

# Exchange of Information Agreements with Tax Havens: How Will this Affect the Rights of Non-Resident Taxpayers and Investors?

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*The Organisation for Economic Cooperation and Development (OECD) appears to have been successful in convincing tax havens and countries with strict bank secrecy laws to exchange information on non-resident taxpayers, investors and businesses using their financial services. As at 18 August 2010, the OECD have confirmed that more than 320 Tax Information Exchange Agreements (TIEAs) and 150 Double Taxation Conventions that incorporate the new transparency standards have been signed between OECD member countries and non-OECD member states since 2006.<sup>1</sup> While this situation may be good for tax administrators in the pursuit of their goal of maximising the collection of tax revenue, the main question examined in this paper is where does it leave the non-resident taxpayer and foreign investor in terms of their right to privacy and the right to maintain the confidentiality of their financial and banking details? The Australian Taxation Office (ATO) has statutory powers that provide an extensive right to access information about a taxpayer's dealings both within Australia and overseas. 'Operation Wickenby', a joint operation between the ATO, the Australian Crime Commission, the Australian Federal Police and a number of government agencies is trying to detect Australian taxpayer's operating foreign bank accounts and evading income tax through the use of tax havens.<sup>2</sup> One of the major concerns about the exchange of information agreements is that tax authorities may be able to access information about their resident taxpayers without restriction and without the taxpayer being given the right to intervene or be consulted. This paper will commence with a brief examination of the existing rights that the domestic taxpayer possesses to maintain the confidentiality of their financial affairs, as well as the powers of the ATO to obtain information from taxpayers and third parties. The paper will then assess whether the OECD's 'model exchange of information agreements' and the new Article 26 of the Double Taxation Agreements will adversely affect the rights that the taxpayer currently possesses.*

## 1 INTRODUCTION

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<sup>1</sup> OECD, *Promoting Transparency and Exchange of Information for Tax Purposes*, 18 August 2010 <[www.oecd.org](http://www.oecd.org)>.

<sup>2</sup> 'Operation Wickenby' is discussed in more detail later in this paper. For more information see <<http://www.ato.gov.au/corporate/content.asp?doc=/content/00220075.htm&page=3&H3>>.

The OECD and the European Union (EU) are anxious to end the movement of capital to low or no tax jurisdictions that have strong bank secrecy laws. The OECD's harmful tax competition project has been successful in convincing tax havens and Offshore Financial Centres (OFCs) to exchange bank details with OECD member states by way of bi-lateral agreements. The OECD can claim to have had success with the Caribbean Community and Common Market (CARICOM) states of the Caribbean and more recently, with the assistance of the G20 nations, success with the European countries with strong bank secrecy laws. It would appear that with the agreement by Switzerland, Austria and Luxembourg the days of tax havens not being prepared to exchange information on non-resident taxpayers is coming to an end. The G20 Ministers at the London conference announced that 'the era of banking secrecy is over'.<sup>3</sup> The harmful tax competition initiative generated by the OECD has been viewed as the destruction of privacy because it requires these sovereign states to breach confidentiality by disclosing bank account information.<sup>4</sup>

The Australian Commissioner of Taxation has appealed to tax agents in Australia to 'dob'<sup>5</sup> in tax scheme promoters and clients with undeclared overseas income. This statement was made as part of the offensive by the Australian Taxation Office (ATO) against tax havens which receive up to \$5.3 billion a year from Australia.<sup>6</sup> The ATO encourages the public to report suspected tax cheats either by telephone or through the internet. However, tax agents now have a separate line to report suspect action of other tax agents or even their own clients.<sup>7</sup> If this approach was to be accepted by tax agents in Australia, what are the implications for both the taxpayers and the tax adviser and accountants? It is contended in this paper that tax advisers and accountants owe a fiduciary duty to their clients who require them to maintain the confidentiality of their financial information. However, should they place their clients first or do they have a higher duty to the community and in turn the ATO, which requires them to report the conduct of their client if their client's activities will result in not paying the correct amount of tax.

By way of contrast, the Internal Revenue Service in the USA pays a reward to tax informers and the Service has been doing this since 1867.<sup>8</sup> More recently the Bush administration introduced the *Tax Relief and Health Care Act 2006* which amended the previous informant reward program and introduced a 'whistleblower' program with rewards of up to 30 per cent

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<sup>3</sup> G20 Declaration: *The Global Plan for Recovery and Reform London*, UK, 2 April 2009, para 15.

<sup>4</sup> Terry Dwyer, "'Harmful" Tax Competition and the Future of Offshore Financial Centres' (2002) 5(4) *Journal of Money Laundering Control* 302, 308.

<sup>5</sup> The term 'to dob' is Australian slang for to report or to inform someone in authority about a person's behaviour.

<sup>6</sup> Fleur Anderson, 'ATO Urges Tax Agents to Dob in Cheats', *Australian Financial Review* Sydney, 9 October 2007, 1.

<sup>7</sup> However, according to Justin Dabner this may have been put on hold as a result of opposition from the accounting profession. See Justin Dabner, 'Partner or Combatants: A Comment on the Australian Tax Office's View of its Relationship with the Tax Advising Profession' (2008) 3 *Journal of the Australasian Tax Teachers Association* 76.

<sup>8</sup> Kneave Riggall, 'Should Tax Informants Be Paid? The Law and Economics of a Government Monopsony' (2008–2009) 28 *Virginia Tax Review* 237, 239.

of the tax, penalties and interest collected.<sup>9</sup> As a countervailing measure, US State parliaments have specifically enacted laws making it a crime for accountants and lawyers to disclose confidential information about their clients in relation to taxation matters.<sup>10</sup> Accountants and lawyers in Australia have a similar duty to maintain the privacy and confidentiality of their clients' details. It is contended that in most cases these duties are based on the fiduciary relationship they have with their client.

There are established mechanisms that enable tax administrators in one country to obtain financial information about the business and investment activities of their own taxpayers in another country. This is achieved through a Double Taxation Agreement (DTA). One of the main purposes of a DTA is to provide the contracting states with the right of the home state to obtain financial and banking information about their residents engaged in business or investment activities within the territory of the other contracting state. Therefore, within countries with DTAs the taxpayer has always been liable to have their foreign financial information disclosed to the tax administration in their home state. However, one of the main features of tax havens is that they have not actively entered into DTAs with other countries for this very reason.

It should also be noted that tax havens and OFCs generate substantial income from the provision of banking, financial, legal and accounting services. In effect the tax avoidance and tax evasion industry provides the income for tax havens and OFCs to survive and prosper, and in many cases this is the main generator of the country's revenue. It is understandable that tax havens have strong bank secrecy laws and an incentive to maintain the privacy of their non-resident taxpayers.

