange of information requests to 13 different TIEA jurisdictions, with several leading to significant assessments being issued by the ATO.[136] The Commissioner has also expressed the view that:

> In the majority of cases our TIEA partners have shown a high level of co-operation including providing additional information relevant to the request and in processing requests promptly.[137]

To date there is no reported litigation related to obtaining tax information through TIEA requests.

4.2. Article 26 of the OECD Model Convention

As well as entering into TIEAs, the Australian government has placed an increased priority on exchange of information arrangements when negotiating DTAs. Currently, Australia has 44 comprehensive double taxation agreements (DTAs) and the special treaty with East Timor (governing activities in the Timor Sea).[138] The revised Article 26[139] has been generally adopted in the 2009 DTA with New Zealand (that carried forward the 2005 amended provisions), Norway, France and Finland in 2006,

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[135] Usually Article 6 of Australia's Agreements.

[136] Commissioner of Taxation, above n 118. The main jurisdictions to which TIEA requests were made: British Virgin Islands (16 requests); Bermuda (11 requests); Isle of Man (7); and Jersey (6).

[137] Ibid.

[138] Treasury, 'Australian Tax Treaties', above n 71.

[139] Article 26 was adopted by the OECD on 28 January 2003 following the OECD report, *The 2002 Update of the Model Convention* (OECD, 2002). The history and operation of Article 26 is briefly explained on the OECD website, above n 74.

Japan and South Africa in 2008, Belgium and Singapore in 2009, Chile, Malaysia and Turkey in 2010 and India in 2011. Australia's ability to upgrade some older treaties is limited by Australia's current treaty policy of not negotiating or renegotiating with countries that do not have robust internal information gathering powers and where bank secrecy rules operate.[140]

4.2.1 Scope of Article 26

Article 26(1) of the OECD Model Convention requires the competent authorities of the Contracting States to exchange information that is *forseeably relevant* for carrying out the provisions of the treaty or for the administration or enforcement of the domestic tax laws, provided the tax imposed is not contrary to the treaty. It allows for the exchange of third party information and spontaneous exchanges.

The standard of foreseeable relevance is intended to ensure that information may be exchanged to the widest possible extent. The information allowed to be exchanged does not have to concern a resident of either State and includes information in respect of every tax imposed by the Contracting States, not just those taxes dealt with under the treaty. However, competent authorities are not required to respond to an information request from the other country which is unlikely to be relevant to the tax affairs of a taxpayer, or to the administration and enforcement of tax laws.[141]

[140] Eg, the tax treaties with the Philippines and Indonesia.

[141] Despite the existence of the new Article 26 in the DTA between Singapore and India the High Court of Singapore in *Controller of Income Tax v AZP* [2012] SGHC 112 could not find the 'requirement of foreseeable relevance' despite unsigned transfer instructions remitting funds to Company X's Singapore bank account where an Indian national did not admit to any connection between himself and Company X. This and another transfer were amongst documents seized from the Indian national and three other associates.

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Although Article 26 does allow for the exchange of information on a wider range of taxes any information provided under a tax treaty must relate to taxes to which the treaty applies.[142] However, the exchange of information article in some of Australia's more recent treaties contemplates exchange of information on taxes not enumerated in those treaties, as long as the tax is 'not contrary to the Convention'.[143] GST or Value Added Tax (VAT) information can only be exchanged under the treaties which expressly permit its exchange (ie, New Zealand, South Africa, Turkey, Norway, France, Finland and Japan).[144] However, although as a number of treaties only cover income tax information, some GST or VAT information can still be obtained.[145]

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[142] Practice Statement PS LA 2007/13: Exchange of Information with Foreign Revenue Authorities in Relation to Goods and Services Tax under International Tax Agreements, [28(a)].

[143] For example the tax treaties with New Zealand (Article 26(1)) and Chile (Article 26(1)) both of which also state that 'the exchange of information is not restricted by Articles 1 and 2' (which respectively list the persons and taxes the treaties cover).

