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**Sections 263 and 264 of the Income Tax Assessment Act 1936:**

**A Privacy Perspective and Review of Overseas Experience.**



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## Abstract

The study examines the powers of the Commissioner of Taxation to enter and search premises, and gather information under ss. 263 and 264 of the *Income Tax Assessment Act 1936 (Cth)*. A critical assessment is made of ss. 263 and 264 with reference to (i) *Privacy Act 1988 (Cth)*, (ii) the recommendations of the Australian Law Reform Commission Privacy Report 1983 and (iii) relevant overseas experience. An important issue for discussion is the lack of judicial authorisation over the Commissioner of Taxation's powers of entry and search of premises.

An aim of the study is to recommend appropriate reforms for ss. 263 and 264.

The study also assesses the potential impact of the *Privacy Act 1988 (Cth)* on the operation of ss. 263 and 264. Although yet to be tested, the Privacy Commissioner appears to have some scope in providing individual taxpayers with protections and remedies in cases of unlawful or unreasonable exercise of power by the Commissioner of Taxation.

The analysis of overseas models includes an overview of taxation legislation in Canada, the United States and the United Kingdom. The Canadian and United States models are notable for constitutional protections that exist for taxpayers in those countries. The United States Taxpayer Bill of Rights is also discussed.

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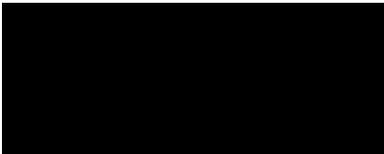
The management and staff of the Victorian College of Agriculture and Horticulture - Burnley for their assistance in resourcing my studies over the past few years.

My family for their support and encouragement.

## Declaration

I, Peter McSweeney declare that this thesis is the work of me alone, except where acknowledgement is made in the text, and does not include material for which any other university degree or diploma has been awarded.

Dated the 23rd day of July 1993.

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Peter McSweeney

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## Chapter 1

### INTRODUCTION

The study critically examines the powers of the Australian Commissioner of Taxation (referred to as "the Commissioner") to enter and search premises, and gather information, under ss. 263 and 264 of the *Income Tax Assessment Act 1936 (Cth)* (referred to as "the ITAA"). It examines the scope of these provisions in the light of relevant court interpretations.

The study also considers the potential impact of the *Privacy Act 1988 (Cth)* (referred to as "the Privacy Act") on the operation of these provisions.

A critical assessment is made of ss. 263 and 264 of the ITAA on the basis of several criteria, including (i) comparison with selected overseas legislation for conferring powers of entry and search of premises, and information gathering, (ii) the requirements of the Privacy Act and (iii) the general concerns raised by the Australian Law Reform Commission in the Privacy Report (1983).

### SIGNIFICANCE OF THE STUDY

A necessary function of government is the collection of revenue which, by necessity, requires some degree of power to enter and search premises, and gather information from

individuals. The level and exercise of this power requires close scrutiny to ensure that the actions of government are not overly intrusive, unreasonable or harsh: the conferring of the power should ensure an appropriate balance exists between the requirements of government to fulfil its role and the rights of the individual.

In the Australian taxation context, the Commissioner's powers of entry and search of premises, and information gathering, are provided in broad terms in ss. 263 and 264 of the ITAA. For this reason alone, these provisions are controversial.

Sections 263 and 264 of the ITAA are also subject to criticism in that the provisions contain few protections concerning the rights of taxpayers. Furthermore, the system of challenging the decisions of the Commissioner using the administrative law and the jurisdiction of the Courts or the Administrative Appeals Tribunal does not appear to be viable for many taxpayers. <sup>(1)</sup> The time and expense involved under this system and the uncertainty of the outcome of legal action may act as a deterrent.

The Australian model for conferring powers is often questioned particularly when comparisons are made with the instances of greater levels of legislative protection afforded to taxpayers overseas. For example, the United States has introduced a Taxpayer Bill of Rights <sup>(2)</sup>, in addition to protections offered by the United States' Constitution. The United Kingdom and Canadian systems also illustrate greater levels of protection for taxpayers. This aspect is discussed in detail in Chapter 4.

Australian Courts have tended to reinforce the view that the Commissioner has considerable powers of entry and search and information gathering in administering the taxation system, and there appears no indication that this attitude will change. An important aspect of this paper is to summarise the Courts' attitude to ss. 263 and 264 of the ITAA. Of particular

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1. See: Richards, R., (1992), "Taking the Tax Man to Court", Vol.62:5, *Australian Accountant*, June, pp.14-18.
  2. *Technical and Miscellaneous Revenue Act 1988*.

relevance to the study are the Courts' views on the limits to acceptable government actions in exercising powers of entry and search and information gathering. An assessment is also made as to whether these actions may be unreasonable, harsh or unfair and, from a privacy perspective, unnecessarily intrusive.

As outlined above, a concern with the Australian legal system in dealing with taxpayer complaints or challenges is the lack of effective access to the Court system. The study therefore examines the implications of the recently introduced Privacy Act which established the office of Privacy Commissioner whose role includes handling complaints concerning interferences with an individual's privacy.

The role of the Privacy Commissioner appears to be similar to that of the Commonwealth Ombudsman whose role in tax matters has assumed a growing importance in recent years. Given the substantial number of tax matters referred to the Commonwealth Ombudsman's office, <sup>(3)</sup> the argument exists that there is a need for a specialist Tax Ombudsman in the future. <sup>(4)</sup> It may be that the roles of the Privacy Commissioner and Commonwealth Ombudsman, will provide effective avenues for taxpayer complaints and challenges outside of the Court system.

Although the Privacy Act is largely untested on the issue of taxpayer rights to privacy, it appears that the several of the Information Privacy Principles, embodied in the Privacy Act, have implications for the Commissioner of Taxation's information gathering powers. The extent to which the Privacy Act fully embodied the recommendations of the Draft Privacy Bill 1983 is also an important discussion question.

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3. Annual Report of the Commonwealth and Defence Force Ombudsman, 1989-90, p.22.
  4. Refer to Richards, R., (1989), "The Need for a Tax Ombudsman", Vol.59:8, *Australian Accountant*, September, p.93.

## **AIMS AND SCOPE OF THE STUDY**

The primary aims of the study are to:

1. critically examine the powers of the Commissioner to enter and search premises, and gather information, under ss. 263 and 264 of the ITAA.
2. recommend appropriate reforms for ss. 263 and 264 of the ITAA.
3. outline the potential of the Privacy Act to provide individual taxpayers with protections and remedies in cases of unreasonable or unlawful exercise of power by the Commissioner.

In achieving these aims, the study will:

1. outline the scope of ss. 263 and 264 of the ITAA with reference to Australian Court decisions in relation to these provisions.
2. compare the Commissioner's powers of entry and search of premises and information gathering under these provisions with equivalent powers in the Canada, the United States and the United Kingdom.
3. examine the operation of ss. 263 and 264 of the ITAA in the light of (i) the Information Privacy Principles contained in the Privacy Act and (ii) the recommendations of the Australian Law Reform Commission as found in the Draft Privacy Bill 1983.

## METHODOLOGY AND INFORMATION SOURCES

The study will entail a review of primary and secondary source documentation. The general approach of the study will be to:

1. summarise significant historical developments in relation to the topic.
2. outline the current state of play concerning relevant powers, rights and protections.
3. make relevant comparative assessments of powers, rights and protections.
4. discuss and comment on the findings of the study.
5. outline recommendations where appropriate.

Primary source documents will include relevant court decisions, Australian and overseas legislation, correspondence and policy documents. A review of Australian and overseas law, accounting and taxation journals and reporting services will also be undertaken.

The analysis of the overseas experience focuses on the legislation in Canada, the United States and the United Kingdom.

## Chapter 2

**THE COMMISSIONER OF TAXATION'S POWERS - SECTIONS 263 AND 264 OF  
THE *INCOME TAX ASSESSMENT ACT 1936 (CTH)***

The 1980s witnessed considerable court activity in Australia over ss. 263 and 264 of the ITAA. This chapter outlines the powers contained in these sections and discusses several of the more important court interpretations of the powers. The Australian Law Reform Commission's comments on these sections with reference to general privacy principles are discussed later in this study.

**SECTIONS 263 and 264 OF THE ITAA**

Section 263 of the ITAA effectively provides the Commissioner with extensive search and entry powers by conferring, at all times, full and free access to buildings, places, and taxpayer records. Section 263 states:

*(1) The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.*

*(2) An officer is not entitled to enter on or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorized to exercise powers under this section.*

*(3) The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.*

The section is notable for the general power it confers of "*full and free access*" which may be exercised "*at all times*" and, therefore, the considerable discretion granted to the Commissioner. The Commissioner's powers are limited by the wording of the legislation to the extent that (i) s. 263(1) must only be exercised "*for any of the purposes*" of the Act; (ii) s. 263(2) provides that the exercise of s. 263 powers must be authorized by the Commissioner; and (iii) s. 263(3) obliges the occupier of the building or place to provide "*reasonable*" facilities and assistance only.

Section 263 is intended to operate hand in hand with the Commissioner's powers governing obtaining of information. The latter is found in s. 264 which provides that:

*(1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority-*

*(a) to furnish him with such information as he may require; and*

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

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

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

The information gathering power under s. 264 is quite broad. Upon written notice, a taxpayer may be obliged to furnish information, attend and give evidence, and produce books, documents and other papers in his custody or under his control. These requirements are restricted to the "*income or assessment*" of the taxpayer issued with the notice or any other person. The only "constraint" apparent within the wording of s. 264 is that the notice requiring a person to comply with s. 264 should be in writing.

## SIGNIFICANT COURT DECISIONS

As has been noted, ss. 263 and 264 of the ITAA contain extensive powers of entry and search of premises, and of information gathering. Significant limitations to these powers lie in the interpretation of the Courts of the provisions and of other relevant legislation, such as the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* and the *Judiciary Act 1903 (Cth)*. These interpretations are dealt with below.

*Administrative Decisions (Judicial Review) Act 1977 (Cth)* (referred to as "the ADJR Act")

One central issue for the Courts has been whether the decisions or actions of the Commissioner are reviewable under administrative law, with particular reference to the ADJR Act. Bray <sup>(5)</sup>, in a commentary on the effect of the ADJR Act on taxation administration, comments that:

*"the ATO perspective is that many of the challenges taken under the ADJR Act against recent decisions made under ss 263 and 264 have been motivated more by the desire to delay the conduct of audits than genuinely to seek review of the decisions."* <sup>(6)</sup>

As a consequence, the Commissioner has challenged the use of the review process under the ADJR Act.

The relevant provisions of the ADJR Act include s. 3 which defines a reviewable decision as:

*"a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not)*

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5. Bray, P., (1991), "The ADJR Act: Its Effect on Taxation Administration", Vol.20:1, *Federal Law Review*, p.138.
  6. *ibid* at p.142.

*under an enactment other than a decision of the Governor General or a decision included in any of the classes of the decisions set out in Schedule 1;..."<sup>(7)</sup>*

Section 5 of the ADJR Act provides the grounds for a judicial review of a decision and s. 13 confers the right on a person to obtain written reasons for the decision. From a practical point of view, an aggrieved person would seek written reasons for an administrative decision, under s. 13, prior to seeking a review under s. 5. The grounds for review set out under s. 5(1) of the ADJR Act are as follows:

*(a) that a breach of the rules of natural justice occurred in connection with the making of that decision;*

*(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;*

*(c) that the person who purported to make the decision did not have jurisdiction to make the decision;*

*(d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;*

*(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;*

*(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;*

*(g) that the decision was induced or affected by fraud;*

*(h) that there was no evidence or other material to justify the making of the decision;*

*(i) the decision was otherwise contrary to law.*

The reference to "*an improper exercise of a power*" under s. 5(1)(e) of the ADJR Act is expanded upon in s. 5(2) to include reference to circumstances such as:

*(f) an exercise of a discretionary power in accordance with a rule or policy without regards to the merits of the particular case;*

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7. Schedule 1 of the ADJR Act lists 19 types of decision that are "*classes of decisions that are not decisions to which this Act applies.*" In relation to the ITAA, "*decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty*" are excluded from review under the ADJR Act.

*(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power [.]*

One case which examined the application of review processes under the ADJR Act to the powers exercised under s. 263 of the ITAA was *Southern Farmers Group Limited v. Deputy Federal Commissioner of Taxation and Ors* in the Federal Court of Australia. <sup>(8)</sup> An objection was raised on behalf of the Commissioner to the competency of an application on behalf of Southern Farmers for a review of the Commissioner's decision to utilise s. 263 of the ITAA. <sup>(9)</sup> The argument advanced on behalf of the Commissioner was that the exercise of s. 263 (1) powers was not a decision *per se*; instead it was the engaging in a course of conduct which resulted from an earlier broad based decision to conduct a tax investigation. <sup>(10)</sup>

*O'Loughlin J.*, rejected this contention, finding that:

*"the rights and powers that are vested in the Commissioner and his delegates under s.263 do not affect automatically the affairs of a particular taxpayer unless or until a relevant decision is made."*<sup>(11)</sup>

Accordingly, it was held the decision was reviewable under s. 5 of the ADJR Act. <sup>(12)</sup> From the taxpayers' point of view, the *Southern Farmer's* decision provides some protection against improper use of administrative power in that the Commissioner's decisions to exercise s. 263(1) powers are reviewable under grounds provided under s. 5 of the ADJR Act.

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8. 90 ATC 4056.  
 9. *ibid* at p.4057.  
 10. *ibid* at p.4063.  
 11. *ibid* at p.4066.  
 12. *ibid* at p.4067.

***Judiciary Act 1903 (Cth)*** (referred to as "the Judiciary Act")

In addition to decisions being reviewable under the ADJR Act, it appears that a review of the Commissioner's decisions may be sought using s. 39B of the Judiciary Act which provides that:

*"The original jurisdiction of the Federal Court Of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth."*

The significance of s. 39B of the Judiciary Act in the context of the Commissioner's powers is explained by Fernandez and Koay who state that the:

*"provision confers on the Federal Court the original jurisdiction of the High Court to review decisions of officers of the Commonwealth. The Commissioner or Deputy Commissioners of Taxation are officers of the Commonwealth."*<sup>(13)</sup>

The application of s. 39B to decisions by the Commissioner was recently examined in *David Jones Finance and Investments Pty Ltd and Anor v. Federal Commissioner of Taxation* in the Full Federal Court.<sup>(14)</sup> The case involved the Commissioner departing from an entrenched practice concerning the allowing of dividend rebates to certain taxpayers.<sup>(15)</sup>

The significant aspect of the decision in the *David Jones* case was the acceptance by the *Morling and French JJ*, in the Full Federal Court, that the Federal Court had the jurisdiction, under s. 39B of the Judiciary Act, to review the *income tax assessments* issued by the Commissioner.<sup>(16)</sup>

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13. Fernandez, R. and Koay, A., (1992/3), "The David Jones Decision: An Alternative Avenue of Redress", Vol.27:6, *Taxation in Australia*, p.323.  
 14. 91 ATC 4315.  
 15. *ibid* at p.4317.  
 16. *ibid* at p.4331.

## **Court Interpretations of Ss. 263 and 264 of the ITAA**

There are several judicial interpretations of ss. 263 and 264 which are significant in defining the powers of the Commissioner. The important aspects of the provisions examined by the Courts include (i) the adequacy of s. 263 authorisations, (ii) the adequacy of s. 264 notices, (iii) the general nature of the Commissioner's investigatory powers under ss. 263 and 264, (iv) the matter of legal professional privilege and (v) their effect on the privacy of individual taxpayers. The relevant Court interpretations are outlined below.

### **(i) S. 263 - Adequacy of Authorisations**

The judgement in the Full Federal Court of Australia in *Federal Commissioner of Taxation & Ors v. Citibank Limited* <sup>(17)</sup> examined the nature and scope of the s. 263 powers. In this case, particular emphasis was given to outlining the requirements for the s. 263 authorisations. The exercise of the s. 263 powers was challenged using the provisions of the ADJR Act and s. 39B of the Judiciary Act.