The second and third parts of this paper will discuss the rights to privacy that existing taxpayers have both from a domestic perspective and an international perspective. The fourth part of the paper will examine the likely impact the OECD initiated 'exchange of information agreements' will have on the rights of privacy and confidentiality of non-resident taxpayers and investors operating in the international arena.

## **2 THE RIGHTS OF THE TAXPAYER – THE AUSTRALIAN POSITION**

Australia has a 'self-assessment' system of taxation in that all income tax returns as well as Fringe Benefit Tax returns, Goods and Services Tax and Business Activity Statements are accepted at face value and are not subject to immediate scrutiny. This means that the Commissioner of Taxation has certain powers to check the veracity of claims by taxpayers.<sup>11</sup> There is very little that the ATO does not know about the finances of the individual and with developments in exchanging information between Australia and other countries, even foreign finances will be part of the vast amount of information gathered by the ATO each year. Even when visiting accountants or lawyers stay in Australia their client lists, which may be stored

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<sup>9</sup> Ibid 241.

<sup>10</sup> Ibid 274.

<sup>11</sup> Reynah Tang, 'The Commissioner's Power to Access Taxpayer Information from Third Parties and a Taxpayer's Right to Privacy – A Case for Reform?' (2005) 34 *Australian Tax Review* 20, 20.

on a data file on their laptop computer, can be seized by the police and used in the prosecution of Australian taxpayers.<sup>12</sup>

The crucial issue with the collection of taxes and administering the tax law is to balance the rights of the taxpayer with maximising the collection of revenue. The rights of the Australian taxpayer are discussed briefly in this part of the paper.

## 2.1 The Taxpayers' Charter<sup>13</sup>

The Taxpayers' Charter outlines the relationship the ATO seeks with the community, and is stated to be one of mutual trust and respect. To this end, the Charter sets out the taxpayers' rights under the law; the service and other standards taxpayers can expect from the ATO; what taxpayers can do if they are dissatisfied with the ATO's decisions, actions or service, or if they wish to complain; and taxpayers' important tax obligations.

The Charter contains two specific rights relating to privacy and confidentiality. At point 5, the ATO assures taxpayers that they respect their privacy and that they are collecting the information in a fair and lawful way that is not unreasonably intrusive and furthermore will advise the taxpayer of the reason why the information is being collected, especially from third parties, and the purpose to which the information will be used. At point 6, the ATO assures taxpayers that all information collected will be kept confidential unless the disclosure is authorised by the law.

One main issue that is at odds with the right of the taxpayer to privacy, and is contrary to the concept of mutual trust and respect as contained in the Taxpayer's Charter, is the ease by which information about a taxpayer can be obtained from third parties.<sup>14</sup> Taxpayers are not given notice of the ATO's intention to obtain information from third parties and third parties are placed in a position of possibly infringing their obligations under the *Privacy Act 1988* (Cth) by not informing the taxpayer of the situation and obtaining their consent. Tang argues that taxpayers should have the right to contest the release of information in what has been described as a 'reverse-FOI procedure'.<sup>15</sup> This approach is in line with the Australian Law Reform Commission report on privacy in advocating that all personal information should be kept confidential and that a person affected by disclosure of that information by a third party should be subject to objection by the person so affected.<sup>16</sup> However, the ATO would contend that in order to effectively collect revenue in some cases the taxpayer should not receive advance notice.

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<sup>12</sup> *Egglisshaw v Australian Crime Commission* [2006] FCA 819.

<sup>13</sup> Australian Taxation Office, 'Celebrating the 10<sup>th</sup> Anniversary of the Taxpayers' Charter' <[www.ato.gov.au/print.asp?doc=/content/86369.htm](http://www.ato.gov.au/print.asp?doc=/content/86369.htm)>.

<sup>14</sup> Tang, above n 11, 27.

<sup>15</sup> *Ibid* 26.

<sup>16</sup> Australian Law Reform Commission, Report No. 108, *For Your Information: Australian Privacy Law and Practice* (ALRC, 2008).

## 2.2 Duty of confidentiality

It is not proposed to discuss breach of confidence actions in detail or to examine the concept of information as ‘property’ in the context of an analysis of the rights of taxpayers. It is well established in the common law that trade secrets and commercial intellectual property are protected by breach of confidence actions. Similarly, certain private and public organisations are governed by the *Privacy Act 1988* (Cth) in order to protect the confidentiality of confidential information. This issue was discussed in some detail by Tang, as well as the fact that organisations breach their legal obligation to maintain the privacy of information of individuals when served with notices under s 263 or s 264, *Income Tax Assessment Act 1936* (Cth) (ITAA 36).<sup>17</sup> The protection of the public revenue is paramount, and rights provided by the privacy legislation are secondary. The coercive powers under s 263 and s 264 provide access powers beyond those provided to the police. The police require a search warrant to access information for criminal proceedings, but such warrants are not required by the ATO when the revenue is being threatened.<sup>18</sup> However, the focus of this section is to examine what protection the law provides to a taxpayer in their confidential dealings with their tax adviser.

It is established law that certain people or institutions have a duty to keep information confidential.<sup>19</sup> This duty is based on trade secrets; and the existence of a special relationship such as lawyer and their client; accountant and their client, or a director and the company.<sup>20</sup> If a tax adviser or accountant were to take notice of the Commissioner of Taxation’s advice and report their clients that have foreign undeclared income then they would breach their duty of confidentiality. If the adviser and client are in a fiduciary relationship, then the taxpayer can take legal action on the basis of the special relationship. However, if that special relationship does not exist, the taxpayer must then rely on the common law to provide the basis for legal action for breach of confidence.

## 2.3 Fiduciary relationship – accountants, tax agents and lawyers

It is contended in this paper that accountants, tax agents and tax advisers are in a fiduciary relationship with their clients, the taxpayer. Moreover, it is equally contended that book-keepers engaged in preparing Business Activity Statements (BAS) are also in a fiduciary relationship with their clients. The High Court in the case of *Hospital Products Limited v Unites States Surgical Corporation* (1984) 156 CLR 41, especially in the judgment of Mason J, summarised the essence of a fiduciary relationship.<sup>21</sup>

In the case of *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165, Kirby J examined in detail the tests to be used in determining the existence of a fiduciary relationship.<sup>22</sup> Applying

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<sup>17</sup> Tang, above n 11, 22.

<sup>18</sup> Ibid 23.

<sup>19</sup> P D Finn, ‘Confidentiality and the “Public Interest”’ (1984) 58 *Australian Law Journal* 497, 508.

<sup>20</sup> Ibid.

<sup>21</sup> (1984) 156 CLR 41, 96.