[144] The access to information relating to GST and VAT taxes is achieved by either Article 26 prescribing that the exchange of information is not restricted by Article 2 (Taxes covered Article) or by inserting a specific paragraph in Article 2 that widens the scope of taxes covered specifically for the purposes of Article 26, eg, the tax treaties with France (Article 2(3)), Finland (2006) (Article 2(4)), Norway (2006) (Article 2(4)), South Africa (Article 2(4)) and Turkey (Article 2(3)).

[145] Eg, the tax treaties with Germany and Papua New Guinea. However, Practice Statement PS LA 2007/13, above n 142, [7]–[9], identifies two classes of GST information that may be sent to foreign tax authorities or other foreign government agencies outside the express treaty authority. These classes are information that has already been made publicly available and information that does not directly or indirectly identify a taxpayer or other person even if the information is not publicly available (eg, statistics about the GST paid by businesses in various industries or a description of a scheme whose participants cannot be identified directly or indirectly). The process for seeking voluntary co-operation from foreign sources for GST information, without the backing of a treaty, is set out in Practice Statement PS LA 2007/14: Gathering

Further the requested State is required to use its information gathering measures to obtain the requested information, even though it may not need such information for its own domestic tax purposes by Article 26(4) of the OECD Model Convention. The obligation is subject to the limitations in Article 26(3) but the limitations cannot be construed to permit a requested State to decline to supply information solely because it has no domestic interest in such information.

Issues with bank secrecy laws are overcome by Article 26(5) of the OECD Model Convention which ensures that Article 26(3) cannot be used to prevent the supply of information solely because the information is held by institutions such as banks, other financial institutions or nominees. Also, the competent authorities can exchange information that relates to transactions or events occurring prior to entry into force of the treaty.[146]

As the information must be transmitted through the competent authority,[147] underlying Article 26 is a requirement for the competent authority (the ATO) to enter into a range of exchange of information protocols (memorandums of understanding) in order to reinforce exchange protocols by providing for a range of mechanisms to facilitate the exchange of information, usually spontaneously.[148] These protocols are normally supported by internal controls, including instructions to ATO staff.[149]

4.2.2 Limitations on Article 26

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and use of information from foreign agencies or sources in relation to goods and services tax, wine equalisation tax and luxury car tax administration.

[146] See 2010 OECD Commentary on Article 26, [10.3].

[147] PS LA 2007/13, above n 142, [28(b)] and [(c)].

[148] For a more detailed explanation of the process for exchange see Farrell, above n 85, 5 to 7.

[149] Eg, PS LA 2007/13, above n 142.

Despite the potentially wide scope of Article 26 there remain a number of limitations on its use.

First, the exchanged information must be 'foreseeably relevant' to the administration or enforcement of the tax laws of the other country. This means the requesting country must establish that the information is of some demonstrable benefit or assistance to that country. A recent decision by the High Court of Singapore indicates that requested State can still demand a high standard of relevance before it is willing to release information.[150]

Secondly, the secrecy and privacy rules in respect of exchange of any material are generally tighter than that contained in the general Australian tax law.[151] Article 26(2) of the OECD Model Convention requires any information received by a Requesting State to be treated as secret in the same manner as information obtained under the domestic laws of that State. It can only be disclosed to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution of, the determination of appeals in relation to, the taxes referred to in Article 26(1). However, the information can be used for non-tax purposes if authorised by the competent authority of the supplying country.

The third limitation is set out in Article 26(3) of the OECD Model Convention. Under Article 26(3), Article 26(1) and (2) cannot be construed as imposing on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative

[150] *Controller of Income Tax v AZP* [2012] SGHC 112.