The *Citibank* case involved the entry of 37 taxation officers onto Citibank premises in Sydney for the purpose of inspecting and copying documents relating to an alleged tax avoidance scheme concerning a redeemable preference share arrangement. <sup>(18)</sup>

The circumstances of this case involved the officers of the Australian Taxation Office visiting different parts of the Citibank premises in small groups, remaining on the premises for up to four hours and searching and taking photocopies of Citibank documents. <sup>(19)</sup> All officers engaged in the raid carried what was described as a "wallet" authorisation signed by a Deputy Commissioner of Taxation and all but three officers carried a letter

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17. 89 ATC 4268.

18. *ibid* at p.4268.

19. *ibid* at p.4271.

authorisation signed by the Commissioner. <sup>(20)</sup> The three officers without a letter authorisation held an additional authority signed by the Commissioner.

The wallet authorisation authorised the officer of the Australian Taxation Office whose photograph and signature appeared on the authority to "*exercise all powers under Section 263 - Income Tax Assessment Act 1936*" <sup>(21)</sup> and under several other Acts. The letter authorisation authorised the holder of it to exercise powers under various Acts, including s. 263 of the ITAA, and:

*"to have full and free access at all times to all buildings, places, books, documents, and other papers for any of the purposes of the Acts mentioned, and for that purpose to make extracts from, or copies of, any such books documents or papers."*<sup>(22)</sup>

The adequacy of these authorisations was examined in the initial judgement on this matter in *Citibank Limited v. Federal Commissioner of Taxation and Ors* <sup>(23)</sup> in the Federal Court of Australia, where *Lockhart J.* stated that:

*"an authorisation under s. 263 must identify, on its face and with sufficient particularity, the premises to which access is sought and the documents or class of documents to be searched for and copied. The practical application of these requirements will vary from instance to instance."* <sup>(24)</sup>

Accordingly, *Lockhart J.* held that:

*"In my opinion all the authorities with which this case is concerned are bad for want of specificity and particularity."* <sup>(25)</sup>

On appeal to the Full Federal Court of Australia <sup>(26)</sup>, the view of *Lockhart J.* was held to be wrong. *Bowen C.J.* and *Fisher J.* <sup>(27)</sup> appeared to examine the requirements of s. 263

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- 20.      ibid at p.4269.
  - 21.      ibid at p.4268.
  - 22.      ibid at p.4273.
  - 23.      88 ATC 4714.
  - 24.      ibid at p.4724.
  - 25.      ibid at p.4726.
  - 26.      op cit at p.4268.
  - 27.      op cit at p.4274.

from a literal perspective and held that the existence of a written authorisation is not "*a condition precedent to the right of access*" under s. 263. Accordingly, the view of *Bowen C.J. and Fisher J.* was that a right of access simply exists under s. 263(1).

Although there is a subsequent requirement under s. 263(2) for an officer to produce an authority in writing if requested to do so by the occupier of the building or place, *Bowen C.J. and Fisher J.* <sup>(28)</sup> stated that:

*"[t]he subsection is silent as to the form and content of the authorisation."*

The requirements of the authority under s. 263(2) were also examined in the Full Federal Court of Australia in *Sharp and Anor v. Deputy Federal Commissioner of Taxation and Ors.* <sup>(29)</sup> The appellant in *Sharp's* case submitted that s. 263(2) required the authority to be signed by the Commissioner. <sup>(30)</sup> *Bowen C.J., Sheppard and Burchett J.J.* <sup>(31)</sup> agreed and stated that:

*"... there is much to be said for a strict construction of subs.(2). Such extreme powers should not be exercised except upon precise compliance with the statutory mandate."*<sup>(32)</sup>

Accordingly, authorisations signed by the Deputy Commissioner of Taxation were invalid. In summary, it appears that the authority required by s. 263 requires the signature of the Commissioner but need not identify, with any specificity, the premises to which access is sought and the documents or class of documents to be searched for.

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28. op cit at p.4274.  
 29. 88 ATC 4259.  
 30. ibid at p.4264.  
 31. ibid at p.4266.  
 32. ibid at p.4266.

(ii) **S. 264 - Adequacy of Notices**

The requirements of notices under s. 264 have been examined in several cases.

The form required for a s. 264 notice to be valid was examined in the Full High Court of Australia in *Federal Commissioner of Taxation v. Smorgon*.<sup>(33)</sup> In that case, *Gibbs ACJ.* stated that:

*"To be valid a notice to produce documents under s.264(1)(b) must of necessity identify with sufficient clarity the documents which are required to be produced. However the notice must in my opinion go further: it must show the person to whom it is addressed that any document which he is required to produce is one whose production the Commissioner is entitled to require. Where a notice is addressed to a taxpayer who is required to produce documents which relate to his own income or assessment, the very description of the documents (for example, "your books of account") may be enough to show that the notice is within the power conferred by the section. Where however the notice is addressed to one person, requiring him to produce the documents of another, the notice must show that those documents relate to the income or assessment of a particular person, who must be identified. The power is confined to giving a requirement of a particular kind - a requirement to produce documents relating to the income or assessment of some person - and a notice requiring the production of documents not so related is beyond the scope of the power."<sup>(34)</sup>*

Accordingly, a key limitation within s. 264 is that a notice may not be issued simply asking for all books and documents. *Smorgon's* case indicates that only books and documents relating to a person's income or assessment can be requested. In *Smorgon's* case itself<sup>(35)</sup>, one particular notice issued by the Commissioner was held to be invalid because it required production of all documents in certain safe deposit boxes without relating the documents required to the income or assessment of any person.

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33. 79 ATR 483.

34. *ibid* at p.490.

35. *ibid* at p.491.

Section 264 procedural issues, including the reasonableness of the timing of notices, were discussed in *Elliott and Ors v. Deputy Federal Commissioner of Taxation* <sup>(36)</sup> and *Perron Investments Pty. Ltd. and Ors v. Deputy Federal Commissioner of Taxation*. <sup>(37)</sup>

The Courts appear to take the view that what is reasonable notice for the purposes of s. 264 is conditional upon matters such as the receiver's ability to comply with the notice. As *Einfeld J.* stated in the Federal Court of Australia in *Perron Investments* <sup>(38)</sup>:

*"... the requirements of the notice and the receiver's ability to comply with it in the time are relevant considerations. The receiver of the notice would obviously have a much better idea than the court if it was oppressive, impossible, or too difficult to comply within the time allowed and therefore if the time was unreasonable."*<sup>(39)</sup>

### (iii) Ss. 263 and 264 - The Nature of the Investigatory Powers

Several cases have examined the general nature of the investigatory powers under ss. 263 and 264.

*O'Reilly and Ors v. Commissioners of the State Bank of Victoria and Ors* <sup>(40)</sup> in the Full High Court of Australia is notable for its examination of the meaning of the expression "*full and free*" access under s. 263(1). The case involved a bank manager granting access to bank premises but refusing a request to unlock a room containing bank records. <sup>(41)</sup> *Mason, Murphy, Brennan and Deane JJ.* <sup>(42)</sup> took the view that although the person concerned in the case did not have a *positive duty* to assist the Commissioner under s. 263, there was no entitlement to obstruct access. Their Honours noted that:

*"[t]he express provision that the Commissioner or his authorized officer shall have "full" access prima facie conveys, at the least, that the availability of entry or*

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36. 90 ATC 4937.  
 37. 89 ATC 4310.  
 38. *ibid* at p.4310.  
 39. *ibid* at p.4320.  
 40. 83 ATC 4156.  
 41. *ibid* at p.4157.  
 42. *ibid* at p.4162.

*examination to which the Commissioner or an authorised officer is entitled extends to any part of the relevant place or building and to the whole of the relevant books, documents and other papers. The express provision that the access shall be "free" conveys, at the least, that access is to be without physical obstruction."*<sup>(43)</sup>

Their Honours also noted that the positive duty to assist the Commissioner by way of furnishing information, giving evidence and production of books, documents and papers lay in s. 264 for which there were protections, including the requirement for a notice in writing. <sup>(44)</sup>

Other cases have examined the general question of whether the Commissioner is empowered, through ss. 263 and 264, to conduct random and wide-ranging investigations, including the conducting of tax audits.

In relation to s.264, *Gibbs A.C.J.*, in *Smorgon's* case, <sup>(45)</sup> examined the scope of s. 264 powers and said that:

*"[t]he apparent intention of the Parliament is that the Commissioner is entitled to have produced any books and documents that relate to the taxpayer's assessment, even if he does not know what those books and documents may reveal. A document may be required to be produced only if it in fact relates to the income or assessment of the person in question, but if it is of that description, that is enough. In other words the Commissioner is entitled to make what was described as a "roving enquiry" into the income or assessment of a particular taxpayer and for that purpose to have produced such documents as relate to that income or assessment."*<sup>(46)</sup>

Both *Mason J.* <sup>(47)</sup> and *Murphy J.* <sup>(48)</sup>, in *Smorgon's* case, held that the Commissioner effectively had the power under s. 264 to "fish" for information to ascertain any person's taxable income.

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43. *ibid* at p.4162.

44. *ibid* at p.4163.

45. *op cit* at p.483.

46. *op cit* at p.490.

47. *op cit* at p.498.

48. *op cit* at p.504.

In a more recent case, *Industrial Equity Limited and Anor v. Deputy Federal Commissioner of Taxation and Ors* <sup>(49)</sup>, determined by the Full High Court of Australia, the taxpayer sought a review of the Commissioner's decision to issue authorisations under s. 263 and notices under s. 264 under the ADJR Act, claiming the decision was an improper exercise of power. <sup>(50)</sup>

*Industrial Equity Limited*, chosen at random by the Australian Taxation Office for a tax audit from a list of the top 100 companies, claimed that the audit, and particularly the random nature of the audit, was not authorised by the ITAA. <sup>(51)</sup> In rejecting the company's claim, *Mason C.J., Brennan, Deane, Dawson, Toohey and McHugh JJ.* adopted the view taken in *Smorgon's* case, that a wide-ranging tax office inquiry was clearly for the purposes of the ITAA. <sup>(52)</sup>

#### (iv) **Legal Professional Privilege**

The term *legal professional privilege* is used to describe a legal practitioner's right to treat as confidential documents held on behalf of a client. Faure <sup>(53)</sup> defines a document as privileged if it is:

"(a) a communication to or from a legal advisor acting in that capacity;  
 (b) created for the sole purpose of obtaining or giving legal advice or for use in existing or anticipated litigation; and  
 (c) confidential."

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49. 90 ATC 5008.

50. *ibid* at p.5015.

51. *ibid* at p.5009.

52. *ibid* at p.5015.

53. Faure, J.E., (1989), "Advising the Advisors (section 263)", Vol.63:4, *Law Institute Journal*, April, p.291.

A client may assert or waive any claims to privilege made on his behalf. <sup>(54)</sup> In relation to a client's right to claim privilege, the *Citibank* <sup>(55)</sup> decision affirmed an important protection for the taxpayer. *Bowen C.J and Fisher J.* in *Citibank* <sup>(56)</sup> stated that:

*"[t]he circumstances of the search indicate clearly to our mind that Citibank was denied the capacity to make an adequate claim of privilege on behalf of its clients."*

*Bowen C.J. and Fisher J.* <sup>(57)</sup> further stated that:

*"[d]oubtless the practical application of the doctrine of privilege is in extra-judicial circumstances extraordinarily difficult. This matter indicates clearly that it is well nigh impossible for an institution such as Citibank to be in a position to safeguard the interests of its clients unless it is warned as to the nature of the documents to which access is to be sought. Only in the most exceptional circumstances can an entry without adequate warning be justified."*

It would appear from this decision that the Commissioner is required to take steps to accommodate claims for privilege, which would include adequate warning of the nature of documents sought and adequate opportunity to claim privilege itself.

A further matter which has been resolved relates to claims for privilege for entries in a solicitor's trust account ledger. *Bowen C.J. and Fisher J.* in *Allen, Allen and Hemsley v. Deputy Federal Commissioner of Taxation and Ors* <sup>(58)</sup>, in the Full Federal Court, stated that:

*"only in the most exceptional circumstances can an entry in a trust account ledger be privileged as disclosing the contents of communication between solicitor and client."* <sup>(59)</sup>

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54. See Skinner, J.C., and Nethercott, L., (1990), "The Commissioner's Powers Under S263 and S264", Vol.24:10, *Taxation in Australia*, June, pp.885-891.  
 55. op cit at p.4268.  
 56. op cit at p.4277.  
 57. op cit at p.4279.  
 58. 89 ATC 4294.  
 59. ibid at p.4297.

Trust account ledgers are not normally created for the purpose of giving advice or for use in litigation.

(v) **A Privacy Perspective**

Clearly, ss. 263 and 264 of the ITAA operate together to provide the Commissioner with considerable powers of investigation. There have been several cases in which the right to privacy was discussed, given the intrusive nature of s. 263.

The judgements in *Citibank* illustrate several attitudes by the judiciary to the question of what constitutes the appropriate or necessary level of authorisation for the exercise of the powers of access under s. 263 of the ITAA.

*Lockhart J.*'s judgement in the *Citibank* case <sup>(60)</sup> illustrated some concern over government powers of access and for the need to balance the taxpayer's right to privacy against the requirements of government. His Honour <sup>(61)</sup> held that:

*"[s]ection 263 confers a wide right or power upon the Commissioner of Taxation and upon officers authorised to take access under the section. On the one hand, I recognise that the Commissioner is charged with important functions in the administration of the Income Tax Assessment Act and the collection of revenue. At the same time, it is a fundamental principle of common law that Australians have rights and privacy which must be respected. In my view, as s. 263 of the Act in its nature is an encroachment upon liberty, it should be so construed so that the encroachment is no greater than the statute allows expressly or by necessary implication.*

*The person - whether the Commissioner of Taxation or his delegate - called upon to authorise the exercise of s. 263 powers must consider the relevant circumstances and decide whether it is appropriate in the circumstances to authorise the exercise of the power."*

*Lockhart J.*, with this view of s. 263 in mind, appeared to attempt to develop or add in requirements for authorisations empowering the use of s. 263. *Lockhart J.*'s purpose in

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60. op cit at p.4714.

61. op cit at p.4716.

doing this appeared to be to provide a minimum level of protection for the taxpayer against unreasonable, arbitrary or intrusive conduct which may result from inadequate authorisations.

On the other hand, *Bowen C.J and Fisher J.* <sup>(62)</sup> in the Full Federal Court in *Citibank*, seemed to take a more literal approach to examining the requirements under which the s.263 powers could operate and did not place the same significance on the need for authorisations for the operation of the section. As outlined previously in this Chapter, *Bowen C.J and Fisher J.* took the view that s. 263 entitles the Commissioner to a right of access *per se* and s. 263(2) was silent as to the form and content of authorisations. The Full Federal Court judgement of *French J.* <sup>(63)</sup>, in *Citibank*, also supported the view of *Bowen C.J. and Fisher J.* *French J.* <sup>(64)</sup> stated there can be no "superadded" requirements to those of s. 263(2).

*French J.* also made the following observation concerning the privacy impact of the s. 263 power.

*"Australia is a liberal democracy with a broad tradition of at least nominal resistance to encroachment upon established rights and freedoms. That view is reinforced by its adherence to the International Covenant on Civil and Political Rights, which relevantly provides in Art. 17, inter alia, that:*

*"No-one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence ...."*

*The nature of this society and its tradition of respect for individual freedoms will support an approach to construction which requires close scrutiny and a strict reading of statutes which would otherwise remove or encroach upon those freedoms. But where the natural meaning of the words is clear, the will of the Parliament must be respected.*

*Section 263 will plainly in some, if not all, cases operate to interfere with privacy and in particular that kind of privacy recognised by the rights to quiet possession of land and personal property which are protected by the common law relating to trespass."*

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62. op cit at p.4274.