<sup>22</sup> *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165, 217.

the tests as enunciated by Kirby J, it can be strenuously argued that an accountant, registered tax agent, tax adviser and registered bookkeeper stand in a fiduciary relationship with their clients. As such, the duty to maintain the privacy and confidentiality of their clients' personal financial details is of paramount importance. If they fail to uphold this duty then they should face the prospect of being sued for damages and be investigated and sanctioned by the appropriate professional body for misconduct.

## **2.4 Information gathering powers of the ATO**

Taxpayers in Australia have virtually no power to prevent the ATO from accessing information from them or third parties or to prevent evidence from being provided to the ATO. Sections 263 and 264 of the *Income Tax Assessment Act 1936* (Cth) (ITAA 36) provide the ATO with coercive power to obtain information from the taxpayer and third parties. Section 263 allows the Commissioner or his delegate to enter buildings and take copies of documents, records and data stored on computers, provided it is undertaken for the purpose of administering the *Income Tax Assessment Act* of 1936 or 1997. Section 264 requires the recipient of the notice, being either the taxpayer or a third party, to provide information to the Commissioner. Section 8C of the *Taxation Administration Act 1953* (Cth) (TAA) makes it an offence to refuse to comply with the notices. A taxpayer served with a notice pursuant to s 263 or s 264 has the right to claim legal professional privilege to maintain the confidentiality of certain documents.<sup>23</sup> The privilege against self-incrimination is abrogated by virtue of s 8C. In fact, failure to comply with either a s 263 or s 264 notice is a strict liability offence under s 8C, TAA. The implications for claiming legal professional privilege or the privilege against self-incrimination and the way in which taxation law takes precedence over the rights of the taxpayer are discussed below.

Under these coercive powers, a taxpayer does not have the ability to remain silent or the ability to claim the privilege against self-incrimination. If a taxpayer fails to comply with either a s 263 or s 264 notice, they face prosecution under s 8C of the TAA.

## **2.5 Privilege against self-incrimination**

The privilege against self-incrimination is different from the common law right to remain silent. The right to remain silent simply means that a person, in the absence of some legal compulsion to answer questions from persons in a position of authority, is free to remain silent and do nothing without fear of having an adverse inference drawn at any subsequent proceeding.<sup>24</sup> The privilege against self-incrimination only arises where a person is compelled to answer questions or provide documents, as is the situation with s 263 and s 264, ITAA 36, and s 8C, TAA. The privilege is also contained in s 128 of the *Evidence Act 1977* (Cth).

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<sup>23</sup> Lisa West, 'The Commissioner's Access and Information Gathering Powers Under Sections 263 and 264 of the Income Tax Assessment Act 1936: Some Issues for Tax Advisers and Criminal Law Practitioners' (2001) 30 *Australian Tax Review* 188, 202.

<sup>24</sup> Kenneth Arenson and Mirko Bagaric, *Rules of Evidence in Australia* (LexisNexus Butterworths, 2005) 48.

The case of *Deputy Commissioner of Taxation v De Vonk* (1995) 31 ATR 481 concerned the issuing of a s 264 notice while the taxpayer, De Vonk, had been indicted for criminal offences relating to a dishonest representation to the ATO and conspiracy to defraud the Commonwealth. The taxpayer was prepared to comply with the notice once the criminal proceeding had been completed, but in the meantime argued that he had the right not to answer questions on the grounds that answers to those questions would tend to incriminate him. He further argued that the issue of the s 264 notice was an abuse of power by the ATO. In terms of whether a taxpayer has the right to refuse to comply with the s 264 notice on the grounds of self-incrimination, Hill and Lindgren JJ concluded that as a result of s 8C being inserted into the TAA in 1984, the privilege against self-incrimination had been abrogated.

In view of the finding of the majority of the Full Bench of the Federal Court in the *De Vonk* case, the privilege against self-incrimination provides no safeguard for a taxpayer facing a s 264 notice due to the effect of s 8C of the TAA. However, Hill and Lindgren JJ did find that an examination under a s 264 notice could amount to a contempt of court and an interference in the administration of criminal justice.

The only benefit a taxpayer has in relation to the privilege against self-incrimination is that a s 264 notice should not be used to obtain information in any pending or subsequent criminal prosecution otherwise the conduct by the ATO may be construed as interfering with the administration of justice. However, Lisa West contends that any evidence gathered under a s 264 notice for audit purposes could be used as evidence if a prosecution is launched, but it may be excluded by a court on grounds of unfairness.<sup>25</sup> West does concede that s 263 and s 264 notices should not be used for the dominant purpose of gathering information for criminal purposes. This view is supported by the decision of Hill and Lindgren JJ in the *De Vonk* case as stated above.<sup>26</sup>

## 2.6 Legal professional privilege

If the Commissioner of Taxation serves a notice pursuant to s 263 or s 264, ITAA 36 the only means available to an Australian taxpayer to prevent access by the ATO to certain documents and advice is to claim legal professional privilege. That privilege will prevent the disclosure of written communication between the taxpayer and their lawyer relating to certain legal advice and legal services in some instances. There are two exceptions to this privilege; the frauds and crime exception and a waiver of the privilege.

The concept underlying the justification for upholding legal professional privilege is explained by Professor Ligertwood<sup>27</sup> as the right of all citizens to obtain legal advice, which is at the core of the rule of law and protection human rights. It is especially important as a bulwark against tyranny and oppression.<sup>28</sup> If citizens are to fully understand their rights they must be encouraged to communicate with lawyers through open and frank discussions and

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<sup>25</sup> West, above n 23, 204.

<sup>26</sup> Ibid 203.

<sup>27</sup> Andrew Ligertwood, *Australian Evidence* (LexisNexus Butterworths, 4<sup>th</sup> ed, 2004).

<sup>28</sup> Ibid 275, and the case of *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 583 (Kirby J).

this can only be achieved if the communications are protected from disclosure.<sup>29</sup> Legal professional privilege is described as a ‘substantive right which applies to prevent any compulsory access to client-lawyer communications’.<sup>30</sup>

The concept of legal professional privilege has been recognised by the *Evidence Act 1995* (Cth) as providing two privileges: an advice privilege, s 118, and a litigation privilege, s 119. The sections provide for the written communications between a legal adviser and their client to be kept confidential provided the communication was made or the written advice was prepared for the ‘dominant purpose’ of the lawyer in providing that advice. It should be noted that all states and territories in Australia have similar provisions in their own Evidence Acts, commonly known as the ‘uniform Evidence Act’.

## 2.7 Exceptions to the privilege – crime and fraud

The legal professional privilege to protect written communication between a lawyer and their client is lost when the documents relate to an activity involving a crime or fraud. The privilege is also lost if the client of the lawyer waives their right to claim protection under the privilege. Both of these exceptions will be examined as they relate to the rights of taxpayers and the ATO.

