SECTIONS 263 AND 264 OF THE INCOME TAX ASSESSMENT ACT AND THE INTERACTION OF LEGAL PROFESSIONAL PRIVILEGE

BRENDAN J. SULLIVAN

Barrister-at-Law, Sydney

INTRODUCTION

The decided case law concerning ss.263 and 264 of the Income Tax Assessment Act, 1936 ("the Assessment Act") is of relatively recent origin. The first reported case was in 1973 (Southwestern Indemnities Ltd v. Bank of New South Wales 73 ATC 4171, concerned with s.263). In the recent Full Federal Court decision in FCT v. Citibank Ltd 89 ATC 4268, French J. noted that fact, and suggested that "it may be a measure of contemporary legal culture" (at 4286). With respect to his Honour, I am inclined to think that it may be more a measure of contemporary administrative culture. I am sure that everyone in attendance here is well aware of the public statements made on a number of occasions over the past couple of years by the Commissioner of Taxation, Mr Boucher, to the effect that the Taxation Office will be concentrating its attention and resources upon the auditing of large companies. Another area targeted for attention is "international profit shifting", again particularly with respect to large companies.

Needless to say, all companies have records (with the possible exception of those which went to the bottom of the harbour in the mid-seventies), and it may generally be expected that larger companies have more voluminous records. In the auditing of those companies it will inevitably be of interest to taxation officers to gain access to some of those records. Just as inevitably, the managers of those companies may wish to keep some of the records confidential to the company. In some cases it may be their wish to have transactions evaluated objectively, without reference to matters such as subjective considerations on the part of the company's managers or its advisers concerning the taxation consequences of the transaction. Such subjective considerations may be contained in the company's own documents, or in advices received from accountants, lawyers, etc. It may well be that the company is quite content to have all aspects of a transaction, as implemented, open to scrutiny by the Taxation Office or other relevant administrative bodies, but would wish to keep confidential its subjective considerations in the planning of the transaction. In passing, one can only observe that taxpayers might point with some conviction to the provisions of the

Assessment Act in support of those desires. Since the demise of s.26(a) and its subjective purpose test, there are few provisions of the Assessment Act the operation of which turns upon a taxpayer's subjective purpose. Section 51(1) has been said to depend substantially on an objective test (Magna Alloys & Research Pty Ltd v. FCT 80 ATC 4542). The anti-avoidance provisions of Part IVA depend upon there being a dominant purpose of obtaining a tax benefit. However, the test of purpose under s.177D is an objective one.

Whatever the relevance to the operation of various provisions of the Assessment Act, it seems clear at the present time that the Commissioner and his officers are intent upon conducting audit activities by pursuing documents disclosing the subjective considerations within the company as to taxation matters and advice received by the company from external advisers. Indeed, the Commissioner's objectives with respect to the gathering of information go well beyond those limits. The events which transpired in the Citibank case made it clear that where taxation officers, in the course of seeking access to documents relevant to the audit of one company, stumbled across documents relevant to the taxation affairs of various other companies, they sought to copy and take away those other documents. That was so regardless of whether the officers concerned knew whether the documents in question concern any matters which are currently under investigation in relation to those other companies. If one were to attempt to identify the test applied by taxation officers, it would seem that it was that "curiosity is sufficient".

The Citibank case has served to clarify (should there have been any doubt following the decision of the High Court in Baker v. Campbell 83 ATC 4606) that s.263 does not override rights of legal professional privilege. Not only does s.263 not give rights of access to privileged documents, but officers seeking to exercise powers of access under s.263 must ensure that an opportunity is given for persons who may wish to claim privilege to make such claims. Legal professional privilege is a subject to which I shall return later.

It is a matter of some importance to officers of companies, and their advisers, to understand the limited defences available against the exercise of powers under ss.263 and 264. It will be important to know what documents in one's possession might be subject to rights of access under s.263, or subject to an obligation to produce under s.264. Failure to comply with the requirements of those sections can result in the commission of criminal offences under the Taxation Administration Act, 1953.

Section 263 is presently in the following terms:

> "(1) The Commissioner, or any officer authorised 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 or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.

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

Penalty for a contravention of this sub-section: $1,000."