63. op cit at p.4290.

64. op cit at p.4290.

*French J.* identifies several issues in this statement which will require closer analysis in the next Chapter of this study. For example, while s. 263 of the ITAA may permit lawful encroachment upon some basic freedoms, there may exist several other requirements before Article 17 of the International Covenant on Civil and Political Rights is complied with.

Article 17 may have implications for the question of appropriate authorisation of powers of entry. With the operation of s. 263, *Lockhart J.* <sup>(65)</sup> drew attention to the risks associated with the authorisation of the exercise of the powers resting with the Commissioner or his delegate. *Lockhart J.* <sup>(66)</sup> stated that:

*"[t]here is a fine line, even in our society, between responsible exercise of large powers and authoritarian cynicism. The Commissioner and his delegates must consider the circumstances of the particular exercise of the s.263 power to ensure that line is not transgressed."*

An important issue for this study is whether there is adequate protection against "*authoritarian cynicism*" and whether, for example, judicial authorisation for the exercise of s. 263 powers is necessary.

There are also several privacy issues relevant to the operation of s. 264. Section 264 relies on the exercise of discretion by the Commissioner concerning such decisions as to whom notices are sent, the timing of notices and the information required to be furnished. A question arises as to whether the present system of judicial review of administrative decisions is adequate to protect individuals from unreasonable or arbitrary decisions extending from the use of s. 264 powers.

An alternative approach for both conferring powers and ensuring taxpayer rights may be the adoption of legislation which more clearly establishes taxpayer rights concerning a range of matters. For example, with s. 264, this could include, among other matters,

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65. op cit at p.4724.

66. op cit at p.4724.

specifying the minimum notice period required for the production of documents and information, the requirements for the content of notices and their authorisation and the type of documents required. With s. 263, this could include, among other matters, specifying the procedures for ensuring the opportunity to make claims for legal professional privilege is made available. The type of documents to which legal professional privilege may apply is also relevant.

## Chapter 3

**IMPLICATIONS OF THE *PRIVACY ACT 1988 (CTH)* FOR THE OPERATION OF SECTIONS. 263 AND 264 OF THE *INCOME TAX ASSESSMENT ACT 1936 (CTH)***

The Privacy Act makes provision to protect the privacy of individuals and ensure that appropriate standards of government behaviour are met in relation to privacy intrusions and, particularly, to obtaining information from individuals.

As was noted in Chapter 1, a primary aim of this study is to discuss the potential of the Privacy Act to provide the taxpayer with protections and remedies in cases of unreasonable or unlawful privacy intrusions. This Chapter, therefore, examines the relevance of the Privacy Act to the general powers of the Commissioner of Taxation to *obtain information* under ss. 263 and 264 of the ITAA.

However, initially, an examination will be undertaken of the Australian Law Reform Commission's Privacy Report 1983 (referred to as "the Privacy Report") which preceded the Privacy Act.<sup>67</sup> In addition to proposing safeguards concerning obtaining information, the Privacy Report proposed safeguards which, specifically, referred to the *powers of arrest and search of persons, places and premises*. However, the latter safeguards, which were recommended in a Draft Privacy Bill by the Australian Law Reform Commission (referred

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67. The terms of reference of the ALRC included the examination of "*the extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of the Commonwealth Parliament*". Refer Australian Law Reform Commission, (1983), Report No.22, Volume 1, p.xxxvi.

to as "the ALRC") were excluded from the Privacy Act. The reasons for this exclusion are not clear.

This chapter does not provide a comprehensive discussion on the laws of privacy.

## **THE PRIVACY REPORT**

This section examines aspects of ss. 263 and 264 powers from a broader privacy perspective with particular reference to the discussion in the Privacy Report. While the Privacy Report has no influence over the operation of ss. 263 and 264, several of the Privacy Report recommendations appear to conflict with the manner in which the s. 263 and 264 powers are conferred and exercised. The analysis in this Section is referred to in Chapter 5 where the areas for reform of ss. 263 and 264 are discussed.

### **Background Comments on Ss. 263 and 264 Powers**

The ALRC noted the lack of safeguards on the powers exercisable by government conferred through Commonwealth and Territory laws. The Privacy Report (Volumes 1 and 2) <sup>(68)</sup> includes the area of taxation, among several areas of government activity, as a potential area for the abuse of powers of intrusion and information gathering. The recommendations contained therein formed the basis for the Privacy Act which was eventually assented to in 1988.

The Privacy Report made the general points that: (i) many Commonwealth Statutes conferred the power to search and enter property; (ii) the safeguards applicable to the exercise of such powers vary significantly; and (iii) in a significant number of cases there is no restriction placed on the power. <sup>(69)</sup> In this regard, it noted that the:

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68. Australian Law Reform Commission, (1983), Report No.22, Privacy, Volumes 1 & 2, AGPS.  
 69. *ibid*, Vol.1 at p.74.

*"width of many of the powers of entry and search, and the lack of safeguards controlling their exercise, provide cause for concern."*<sup>(70)</sup>

In relation to the powers conferred upon the Commissioner by ss. 263 and 264, the Privacy Report made the general observation that neither:

*"S.263 nor S.264 contains any limitations upon the exercise of official power in the interests of protection of personal privacy, notwithstanding the fact that by their terms they permit wide-ranging intrusions into the private domain and personal histories of ordinary people whose private affairs are recorded in the records of organisations such as banks, and legal and accounting firms."*<sup>(71)</sup>

It also specifically identified the following areas of concern:

- (i) S. 263 contains no definition of the phrase "full and free" and the ambit of the power appears only to be restricted by the requirement that access be for the purposes of the ITAA; <sup>(72)</sup> and
- (ii) the s. 264 is quite broad, allowing the Commissioner to obtain personal information about individuals from many sources. <sup>(73)</sup>

### **International Covenant On Civil And Political Rights**

The Privacy Report suggested that official powers of an intrusive nature should be assessed against relevant international guidelines. Accordingly, the Privacy Report recommendations were guided by the 1976 International Covenant on Civil and Political Rights (referred to as "the ICCPR") to which Australia is a signatory. <sup>(74)</sup> The ICCPR is derived from the United Nations' Universal Declaration of Human Rights 1948.

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70. *ibid* at p.74.

71. *ibid* at p.92.

72. *ibid* at p.75.

73. *ibid* at p.91.

74. Privacy Report Vol.2 at p.183. Australia ratified the ICCPR on August 13, 1980.

Article 17 of the ICCPR addresses the matter of privacy and states that:

*"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks."*

In a discussion about the meaning and scope of Article 17, Volio claims that Article 17 was intended to apply to laws, regulations, the use of executive power and the exercise of discretions. <sup>(75)</sup> Volio also discusses the meaning of "*arbitrary or unlawful interference*" which, in his view, includes not only those interferences "*without legal grounds*" or "*contrary to law*" but also behaviour which was "*capricious, despotic, imperious, tyrannical, or uncontrolled*". <sup>(76)</sup> Illustrations of such privacy interferences with the home or family include uninvited entry, peeping or eavesdropping, and electronic surveillance.

The ICCPR does not specify how the Articles should be implemented by the parties to the ICCPR. However, subs. 2 of Article 2 of the ICCPR states that:

*"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

Subs. 3 of Article 2 of the ICCPR requires that an effective remedy be available to persons whose rights are violated. It states that:

*"Each State Party to the present Covenant undertakes:  
(a) To ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

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75. Volio, F., "Legal Personality, Privacy and the Family" in Henkin, L.(ed), (1981), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, at p.197.
76. *ibid* at p.191.

*(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*  
*(c) To ensure that the competent authorities shall enforce such remedies when granted."*

A matter which is unclear is whether the ICCPR Articles are legally binding on the parties to the ICCPR or are, merely, principles to guide domestic laws. In a discussion on this topic, Schachter argues that parties are bound by the ICCPR. He states that:

*"The Covenant ..... clearly requires execution through domestic legal measures."*<sup>(77)</sup>

However, Schachter does not appear to fully examine the legal status and authority of the ICCPR.

### **ALRC Privacy Principles**

The Privacy Report used the ICCPR as a basis for developing and recommending statements of principles to address the privacy aspects of existing or proposed Commonwealth and Territory legislation and administrative practices. The general terms of reference of the ALRC require that ALRC recommendations are "*as far as practicable, consistent with the ICCPR*",<sup>(78)</sup> and its statements of principles, in turn, formed the basis of the Draft Privacy Bill.

The statements of principles in the Draft Privacy Bill covered (i) privacy intrusions, including powers of arrest and of search of persons and property, and (ii) information privacy.

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77. Schachter, O., "Obligation to Implement Covenant in Domestic Law" in Henkin, *op cit* at p.311.

78. Privacy Report, Vol.2 at p.33.

(i) **Privacy Intrusions**

In the introduction to this Chapter it was stated that it was unclear why the Draft Privacy Bill provisions concerning the powers of arrest and of search of property and persons were excluded from the Privacy Act. Several of the excluded principles and provisions are, however, important in discussing potential reforms for ss. 263 and 264.

The basic principles proposed by the ALRC include those in relation to the granting and exercise of powers of intrusion. In relation to the former, the principles are as follows:

*"Principles Governing The Granting Of Powers Of Intrusion*

- 1. A power of intrusion (i.e. a power to arrest a person, to search a person or a place or to enter private premises) should not be granted as a matter of course. There should be a clear weighing up of the need to interfere with privacy against the social value of the policy to be achieved by conferring the power.*
- 2. A power of intrusion should be conferred expressly, not by implication.*
- 3. A power of intrusion should be conferred by an Act not by subordinate legislation.*
- 4. The grounds on which a power of intrusion should be exercised should be stated expressly and in objective terms.*
- 5. Authority to exercise a power should normally be made dependant on special judicial authorisation (a warrant). Exceptions may be made to this, where necessary, for 'barrier' powers (for example, customs) and cases of emergency."<sup>(79)</sup>*

The granting of the Commissioner's powers of intrusion appears to comply with some elements of the above principles. For example, the powers are conferred expressly by an Act, under s. 263 of the ITAA. Furthermore, s. 263 requires that the access to premises must be for the purposes of the ITAA. However, s. 263 does not state the grounds for intrusion "*expressly and in objective terms*"; nor is there a requirement for a special judicial warrant.

In relation to the *exercise* of the powers, the ALRC recommended the following principles:

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79. *ibid* at p.35.

*"Powers of entry and search of premises (including vehicles)*

*15. A person should not exercise a power to search premises (including vehicles and other property) except:*

- (a) with the consent of the owner or occupier of the premises or property;*
- (b) to prevent the loss, concealment or destruction of evidence relating to an offence; or*
- (c) in accordance with law.*

*(16) Reasonable notice should be given of intention to exercise a power of entry, unless to do so would defeat the purpose of the exercise of the power.*

*(17) A power of entry onto premises should only be exercised at a reasonable time.*

*(18) A person should not use any more force than is necessary in effecting entry onto premises under a power of entry.*

*(19) Where a person has taken possession of any goods, papers or documents he should permit, so far as practicable, the person otherwise entitled to possession of them to use them."<sup>(80)</sup>*

Several of the above principles are not provided for within s. 263 of the ITAA. For example, there is no express requirement in s. 263 that powers of entry are exercised with reasonable notice and at a reasonable time. Section 263 is also silent on the issue of use of necessary force in order to gain entry onto premises.

**(ii) Information Privacy**

The ALRC's second set of privacy principles focus on information privacy. These are based primarily on the guidelines recommended by the Council of the Organisation for Economic Co-operation and Development (referred to as "the OECD") and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>(81)</sup> The Information Privacy Principles (referred to as "the IPP") recommended by the ALRC were included in the Draft Privacy Bill, and, unlike the principles governing the exercise of powers of intrusion, the IPP were included in the Privacy Act. The Privacy Act and the IPP are discussed in the next section.

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80. *ibid* at p.36.

81. *ibid* at p.79.

### **THE PRIVACY ACT 1988 (Cth)**

The enactment of the Privacy Act (in this section referred to as "the Act") followed the publication of the ALRC Privacy Report 1983. There was clearly a considerable delay in the introduction of the legislation and there appeared a lack of enthusiasm by Government, compared to the ALRC, in implementing privacy protection measures. <sup>(82)</sup> This is evident in an assessment of the final content of the Act compared to the 1983 Draft Privacy Bill. <sup>(83)</sup> As was noted earlier, the privacy issues covered by the Act are restricted to matters of information privacy whereas the Draft Privacy Bill also embraced the exercise of official powers, including powers of arrest, and powers of search of both the person and of premises.

The preamble to the Act states that it is "*An Act to make provision to protect the privacy of individuals being natural persons, and for related purposes*". <sup>(84)</sup> Furthermore, the Act is the legislative measure which was undertaken by Australia, as a party to the ICCPR, which gives effect to "*the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence*". <sup>(85)</sup> The preamble to the Act also notes that the Act follows the recommendation by the Council of the OECD that member countries take into account in their domestic legislation the OECD principles concerning the protection of privacy and individual liberties.

Two key components of the Act are the inclusion of grounds for establishing breaches of information privacy and the establishment of a Privacy Commissioner.

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82. See Bygrave, L.A., (1990), "The Privacy Act 1988 (Cth): A Study in the Protection of Privacy and the Protection of Political Power", Vol.19:1, *Federal Law Review*, p.137.
83. Privacy Report, Vol.2, Appendix A, p.215
84. Privacy Act, 1988, Introduction.
85. *ibid.*

Section 13(a) of the Act states, *inter alia*, that:

*"For the purposes of this Act, an act or practice is an interference with the privacy of an individual if, and only if, the act or practice:*

*(a) in the case of an act or practice engaged in by an agency (whether or not the agency is also a file number recipient) - breaches an Information Privacy Principle in relation to personal information that relates to that individual;"*

### **Important Definitions**

The Act (s. 6(1)) defines "agency" to include "a Minister" and "a Department" and "personal information" refers to "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion". The operation of the Act is restricted to Commonwealth agencies.

The Act applies to "individuals" meaning "natural persons". The view taken by the ALRC on the scope of the Act was that protections necessary for individuals were not needed or justifiable in the case of corporations. This is not to say some complaints about intrusive conduct in relation to information held by a corporation would be ignored. The ALRC recommended that a flexible test should be proposed to ascertain whether information, nominally concerning an artificial person, was of a personal nature. <sup>(86)</sup>

### **The Information Privacy Principles**

A taxpayer subjected to the exercise of s.263 and 264 of the ITAA powers may be able to utilise several privacy principles found in the Privacy Act, the main being IPP 1, IPP 2 and IPP 3.

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86. Privacy Report, Vol.1 at p.14.

## (1) Information Privacy Principle 1

IPP 1 prescribes the manner and purpose of collection of personal information. It provides that:

*"1. Personal information shall not be collected by a collector for inclusion in a record or in a generally available publication unless:*

*(a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and*

*(b) the collection of the information is necessary for or directly related to that purpose.*

*2. Personal information shall not be collected by a collector by unlawful or unfair means."*

It appears that IPP 1 may operate to impose some important constraints upon agencies, such as the Australian Tax Office, collecting information that may be "*personal information*". The main constraints may be on the power of the Australian Taxation Office to "fish" for information and to collect information by "unlawful or unfair means".

### (i) Fishing Expeditions

IPP 1 requires that (i) the information is collected for a lawful purpose related to the function of the collector and (ii) the collection is necessary for or directly related to that purpose. IPP 1 appears to preclude a general information gathering role.

As outlined in Chapter 2, s. 263(1) of the ITAA also contains a limitation that the Commissioner's access must be for "*the purposes of [the] Act*". Under s. 264 of the ITAA, the Commissioner may seek information "*concerning [the notice recipient's] or any other person's income or assessment*".