In the case of *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 48 ATR 650, North J held that the crime and fraud exception prevented the legal professional privilege being used to protect certain documents between the lawyer and client from being disclosed to the Australian Federal Police even though the alleged fraud was committed by a third party.

From the perspective of the taxpayer and their right to maintain the confidentiality of certain written communications, the basis on which this exception has been applied would tend to suggest that the tax administrator has been granted an unfair advantage. This view is supported by Vincent Morfuni when he contends that the extension of the exemption of the privilege to third parties contradicts the widely held view that legal professional privilege is a fundamental right; Morfuni hopes that an appellate court will restore the exception to its traditional boundary.<sup>31</sup> Morfuni<sup>32</sup> advocates the restoration of the view taken by Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 where he stated that:

Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed, even to promote the search for justice or truth in the individual case or matter and extends to protect a citizen from compulsory disclosure of protected communications or materials to any court or

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<sup>29</sup> Ibid 274.

<sup>30</sup> Ibid.

<sup>31</sup> Vincent Morfuni, ‘Legal Professional Privilege and the Government’s Right to Access Information and Documents’ (2004) 33 *Australian Tax Review* 89, 112.

<sup>32</sup> Ibid.



to any tribunal or person with authority to require the giving of information or the production of documents or other materials.<sup>33</sup>

The Australian Crime Commission was not successful in arguing this exception in the Paul Hogan situation before Emmett J in the Federal Court.<sup>34</sup>

## 2.8 Exception to the privilege – waiver

The privilege belongs to the client and not the lawyer providing the advice.<sup>35</sup> Therefore, unless the client expressly claims the privilege, there is a presumption that it has been waived.<sup>36</sup> However, if the documents are already in the possession of the lawyer it is assumed that the privilege exists unless waived by the client.<sup>37</sup> In this situation the lawyer needs to be in a position where they can contact their client for specific instructions on claiming the privilege. Section 122 of the *Evidence Act 1995* (Cth), the uniform evidence legislation, provides for the waiver of the privilege along the lines of the common law waiver.

In the case of *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 51 ATR 593, the issue of whether the privilege was waived in a situation where written legal advice prepared by ABL was provided to a firm of accountants, PW, for further analysis. In the Federal Court of Australia Kenny J held that the client had not waived privilege in a situation where documents were provided to a firm of accountants.<sup>38</sup>

This decision is important because many taxpayers provide their accountants with copies of legal advice so that tax returns can be prepared on the basis of the legal advice provided. In such situations that legal advice retains the protection of the privilege and it would therefore not be available to the ATO. This would also apply to foreign legal advice provided to an Australian accountant for similar purposes.

## 2.9 Tax advisers and professional privilege

In June 2005 the New Zealand government introduced statutory law to extend the professional privilege to tax advisers.<sup>39</sup> The USA had extended the privilege to tax advisers from as early as 1998.<sup>40</sup> Keith Kendall contends that there is a logical argument to extend the

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<sup>33</sup> (1986) 161 CLR 475, 491.

<sup>34</sup> *A3 v Australian Crime Commission (No 2)* (2006) 63 ATR 348.

<sup>35</sup> Ligertwood, above n 27, 294.

<sup>36</sup> *Ibid* 295.

<sup>37</sup> *Ibid*.

<sup>38</sup> (2003) 51 ATR 593, 613.

<sup>39</sup> Keith Kendall, 'Prospect for a Tax Advisers' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 47. The New Zealand provisions are found in the *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* (NZ).

<sup>40</sup> *Ibid*.

privilege to tax advisers in Australia on the basis that registered tax agents are given a statutory right to provide advice on tax law and that many tax agents are not lawyers.<sup>41</sup> Section 251L(1), ITAA 36, provides a penalty for the provision of advice on taxation law by anyone other than a registered tax agent or a barrister or solicitor. Kendall is in favour of extending the privilege to non-lawyer tax advisers on the basis of their need to be registered tax agents before they can provide advice. The fact that both the USA and New Zealand have extended the privilege, coupled with the fact that the ATO recognises the role played by accountants in the taxation process, should be reason enough for the privilege to be extended in Australia. This view is also supported by the Australian Law Reform Commission as discussed in their report titled *Privilege in Perspective: Client Legal Privilege in Federal Investigations*.<sup>42</sup> It would appear that it is only a matter of time before the privilege will be extended to tax advisers in Australia.<sup>43</sup>

## 2.10 Spousal privilege

According to Professor Ligertwood, the common law sought to protect the institution of marriage by forbidding spouses from testifying for or against each other in civil or criminal cases.<sup>44</sup> Unfortunately the common law has been overruled by specific statutory provisions at the state and federal level, which makes the spouse a competent and compellable witness. The statutory law generally make the spouse a compellable witness for the defence, but the spouse can be exempted from being compelled to give evidence for the prosecution by the judge if the relationship may be harmed.<sup>45</sup>

## 2.11 Banker–customer relationship

Both resident and foreign taxpayers should be confident that their financial details will not be disclosed by their bank. The common law duty of confidence or secrecy<sup>46</sup> that a bank owes to its customers was established in the case of *Tournier v National Provincial and Union Bank of England Ltd* [1924] 1 KB 461.<sup>47</sup>

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<sup>41</sup> Ibid 52.

<sup>42</sup> Australian Law Reform Commission, Report 107  
<<http://www.austlii.edu.au/au/other/alrc/publications/reports/107/>>.

<sup>43</sup> For an extensive discussion on the New Zealand law see Andrew Maples, ‘The Non-Disclosure Right in New Zealand – Lessons for Australia’ (2008) 1 *Journal of the Australasian Law Teachers Association* 351.

<sup>44</sup> Ligertwood, above n 27, 371.

<sup>45</sup> Ibid 372.

<sup>46</sup> W S Weerasooria, *Banking Law and the Financial System in Australia* (LexisNexus Butterworths, 5<sup>th</sup> ed, 2000) 474. It is important to note that the text refers to the fact that the duty of confidence is also referred to as a duty of secrecy.

<sup>47</sup> Also [1923] ALL ER Rep 550.

There are two situations where s 263 and s 264 notices were served on banks seeking information about certain customers and the role of the bank in providing that information to the ATO created a concern for the bank in performing their duty to their customer. The first case highlighted the fact that the banker–customer duty of secrecy is overridden by statutory requirements to disclose customer information. In the case of *Smorgon v Federal Commissioner of Taxation* (1979) 9 ATR 483, the High Court of Australia held that the ANZ Bank must allow the ATO access to documents contained in a safe deposit box belonging to their customer and it did not matter that the ATO was on a ‘fishing’ expedition because they had no idea what information or documents might be found in the safe deposit boxes.