Sub-section (1) has existed unchanged since the enactment of the Assessment Act in 1936. Sub-sections (2) and (3) were inserted with effect from 5 June 1987. The obligations under sub-s.(3) to provide facilities and assistance were clearly consequential upon the decision of the High Court in O'Reilly v. State Bank of Victoria 83 ATC 4156, in which it was held that sub-s.(1) by itself imposed no such obligations.

It has been said by the High Court that ss.263 and 264 must be construed together (FCT v. ANZ Banking Group Ltd 79 ATC 4039). Section 264 is in the following terms:

"(1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connection 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 authorised 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 under his control relating thereto.

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

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

I shall now turn to consider a number of issues which have arisen in respect of both s.263 and s.264. That the majority of this paper deals with s.263 issues is a reflection of the fact that more cases, particularly the recent cases, have been concerned with s.263. However, as the High Court has said, the sections are to be construed together, and many of the principles identified in this paper with respect to s.263 are likewise applicable to s.264, particularly in the context of principles of review under the Administrative Decisions (Judicial Review) Act, 1977 ("the ADJR Act").

ISSUES CONCERNING SECTION 263

1. **What are the rules in relation to the production by taxation officers of written authorisations under section 263?**

Issues concerning the form of authorisations required to be held by taxation officers for the purposes of s.263 were hotly contested in 1988 in three cases - Sharp v. DFCT 88 ATC 4259, Citibank Limited v. FCT 88 ATC 4714 and Allen Allen & Hemsley v. DFCT 88 ATC 4734. The various issues were finally argued before the Full Federal Court in December 1988, which led to the recent decisions reported as FCT v. Citibank Limited 89 ATC 4268 and Allen Allen & Hemsley v. DFCT 89 ATC 4294. It presently seems unlikely that there will be any applications made for special leave to appeal to the High Court from either of those recent decisions, with the result that they may have settled, at least for the immediate future, the various issues which have been ventilated on the question.

On the basis of the reasoning of the Full Federal Court in the recent Citibank judgment, it seems that the relevant principles may now be summarised as follows:

(1) There is no express requirement in the legislation that authorisation for the purposes of s.263 be in writing. Neither is any such requirement to be implied;

(2) However, a taxation officer who has no written authorisation may have his entitlement to remain on premises and take access to documents terminated pursuant to s.263(2) if the occupier makes a request for proof of his authority;

(3) Consequently, authorisations of the type commonly carried by taxation officers (the black fold-up "wallet" type authorities, containing the officer's photograph and name) are valid authorisations for the purposes of s.263 - they may be signed by Deputy Commissioners who have a delegation of authority from the Commissioner;

(4) The authorisations need not comply with the requirements which exist in relation to search warrants under s.10 of the Crimes Act - ie. the authorisations do not need to be specific in relation to the particular search, and do not need to identify the premises to be searched, or the documents to be searched for. Taxation officers can therefore be issued with general authorisations, with the consequence that it is a matter for the individual officer to determine when and in what circumstances he will exercise his powers under s.263 (subject, of course, to the officer exercising the power in accordance with law);

(5) Taxation officers are not required to produce their authorisations before taking access to premises and documents. The obligation to produce only arises if a request is made by the occupier pursuant to s.263(2);

(6) The process of authorisation pursuant to s.263 is only one of two methods by which a taxation officer may become entitled to exercise powers under the section. The other method is by a delegation of the Commissioner's powers pursuant to s.8 of the Taxation Administration Act, 1953;

(7) Where the Commissioner himself is exercising powers under s.263 he is not subject to the requirements of s.263(2) in relation to the production on request of proof of authority. The same is true of officers who have a delegation of power under s.8 of the Administration Act. As a consequence, while taxation officers who hold authorisations under s.263 are subject to the requirements of s.263(2), officers who hold delegations under s.8 are not.

In the first instance proceedings in the Citibank case Lockhart J. held that authorisations should be specific to the particular occasion of access, and should identify with particularity the premises to which access is sought and the documents to be searched for. The starting point of his Honour's reasoning was that s.263 encroaches upon liberty, and therefore should be construed to detract from civil rights no more than was required by the statute expressly or by necessary implication. As his Honour noted, that is a recognised rule of statutory construction. The implementation of that rule of statutory construction led, in his Honour's view, to a need for s.263 authorisations to satisfy the requirements which have been recognised by the courts as appropriate to warrants issued under s.10 of the Crimes Act.