In interpreting the scope of the ss. 263 and 264 powers, it was noted in Chapter 2 that the Courts have permitted wide ranging investigations using the powers under ss. 263 and 264. In *Smorgon's case* <sup>(87)</sup>, the Commissioner was held to have the power to effectively "fish" for information under s. 264. In the *Industrial Equity Limited case* <sup>(88)</sup>, a wide-ranging tax office inquiry or tax audit was held to be consistent with the ss. 263 and 264 powers.

What is unclear or remains to be tested is whether the requirement of IPP 1, that information collected be "*directly related*" to the function of the collector, is consistent with the Courts allowing the Commissioner to effectively "fish" for information or conduct wide-ranging inquiries.

**(ii) Unlawful or Unfair Means**

IPP 1 prevents the collection of information by "*unlawful or unfair means*", which is not defined in the Act. The ALRC commented in the Privacy Report that "*unlawful means*" would include methods of collection that are already prohibited by Australian law. The Report stated that, for example:

*"it is unlawful for the police to obtain a confession by threat of violence or under an inducement. It is also unlawful to assault a person in order to force him to disclose information."*<sup>(89)</sup>

There is less certainty about the meaning of "*unfair means*". The ALRC did not expand specifically on what is meant by "*unfair*" in the context of ss. 263 and 264, however, it did discuss "*unfair*" in the following terms:

*"... an individual should normally be entitled to exercise real control over the way he is seen by others: he should be able to make an informed choice before revealing personal information. In the case of collections which are not compulsory, co-*

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87. op cit at p.504.

88. op cit at p.5015.

89. Privacy Report, Vol.2 at p.88.

*operation should be obtained freely, not by coercion or deception. Any form of harassment should be subject to the general law controlling harassment."*<sup>(90)</sup>

At the time of conducting this study, the Office of the Privacy Commissioner was, apparently, yet to deal with complaints concerning the use of "*unfair means*" in the context of the Commissioner's use of ss. 263 and 264 powers. However, the Office of the Privacy Commissioner has expressed the following view in relation to the meaning of "*unfair means*" under IPP 1:

*"In considering whether information has been collected unfairly both circumstances and methods of collection should be taken into account. Issues to be considered include whether any unfair pressure was used to obtain the information; whether the overall language used by the collection agency, on forms or by the person soliciting the information, could be understood by the ordinary person; and whether intrusive means such as covert surveillance was used to collect the data."*<sup>(91)</sup>

This view emphasises the relevance of both the method of collection and the context or circumstances of the information collection. Accordingly, this view seems to imply that it is difficult to establish that a particular method of collection is *per se* "*unfair*".

As the meaning of "*unfair means*" appears to be untested, a clearer understanding of the expression should develop if and when complaints to the Privacy Commissioner eventuate.

The Australian Taxation Office has made available guidelines for taxpayers on the Australian Taxation Office's expectations and routines governing the conducting of tax audits. These guidelines include an outline of taxpayer "*rights*" which include the broad principles under which audits will operate, including:

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90. *ibid* at p.88.

91. Letter received from Human Rights Australia, Privacy Commissioner Policy Officer dated 5/11/91 which stated that no Privacy Commission proceedings relating to ss.263 and 264 had yet been initiated by individuals. This letter also elaborated on certain aspects of IPP 1, 2 and 3. A verbal inquiry to the Complaints Section of the Office of Privacy Commissioner was made on 29/4/93 which confirmed that complaints concerning ss. 263 and 264 were still yet to be initiated.

*"[the taxpayer] may expect the auditor to act in a professional and courteous manner and to show fairness and impartiality in the conduct of the audit."*<sup>(92)</sup>

The tax audit guidelines also emphasise that the approach outlined above is not legally required and it is implied will operate in return for "*co-operation and goodwill prevailing*".<sup>(93)</sup> The reference in the guidelines to "*rights*" is somewhat misleading and should probably refer to what taxpayers "*may expect*" in return for taxpayer co-operation.

The guidelines themselves imply that the manner and fairness of audits and investigations are likely to depend upon the co-operation of the taxpayer. The guidelines would then suggest that what is fair depends upon the context of the audit and the attitude of the taxpayer.

By the Australian Tax Office's own standards, if a taxpayer is likely to comply with all information requests and generally co-operate, practices, such as a raid, coercion or demands for information without notice could be construed as unfair practices. On the other hand, with taxpayers unlikely to co-operate, such practices may be fair or necessary from the Australian Taxation Office's point of view.

It should be noted that an existing frame of reference for the review of government behaviour is the grounds of review under Section 5 of the ADJR Act. Several grounds for arguing the improper use of power were referred to in this Study in Chapter 2. For example, s. 5(2)(f) covers the exercise of power without regard to the merits of the case and s. 5(2)(g) covers the unreasonable use of power. These grounds cover what may be construed as unfair behaviour.

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92. Section 4, Business Audit Explanatory Booklet, Australian Tax Office, undated.  
93. *ibid*, Section 5.

## (2) Information Privacy Principle 2

IPP 2 refers to the solicitation of information from individuals and states:

*"Where:*

*(a) a collector collects personal information for inclusion in a record or in a generally available publication; and*

*(b) the information is solicited by the collector from the individual concerned; the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, before the information is collected or, if that is not practicable, as soon as practicable after the information is collected, the individual concerned is generally aware :*

*(c) the purpose for which the information is being collected;*

*(d) if the collection of the information is authorised or required by or under the law - the fact that the collection of the information is so authorised or required; ..... "*

The ALRC took the view that legal compulsion is not reason enough to deny an individual the right to know the purpose of the collection and that it is authorised by the law. <sup>(94)</sup> The authorisations and notices under ss. 263 and 264 of the ITAA would seem to meet the requirement of IPP 2 provided the notices are issued before the information is collected or soon thereafter, and the format of the notices meets the requirements contained in paras. (c) and (d) above.

## (3) Information Privacy Principle 3

Grounds for complaint by a taxpayer subjected to the exercise of s. 263 and 264 powers may exist under IPP 3 which states:

*"Where:*

*(a) a collector collects personal information for inclusion in a record or in a generally available publication; and*

*(b) the information is solicited by the collector; the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which information is collected:*

*(c) the information collected is relevant to that purpose and is up to date and complete; and*

*(d) the collection of the information does not intrude to an unreasonable extent upon the personal affairs of the individual concerned."*

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94. Privacy Report, Vol.2 at p.90.

The meaning of subsection (d) of IPP 3 is open to considerable interpretation and there appears to be some overlap between this and IPP 1 (2) requirements. The Office of the Privacy Commissioner has elaborated on IPP 3 in the following general terms:

*"Agencies would be expected to justify the relevance of any particular item of information collected against the purpose for which that item is being collected. Attempting to solicit personal information from an individual's home at night, over mealtimes, early on weekends or outdoors could be considered unreasonably intrusive, as could collection of personal information over a busy public counter within hearing of other individuals."*<sup>(95)</sup>

## PRIVACY COMMISSIONER

### Breaches under the Privacy Act

Section 16 of the Act requires an agency *"not to do an act, or engage in a practice, that breaches an Information Privacy Principle"*. The Privacy Commissioner has been empowered to investigate complaints made under the Act and to carry out a broader educational and compliance seeking role.

The Privacy Commissioner's functions, provided for under s. 27, are quite diverse. The powers include investigation of acts or practices which breach an IPP and, *"where the Commissioner considers it appropriate to do so, endeavour, by conciliation, to effect a settlement of the matters that give rise to the investigation"* (s. 27(1)(a)).

Section 36(1) of the Act gives an individual the right to complain about *"an act or practice that may be an interference with the privacy of the individual"*. Section 36(2) also allows an individual to complain on behalf of other individuals in the case of an act or practice that may interfere with the privacy of 2 or more individuals. For this sub-section to apply,

95. Letter from Human Rights Australia, 5/11/91, refer note 91.

the complaint must be made in good faith on behalf of persons other than the complainant (s. 38(1)).

## **Investigations**

Part V of the Act governs complaints and investigations (Division 1), determinations following investigations (Division 2) and review and enforcement of determinations (Division 3).

The provisions regarding complaints and investigations give the Privacy Commissioner considerable discretion in terms of whether to investigate a complaint and empowers him to follow up matters not the subject of a complaint. The important sections on investigations are summarised as follows:

- (i) s. 36(3) - Complaints shall be in writing and complainants may rely on the assistance of the Human Rights and Equal Opportunity Commission to formulate a complaint.
- (ii) s. 37 - The respondent to the complaint should be specified as "*The Secretary of the Department*" in the case of a "*Department*".
- (iii) s. 40 - The Privacy Commissioner is required to investigate an interference with the privacy of an individual which are the subject of complaints made under s. 36 of the Act. Furthermore, the Privacy Commissioner *may* investigate an interference with the privacy of an individual on his own initiative. Interferences with privacy are defined under s. 13 of the Act as acts or practices which breach IPP or guidelines concerning tax file number disclosures, credit reporting and data matching.

- (iv) s. 41(1) - The Privacy Commissioner may decide not to investigate complaints if he is satisfied that: the complaint involves an act or practice which is not an interference with privacy; the complainant has not complained to the respondent; the complaint was made more than 12 months after the complainant became aware of the act or practice; the complaint is frivolous, vexatious or lacking in substance; the act or practice is the subject of an application under another Commonwealth Act and the subject-matter of the complaint has been, or is being, dealt with adequately under that Act; or a more appropriate remedy is available under another Commonwealth Act. Under ss. 41(2)(3)(4), the Privacy Commissioner may decide not to investigate, or not to investigate further, if a respondent has dealt or is dealing with a complaint adequately, or has not had an adequate opportunity to deal with the complaint.
- (v) The Privacy Commissioner has the power to conduct a preliminary investigation into a matter (s. 42) and has some discretion in relation to how to conduct an investigation (s. 43).
- (vi) Power to obtain information and documents (s. 44) is restricted by ss. 69 and 70. For example, under s. 69 the Privacy Commissioner is restricted in obtaining certain personal information and documents from agencies.
- (vii) Under s. 70, the Privacy Commissioner is not entitled to require persons to give information to the Privacy Commissioner where the disclosure "*would be contrary to the public interest*". It appears if a respondent refused to comply with information requests under this section, an application to that effect would be made by the respondent to the Attorney-General who in turn would furnish a certificate to the Privacy Commissioner certifying that the production of the document would be contrary to the public interest. Grounds under which government agencies could seek to avoid disclosure of information under this

section could include s. 70 (1e) of the Act where disclosure could "*prejudice the conduct of an investigation or inquiry into crime or criminal activity that is currently being pursued, or prejudice the fair trial of any one person*". For example, the Australian Taxation Office could claim that matters under investigation and information sought by the Privacy Commissioner are also subject to criminal law, rather than, as well as, or in addition to a taxation investigation.

- (viii) The Privacy Commissioner has the power to examine witnesses under oath (s.45), require persons to attend a compulsory conference (s. 46) and authorise persons to enter premises and inspect documents (s. 68). If circumstances require, a Magistrate may issue a warrant to a person authorised by the Privacy Commissioner to enter premises for the purpose of exercising the Privacy Commissioner's powers under the Act (s. 68 (4)).

The Privacy Act does not state that the Privacy Commissioner is also subject to the IPP in obtaining information while carrying out investigations. However, as a Commonwealth agency, the Office of the Privacy Commissioner would appear to be governed by the IPP in obtaining information from other agencies.

### **Determinations of the Privacy Commissioner and their Enforcement**

Under s. 52, the Privacy Commissioner may dismiss a complaint or may make a determination which substantiates the complaint. The determination may take several forms but is required to state the findings of fact upon which it is based. The declaration may state that an agency or respondent has engaged in an act which constitutes an interference with an individual's privacy and requires the principal executive of that agency or the respondent not to repeat or continue such conduct. The respondent may be required to "*perform any reasonable act or course of conduct to address any loss or damage*

*suffered by the complainant*" (s. 52 (1)(b)(ii)). Conversely, the Privacy Commissioner may decide it would be inappropriate to take further action in the matter.

In the event of a failure to comply with determinations, the complainant or the Privacy Commissioner may apply to the Federal Court for an order directing the agency to comply (s. 59). The onus is on the principal executive officer of an agency to take steps as are reasonably within his power to ensure the Privacy Commissioner's decisions are complied with.

### **Compensation and Expenses**

Sections 52 (1)(b)(iii) and 52 (3) provide the Privacy Commissioner with the power to specify compensation for any loss or damage suffered by the complainant, and for expenses reasonably incurred in connection with the making and investigation of the complaint. The Act provides that the complainant is entitled to be paid amounts specified in a declaration and the amount is recoverable as a debt due by the agency or Commonwealth, whichever is the case (s. 57). The Act does not provide for the recovery of the debts due.

In relation to declarations concerning (i) compensation for loss suffered by a complainant or (ii) reimbursement to a complainant for expenses incurred in making a complaint, the decisions of the Privacy Commissioner are reviewable under s. 58(1) by the Administrative Appeals Tribunal.

### **Privacy Commissioner's Power to Seek an Injunction**

Section 98 of the Act provides that the Privacy Commissioner or any other person may seek a preventative or mandatory injunction from the Federal Court in the case of any conduct, or any refusal or failure to act, which constitutes or would constitute a

contravention under the Act. An interim restraining order may be granted pending consideration of the application for the injunction.

### **THE PRIVACY COMMISSIONER AND SS. 263 AND 264 - UNTESTED GROUND**

An examination of the provisions of the Act suggests that the Commissioner's powers of investigation and information gathering conferred by ss. 263 and 264 of the ITAA may be subject to the IPP contained in the Act. Consequently, breaches of the IPP by the Commissioner exercising such power may be the subject of a complaint by an individual or the subject of an investigation by the Privacy Commissioner.

It can be argued that the particular constraints imposed by the IPP on the exercise of ss.263 and 264 powers are that:

- (i) the information collected by the Australian Taxation Office should be "*directly related*" to the purpose of the collector (IPP 1); this may operate to exclude the "*fishing*" for information;
- (ii) the means of collection should not be "*unlawful or unfair*" (IPP 1);
- (iii) the individual should be advised of the purpose for which the information is being collected and that the collection is appropriately authorised (IPP 2); and
- (iv) in the case of the soliciting of information, the collection should not intrude to an unreasonable extent upon the affairs of the individual (IPP 3).

The implications of the IPP and the above "constraints" remain untested. It appears there are yet to be any proceedings using the IPP in relation to ss. 263 and 264 of the ITAA. <sup>(96)</sup>

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96. As advised by the Office of the Privacy Commissioner, as at July, 1993.

Furthermore, the Annual Reports covering the early period of operation of the Office of the Privacy Commissioner indicate there have been relatively few complaints handled overall.

Table 1 identifies complaints lodged under the Act, reported in the 1989, 1990 and 1991 Annual Reports. <sup>(97)</sup> The first report on the operation of the Privacy Act was for the six months ending June 30, 1989.

Table 1 Complaints Lodged under the Privacy Act

	Annual Report		
	<u>1989</u>	<u>1990</u>	<u>1991</u>
<i>Total No. of Formal Complaints Received</i>	21	57	66
<i>Ground of Complaint*</i>			
<u>Alleged Breaches of IPPs</u>			
Collection of Information: IPP 1-3	13	27	18
Storage of Info. and Access to it: IPP 4-7	5	6	30
Accuracy and Use of Info: IPP 8-9	Nil	4	18
Limits on Use and Disclosures: IPP 10-11	4	17	45
* Some complaints cover several IPPs.			

The Annual Reports of the Privacy Commissioner do not elaborate on the nature of the complaints lodged although the Second Annual Report suggests there is a bias towards concerns about information collection and disclosure. <sup>(98)</sup> In relation to Australian Taxation Office matters, the Privacy Commissioner's priorities have centred upon an examination of the privacy implications of the Tax File Number system.