In the case of *Citibank v Federal Commissioner of Taxation* (1989) 20 ATR 292, a bank was placed in a difficult situation of not being in a position to claim legal professional privilege over documents being seized by the ATO pursuant to a s 263 notice. The ATO entered Citibank’s premises looking for documents relating to a preference share arrangement but copied other documents relating to tax minimisation. The bank’s employees were not given an opportunity to claim legal professional privilege before the copies were taken by the ATO. The Full Bench of the Federal Court, per Bowen CJ, Fisher and French JJ held that Citibank should have had an opportunity to claim privilege on behalf of their customers before copies of documents were taken and that the ATO needed to adopt guidelines in order to prevent this from happening in a similar situation in the future.<sup>48</sup>

One of the arguments in favour of using s 263 or s 264 notices is that they are quicker to obtain because they do not require the consent of a judicial officer, as is the case with obtaining a search warrant. In some situations a search warrant is used particularly when criminal activity is suspected and evidence needs to be collected for a prosecution. In that case a s 263 or s 264 notice is not appropriate.

## **2.12 Search warrants and appearances – criminal tax matters**

The use of a search warrant clearly violates the privacy of the individual and therefore there must be checks on the powers of the police. The justification for the warrant system is that it represents a control device by requiring a judicial officer, the person who issues the warrant, being convinced of the reasonableness of both the suspicion of the police and the proposed investigative action in order to provide some protection for the individual.<sup>49</sup>

The case of *Egglshaw v Australian Crime Commission* [2006] FCA 819 concerned a challenge to a search warrant pursuant to the *Judiciary Act 1903* (Cth) on the basis that the warrant was unlawful and of no effect, and that the seizure of the laptop computer and other material was unlawful. The applicant was Philip Egglshaw, a banker from Switzerland, who while staying in a hotel in Australia had his laptop computer seized under a search warrant. The computer contained a list of Australian clients using the services of Strachans bank, a bank controlled by Egglshaw and situated in Switzerland. As a result of the personal records of the Australian clients using the tax haven bank being disclosed to the Australian authorities,

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<sup>48</sup> French J, (1989) 20 ATR 292, 320.

<sup>49</sup> Jill Hunter, Camille Cameron and Terese Henning, *Litigation II: Evidence and Criminal Process* (LexisNexus Butterworths, 2005) 525.

Egglishaw, the applicant, challenged the validity of the search warrant in an attempt to protect his clients from the pending disclosure.

Sundberg J held that the Australian Crime Commission had discharged their burden of proof that their actions were lawful by obtaining a search warrant and that the applicant had the burden of showing that the warrant and actions of the officers executing the warrant was unlawful. Egglishaw was unable to convince the court that the obtaining of information contained in the laptop computer was unlawful.

### **2.13 Summons to appear – *Australian Crime Commission Amendment Act 2007 (Cth)***

Philip Egglishaw was compelled to provide evidence to the Australian Crime Commission (ACC) pursuant to s 28 of the *Australian Crime Commission Act 2002 (Cth)* (ACC Act). From this, the ACC learnt that Egglishaw's bank, Strachans, administers various companies, trusts and bank accounts based in foreign countries on behalf of, and for the benefit of, a number of Australian residents and their families. The ACC believed that the services provided by Strachans enabled Australian residents to: accumulate substantial assets overseas in companies and trusts hidden behind an impenetrable veil of incorporation; create misleading documents which assist in defrauding the Commonwealth of Australia; and access their funds administered by Strachans from anywhere in the world by the use of debit or credit cards linked to bank accounts opened and operated for them by Strachans outside Australia, including at Corner Banca, SA in Lugarno, Switzerland. Based on the information obtained from Egglishaw, the ACC commenced criminal investigations into suspected fraud and money laundering by a number of Australian residents who have utilised the services provided by Strachans and Corner Banca.

Egglishaw challenged the validity of the summons to appear, s 28, and the notice to produce documents, s 29. The matter came before Besanko J of the Federal Court and is reported in *Egglishaw v Australian Crime Commission* [2009] FCA 1027, (2009) 71 ATR 570. Egglishaw failed on all grounds to have the proceedings by the ACC declared invalid.

### **2.14 Freedom of information**

Taxpayers have a legal right to access information held by the ATO pursuant to the *Freedom of Information Act 1982 (Cth)*. However, there are a number of exemptions contained in ss 36, 37, 38, 40 and 42 that may prevent the taxpayer from being able to access all relevant information. Obviously, if the ATO has obtained legal advice from the Australian Government Solicitor (AGS) then legal professional privilege would apply. Similarly, if the Director of Public Prosecutions (DPP) provides legal advice to the ATO then the documents are privileged. This was the finding of the Administrative Appeals Tribunal (AAT) in the case of *Re Collie and Deputy Commissioner of Taxation* (1997) 35 ATR 1204. However, not only can the ATO claim an exemption from disclosing information, it can frustrate the process by charging for the retrieval of documents which in some cases can amount to tens of

thousands of dollars.<sup>50</sup> As Reynah Tang states, the taxpayer is precluded from being able to recoup the costs of complying with any ATO demands to provide information.<sup>51</sup>

## 2.15 Human rights to protect taxpayers

The United Kingdom (UK) adopted the European Convention on Human Rights in 1953, but it was not until 1998 that the UK Parliament brought into existence statutory law to incorporate the Convention with the enactment of the *Human Rights Act 1998* (UK).<sup>52</sup> The effect of the European convention was to guarantee a number of basic human rights by allowing the individual to complain about the behaviour of their own government.<sup>53</sup> Lee contends that there are three main principles for the operation of the UK *Human Rights Act 1998*: first, any statutory interpretation must find a meaning that will prevent the legislation from being incompatible with the Convention rights; second, no court is able to strike down or disregard legislation that conflicts with the Convention rights otherwise the primary or secondary legislation must be corrected; and third, the act requires all public authorities, including the Inland Revenue Service, to act in accordance with Convention rights.<sup>54</sup> However, Lee is of the opinion that taxpayers in the UK will have a bleak future in trying to use the Convention rights as a weapon against statutory provisions.<sup>55</sup> The impact of human rights legislation in Australia in relation to taxation law was considered by Farrell as potentially providing a fertile ground for tax practitioners,<sup>56</sup> and it has been raised by the Federal Court in the case of *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 ATR 292. In the judgment by French J, His Honour endorsed the need to adhere to the International Covenant on Civil and Political Rights in administering the taxation law by the ATO in Australia.<sup>57</sup>

## 2.16 Australian tax agents and tax advisers – duty to society

Tax advisers can never without the authority of their client voluntarily give information to the Commissioner no matter how inclined they may be to co-operate. The confidentially implied in the relationship of lawyer and client or accountant and client ensures this. This

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<sup>50</sup> Tang, above n 11, 24. *Re Collie and Federal Commissioner of Taxation* (2003) 54 ATR 1048.