[151] It is not possible to divulge the details of specific exchanges that have been made using our tax treaty network, as that would be a breach of Australia's international treaty obligations to foreign governments – see Item 5 of the ATO, National Tax Liaison Group meeting minutes of 20 March 2007.

practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

Fourthly, there are a number of legal avenues that impact upon the effective use of Article 26. They include legal professional privilege[152] and challenges under administrative law.[153]

[152] In the long running litigation regarding Mr Petroulias relating to his conduct as an Assistant Commissioner of Taxation and as an officer of the ATO the ATO had sought the assistance of the New Zealand Inland Revenue Department (IRD) in 2004 to obtain documents held in New Zealand. In *Petroulias v FCT* [2010] FCA 1464, Mr Petroulias had sought an interlocutory injunction to restrain the Commissioner from accessing the documents received by the Commissioner from the IRD on the basis of a claim of legal professional privilege. As part of this litigation the request made by the ATO under Article 26 of the Australia New Zealand DTA was considered valid. On appeal, the Federal Court in *Petroulias v FCT* [2011] FCA 795 held that Mr Petroulias should be able to argue the claim of legal professional privilege before the Full Federal Court.

[153] In a recent case arising from Project Wickenby the ATO's use of Article 26 (Article 27 in the 2003 Australia United Kingdom DTA in question) was tested from an administrative law perspective. In *Hua Wang Bank Berhad v Commissioner of Taxation (No 2)* [2012] FCA 938 it was claimed that the Commissioner's power to make a request was ultra vires where that request was made where his sole or dominant purpose was to gain an advantage in current legal proceedings (in this case under Part IVC of the *Tax Administration Act*). In dismissing this aspect of the proceedings the court held at [33]-[39] that this proposition may be arguable but on the facts before it

4.3 Section 23 of the *International Tax Agreements Act 1953* (Cth)

The final aspect of the change was the enactment of s 23 of the *International Tax Agreements Act* to ensure that the domestic law's access to information regimes supported both Article 26 and TIEAs.[154] Section 23(1) expressly authorises the Commissioner to use the domestic information gathering provisions for the purpose of gathering information to be exchanged under both DTAs and TIEAs. The information provided is not restricted to information relating to Australian tax.[155] The 'information gathering provisions' are any taxation law provision that allows the Commissioner to:

- access land, premises, documents, information, goods or other property;
- require or direct a person
- require or direct a person to appear before the Commissioner or an officer and give evidence or produce documents.[156]

The term 'taxation law' is also broadly defined by reference to the definition in the *Income Tax Assessment Act 1997* (Cth) (*ITAA 1997*) to be any act administered by the Commissioner

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there was no evidence that this was the sole or dominant purpose of the Article 27 request. In considering Article 27 the Court observed at [23]-[24] that requests for information are made pursuant to the Commissioner's general power of administration and are not limited to being authorised by s 23 of the *International Agreements Act* (considered in the following section of this paper). Further the court noted at [21]-[22] that the DTA information exchange article did not of itself authorise the making of a request, rather it set out the responsibilities of the recipient of that request. This may provide fertile ground for litigation of the domestic legal basis of Commissioner's decisions to request information through the DTA provisions.

[154] By Schedule 2 of the *International Tax Agreements Amendment Act (No 1) 2006* (Cth).

[155] *International Tax Agreements Act*, s 23(3).

[156] *International Tax Agreements Act*, s 23(4).

and any regulation made under such an Act; thus, the potential scope of the information that may be exchanged is wide and includes information regarding the GST.

Finally, when s 23 of the *International Tax Agreements Act* was inserted in 2006 s 23(2) ensured that the disclosures would not violate the secrecy provisions. Section 23(2) was repealed in 2010 by the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth) that consolidated tax secrecy and disclosure provisions into a revised Div 355 of Schedule 1 of the *Taxation Administration Act*.

4.4. Summary

The foregoing analysis demonstrates that there has been significant recent activity and effort devoted to the negotiation and use of bilateral agreements for the exchange of tax information. Given that these changes have evolved in less than 15 years and change is gaining pace with the increased prominence given to multi-lateral agreements; a touch of alchemy may present in this evolution.

5. ALCHEMY OR EVOLUTION? CONCLUSION

By adopting the model TIEAs and having enacted the domestic legislation and procedures to support the adoption of the new Article 26 in DTAs entered into since 2005, Australia has, for those new agreements, internationalised its exchange of information powers. This represents a step in the evolution of Australia's exchange of information powers rather than some quantum leap (alchemy).