Given the overall number of complaints dealt with to date by the Privacy Commissioner, it is difficult to assess the complaint handling aspect of the Privacy Commissioner's role. Furthermore, it appears premature to assess the efficacy of the Privacy Commissioner in

97. Privacy Commissioner, First Annual Report on the Operation of the Privacy Act, p.22 and Second Annual Report on the Operation of the Privacy Act, p.29.  
 98. *ibid*, Second Annual Report, p.29.

tackling the relevant procedures of agencies and their powers to access and collect and store information.

Bygrave, in speculating about the early experience of the Office of the Privacy Commissioner, was sceptical about the likely effectiveness of its role. Bygrave's view was that:

*"it would not be unrealistic to expect the Commissioner to follow the well-documented path taken by most other regulatory bodies. That path involves adopting essentially a reactive posture of tackling problems (and indeed only some of these) after they arise, and making platitudinous appeals to government agencies and others to observe the Privacy Act. This posture, of course, will limit severely the extent to which the Commissioner will be able to induce meaningful structural changes to the way information is processed."*<sup>(99)</sup>

Bygrave also took the view that the number of complaints to the Privacy Commissioner would rise significantly. The reasons for this view were not expanded upon, however, it is reasonable to assume this may happen as the general awareness of the complaints handling facility grows. Furthermore, it could be argued that the Privacy Commissioner provides a level of access to legal redress similar to that provided by the Commonwealth Ombudsman. Accessibility is likely to influence the complaints function while traditional avenues of redress through the Administrative Appeals Tribunal and the Federal Court are more costly and time-consuming.

The relationship between the roles of the Commonwealth Ombudsman and the Privacy Commissioner as it presently exists and develops into the future is also likely to influence the complaints workload of both Offices. At present, the Commonwealth Ombudsman may investigate complaints about administrative actions of Commonwealth Government departments if the actions are *"unreasonable, unjust, oppressive or improperly discriminating"*.<sup>(100)</sup>

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99. op cit at p.152.

100. Commonwealth and Defence Force Ombudsman, 1990-1 Annual Report, p.34.

Bygrave's claim that the Privacy Commissioner is likely to be reactive in outlook is a matter of opinion put forward on the basis of the experience of other under-resourced complaint-based models of regulation. Bygrave also highlights the point that the Privacy Commissioner's responsibilities under the Act are numerous and diverse. <sup>(101)</sup>

A further matter for speculation is how the on-going relationship with Commonwealth agencies will develop. Bygrave suggests that:

*"[a]gencies may well prove to be hostile towards the Act simply because it makes fulfilment of their functions more onerous."*<sup>(102)</sup>

In theory, the Act (ss. 27(1)(a) and 43(5)) encourages the Privacy Commissioner to seek voluntary compliance from agencies, an approach which would probably bring about a more effective long term change of attitudes and behaviour. Beyond seeking compliance, the Privacy Commissioner has the ability to issue determinations and seek injunctions, with the sanction, if necessary, of the Federal Court. In effect, the role entails seeking the co-operation of agencies on the one hand, and policing their actions on the other.

One issue which is likely to test the relationship between the Privacy Commissioner and agencies will be the work of the Privacy Commissioner or the Human Rights Commission in addressing existing or proposed legislation which authorises actions which may interfere with individuals' privacy. The Privacy Report highlighted ss. 263 and 264 of the ITAA as illustrations of powers without restrictions. <sup>(103)</sup> At the time, the ALRC anticipated that the recommended review of existing powers of agencies should be performed by the Human Rights Commission. <sup>(104)</sup> With the Privacy Commissioner assuming probably a broader role than was expected by the ALRC, the task of reviewing existing legal powers seems to sit with the Privacy Commissioner. The ultimate test of whether the Privacy

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101. op cit at p.152.

102. op cit at p.149.

103. Privacy Report, Vol.1 at p.75.

104. Privacy Report, Vol.2 at p.37.

Commissioner adopts a reactive, rather than proactive outlook, may be in his efforts in challenging the powers of agencies.

## Chapter 4

### **THE NORTH AMERICAN AND BRITISH EXPERIENCE**

This chapter examines aspects of constitutional and taxation legislation in selected overseas countries, namely, Canada, the United States of America and the United Kingdom, with particular reference to government powers and taxpayer protections in those countries. Its aim is to compare the powers of entry and search of premises and information gathering in these countries with the powers that exist under ss. 263 and 264 of the ITAA.

#### **CANADA**

The recent Canadian experience with the introduction of the Charter of Rights and Freedoms (referred to as "the Charter") and its subsequent impact on all areas of law is relevant to a comparative assessment of the Australian situation.

Canadian taxation legislation exhibits an alternative approach to conferring official powers of access. This section discusses, *inter alia*, the issues raised by a system based on a more detailed set of rules.

#### **Canadian Constitutional Protections - The Canadian Charter of Rights and Freedoms**

The Charter was incorporated in the Canadian Constitution in 1982. Ferguson, in providing an overall assessment of the Charter, describes its effect as like:

*"an exploding bomb dropped in the middle of the Canadian legal system, it has destroyed a few laws, shaken up a host of other laws and generated an immense amount of activity and at least some anxiety."*<sup>(105)</sup>

The provisions in the Charter governing rights and freedoms are further described as applying:

*"to all legislative and executive activities, at both the federal and provincial level, and to the activities of any body or person exercising statutory authority, such as a municipality, a law society, a university or any public official."*<sup>(106)</sup>

In the context of taxation investigations, s. 8 of the Charter is particularly relevant. It provides that:

*"Everyone has the right to be secure against unreasonable search or seizure."*<sup>(107)</sup>

The role of s. 8 was discussed by the Supreme Court of Canada in the 1984 case of *Hunter et al. v. Southam Inc.* (referred to as "*Hunter v. Southam*").<sup>(108)</sup> In *Hunter v. Southam*, a search was conducted under ss. 10(1) and 10(3) of the *Combines Investigation Act 1970* which provide, as follows:

*"10.(1) Subject to subsection (3), in any inquiry under this Act the Director (of Investigation and Research of the Combines Investigation Branch) or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.*

*(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the (Restrictive Trade Practices) Commission, which may be granted on the ex parte application of the Director, authorizing the exercise of such power."*

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105. Ferguson, G., (1990), "The Impact of an Entrenched Bill of Rights: The Canadian Experience", Vol.16:2, *Monash University Law Review*, p.213.

106. *ibid* at p.212.

107. The Charter (Part 1 of the Constitution Act,1982) is discussed in Chapter 7, Fontana, J.A., *The Law of Search and Seizure in Canada*, Butterworths, Toronto, 1984.

108. 84 2 SCR 145.

The search involved several Combines Investigation Officers entering and examining documents and other things at the respondent's business premises and at other premises.

(109) The Supreme Court of Canada held that the procedures for conducting searches under s.10(3) of the Act were constitutionally defective. It was held that:

*"First, for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. Inter-alia he must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme. The significant investigatory functions bestowed upon the Restrictive Trade Practices Commission and its members by the Act vitiated a member's ability to act in a judicial capacity in authorizing a s.10(3) search and seizure and do not accord with the neutrality and detachment necessary to balance the interests involved.*

*Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search constitutes the minimum standard consistent with s.8 of the Charter for authorizing searches and seizures. Subsections 10(1) and 10(3) of the Act do not embody such a requirement. They do not, therefore, measure up to the standard imposed by s.8 of the Charter. The Court will not attempt to save the Act by reading into it the appropriate standards for issuing a warrant. It should not fall to the Courts to fill in the details necessary to register legislative lacunae constitutional."*<sup>(110)</sup>

## Canadian Taxation Legislation

As a result of the 1984 decision in *Hunter v. Southam*, there were significant amendments to the search and seizure provisions included in Canadian taxation legislation. The most important of these occurred in 1986. Before the 1986 reforms are examined, a brief analysis will be made of the position before their introduction.

### (i) Prior to 1986 Reforms

As with many areas of Canadian law, taxation legislation has undergone review as a result of the introduction of the Charter and the interpretation of the s. 8 in *Hunter v. Southam*.

109. *ibid* at p.145.

110. *ibid* at p.146 per *Dickson J.*

Section 231 of the *Income Tax Act 1952* (referred to as "the ITA") governs, among other areas, investigations and inquiries conducted by the office of the Minister of National Revenue (described in this Chapter as "the Minister").<sup>(111)</sup> Prior to being amended in 1986, s. 231 of the ITA included the following provisions:

*"231(1) Any person thereunto authorized by the Minister, for any purpose related to the administration or enforcement of the Act, may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are or should be kept, and*

*(a) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act,*

*(b) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act,*

*(c) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and for that purpose, require the owner or manager to attend at the premises or place with him, and*

*(d) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the documents, books, records, papers or things that may be required as evidence as to the violation of any provision of this Act or a regulation.*

*(2) The Minister shall,*

*(a) within 120 days from the date of seizure of any documents, books, records, papers or things pursuant to paragraph (1)(d), or*

*(b) if within that time an application is made under this sub-section that is, after the expiration of that time, rejected, then forthwith upon disposition of the application,*

*return the documents, books, records, papers or things to the person from whom they were seized unless a judge of a superior court or county court, on application made by or on behalf of the Minister, supported by evidence on oath establishing that the Minister has reasonable and probable grounds to believe that there has been a violation of this Act or a regulation and that the seized documents, books, records, papers or things are or may be required as evidence in relation thereto, orders that they be retained by the Minister until they are produced in any court*

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111. *Income Tax Act*, per: R.S.C. 1952 (as amended).

*proceedings, which order the judge is hereby empowered to give on ex parte application.*

*(3) The Minister may, for any purposes related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person*

*(a) any information or additional information, including a return of income or a supplementary return, or*

*(b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents,*

*within such reasonable time as may be stipulated therein.*

*(4) Where a Minister has reasonable and probable grounds to believe that a violation of this Act or a regulation has been committed or is likely to be committed, he may with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on ex parte application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls to assist him and such other person as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things that may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away such documents, books, records, papers or things and retain them until they are produced in any court proceedings.*

*(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based."*

Subsections 6-15 of s. 231 of the ITA, which are not outlined here, cover the taxpayer's rights of access to seized documents, the copying of documents by the taxpayer and the Department of National Revenue, and the conducting of tax inquiries. Section 232 examines the extent of solicitor-client privilege.

The significant features of s. 231 of the ITA, as outlined above, were that:

- (i) s. 231(1) authorised audits or examinations and provided that any person authorised by the Minister may, "*at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are or should be kept*". This provision authorised a *general* power of entry to

premises for the purpose of auditing or examining books and records. S. 231(1)(d) authorised the seizure of things found during the course of an audit that may be required as evidence as to a violation of the Act;

- (ii) s. 231(4) authorised a *specific* power of entry and search of premises, not restricted to business premises, and seizure of documents, including the power to enter and search "*if necessary by force*". This provision was intended to operate where there was a belief that a violation of the Act had been or was likely to have been committed. The power to seize things that may be afford evidence was also authorised under s. 231(4);
- (iii) s. 231(1)(c) required owners or managers of the property or business and any other person on the premises to give "*all reasonable assistance*" with an audit and to answer "*all proper questions relating to the audit*";
- (iv) s. 231(3) generally conferred broad powers of information gathering in that the "*Minister may for any purposes related to the administration or enforcement of the Act .... require from any person any information ...*". Furthermore, it appears that Canadian courts have taken s. 231(3) at face value.<sup>(112)</sup> The only constraint apparent within s. 231(3) was that the Minister could require information "*within such reasonable time as may be stipulated*" in the notice.

The major concern with s. 231, prior to its amendment, was that under s. 231(4), it was the Minister who had to have reasonable and probable grounds to believe evidence of a violation of the ITA was likely to be found. In relation to this section, there was concern that ss. 231(4) and (5) did not contain a standard for the judge to apply when assessing whether or not the Minister's belief was properly founded.

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112. See: Commentary in Canada Tax Service, p.231-106, 1981, De Boo, Toronto, with reference to Canadian Bank of Commerce v. Attorney-General of Canada, 1962 S.C.R. 729.

The constitutional shortcomings of s. 231(4), in particular, were discussed by the Supreme Court of British Columbia in *Constantine Kourtessis and Hellenic Import-Export Company Limited v. Minister of National Revenue and Her Majesty The Queen of Canada in right of Canada* (referred to as "*C.Kourtessis v. M.N.R.*").<sup>(113)</sup> The Court, in examining the amendments to s. 231, noted that prior to its reform, s. 231 had the following deficiencies:

*"First, that there was no provision for prior authorization by a neutral arbiter. Second, the criteria for issuing an authorization for entry, search, and seizure failed to provide an adequate standard against which to test an applicant's grounds for belief that an offence had been committed and that evidence was to be found at the place of search."*<sup>(114)</sup>

### After the 1986 Reforms

There were several significant changes to the Minister's powers of entry, search and seizure of documents in the 1986 amendments to the ITA. The Minister's *general* power of entry, as provided by s. 231(1), was substantially reduced and the exercise of the Minister's *special* power of entry, as provided by s. 231(4) was made subject to judicial authority.

#### (i) General Power of Entry

A *general* power of entry is conferred under s. 231.1<sup>(115)</sup> which provides that:

*"(1) An authorised person may, at all reasonable times, for any purposes related to the administration or enforcement of this Act,*  
*(a) inspect, audit, or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by him under this Act, and*  
*(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an*

113. 89 1 CTC 56.

114. *ibid* at p.60 per Lysyk J.

115. The 1986 amendments to the ITA introduced a revised numbering of sections. For example, s. 231(1) of the ITA was re-numbered as s. 231.1(1).

*examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by him under this Act,*  
*and for those purposes the authorized person may*  
*(c) subject to subsection (2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept;...*"

The significant change to the *general* power of entry was that under s. 231.1(2) a restriction was placed on an authorised officer's powers to enter into any premises or place, at all reasonable times. S. 231.1(2) provides that:

*"Where any premises or place referred to in paragraph (1)(c) (reference to s.231.1(1)(c)) is a dwelling-house, an authorised person may not enter that dwelling house without the consent of the occupant except under the authority of a warrant under subsec (3) (reference to s.231.1(3))."*

As a result of this amendment, there is now a distinction between "*any premises or place*" where any business is carried on and "*a dwelling-house*" in which a business is carried on. A "*dwelling-house*" is defined under the ITA as "*the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence*".

In order to inspect or audit books or documents kept in a "*dwelling-house*", s. 231.1(2) requires that a warrant be obtained. Under s. 231.1(3), a judge may issue a warrant where he "*is satisfied by information on oath*" that the dwelling-house is a premises or place referred to in s. 231.1(1)(c). Furthermore, the judge is required to be satisfied that entry is necessary for enforcement of the ITA and that entry has been or is likely to be refused.

## **(ii) Special Power of Entry**

S. 231(4), which authorised a *special* power of entry, was replaced by s. 231.3(1) which states:

*"231.3 (1) A judge may, on ex parte application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building,*

*receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize and, as soon as practicable, bring the document or thing before, or make a report in respect thereof to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.*

*(2) An application under the subsection (1) shall be supported by information on oath establishing the facts on which the application is based.*

*(3) A judge shall issue the warrant referred to in subsection (1) where he is satisfied that there are reasonable grounds to believe that*

*(a) an offence under this Act has been committed;*

*(b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and*

*(c) the building, receptacle or place specified in the application is likely to contain such a document or thing.*

*(4) A warrant issued under subsection (1) shall refer to the offence for which it is issued, identifying the building, receptacle or place to be searched and the person alleged to have committed the offence and it shall be reasonably specific as to any document or thing to be searched for and seized.*

*(5) Any person who executes a warrant under subsection (1) may seize, in addition to the document or thing referred to in subsection (1), any other document or thing that he believes on reasonable grounds affords evidence of the commission of an offence under this Act and shall as soon as practicable bring the document or thing before, or make a report in respect thereof to, the judge who issued the warrant or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section."*

The exercise of the power to enter and search premises and seize documents under s.231.3, requires a judge to be presented with information establishing that there are "*reasonable*" grounds to believe that an offence has been committed and that evidence exists and "*is likely to be found*" in the relevant building, receptacle or place specified in the application.