While the Full Federal Court unanimously rejected that approach in construing s.263, the majority (Bowen C.J. and Fisher J.) gave some fairly clear indications to the effect that while they could not endorse the approach of Lockhart J. as a matter of statutory construction, they nevertheless saw it as desirable in the context of a provision such as s.263. Their Honours stated that they considered "that it is unfortunate that such a degree of

specificity was not a mandatory obligation". They noted that inclusion of specific information in an authorisation would assist in making the occupier of premises aware of the extent and nature of his obligation to provide assistance under s.263(3).

It will be interesting to see whether the Parliament pays heed to a fairly direct hint from the Full Federal Court, and takes steps to amend s.263 to require authorisations to contain information of the type regarded as necessary by Lockhart J. Given that the submissions on behalf of the Commissioner to the Federal Court were in terms such requirements would impose an inordinate burden on the operation of the Taxation Office, it must be expected that the Commissioner, at least, would resist amendment to s.263 in that regard. Individuals and corporations may, however, be entitled to ask why the Commissioner's powers of access to premises and documents under s.263 should be wider than the powers of the police in relation to the investigation of serious crime.

2. Is it required that a taxation officer have regard to the effect of the search/access on the person whose premises are searched, or on other persons who may be affected?

Following the decision of the Full Federal Court in the Citibank case, it is clear that a taxation officer must have regard to the effect of the search/access on persons who may be affected in at least one respect - namely the possibility of claims for legal professional privilege. That is a matter considered in greater detail below.

What perhaps remains unclear on the basis of present authority is the extent to which a taxation officer is obliged to have regard to other ways in which the search/access might impact on persons affected. The Administrative Decisions (Judicial Review) Act, 1977 ("ADJR Act") entitled persons aggrieved by decision to which the Act applies to seek judicial review on any one of a number of grounds specified in s.5(1) to the Act. Section 5(1)(e) provides that one ground is that the decision was "an improper exercise of the power", and s.5(2)(b) provides than an improper exercise of power includes "failing to take a relevant consideration into account in the exercise of a power". The result is that failure by a taxation officer to consider a matter which he should have considered may provide a basis for seeking judicial review.

The leading statement on the subject of failure to take into account relevant considerations is that contained in the judgment of Mason J. (as he then was) in Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-42.

To summarise his Honour's reasoning:

(a) A decision will only be bad for failing to take into account a relevant consideration if the decision-maker fails to take into account a matter which he is bound to take into account;

(b) Identification of matters which the decision-maker is bound to take into account is to be determined by construction of the particular statute;

(c) If those matters are not expressly identified by the statute, they must be determined by implication from the subject matter, scope and purpose of the Act. Where a discretion is unconfined by the terms of the statute, a court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act;

(d) Not every failure to take a relevant consideration into account will justify the court in setting aside a decision. The matter might be so insignificant that it could not materially affect the decision;

(e) The weight to be given to various considerations is generally a matter for the decision-maker, and not for the court. The court has a limited role in reviewing the exercise of administrative discretion.

Section 263 clearly falls into the category of legislative provisions which fail expressly to identify matters to be taken into account by the decision-maker. Save for the matter of legal professional privilege, it is perhaps correct to say that there is presently little judicial guidance as to matters which can be identified, by implication from the subject matter, scope and purpose of the Assessment Act, as required to be taken into account by a taxation officer in deciding to exercise powers of access under s.263.

One matter to which reference has been made in the cases is a bank's duty of confidentiality to its customers. The existence of that duty was recognised by the High Court in Smorgon v. Australia & New Zealand Banking Group Ltd (1976) 134 CLR 475. It was also recognised by the High Court in Smorgon's case that a bank's duty of confidence to its customers is overridden by s.263. As between the two legal obligations imposed on a bank, that which prevails is the obligation under s.263.

However, the fact that s.263 prevails over the bank's duty of confidentiality does not necessarily lead to the conclusion that the bank's duty is not a matter which a taxation officer must take into account. At first instance in the Citibank case Lockhart J. stated that (at 4726):

> "In my view, a decision-maker, reaching a decision to conduct a search under s.263, and determining the scale of the search and the manner in which it is to be conducted, must have regard to the effect of the search upon those whose interests are affected, and as a corollary of that obligation must have regard to the effect of the search upon

> a bank's ability to comply with its duty of confidentiality owed to its clients. The wider the scope of the proposed search, and the larger the intrusion into the affairs of clients other than those under investigation, the greater the relevance which this factor ought to be accorded in the decision-making process. This is not to allow a privileged situation to banks, or indeed to other financial institutions and to solicitors and accountants and other professional people who owe duties of confidence to their clients; but rather to require that the decision-maker have regard to all relevant circumstances, which will include the circumstance of the duties of confidence owed by such persons, and the circumstance of the intrusion into the privacy of other clients of such persons consequent upon the exercise of a statutory power overriding the duty of confidence."