Firstly, this internationalisation only applies to those new agreements. Gradually, through the re-negotiation of pre-existing DTAs (on average a DTA has currency for 30 years) and the entering of new TIEAs this internationalisation will spread (most likely slowly in the case of DTAs). Secondly, internationalisation was occurring prior to these initiatives. They seek to enhance pre-existing measures and strategies in the

arena of international information sharing. Thus it is unlikely there will be a marked sudden change of practice.

Of greatest concern is whether the use of these internationalised powers will be operationally effective. The first point to be made is that the powers must be used. They are not self-actuating, they are investigatory tools. It is their successful application that will assist in changing taxpayer behaviour as well as raising revenue.[157] Associated with the first point is that the use of these powers is complicated. They are not exercised unilaterally. They require continuing mutual cooperation between jurisdictions and the associated international relationship development and management, both of which are resource (expensive) intensive. The ATO appears to have devoted considerable effort to the development and maintenance of these relationships with nearly 90 tax information exchange partners. The need for them is clearly demonstrated in scenarios such as are being raised in Project Wickenby[158] and the fact that in 2008 alone Australians transferred over AUD 16 billion to tax havens.[159]

There are questions as to whether Article 26 and the TIEAs will have any major impact.[160] The former Commissioner was at

[157] Assistant Treasurer, above n 7.

[158] As at 31 May 2013 the ATO reports that Project Wickenby had raised than AUD 703 million of outstanding revenue against a target of AUD 568.7 million: ATO (May 2013) <http://www.ato.gov.au/General/Tax-evasion-and-crime/In-detail/Tax-crime/Project-Wickenby/?page=17#Ongoing_compliance>. Unfortunately these raw numbers do not break down further to distinguish between cross-border and domestic recoveries.

[159] Assistant Treasurer, above n 7.

[160] Andrew Mills, 'International Acts: Current Developments in Tax Treaties' (Paper presented at the Taxation Institute of Australia's National Convention, 13 March 2008) argues that in the context of discovery of documents the new Article 26 seems to have little impact. In the lead up to making its decision in *Avowal Administrative Attorneys Ltd and Ors v District Court at North Shore and CIR* (2007) 23 NZTC 21-616, the High Court of New Zealand considered the application of the new Article 26 in *Avowal Administrative Attorneys Ltd*

least optimistic. In a recent speech the then Commissioner made the point that the ATO was active and enthusiastic in its exchange of information under DTAs. In fact some of Australia's major treaty exchange partners had presented the ATO with a series of 'meritorious achievement' awards.[161] In the same speech the Commissioner referred to the use of the DTA provisions by the ATO, including a case where requests were made to multiple treaty partners to establish residency.[162]

Finally, although the growth in information exchange may lead to more effective enforcement of existing laws, the changes in access to the information will not of its self stop tax arbitrage. The source of this arbitrage can be attributable to a combination of:

- inadequate domestic residence and source 'rules';
- cross border domestic residence and source 'rules' mismatches; and
- domestic courts encountering difficulties in applying OECD Guidelines in the context of aged domestic transfer pricing legislation.

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and Ors v District Court at North Shore and CIR CIV-2006-404-007264 (unreported interim judgment delivered in 2007). The issue before the Court was whether documents containing ATO requests for information, which were the basis upon which searches were performed on the taxpayer's premises, could be the subject of an order for discovery against the New Zealand Commissioner of Internal Revenue. The High Court concluded they were bound by the decision of the Court of Appeal case of *CIR v ER Squibb* (1992) 14 NZTC 9. Consequently, the law in relation to the discovery of documents containing information requests under the Australia-New Zealand DTA would appear to remain the same as it was prior to the latest protocol.

[161] The treaty partners referenced were the US, the UK and Japan; Commissioner of Taxation, above n 118.

[162] The treaty partners included the UK, Netherlands and New Zealand and related to AUD 26.5 million in undeclared income; ibid.

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The prominence and framework of tax information access and exchange has evolved as the environment in which Australia's tax laws operate has changed through the internationalisation of commerce. It may be that only by reforming the domestic law will true alchemy be achieved by reducing the opportunities for tax arbitrage.