These requirements differ significantly from s. 231(4) which required that the Minister, not a judge, had to have "*reasonable and probable grounds*" to believe that a violation had been or was likely to be committed. Furthermore, under s. 231(4) the Minister could authorise the entry and search of places that "*may afford evidence*" as to a violation of the Act, unlike s. 231.3 where entry is authorised where evidence "*is likely to be found*".

## Judicial Consideration of Reforms

The new provisions of the ITA generated several Court challenges which invariably focused on the inconsistency between the rights established in the Charter and the powers authorised under s. 231.3 of the ITA.

The Canadian courts, as illustrated by the decision in *C.Kourteassis v. M.N.R.*, initially appeared to support the view that the new s. 231.3 powers were valid in that they did not contravene the spirit of the Charter. The minimum grounds for authorising a search were examined in *C.Kourteassis v. M.N.R.* where the taxpayers argued that "reasonable grounds" for belief (as required by s. 231.3) represented a constitutionally unacceptable watering down of the requirements of the Charter.<sup>(116)</sup> However, the Court took the opposite view, finding that the:

*"sole standard explicitly supplied by section 8 of the Charter is that of reasonableness. Authority does not establish and, in my view, principle does not commend the proposition contended for by the petitioners to the effect that absence of a statutory requirement for probable as well as reasonable grounds for belief is constitutionally fatal."*<sup>(117)</sup>

More recently, the Federal Court of Appeal in *Berl Baron and Howard Baron, C.A. v. Her Majesty The Queen and the Attorney General for Canada and The Honourable Otto Jelinek in his capacity as Minister of National Revenue* (referred to as "*Baron (B.) v. Canada*")<sup>(118)</sup> also held that "reasonable" grounds for belief was an adequate standard for the authorisation of a warrant. However, the Court found two other matters offensive to the spirit of the Charter and, accordingly, quashed search warrants issued under s. 231.3, ordered the return of everything seized and also declared that s. 231.3 was of no force or effect because of its inconsistency with the Charter.<sup>(119)</sup>

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116. op cit at p.62.

117. ibid at p.64 per *Lysyk J.*

118. 91 1 CTC 125.

119. ibid at p.139.

Firstly, the Court held that s. 231.3(3) was defective in its wording in that it states that "*a judge shall issue the warrant referred to in subsection 1 ..*". The Court held that use of the word "*shall*" in the context of s. 231.3(3) does not permit the exercise of judicial discretion. <sup>(120)</sup>

Secondly, the Court held that s. 231.3(3) was defective in that it provides that a warrant shall be issued where there are reasonable grounds to believe that "*a document or thing that may afford evidence of the commission of the offence is likely to be found; ...*". The Court held that a belief that evidence *may* be found is insufficient for the issue of a warrant. It stated that:

*"the use of the word "may" allows the issuance of a search warrant on showing reasonable grounds to believe in a mere possibility that the thing to be found will afford evidence of a crime."* <sup>(121)</sup>

On the use of the word "*may*", the Court <sup>(122)</sup> referred to the judgement of the Supreme Court of Canada in *Hunter v. Southam* which stated that its use constituted:

*"a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure."* <sup>(123)</sup>

The Court's interpretation of s. 231, as it stands, in *Baron (B.) v. Canada* poses a problem for the Department of National Revenue's powers of entry to premises. *Baron (B.) v. Canada* casts doubt on the power to enter and search premises, and seize documents under warrant, using the provisions of s. 231.3.

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120. *ibid* at p.126.

121. *ibid* at p.137.

122. *ibid* at p.137.

123. *op cit* at p.167.

However, the Department of National Revenue still enjoys considerable powers of access to premises for inspection or audit purposes. Under s. 231.1 of the ITA, officers of the Department of National Revenue may enter premises "*at all reasonable times*" where any business is carried on unless the premises is a dwelling house, in which case the consent of the occupant or a search warrant is required.

As at June, 1993, the problems for the Department of National Revenue appeared yet to be resolved by way of either appeal in *Baron (B.) v. Canada* or by amendment to the ITA.

### **Comment on the Canadian Experience**

The impact on domestic taxation legislation of the Canadian Charter of Rights and Freedoms is a clear illustration of the effects of the Charter as described by Ferguson at the start of this chapter. A critical question is whether the concerns created by *Baron (B.) v. Canada* case are temporary or illustrative of a prolonged period of confusion concerning the grounds under which the powers of search and seizure may be exercised. One suspects the former is the case until the problems with the legislation are rectified.

The Canadian experience illustrates the need for legislation which is both adequately worded and, more importantly, consistent with any general standards of protection laid down by Parliament or the Courts. The Canadian system also demonstrates the benefit of having a system which subjects government powers of intrusion in domestic legislation to Constitutional protections.

Assuming the Canadian system eventually settles down, the advantage of the approach adopted in Canada will be in having both the general framework of rights provided by the Charter and an adequate level of detail in its taxation legislation which puts the respective rights of the individual and powers of the State into context.

A critical distinguishing feature from the Australian system of taxpayer protections is the role of the judiciary in authorising access to premises. Unlike the Australian system for conferring powers of access, in Canada, judicial authorisation is required in order to:

- (i) enter into "*dwelling-houses*" or residences where a business is carried on and the occupant refuses or is likely to refuse entry. Otherwise, authorised officers have the power to enter premises "*at all reasonable times*" for inspection and audit purposes; and
- (ii) enter and search premises for documents or things that may afford evidence of an offence under the ITA, and to seize such documents and things.

## **UNITED STATES**

The United States taxation administration system provides the Internal Revenue Service (referred to as "the IRS") with considerable powers of investigation through the *Internal Revenue Code 1954 (Federal)* (referred to as "the IRC"). Unlike ss. 263 and 264 of the ITAA, the IRC contains several provisions, known collectively as the Taxpayer Bill of Rights, which are designed to protect taxpayers against procedural irregularities. United States taxpayers are also protected by the Fourth and Fifth Amendments to the United States' Constitution.

### **IRS Investigatory Powers**

Under the IRC, the IRS may seek information on a voluntary basis or under compulsion.

Section 7602 of the IRC empowers the IRS to (i) examine books, papers, records, or other data which may be relevant to a taxation enquiry, and (ii) summon a person to appear before the IRS to produce books, papers, records or other data and to give testimony,

under oath. Special procedures are set down under s. 7609 for summoning the production of records kept by a third party. Section 7604 provides for the district courts to enforce the requirements of a summons if the person who has received the summons neglects or fails to comply with it. The general expectation with the summons is that it will be complied with voluntarily. <sup>(124)</sup>

The nature of the summons which is issued under s. 7602 of the IRC is summarised by Shaya who states that the:

*"scope of the summons cannot be so broad, indefinite, or burdensome as to constitute an unreasonable search or invasion of privacy. If consent was induced by deceit, treachery or misrepresentation by an IRS agent, the search will be considered unreasonable under the fourth amendment. The zone of privacy doctrine protects taxpayers generally from warrantless searches on private premises of businesses or individuals. The time and place of the examination must also be reasonable."* <sup>(125)</sup>

Prior to enforcing a summons, the courts would need to consider matters such as whether the IRS access to testimony or information is relevant or material to the IRS inquiry.

Under s. 7608, enforcement officers of the IRS have the authority to *"execute and serve search and arrest warrants, and serve subpoenas and summonses issued under authority of the United States"*. The obtaining of a search warrant is governed by the Fourth Amendment, as discussed below.

### **Constitutional Protections**

The two provisions of the United States' Constitution relevant to the powers associated with requesting or obtaining information and the search of premises, are the Fourth and Fifth Amendments. The Fourth Amendment provides that:

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124. Shaya, L., (1988), "The New Taxpayer's Bill Of Rights: Panacea or Placebo", Vol.65, *University of Detroit Law Review*, p.459.

125. *ibid* at p.462.

*"The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."*

The Fourth Amendment ensures that a search warrant is obtained where government agencies wish to compulsorily search "*persons, houses, papers and effects*". The Amendment requires that the determination of "*probable cause*" can only be made by judicial authority <sup>(126)</sup> and the place to be searched and items to be seized must be outlined in detail in the warrant. <sup>(127)</sup>

The Fourth Amendment requires that "*probable cause*" be established in order to prevent unreasonable searches or seizures. Reasonableness may be determined in light of "*the total atmosphere of the case, and in the area of reasonableness of search and seizure, each case must be judged on its own facts and circumstances*". <sup>(128)</sup>

The Fifth Amendment states that:

*"No person will be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law."*

The Fifth Amendment may be used to protect a person from being forced to be a witness against himself and individuals are required to be warned of their constitutional rights prior to seeking information. In the context of taxation investigations, the Fifth Amendment protection would (i) prevent the IRS from using an administrative summons under s. 7602 of the IRC to compel a taxpayer to give testimony which may incriminate himself, and (ii) require that the IRS warn a taxpayer of his rights under the Fifth Amendment. The Fifth

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126. Jordan, E.M.Q., (1987), "Scope of the Constitutional Protection Against Unreasonable Governmental Intrusions under the Fourth Amendment of the United States Constitution and Secs. 8 & 10, Article II of the Puerto Rico Constitution", Vol.56, *Revista Juridica De La Universidad De Puerto Rico*, p.310.
127. Bittker, B.I. and Lokken, L., (1992), Vol.4, *Federal Taxation of Income, Estates and Gifts*, Warren, Gorham and Lamont, Boston, p.62.
128. Refer Section on Searches and Seizures, Vol.68:2d, *American Jurisprudence*, (1992), Lawyers Publishing Co, New York, p.662.

Amendment relates to testimony which may be incriminating and does not, as a general rule, prevent the production of incriminating documents which could be sought by the IRC under administrative summons. <sup>(129)</sup>

### **Taxpayer Bill Of Rights**

The United States Taxpayer Bill of Rights has been given much attention as a suitable model for Australia to follow in terms of providing taxpayer protections.

As a result of the 1988 *Citibank* raid, referred to in Chapter 2, considerable public debate ensued <sup>(130)</sup> over the apparent lack of safeguards for taxpayers in dealing with the Australian Taxation Office. As part of this debate, McGuinness proposed that the United States Taxpayer Bill of Rights deserved to be studied as a model for policy. <sup>(131)</sup> McGuinness did, however, recognise that the provisions of the Taxpayer Bill of Rights were specific to the United States legal system and that the legislation operated within the framework of the protections provided by the United States Constitution.

The Taxpayer Bill of Rights, also known as the Omnibus Taxpayer Bill of Rights, is the popular term for the *Technical and Miscellaneous Revenue Act 1988 (Federal)* which introduced several amendments to the IRC. The Taxpayer Bill of Rights introduces procedural rights for taxpayers being interviewed by IRS officers in the course of an IRS investigation. Several of the amendments to the IRC introduced by the *Technical and Miscellaneous Revenue Act 1988 (Federal)* are as follows:

- (i) s. 6227 requires that a statement which sets out in "*simple and nontechnical terms*" the rights of taxpayers and the obligations of the IRS during an audit, be

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129. op cit at p.463.

130. An illustration of this discussion can be found in an article by McGuinness, P., (1989), "U.S. Taxpayers' Bill of Rights", Vol.24:4, *Taxation in Australia*, pp.232-233.

131. *ibid.*

issued *"to all taxpayers the Secretary contacts with respect to the determination and collection of any tax"*.

- (ii) s. 7520(a)(1) permits taxpayers to make audio recordings of *"any in-person interview"*. Under s.7521(a)(2), IRS officers may record any interview provided the taxpayer is informed of such recording prior to the interview and upon request the taxpayer receives a transcript or copy of the recording.
- (iii) s. 7520(b)(1) requires an explanation to be given to the taxpayer, before or at an initial interview, of the audit process and taxpayer rights under such process. Section 7520(b)(2) gives the taxpayer the right, at any time during any interview, *"other than an interview initiated by an administrative summons"*, to suspend the interview and consult with *"an attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service"*. An *"administrative summons"* is a summons issued under s. 7602 of the IRC.
- (iv) s. 6229 enables the taxpayer to rely on the written advice of the IRS and precludes the IRS from seeking penalty tax or additional tax attributable to any erroneous advice.
- (v) s. 7811 provides for the Office of Ombudsman to issue *"a Taxpayer Assistance Order, if in the determination of the Ombudsman, the taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary"*. The terms of the Order may involve the IRS releasing property of the taxpayer levied upon or ceasing or refraining from taking certain actions against the taxpayer.

## Comment on the United States Experience

The 1988 amendments to the IRC were aimed at establishing several procedural rights and obligations. The need for these amendments emerged during a period where the IRS was facing considerable criticism concerning its aggressive use of revenue collecting powers. As a consequence, the amendments were seen as ensuring greater control over the employees of a large public sector organisation, although it is unclear whether this control has been achieved.

In evaluating the amendments to the IRC *per se*, it is clear that the powers of the IRS to obtain information have not been significantly reduced or modified. Rather, the nature of the amendments was to ensure greater regularity in relation to IRS procedures and to ensure taxpayers could exercise several rights. These include the right to (i) be advised of their rights during IRS investigations, (ii) record certain interviews with the IRS, (iii) suspend interviews and consult with advisers except where the interview is initiated by an administrative summons, and (iv) seek assistance from the Ombudsman if the taxpayer is about to suffer a significant hardship as a result of the manner in which revenue laws are being administered. In relation to the right to suspend interviews, it is not clear why this right does not exist where the interview is initiated by an administrative summons.

Shaya, in evaluating the amendments to the IRC, states that although the changes "*appear superfluous, several of the ideals are worthy of attention*".<sup>(132)</sup> For example, Shaya suggests that the role of the Ombudsman may mean that taxpayers may not have to incur the risks and costs of litigation as a means of protection from "*the arbitrary and capricious actions of overzealous revenue officers*".<sup>(133)</sup> However, Shaya's overall view is that the Taxpayer Bill of Rights does not offer any greater level of protection for the taxpayer against abuses of power. In her view, the real problem comes from the failure to

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132. op cit at p.489.

133. op cit at p.489.

observe the safeguards that already exist. Furthermore, the Taxpayer Bill of Rights does little to protect against IRS agents who fail to observe the IRC and IRS policy. In summarising her views on the protections required by taxpayers, Shaya states that taxpayers:

*"need a protective shield against bureaucratic aggression, unjustified seizures, coercive initiatives, and unreasonable manipulations of procedural regulations."*  
(134)

The United States experience, in Shaya's view at least, suggests that the introduction of new laws, such as the Taxpayer Bill of Rights, is far from the complete answer to the problem of protecting taxpayer rights. The proper enforcement of new and existing laws also appears to be a critical consideration.

## **UNITED KINGDOM**

The Board of Revenue's powers to gather information, including the search of premises, are outlined in the *Taxes Management Act 1970* (described as "the TMA").

### **Board of Revenue Investigatory Powers**

#### **(i) Power to Obtain Documents**

The Board of Revenue's powers to obtain documents are conferred under the TMA which authorises the collection of documents from: (i) a taxpayer (by an inspector under s. 20(1) or the Board of Revenue under s. 20(2)); (ii) any person other than the taxpayer (under s.20(3)); and (iii) tax accountants (under s. 20A).

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134. op cit at p.490.

As an illustration of the powers conferred under the TMA, s. 20(1) of the TMA provides that:

*"an inspector may by notice in writing, require a person-*

*(a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to-*

*(i) any tax liability to which the person is or may be subject, or*  
*(ii) the amount of any such liability, or*

*(b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability."*

Inspectors do not have absolute discretion in the the issuing of notices. S. 20(7) states:

*"Notices ... are not to be given by an inspector unless he is authorised by the Board for its purposes; and-*

*(a) a notice is not to be given by him except with the consent of a General or Special Commissioner; and*

*(b) the Commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section."*

It can be seen that s. 20(7) provides that a tax inspector must obtain the consent of a "General or Special Commissioner" before a notice can be given. A condition on the giving of a notice is that the General or Special Commissioner must be satisfied that the tax inspector is justified in issuing the notice. One important requirement under s. 20(7)(b) is that the taxpayer must have been given a reasonable opportunity by a tax inspector to provide the documents and information in question.