His Honour, seeming to have in mind the statements by Mason J. in the Peko-Wallsend case, went on to state that:

> "Where the Act is silent about the matters which must be considered before the powers conferred by section 263 are exercised and about the contents of written authorisations, I have a preference for a construction which affords some reasonable degree of protection to existing legal rights of individuals and corporations; and I lean against the construction which necessarily erodes those rights and supports the exercise of unlimited bureaucratic power. That preference, as I have noted, has ample precedent in the development of the common law."

In the Full Federal Court judgments in the Citibank case, two issues were considered in some detail (the form of the authorities and the effect of legal professional privilege) to the exclusion of a number of other matters dealt with by Lockhart J. at first instance. The Full Court did not consider the question of matters which it is necessary for a taxation officer to take into account before deciding to exercise powers under s.263. In the result, the law as it presently stands on that matter should be taken to be as stated by Lockhart J. in the passage quoted above.

3. Is a taxation officer permitted to plan a search/access so as to effectively prevent, or make it difficult, for the person affected to get access to the courts to challenge the legality of the search?

At first instance in the Citibank case Lockhart J. found, on the evidence before him, that the taxation officer intended to take Citibank by surprise and to conduct the search as quickly as possible (within the space of 2 hours) because he feared that there was a likelihood that injunctions might be obtained from the court restraining the search. His Honour concluded that (at 4731):

> "In my opinion it was impermissible for Mr. Booth to take into account, when making his decision to search the Citibank premises, the consideration that the search be conducted so as to prevent Citibank from obtaining any practical benefit from its legitimate legal right to approach the Court for injunctive relief if the Court thought it proper to grant that relief in all the circumstances."

That was another matter which was not adverted to by the Full Court on appeal. It would seem, however, to be fairly trite law that exercising a power in such a manner is to prevent a person from effective use of such legal remedies as may be available is to take into account an irrelevant matter, thus exposing the decision to review under s.5 of the ADJR Act.

4. Must a taxation officer give a person advance notice before seeking access under section 263?

On the basis of statements made by Bowen C.J. and Fisher J. in the Full Court in the Citibank case, it would appear that there may be circumstances where advance notice of intention to take access under s.263 should be given.

One circumstance which will give rise to such an obligation is conducting a search with a large number of officers, as occurred in the Citibank case. Their Honours concluded (at 4278) that the lack of warning left Citibank without sufficient preparation to ensure that it could raise appropriate claims of legal professional privilege. A further relevant factor identified by the court was that the search would result in taking access to documents other than those involved in the preference share arrangement the investigation of which had led to the search in that case. Their Honours referred to the statement by Lockhart J. at first instance that it was permissible for taxation officers to take access to documents other than those relating to the arrangement which was the primary object of the search, and concluded (at 4279) that they agreed with that view "but on the assumption that sufficient warning of the search had been given so as to enable adequate claims to be made that certain of the documents were covered by privilege".

In attempting to identify circumstances in which a taxation officer must give advance notice of intention to take access to documents under s.263, the conclusion to be drawn from their Honours' statements would appear to be that advance notice must be given where it is necessary to enable claims for legal professional privilege to be raised.

The result of their Honours' statements on that subject would appear to be to make it difficult, if not impossible, for the Commissioner ever again to mount a raid of the type involved in the Citibank case. The whole thrust of such a raid is to take someone by surprise, such that they have not been able to mount

any defence. The necessity to give advance warning defeats the singular advantage of a raid on that scale. The one circumstance where such a raid may continue to be permissible would be that where there was no reasonable expectation that documents accessed might be subject to claims for legal professional privilege.

5. Is a person confronted by a taxation officer seeking access under section 263 entitled to request a delay so that he may obtain legal advice as to his rights and obligations?

In the Citibank case Lockhart J. and the majority in the Full Court held that it was unreasonable for taxation officers to refuse requests made by Citibank officers for the search to be suspended while legal advice was obtained (at 4278 in the Full Court judgment). The basis for the conclusion of Bowen C.J. and Fisher J. in that regard was the lack of warning given as to the nature and extent of the search.