<sup>51</sup> *Ibid.*

<sup>52</sup> Natalie Lee, 'The Effect of the Human Rights Act 1998 on Taxation Policy and Administration' (2004) 2(2) *eJournal of Tax Research* 155, 155.

<sup>53</sup> *Ibid* 157.

<sup>54</sup> *Ibid* 159–60.

<sup>55</sup> *Ibid* 181.

<sup>56</sup> James Farrell, 'Strange Bedfellows? Tax Administration and Human Rights Brought Together' (2009) 44(3) *Taxation in Australia* 147, 150.

<sup>57</sup> (1989) 20 ATR 292, 316.

confidentiality is, however, overborne by s 264.<sup>58</sup> However, in the absence of any lawful obligation to disclose confidential and private information, it is submitted that a tax agent or tax adviser must not disclose any information belonging to their client to the ATO. The following statement by A J Myers QC on the duty owed by a tax adviser to their client provides the most appropriate answer to the conflict between a duty to society and a duty to the taxpayer:

A legal adviser in the field of taxation or anything else has two main duties: to advise his client to the best of his knowledge and ability, and to uphold the law. There is no conflict between those roles, properly understood. The adviser upholds the law by advising his client to the best of his knowledge and ability.<sup>59</sup>

## 2.17 Conclusion

From the above analysis of the rights that a taxpayer possesses to maintain the privacy and confidentiality of their financial information, the right to claim legal professional privilege over certain information provides the only form of protection for a taxpayer. However, the crime and fraud exception severely weakens this privilege. The crime and fraud exception was defeated by Paul Hogan who was successful in claiming the privilege in an action by the ACC to use materials they had seized as part of 'Operation Wickenby'. The privilege was upheld by Emmett J in the Federal Court proceedings, *Hogan v Australian Crime Commission (No 4)* (2008) 72 ATR 107, and the ACC abandoned further action against the decision in the subsequent High Court proceedings instituted by Paul Hogan to prevent the disclosure of documents that had been produced in evidence: *Hogan v Australian Crime Commission & Ors* [2010] HCA 21.

The coercive powers that the ATO has to obtain information and the powers that are available in criminal cases far outweigh the rights a taxpayer has to maintain the confidentiality of their financial information.

## 3 THE RIGHTS OF THE TAXPAYER – THE INTERNATIONAL POSITION

With the OECD being successful in having all OECD member states accepting the revised Article 26 of the Double Taxation Agreement on the exchange of information and having signed more than 320 tax information exchange agreements, what then are the chances of a non-resident taxpayer being able to maintain the confidentiality of their banking details? This is one of the main issues to be examined in this part of the paper. The international situation is further complicated by the fact that some countries are willing to disclose information on banking details if the request involves a criminal tax matter but refuse to co-operate if it is merely a civil tax matter. However, the emphasis of the Australian government on categorising all forms of tax minimising, tax avoidance and tax evasion as constituting a criminal act is designed to overcome this particular reservation and to succeed in obtaining

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<sup>58</sup> D G Hill, 'The Role and Responsibility of the Tax Practitioner' (1984) *Taxation in Australia* 298, 311.

<sup>59</sup> A J Myers, 'Tax Advice: The Lawyer's Ethical Responsibility' (1990) 19 *Australian Tax Review* 80, 87.

information from other countries. This particular issue will not be discussed in this paper as it has been discussed in detail elsewhere.<sup>60</sup>

### **3.1 The OECD and a level playing field**

In their recent report, *Tax Co-operation 2009: Towards a Level Playing Field*, the OECD highlighted the reason why transparency and exchange of information agreements were so important for the collection of revenue. The following statement illustrates this point:

International banking has become commonplace and it is no longer extraordinary for taxpayers to reside in one country, hold assets in another and have them managed from a third location. ... But regardless of why taxpayers situate their assets beyond the boundaries of their own residence country, the result is that tax administrations around the world face more and greater challenges to the proper enforcement of their tax laws than ever before. To meet these challenges, tax authorities must increasingly rely on international co-operation based on the implementation of international standards of transparency and effective exchange of information.<sup>61</sup>

The OECD's standards for transparency and information exchange are contained in the progress report. The standards are supported by the European Union, the G8, the G20 and the UN. They require that: countries have a mechanism for exchanging information on request; the information will relate to domestic tax matters of a civil and criminal nature; there will be no restriction caused by the application of the dual criminality principle or domestic tax interest requirement; there will be respect given to safeguards and limitation; strict confidentiality rules will apply; and countries will make available reliable information such as ownership, identity and accounting information and powers to obtain and provide such information in response to a specific request.<sup>62</sup>

### **3.2 Double Taxation Agreements – Article 26**

Double Taxation Agreements (DTAs) are entered into between two nations for the avoidance of double taxation and the prevention of fiscal evasion. The following article relating to the exchange of information is only relevant where there is in existence a DTA. Australia does not have a DTA with tax havens, although there is a DTA between Australia and Switzerland. However, in the case of tax havens other 'exchange of information agreements' are used to try to achieve a similar outcome. The new Article 26 for the exchange of information requires the contracting state to provide information when requested on financial and banking information even if held in a nominee capacity. Article 26 strengthens the ability of the requesting state to obtain banking information and the contracting state has no justification to deny the supply of that information to the requesting state.

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<sup>60</sup> For a full discussion on the blurring of tax avoidance and tax evasion see: John McLaren, 'The Distinction Between Tax Avoidance and Tax Evasion Has Become Blurred in Australia: Why Has it Happened?' (2008) 3(2) *Journal of the Australasian Tax Teachers Association*, 141.

<sup>61</sup> OECD, *Tax Co-operation 2009: Towards a Level Playing Field* (OECD, 2009) 9.

<sup>62</sup> *Ibid.*

What rights does a non-resident taxpayer or foreign investor have to be involved in the process whereby information has been requested from a contracting state by the country of residence and that information may be privileged or of no relevance to a taxation matter? According to Branson, some countries will provide the taxpayer with notification that their financial details are being requested by another state except in the case of fraud.<sup>63</sup> The following countries provide some type of prescribed notification to taxpayers when a request for information has been made: Germany, Luxembourg, Portugal, The Netherlands, Sweden, Switzerland and the United States.<sup>64</sup> Branson discusses the possibility of providing the taxpayer with a right to notification, a right of consultation or a right of intervention and concludes with the finding that at present Australian taxpayers have no right to participate in the process whereby information is made available under the DTA. Branson discusses the fact that in Germany, The Netherlands, Portugal and Switzerland the government has introduced regulations giving rights of participation and The Netherlands and Switzerland have provided laws to govern obtaining court orders to prevent or control the transfer of information.<sup>65</sup> An Australian taxpayer or foreign investor would have no knowledge of the fact that their financial information was being requested from a foreign country under the DTA, nor would they have the ability to contest the validity of such a request. Branson examines the possible remedies available to a taxpayer including resorting to the various conventions on human rights as one possible way in which a taxpayer's privacy may be maintained in the absence of rules providing a taxpayer with the right to participate in the information exchange process.<sup>66</sup>