## **(ii) Powers of Search and Seizure**

The Board of Revenue has the power to enter and search premises and seize documents.

Section 20(C)(1) provides that an appropriate judicial authority may issue a warrant authorising an officer of the Board of Revenue to enter premises, if necessary by force, and

search them. The judicial authority must be satisfied, on information given under oath by an officer of the Board of Revenue, that there is reasonable ground for suspecting an offence involving "*serious fraud*" is being, has been or is about to be committed.

Serious fraud is described in the legislation (s. 20C(1A)) as:

*"...an offence ... [which has led], or is likely to lead, either to substantial financial gain to any person or to serious prejudice to the proper assessment or collection of tax; and*

*(b) an offence which, if considered alone, would not be regarded as involving serious fraud may nevertheless be so regarded if there is reasonable ground for suspecting that it forms part of a course of conduct which is, or but for its detection would be, likely to result in serious prejudice to the proper assessment or collection of tax."*

In assessing whether an offence involved serious fraud, the judicial authority will need to examine if it had led or was likely to lead to (i) substantial financial gain to any person or (ii) serious prejudice to the proper assessment or collection of tax. In the latter case, the judicial authority would need to consider the seriousness or significance of the offence in terms of tax assessment or collection principles and procedures.

Section 20C(3) confers on an officer of the Board of Revenue exercising the warrant the power to "*seize and remove any things whatsoever found there which he has reasonable cause to believe may be required as evidence .... and search or cause to be searched any person found on the premises whom he has reasonable cause to believe to be in possession of any such things; but no person shall be searched except by a person of the same sex*" (s.20C(2)).

Section 20CC governs the procedures for persons to obtain a record of documents removed and the conditions under which records may be retained by the Board of Revenue. The Board of Revenue also has the discretion to refuse access to documents or allow copies of

documents to be taken if the access or copying would prejudice an investigation or criminal proceedings (s. 20CC(8)).

### **Comment on the United Kingdom Experience**

The approach adopted in the TMA is quite different to that illustrated by ss. 263 and 264 of the ITAA. Although the Board of Revenue has substantial powers to search and to obtain information, the TMA has separate provisions for calling for documents from taxpayers, other persons and tax accountants. The TMA also details restrictions on the s. 20 powers to call for documents from barristers, advocates or solicitors. In relation to this matter, s. 20(B)(8) provides that a barrister, advocate or solicitor is not obliged "*to deliver or make available, without the client's consent, any document with respect to which a claim to professional privilege could be maintained*", .

In relation to powers of search and entry, unlike s. 263 of the ITAA, the TMA requires a judicial warrant. The TMA also provides for seizure of documents and the search of persons.

The history of ss. 20 to 20CC has indicated that, over time, the powers have developed as an increasingly more detailed set of rules. <sup>(135)</sup> A feature of the United Kingdom legislative approach is that the government powers and taxpayer protections appear to have been subject to closer scrutiny by the parliament.

### **SS. 263 AND 264 OF THE ITAA - COMPARATIVE ANALYSIS**

An examination of the powers of access and information gathering of the taxation authorities in Australia, Canada, the United States and the United Kingdom indicates some

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135. Simon's Taxes, (1983), Butterworths, London, 3rd ed. as amended, issue 157, p.637.

significant differences between these countries. These differences are evident in terms of: (i) the extent of the powers exercised by government and conferred in taxation legislation; (ii) the legislative models for conferring powers; and (iii) the legal environment in which the powers operate. A comparative analysis of the key features of the taxation legislation in the above countries is shown in Table 2.

A feature of the analysis in Table 2 is the scope of the Commissioner's powers of entry compared to Canada, the United States and the United Kingdom and the lack of judicial authorisation over these powers. On the other hand, the Commissioner does not have the power to seize documents (he may only copy them), or arrest or search persons, as is allowed elsewhere.

The power to obtain information under s. 264 of the ITAA is also expressed in comparatively broad terms and the requirement to give reasonable notice for complying with requests for information is noticeably absent.

Table 2 Comparative Table of Search and Information Gathering Provisions in Tax Legislation in Australia, Canada, United States and United Kingdom.

	<u>Australia</u>	<u>Canada</u>	<u>U.S.</u>	<u>U.K.</u>
<u>Powers of Entry</u>				
Nature of access to premises	"full and free access" "at all times"	"entry at all reasonable times" unless a dwelling, otherwise a search warrant	Consent required or search warrant	Consent required or search warrant
Access is authorised by	Commissioner of Taxation in writing	Judicial Warrant	Judicial Warrant	Judicial Warrant
Nature of authorisation/ search warrant	Written authority that officer is authorised to exercise powers	Identifies alleged offence, offender, place, documents, search officer	Identifies place to be searched and person or things to be seized"	TMA does not specify contents
Grounds for warrant	Not applicable	Reasonable grounds to believe offence committed	Probable cause criteria	Reasonable grounds for suspecting serious fraud
Power to seize documents	None - may copy	Yes	Yes	Yes
Power to search persons	No	No	Under warrant if probable cause	Yes
Power of arrest	No	No	Yes	No
<u>Powers of Information Gathering</u>				
Power to obtain information from taxpayers*	May require any person to attend any give evidence and produce all books	May require any information or any document	May summon taxpayer to appear, produce books and give testimony	May require delivery of documents and furnishing of relevant particulars
Form/delivery of notice	In writing	Served personally or by registered or certified mail	Attested copy delivered by hand	In writing
Timing of notice	No requirements in s.264 of ITAA	A reasonable time as stipulated in the the notice. Not less than 10 days notice if required to attend	A reasonable time, given circumstances, for examining books.	Not less than 30 days after date of notice
* United Kingdom. outlines separate requirements for requesting information from 3rd parties and accountants. Canada and the United States have separate summons requirements for third-parties.				

## Chapter 5

### **DISCUSSION AND RECOMMENDATIONS**

This chapter highlights several concerns with the powers of the Commissioner and the Australian Taxation Office to enter and search premises, and gather information under ss.263 and 264 of the ITAA.

The potential impact of the Privacy Act in relation to ss. 263 and 264 of the ITAA is discussed, as well as the inadequacy of the Privacy Act, itself, to address several key privacy principles.

The chapter includes some general comments about the legislative model in Australia under which the powers of entry and search of premises, and information gathering, are conferred.

### **COMMENTS ON SECTIONS 263 AND 264 OF THE ITAA**

In light of the privacy principles discussed in Chapter 3 and the selected overseas tax models examined in Chapter 4, ss. 263 and 264 of the ITAA appear to be quite deficient in a number of areas and in need of review.

The main areas of concern with the operation of ss. 263 and 264 of the ITAA are as follows:

- (i) Section 263 is inconsistent with the principles outlined by the ALRC in the Draft Privacy Bill, governing the powers of arrest, and search of premises and places. Although the powers of the Commissioner are conferred expressly in legislation, as recommended in the Bill, the *grounds* for intrusion are not stated. Nor is there a requirement for a special judicial warrant, as recommended by the ALRC.

In relation to the overseas experience, Chapter 4 highlighted that the need for judicial warrants is a critical protection for taxpayers in Canada, the United States and the United Kingdom.

The only existing limitation concerning s. 263 is that entry must be for the purposes of the ITAA.

- (ii) Section 263 does not require a notice to be given prior to entry and authorises access to premises at all times. The ALRC, on the other hand, recommended that (i) reasonable notice should be given of an intention to enter, unless this would defeat the purpose of the exercise of the power and (ii) a power of entry should only be exercised at a reasonable time.

The United States and United Kingdom approaches require that prior consent be obtained before entry otherwise a search warrant is required. The Canadian approach also restricts entry onto premises by specifying that entry is only permitted at all reasonable times unless the premises is a dwelling-place. In the case of a dwelling-house or entry at unreasonable times, a search warrant is required.

While s. 263 is notable for the lack of limitations concerning the powers of entry, Table 2 in Chapter 4 illustrates that the Commissioner does not have several other intrusive powers exercised by several of his overseas counterparts. These include the power to (i) use force to gain access to premises, (ii) to seize documents and (iii) to search and arrest persons.

- (ii) Chapter 2 discussed the authorisations required for the exercise of s. 263 powers. In particular, the decision of *Lockhart J. in Citibank* was discussed where it was held that the wallet and letter authorisations were inadequate, in that they lacked specific or particular information about the search. On appeal, however, it was concluded that s. 263 is silent as to the form and content of the authorisation.
- (iv) In relation to s. 264, the ALRC expressed the general view that s. 264 allowed the Commissioner to obtain personal information from many sources. Section 264 is notable for the scope of the power to gather information and the lack of limitations on this power.
- (v) The requirements of s. 264 notices are similar to overseas approaches in that the notices must be in writing and must show that the documents which are required relate to the income or assessment of a taxpayer. However, s. 264 is deficient in that it does not specify time for compliance with the notices.
- (vi) A feature of both s. 264 and the information gathering powers of those countries examined in Chapter 4, is that the respective governments effectively have the power to "*fish*" for information to ascertain a person's taxable income. This power is not only cause for concern in itself, it may also conflict with the restrictions placed on Commonwealth agencies to collect personal information under IPP 1 of the Privacy Act.

It was noted in Chapter 3 that IPP 1 appears to preclude a general information gathering role of Commonwealth agencies in that it requires that (i) the information collected should be for a lawful purpose related to the function of the collector and (ii) the collection is necessary for or directly related to that purpose. The impact of IPP 1 appears yet to be tested.

IPP 3 also appears relevant to the Commissioner's powers of information gathering in that it requires that the collection of information does not intrude to an unreasonable extent upon the affairs of the individual in the case of soliciting of information.

## **THE IMPACT OF THE PRIVACY ACT ON SECTIONS 263 AND 264 OF THE ITAA**

Several of the concerns with ss. 263 and 264 of the ITAA, outlined above, stem from the requirements of the Privacy Act and the ALRC recommendations in the Privacy Report.

The Privacy Act was described in Chapter 3 as a significant legal development, although relatively new and untested on certain issues relating to taxpayer rights. However, the Privacy Act is restricted to matters of information privacy only. The Draft Privacy Bill and the Privacy Report, on the other hand, considered powers of arrest and of search of both the person and of premises. That the Privacy Act does not address these powers is a major concern and a topic for further study in itself. <sup>(136)</sup>

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136. At the time of preparing this report, the Human Rights Commission had been contacted to ascertain whether the Privacy Commissioner's functions extended beyond dealing with information privacy principles only to include broader privacy issues. The Privacy Commissioner's interpretation of the narrowing of the scope of the Privacy Act itself from the draft bill was also sought. As at July, 1993 a reply to this request for information had not been received.

## **Information Privacy Principles**

The application of the Privacy Act to the collection of information for tax purposes appears to be untested in relation to IPP 1 (2), in particular, which requires that "*personal information shall not be collected by a collector by unlawful or unfair means*". The scope of the term "*personal information*" requires definition as does the extent to which corporate information may be regarded as personal information. The Privacy Act does not apply to non-natural persons.

Illustrations of "*unfair means*" are discussed in the Privacy Report, however, there does not appear to be clear guidelines to accompany IPP 1. In the absence of such guidelines, instances of unfair behaviour will probably be assessed on a case by case basis. There is also a lack of guidelines to accompany part (d) of IPP 3 which governs the collection of information which intrudes to an unreasonable extent upon the personal affairs of individuals.

The Privacy Act empowers the Privacy Commissioner to make a range of determinations including declaring that the government agency has been interfering with an individual's privacy, requesting the agency not to repeat such conduct, seeking a preventative injunction, if necessary, and specifying compensation for loss.

## **Powers of Entry and Search**

Notably absent from the Privacy Act are provisions on the principles governing the granting of powers of intrusion and powers of entry and search of premises which are outlined in Chapter 3. Furthermore, there is no evidence of overtures by the Privacy Commissioner to the Australian Taxation Office concerning the appropriateness of ss. 263 and 264 in light of these principles.

It has already been emphasised that ss. 263 and 264 powers are out of line with the powers of the taxation authorities that operate in Canada, the United States and the United Kingdom as outlined in Chapter 4.

The powers are also out of line with the police powers that, generally, operate in Australia. The police may normally access premises and exercise a right to copy documents, only upon obtaining a search warrant. <sup>(137)</sup>

## COMMENTS ON THE AUSTRALIAN MODEL FOR CONFERRING POWERS

### Constitutional Guarantees

Australia has no constitutional bill of rights. It has been suggested that lack of such a bill of rights makes the protection of individuals' freedoms in Australia more difficult. For example, Jones states that because Australia is a democracy:

*"the basic freedoms are respected by our political culture. However, we have very limited legal or constitutional guarantees of these rights. This raises the question as to whether we need a Bill of Rights. Without any firm legal protection of civil liberties, they are easily eroded by governments who find them politically inconvenient (and in a federal system we have many governments in a position to chip away at our rights)."*<sup>(138)</sup>

While the focus of Jones' comment was toward the fundamental or traditional freedoms, it could be argued that the point applies equally to the right of privacy. This study has emphasised that the protections Australians have against the various forms of intrusive behaviour, by government in particular, lie in the adequacy of the empowering legislation, the system of administrative review and the attitude of the Courts.

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137. Crowe, M., (1991), "Have the Tax Commissioner's Powers Gone Too Far?", Vol.3:3, *Decisions*, August, p.16.

138. Jones, M., "The Fundamental Freedoms", in Pagone, T. and Wallace, J. (eds), (1990), *Rights and Freedoms in Australia*, Federation Press, Sydney, p.3.

One argument for a constitutional bill of rights is that a minimum set of rights are established. As an illustration, under the United States Fourth Amendment, conduct such as warrantless searches are generally invalid and the general conditions under which a warrant will be issued are specified. The Canadian Charter of Rights and Freedoms also demonstrates the benefits of minimum Constitutional protections against which to scrutinise the powers of government intrusion.

An alternative perspective on the value of a bill of rights is that the protections are, invariably, very broadly stated and it is the Courts which will ultimately put these protections into context. An illustration supporting this line of reasoning is, possibly, the Fifth Amendment to the U.S. Constitution which protects a person from being compelled to be a witness against himself without due process of law. In the case of tax investigations, this protection is construed narrowly and does not prevent the production of taxpayer records and documents which may be incriminating.

One concern about the Courts playing a major role in putting constitutional rights into context, is that the opportunity exists to erode the rights of the individual in favour of the state. For example, Causey and McNair discuss what they describe as "*the shrinking zone of privacy*" in the United States, and state that:

*"[r]ecent U.S. Supreme Court decisions in Internal Revenue Service-related cases have steadily eroded the taxpayer's zone of privacy and the Fifth Amendment privilege against self-incrimination, ..."* <sup>(139)</sup>

This concern is also raised by Jordan who is critical of "*the adoption of persuasive federal precedents which reduce the scope of the constitutionally protected legitimate expectations of privacy*". <sup>(140)</sup> At the same time, Jordan recognises the difficult nature in balancing the needs of the state overall and the rights of the individual. He states that sometimes:

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139. Causey, D. and McNair, F., (1989), "Protecting Taxpayer Privacy from the IRS", Vol.168:4, *Journal of Accountancy*, p.44.  
 140. op cit at p.311.

*"it is necessary to validate minimal reductions in the scope of personal liberty rights to achieve higher societal needs such as crime prevention and detection. The adequate balancing of these interests in conflict will always depend on the reasonableness of the governmental intrusions in the particular circumstances involved in each case."*<sup>(141)</sup>

## The Likelihood of an Australian Bill of Rights

While this study was not intended to focus on the bill of rights debate, *per se*, the lack of constitutional protections will necessarily influence the degree to which rights need to be spelled out in enabling legislation. Minimum protections not provided for in a bill of rights will need to be considered in taxation legislation itself.