### **3.3 Offshore Information Notice – Section 264A(1)**

Section 264A took effect on 8 January 1991 and was part of the general anti-avoidance regime.<sup>67</sup> This notice is designed to obtain information about the affairs of the taxpayer that is located outside Australia. The notice can be served on either the taxpayer or a third party. The taxpayer has 90 days in which to comply. If the documents or information are in the control or custody of a third party, they still must be produced. The information or materials required to be produced must relate to the assessment of the taxpayer.<sup>68</sup> If the notice has been served on a trustee and the trustee is not in a position to pay income tax because there are beneficiaries presently entitled and not under a legal disability, then the notice will be invalid.<sup>69</sup> The taxpayer liable to tax must be identified in the notice.<sup>70</sup> This means that if the

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<sup>63</sup> C C Branson, 'The International Exchange of Information on Tax Matters and the Rights of Taxpayers' (2004) 33 *Australian Tax Review* 71, 84.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* 86.

<sup>66</sup> *Ibid* 87.

<sup>67</sup> *Taxation Laws Amendment (Foreign Income) Act 1990 (Cth)*.

<sup>68</sup> For a detailed examination of this issue see *Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499, 535.

<sup>69</sup> *Ibid.*

<sup>70</sup> Morfuni, above n 31, 101.



Commissioner is not sure about the actual taxpayer because of trusts being used, then a subsection 264A notice may not be appropriate. The taxpayer can refuse to provide documents and information if covered by legal professional privilege.

As stated above, subsection 264A(22) does not have the same effect as s 263 and s 264 in that it is not an offence if the taxpayer fails to comply with the offshore notice. The only sanction is that the taxpayer is unable to rely on offshore information or documentary evidence in contesting an assessment that would have been provided under the notice. However, the Commissioner may consent to allow the information.<sup>71</sup>

### **3.4 Mutual assistance requests – *Mutual Assistance in Criminal Matters Act 1987 (Cth)***

The ACC and the DPP are able to obtain information relating to criminal activities that is located in a foreign country under the *Mutual Assistance in Criminal Matters Act 1987 (Cth)*. A number of treaties have been entered into by the Australian government and various foreign countries in order to put into effect mutual assistance in criminal matters. In the case of *Dunn v The Australian Crime Commission* [2008] FCA 424, the Federal Court was asked to declare that the request sent to the Swiss authorities pursuant to the *Mutual Assistance Act* was made without authority, outside jurisdiction and unlawful. The request for information was undertaken as part of ‘Operation Wickenby’ and followed on from information that had been obtained from the laptop computer belonging to Philip Egglshaw. Tracey J found that the request for information was valid. Thereafter similar arguments were heard by Tracey J in the case of *Strachans v Attorney-General* [2008] FCA 553, and once again the request for information was held to be valid. Dunn subsequently appealed the decision and in *Dunn v Australian Crime Commission* [2009] FCAFC 16, the Full Bench of the Federal Court, per Moore, Jessup and Gilmour JJ, dismissed the appeal and upheld the validity of the request for information that had been sent to the Swiss authorities.

These cases illustrate the fact that information can be successfully obtained from foreign countries under the *Mutual Assistance in Criminal Matters Act* and that it is very difficult to challenge the validity of the request.

### **3.5 Legal professional privilege – foreign lawyer**

What is the situation where an Australian taxpayer has obtained legal advice from a lawyer in a foreign country and they claim that the document is privileged? In the case of *Kennedy v Wallace* (2004) 208 ALR 424, Giles J of the Federal Court of Australia held that legal professional privilege is available, subject to limitations, to protect communication between the client and their foreign lawyer relating to advice on foreign law.

Unfortunately, Kennedy was unsuccessful in claiming that the documents were covered by the privilege. The fact that the documents related to the laws of a tax haven, namely Switzerland, appeared to weaken his claim for legal professional privilege. The view taken by Giles J to limit the application of the privilege to foreign legal advice has been severely criticised. James McComish is critical of the claim by Giles J that in order to benefit from the privilege, ‘foreign legal advice must have some connection to the administration of justice or

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<sup>71</sup> Ibid.

the proper functioning of the legal system in Australia'.<sup>72</sup> Mr Kennedy appealed to the Full Bench of the Federal Court, per Black CJ, Emmett and Allsop JJ, where once again he was not successful in upholding his claim of privilege. However, the spurious restrictions placed on claiming privilege in relation to foreign legal advice as advanced by Giles J were rejected by the Full Bench.

While it is to the advantage of a taxpayer that they may be able to claim legal professional privilege when a foreign lawyer provides legal advice, what happens when documents are obtained under an exchange of information agreement with a foreign tax authority and the foreign taxpayer has no knowledge of the release of the communication in the first place and then has no opportunity to claim the privilege either in the foreign country or in Australia? Moreover, the staff at the foreign bank may not be experienced enough to claim the privilege on behalf of their customer.

### **3.6 OECD – exchange of information agreements**

The main question raised in this chapter is what effect will the exchange of information agreements, as espoused by the OECD, have on non-resident taxpayers and investors with money in tax havens and OFCs? As discussed in the previous sections of this paper, taxpayers have very little protection in preventing their personal financial details from being disclosed to the tax administrators. In Australia the ATO has coercive powers of seizure under s 263 and s 264 notices, search warrants, and compulsory attendance before the ACC. In terms of information held overseas, the ATO can request the information from the taxpayer pursuant to subsection 264A, by use of the DTA, or under the *Mutual Assistance Act*. If this is the case and it is possible to access information through a range of legal means, why then do the OECD and the G20 nations require all states to enter into 'exchange of information agreements'?

In its *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* the OECD examines three approaches to exchanging information: first, 'exchange of information on request'; second, a 'spontaneous exchange'; and third, an 'automatic or routine exchange of information'.<sup>73</sup> Article 26, as discussed above, only applies to the exchange of information on request. In situations where there is no DTA between Australia and the other state, a separate exchange of information agreement is entered into by the parties. The OECD advocates that states take the further step of agreeing to automatic or spontaneous exchanges of information. An automatic exchange of information requires the country of source to automatically report to the country of residence, information about non-residents receiving interest, dividends, royalties or pension payments. The country of residence does not need to request the information on a specific non-resident taxpayer. The spontaneous exchange of information takes the process a step further and involves a foreign tax administrator identifying additional non-resident taxpayers involved in taxation arrangements and the information can be passed on to the tax administrators in the country of residence. Both of these activities would arguably contravene non-residents' rights of privacy

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<sup>72</sup> James McComish, 'Foreign Legal Professional Privilege: A New Problem for Australian Private International Law' (2006) 28 *Sydney Law Review* 297, 317.