The state of play concerning Australian constitutional reform is not promising. In 1985, Australia's Constitutional Commission inquired into whether the democratic rights of individuals were guaranteed. On this matter, Ferguson notes that the:

*"Commission's Advisory Committee on Individual and Democratic Rights concluded that the few existing references to individual rights in the Australian Constitution were inadequate, that Australia and New Zealand were the only parliamentary democracies left in which there were almost no constitutional limitations on excesses of power by governments over the functioning of individuals in society, and that since unrestrained government is a threat to the well-being of society, this gap in the Australian Constitution should be remedied by including a guarantee of fundamental rights and freedoms in the Constitution itself."*<sup>(142)</sup>

Ferguson sees constitutional reform in Australia as "*politically dormant*" at least until a crisis emerges and, given the failure of the 1988 referendum to achieve constitutional change, assesses reforms as unlikely.<sup>(143)</sup>

Although constitutional reform may not appear promising, the concept of a judicially created bill of rights has recently appeared. This concept resulted, primarily, from the

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141. op cit at p.371.

142. Ferguson, G., (1990), "The Impact of an Entrenched Bill of Rights: The Canadian Experience", Vol.16:2, *Monash University Law Review*, p.215.

143. *ibid*, p.216.

High Court decision of *Australian Capital Television and Ors. v. The Commonwealth* <sup>(144)</sup> where it was held that the *Political Broadcasts and Political Disclosures Act 1991 (Cth)* was invalid. This legislation was introduced by the Commonwealth Government to ban certain political advertising for state and federal elections. In this case, *Deane and Toohey JJ.* rejected the ban on advertising and held that:

*"it is an implication of the doctrine of representative government embodied in the Commonwealth Constitution that there shall be freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth."* <sup>(145)</sup>

The reaction to this decision appeared to be quite varied with the then Commonwealth Minister for Administrative Services, Senator Bolkus reported to have stated that:

*"it is quite possible that what the High Court has done is entrench into the Constitution freedom of expression. If they've done that, then ...what we will probably find is that by this decision we may have the makings of a charter of rights in the Constitution."* <sup>(146)</sup>

Another view was put by the then president of Victorian Council for Civil Liberties, Mr. Ron Merkel who is reported to have stated that:

*"I think what the High Court are doing is that they are analysing what is necessary in a free society for democratic constitutional government, and fundamental to that is the right of the citizenry to be informed freely and openly by persons standing for office, why they should be elected..... Therefore any impediment directly or indirectly to that process will be undermining the constitutional guarantee of truly free and democratic elections."* <sup>(147)</sup>

Whether the decision of the High Court is significant or not, in terms of a judicially created bill of rights, it seems that, in the foreseeable future, reforms to Australian taxation legislation are likely to be discussed against a backdrop of few constitutional rights.

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144. unreported, 30 September 1992, FC 92/033. See Priest, P., (1992), "Political Advertising", Vol.66:12, *Law Institute Journal*, p.1133.

145. reported in *ibid.*

146. Kingston, M., Kelly, H. and Innes, P., (1992), "Bill of rights on way: Bolkus", *The Age*, August 29, p.1.

147. *ibid.*

## The Nature of Australia's Taxation Legislation

In Chapter 2, ss. 263 and 264 of the ITAA were described as conferring broad powers of entry, search and information gathering and the key legislative and court imposed limitations to these powers were outlined. There are several concerns with this general approach for conferring of powers.

Firstly, the Commissioner's powers are largely dependent upon court interpretations of ss. 263 and 264. Furthermore, there are illustrations of where the courts have been willing to apply different standards in assessing the reasonableness of government behaviour, at least, in terms of privacy intrusions. For example, the overturning of the decision of *Lockhart J.* in the *Citibank* case illustrates this.

Secondly, notwithstanding the several important restrictions to the exercise of the powers in ss. 263 and 264, it could be argued that the reasonable exercise of the powers is still very much dependent on the attitude, policies and the operational procedures adopted by the Australian Taxation Office.

Thirdly, the powers conferred under ss. 263 and 264 are being used to engage in conduct the scale of which was probably not envisaged when the legislation was first drafted. Sections 263 and 264, in effect, authorise the conduct of large scale audits which may be quite onerous and time-consuming. Richards expresses the view that under the present system there is a lack of a proper legislative basis for business audits and "*[p]arliament never contemplated the type of audit programs currently being implemented by the Taxation Office in the first place*".<sup>(148)</sup>

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148. Richards, R., (1992), "A Legislative Basis for Tax Audits", Vol.62:8, *Australian Accountant*, September, p.59.

Fourthly, the present system may also be criticised for the inherent uncertainty surrounding the rules by which the Australian Tax Office ought to operate and the respective rights of individuals. A problem for the Australian taxpayer is that rights and protections may be found in disparate areas of law. There are potential problems of access to the Administrative Appeals Tribunal and the Federal Court for many categories of taxpayer. The role of the office of the Commonwealth Ombudsman and the adequacy of the Ombudsman's powers in tax matters is relatively new and untested, as is the relationship between the Ombudsman and Privacy Commissioner.

Adding to the uncertainty, is the existence of the Australian Taxation Office's own policy and procedure statements which are a mixture of Australian Tax Office protocol and legitimate powers. Chapter 3 briefly commented on the status of the Australian Taxation Office guidelines for taxpayers which govern the operation of business audits.<sup>(149)</sup> Such a document merely outlines that the Australian Taxation Office will conduct its affairs in a reasonable manner in exchange for taxpayer co-operation.

Finally, another difficulty with Australia's taxation legislation is the level of discretion given to the Commissioner. While this paper has not focused on a comparative study of models for the effective operation of discretions, the general arguments for more or less discretions are relevant to an assessment of the system of taxpayer protections.

Given that from a practical point of view some level of discretion by the administrative arm of government is necessary, the critical question is what is a desirable level.

The arguments for less discretionary power include that open-ended legislation effectively hands over the role of law making to the administrative arm of government. Furthermore, the courts and tribunals, in the judicial review of government decisions, may lack applicable criteria for reviewing decisions.

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149. Business Audit Explanatory Booklet, op cit.

Administrative discretions would also seem inherently different from the concept of judicial discretion. Officers of the administrative arm of government have biased or vested interests in making decisions.

Alternative models to ss. 263 and 264, for conferring powers, are illustrated, in this study, by the Canadian, United States and United Kingdom tax legislation. The powers of government in these countries are governed, in varying degrees, by more comprehensive sets of rules. For example, the United States Taxpayer Bill of Rights contains quite specific provisions, using a procedural format, governing IRS investigations. Theoretically, this approach establishes greater certainty and consistency in relation to both the processes a government agency must follow and the protections afforded to the taxpayer. However, as discussed in Chapter 4, Shaya is of the view that the introduction of laws was not the complete answer to the protection of taxpayer rights. Enforcement of the laws was an important consideration.

## **SUMMARY COMMENTS AND RECOMMENDATIONS**

### **Amendments to Ss. 263 and 264 of the ITAA**

One of the primary aims of the study was to recommend areas for reform that flowed on from an examination of ss. 263 and 264 of the ITAA. As a result of the concerns outlined in this Chapter, ss. 263 and 264 of the ITAA require several significant amendments. <sup>(150)</sup>

The proposed amendments to the ITAA are that:

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150. Several other problem areas were identified during the course of this study however were not examined in detail. These areas included:
- (i) the lack of a legislative basis for conducting field audits.
  - (ii) the adequacy of opportunity to seek legal professional privilege, and clarification of the class of document to which privilege applies and the general protection against self-incrimination.

- (i) the Commissioner's powers of entry and search of premises under s. 263 should be subject to judicial authorisation. Consideration should be given to following the Canadian model which confers (i) a *general* power of entry for access to premises or places (other than dwelling-houses) at all reasonable times and (ii) a *special* power of entry which requires judicial authorisation for entry to dwelling-houses and entry at unreasonable times. A *special* power of entry under s. 263 could be authorised by a judge of the Federal Court of Australia.
- (ii) s. 263 should require that reasonable notice of an intention to enter premises under a *general* power of entry be given by the Commissioner to the taxpayer or other custodian of documents or things relevant to a taxation enquiry, unless to do so would defeat the purpose of the power.
- (iii) s. 263 should specify the form and content of the authorisations issued by the Commissioner which should be required for the exercise of a *general* power of entry. The authorisation should specify the officers authorised to enter the premises, the premises to be entered and the places, books and documents that may be searched.
- (iv) s. 264 should specify the form and content of the notices issued by the Commissioner and that a reasonable time be allowed for compliance with these notices. In accordance with the requirements in *Smorgon's* case, as outlined in Chapter 2, the notices should identify with sufficient clarity the documents which are required to be produced. In the case of a notice requiring a person to produce the documents of another person, the notice should identify (i) the

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(iii) the system of penalties to apply to taxation officers failing to observe the necessary requirements concerning procedures and the system of compensation to apply to taxpayers for relevant damage or loss including maladministration.  
(vii) the admissibility of evidence gained by illegal means.

name of that other person, (ii) the documents required to be produced and (iii) that the documents relate to the income or assessment of that person.

### **The Privacy Act and the Role of the Privacy Commissioner**

The Privacy Commissioner has the scope to investigate complaints relevant to the breaches of the IPP. It also behoves the Privacy Commissioner to actively develop and promote the minimum standards to be followed in the authorising and exercising powers of information gathering. Legislation which confers powers of information gathering, such as the ITAA, should be consistent with the standards.

The inability of the Privacy Act to deal with an unreasonable privacy intrusion, *per se*, and the limitation of the Privacy Commissioner's role to the IPP, only, is a major weakness in the control over privacy intrusions. The scope of the Privacy Act requires broadening as it was intended by the ALRC and outlined in the initial Privacy Bill.

The Privacy Act is also intended to apply to the collection of personal information relating to individuals. The circumstances under which the Privacy Act is relevant to corporate taxpayers requires clarification. In Chapter 3 it was noted that the ALRC recommended that a flexible test should be proposed to ascertain whether information, nominally concerning an artificial person, was of a personal nature.

As the role of the Privacy Commissioner is in a developmental stage, the relationship between the roles of the Ombudsman and the Privacy Commissioner in tax matters requires clarification.

## **Review of the Model for Conferring Powers**

Australia's model for conferring powers of entry and search of premises, and information gathering requires overall review. It could be argued that the scope of the powers and the limitations to the powers need to be more closely defined in the ITAA.

As part of this review, consideration should be given to the United States, United Kingdom and Canadian approaches which provide illustrations of (i) some important limitations to the powers of revenue collection authorities and (ii) some significant taxpayer rights or protections. The Canadian approach is particularly instructive given the close examination of the recent legislative reforms by the Canadian courts. The concept of a United States Taxpayer Bill of Rights is also worthy of review as a means of legislating for the rights of taxpayers.

## **CONCLUSION**

Sections 263 and 264 of the ITAA remain controversial for the broad interpretation given to the powers by the Courts and the manner by which the power is conferred in the legislation. The lack of interference with an individual's privacy is, arguably, dependent upon the benign administration of the Australian Taxation Office.

While the Courts and Administrative Appeals Tribunal are becoming less accessible to ordinary taxpayers, it is likely the Ombudsman and the Privacy Commissioner will assume more importance in their respective roles. Furthermore, it is hoped that the Privacy Commissioner will actively pursue several of the concerns with ss. 263 and 264, as they now stand.

In comparison with both the taxpayer protections found overseas and general privacy principles, the major concern with ss. 263 and 264 is the lack of judicial control over the powers of search and entry of premises.

## BIBLIOGRAPHY

- American Jurisprudence*, (1992), Vol.68:2d, Lawyers Publishing Co, New York.
- Australian Law Reform Commission, (1983), Report No.22, Privacy, Vols. 1 & 2, AGPS.
- Australian Tax Cases, 1988-90, CCH Ltd.
- Australian Tax Office, (undated), Business Audit Explanatory Booklet.
- Bittker, B.I. and Lokken, L., (1992), Vol.4, *Federal Taxation of Income, Estates and Gifts*, Warren, Gorham and Lamont, Boston.
- Bray, P., (1991), "The ADJR Act: Its Effect on Taxation Administration", Vol.20:1, *Federal Law Review*, pp.138-144.
- Bygrave, L.A., (1990), "The Privacy Act 1988 (Cth): A Study in the Protection of Privacy and the Protection of Political Power", Vol.19:1, *Federal Law Review*, pp.128-153.
- Canada Tax Cases, 1988-91, De Boo, Canada.
- Canada Tax Service, 1981, De Boo, Toronto.
- Causey, D. and McNair, F., (1989), "Protecting Taxpayer Privacy from the IRS", Vol.168:4, *Journal of Accountancy*, pp.44-48.
- Commonwealth and Defence Force Ombudsman, Annual Report, 1990-1.
- Crowe, M., (1991), "Have the Tax Commissioner's Powers Gone Too Far?", Vol.3:3, *Decisions*, August, pp.16-17.
- Faure, J.E., (1989), "Advising the Advisors (section 263)", Vol.63:4, *Law Institute Journal*, April, pp.291-293.
- Ferguson, G., (1990), "The Impact of an Entrenched Bill of Rights: The Canadian Experience", Vol.16:2, *Monash University Law Review*, pp.211-227.
- Fernandez, R. and Koay, A., (1992/3), "The David Jones Decision: An Alternative Avenue of Redress", Vol.27:6, *Taxation in Australia*, p.323.
- Fontana, J.A., (1984), *The Law of Search and Seizure in Canada*, Ch.7, Butterworths, Toronto, 1984.
- Henkin, Louis (ed), (1981), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York.
- Jones, M., "The Fundamental Freedoms" in, Pagone, T. and Wallace, J. (eds), (1990), *Rights and Freedoms in Australia*, Federation Press, Sydney.
- Jordan, E.M.Q., (1987), "Scope of the Constitutional Protection Against Unreasonable Governmental Intrusions under the Fourth Amendment of the United States Constitution and Secs. 8 & 10, Article II of the Puerto Rico Constitution", Vol.56, *Revista Juridica De La Universidad De Puerto Rico*, pp.309-371.
- Kingston, M., Kelly, H. and Innes, P., (1992), "Bill of rights on way: Bolkus", *The Age*, August 29, p.1.

McGuinness, P., (1989), "U.S. Taxpayers' Bill of Rights", Vol.24:4, *Taxation in Australia*, pp.232-233.

Priest, P., (1992), "Political Advertising", Vol.66:12, *Law Institute Journal*, p.1113.

Privacy Commissioner, First Annual Report on the Operation of the Privacy Act, 1st Jan - 30 June 1989.

Privacy Commissioner, Second Annual Report on the Operation of the Privacy Act, 1989-90.

Privacy Commissioner, Third Annual Report on the Operation of the Privacy Act, 1990-91.

Richards, R., (1989), "The Need for a Tax Ombudsman", Vol.59:8, *Australian Accountant*, September, p.93.

Richards, R., (1992), "Taking the Tax Man to Court", Vol.62:5, *Australian Accountant*, June, pp.14-18.

Richards, R., (1992), "A Legislative Basis for Tax Audits", Vol.62:8, *Australian Accountant*, September, p.59.

Schachter, O., "Obligation to Implement Covenant in Domestic Law" in Henkin, L.

Shaya, L.A., (1988), "The New Taxpayer's Bill of Rights: Panacea or Placebo?", Vol.65, *University of Detroit Law Review*, pp.451-491.

Skinner, J.C., and Nethercott, L.,(1990), "The Commissioner's Powers Under S263 and S264", Vol.24:10, *Taxation in Australia*, June, pp.885-891

Simon's Taxes, (1983), (3rd. ed. as amended), issue 157, Butterworths, London.

Volio, F., "Legal Personality, Privacy and the Family" in Henkin, L.