<sup>73</sup> OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* (OECD, 2006) 7.

and confidentiality as contained in the charter of human rights. However, the OECD and the G20 would like to put an end to tax havens and OFCs.

The Australian government has entered into a number of exchange of information agreements with tax havens; in two examples, the agreement with Bermuda and the agreement with Jersey, the only requirement is to exchange information on request. What is of interest is the fact that in relation to the Bermuda agreement reference is made to ‘serious tax evasion’ whereas in the Jersey agreement reference is made to ‘criminal tax matters’. The Australian government has been actively blurring the distinction between tax avoidance, a non-criminal activity, with tax evasion, a criminal activity. One of the main reasons for doing this has been to treat all arrangements that involve foreign bank accounts and financial arrangements with tax havens and OFCs as constituting a criminal tax matter so that other countries are pressured into providing information on Australian taxpayers utilising those financial services.<sup>74</sup>

From the perspective of the United States, Timothy Addison contends that Tax Information Exchange Agreements (TIEAs) are of very limited benefit.<sup>75</sup> Addison contends that the US has to identify not only the taxpayer or investor to be investigated and information obtained from the foreign country, but also that evidence exists to prove the taxpayer has engaged in criminal or civil tax activities.<sup>76</sup> The US must show that it is not engaged in a ‘fishing expedition’. Moreover, Addison states that the TIEA will not overcome the domestic bank secrecy laws of the tax haven. This view is supported by the evidence given by Professor Reuven Avi-Yonah to the Senate Finance Committee on Offshore Tax Evasion, 110<sup>th</sup> Congress.<sup>77</sup> Addison provides evidence to suggest that the Cayman Islands has continued to experience stable growth in its financial industry and is now ranked fourth in market share for international banking behind the United Kingdom, United States and France.<sup>78</sup> While this may be comforting for non-resident taxpayers and foreign investors using tax havens, why then did the Union Bank of Switzerland disclose the details of their account holders to the Internal Revenue Service in the United States?

### **3.7 The United States and the Union Bank of Switzerland (UBS)**

In November 2008, an official from UBS was indicted by a US federal grand jury for an alleged conspiracy to conceal thousands of US taxpayers’ accounts from the Internal Revenue Service (IRS).<sup>79</sup> In February 2009, UBS entered into a deferred prosecution agreement on the basis that the bank paid US\$780 million to provide details of about 4500 US account holders to the IRS. The US Justice Department alleged that there were about 52 000 accounts of US

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<sup>74</sup> McLaren, above n 60.

<sup>75</sup> Timothy Addison, ‘Shooting Blanks: The War on Tax Havens’ (2009) 16(2) *Indiana Journal of Global Legal Studies* 703, 717.

<sup>76</sup> *Ibid* 718.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid* 720.

<sup>79</sup> ‘Swiss Bank Settles U.S. Tax Charges, Mounting Pressure on Swiss Bank Secrecy’ (2009) 103 *The American Journal of International Law* 338.

citizens with about 20 000 containing securities and 32 000 containing cash with a total value of US\$14.8 billion.<sup>80</sup> This may be seen as a great victory for the US government and the IRS. However, it must also be viewed as being a comprehensive disregard of the rights of the account holders to expect their bank to maintain the confidentiality of their financial details. It is not the behaviour of a first world democracy.

As a result of UBS providing the names of US citizens having bank accounts with their bank, no foreign investor or non-resident taxpayer can have any confidence that this situation will not be repeated around the world. It would appear that the right of confidentiality has come to an end as far as the US is concerned. The situation could just as easily be replicated in Australia. The only feature that may provide comfort for non-resident taxpayers and investors is that the US government did not require all foreign banks located in the US to disclose bank account details of their US citizens, nor did the US government target Switzerland as a whole.<sup>81</sup> The agreement between the US and UBS did not violate the Swiss bank secrecy laws.<sup>82</sup>

#### 4 CONCLUSION

Australian taxpayers have very limited rights to privacy and confidentiality of their financial affairs. The ATO has strong coercive powers to obtain information pursuant to s 263 and s 264 notices and the only defence to prevent access to certain information by the ATO is to claim legal professional privilege. This right, which is fundamental to the administration of justice, has been weakened by the crime and fraud exemption. Australian taxpayers have no right to remain silent when confronted with a s 264 notice. Similarly, a taxpayer cannot claim the privilege against self-incrimination when faced with a s 264 notice. The right of a spouse not to give evidence against their partner is of no effect when required to appear before the ACC. The banker–customer duty of confidentiality has been severely weakened by the coercive powers of the ATO and provides no protection to a s 264 notice whereby the ATO is able to go on a fishing expedition. A taxpayer has no defence against a search warrant or a summons to appear before the ACC as has been demonstrated by the Eglishaw cases.

From a domestic law perspective, Australian taxpayers can only rely on legal professional privilege in order to maintain their right to privacy over legal advice.

The research shows that with the introduction of TIEAs between tax havens and OFCs and OECD member nations, the rights of a non-resident taxpayer to maintain the confidentiality of their financial affairs in a foreign country is under threat. It is also apparent that non-resident taxpayers are not in a position to know if their financial details are being disclosed by a foreign tax authority to the tax authority in their home country, and even if documents are protected by legal professional privilege there is no way of claiming that privilege if the taxpayer is unaware that the documents are being disclosed. The research into the protection provided by the declarations on human rights and a variety of statutory provisions incorporating human rights was found to be of limited use in the area of taxation law. It was found that the courts in the UK were reluctant to allow taxpayers to rely on the human rights

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<sup>80</sup> Ibid 339.

<sup>81</sup> ‘Offshore Private Banking Lives On’ *Euromoney*, London, September 2009.

<sup>82</sup> Ibid.

provisions when it came to matters of taxation revenue. It is contended in this paper that while ‘fishing expeditions’ by the ATO might be allowed under Australian domestic law, they are not permitted under the laws of tax havens and OFCs. If the ATO wants information about certain tax arrangements involving a tax haven then they must provide details of specific taxpayers and specific transactions before information is exchanged.

Based on the research undertaken for this paper, it is possible to draw the conclusion that with the introduction of TIEAs, non-resident taxpayers and Multi National Enterprises (MNEs) face a greater possibility of having their financial details disclosed to the tax authorities in their country of residence. This directly impacts on the future of tax havens and OFCs because the greater the threat of disclosure, the less non-resident taxpayers will use tax havens to hide financial assets and income. This would appear to coincide with the main objective of ‘Operation Wickenby’: to deter and detect Australian residents who hide income in tax havens and OFCs.