The principle would appear to be that where there has been inadequate warning as to the proposed exercise of powers under s.263, such that persons affected by the search have not had an opportunity to obtain advice as to their rights in respect of the particular documents affected by the search, they are entitled to ask that the search be suspended while they obtain advice.

The position may be different, of course, where the taxpayer has had adequate warning and the search does not extend beyond the boundaries indicated by the taxation officer. It is therefore incumbent upon any officer of a bank or other financial institution to obtain any necessary advice where notice is given that access is proposed to be taken to documents under s.263.

6. What is the extent of the obligation to provide assistance under section 263(3)?

Section 263(3) provides that the occupier of the premises "shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section".

It is, of course, fairly obvious that the expression "all reasonable facilities and assistance" is quite vague and unspecific, and that the obligations which are imposed will depend significantly upon the facts of the particular case.

One matter militating in favour of a narrow construction of sub-s.(3) is the fact that failure to comply results in the commission of an offence. There is a rule of statutory construction that any ambiguity in a provision of a statute which gives rise to an offence should be resolved in favour of the subject. It is perhaps also correct to observe that that rule of statutory construction is given less emphasis by the courts today than in previous times - cf. D.C. Pearce Statutory Interpretation in Australia, (2nd ed.), 138-142.

The Explanatory Memorandum issued by the Treasurer when sub-s.(3) was enacted in 1987 contained the following statement:

> "New sub-section 263(3) will ensure that the Commissioner or an authorised taxation officer who has entered or proposes to enter a building or place for the purposes of the Act is entitled to reasonable facilities and assistance for the effective exercise of powers under section 263. An authorised taxation officer will thus be entitled to reasonable use of photocopying, telephone and light and power facilities and of work space and facilities to extract relevant information stored on computer. In addition, the officer will be entitled to reasonable assistance in the form of, for example, advice as to where relevant documents are located and the provision of access to areas where such documents are located."

Section 263(3) was no doubt perceived to be necessary following the decision of the High Court in O'Reilly v. State Bank of Victoria 83 ATC 4156. In that case, the taxation officers attended at a bank seeking access to documents in relation to a customer's account. They were admitted to the premises, but were provided with no assistance in locating documents. There was a refusal to unlock a door to allow access to a room. The court held that bank officers were obliged to unlock the door so as to give full and free access, but otherwise were under no obligation to provide assistance in locating documents.

The vagueness of the obligation under s.263(3) is a matter which might be expected to give rise to substantial litigation in the near future, particularly having regard to the Commissioner's stated intentions with respect to the auditing of large companies. One issue in particular which I would expect may be hotly contested is the degree of assistance required to be provided in locating documents. It seems tolerably clear that where an authorised taxation officer asks a question as to the location of a document which he accurately identifies, assistance must be given in locating that document. More difficult problems arise where the taxation officer is unable accurately to identify particular documents. Where he is able to give an accurate description of a class of documents by reference to subject matter or some other criteria, again it would seem that an obligation probably exists to provide assistance in locating documents which satisfy the description. However, where he has insufficient information to enable him to indicate a class of documents with any accuracy or specificity, he may resort to asking questions which are directed to obtaining information which will then enable him to identify documents. In those cases, the different roles of ss.263 and 264 must be appreciated. Section 263 provides a power of access, while s.264 provides a power to obtain information (by requiring persons to attend and give evidence). There will clearly be a point at which questions which may be asked cease to come within the category of obtaining assistance under s.263(3), in which case they should properly be

put under s.264(1)(b). Resolution of that issue is a matter which I expect will soon occupy the attention of the courts.

7. Legal professional privilege

From the point of view of taxpayers facing audit activities, two of the most significant decisions of the High Court in recent times are Baker v. Campbell 83 ATC 4606 and the Citibank case. In Baker v. Campbell, the High Court reversed its decision given only a short time previously in O'Reilly v. State Bank of Victoria 82 ATC 4671, and held that legal professional privilege was a substantive rule, not merely a rule of evidence confined to judicial and quasi-judicial proceedings. It is a privilege available against all forms of compulsory disclosure unless expressly, or by necessary implication, excluded by Parliament. It was held in that case that privilege was not excluded by s.10 of the Crimes Act, 1914 (dealing with the issue of search warrants). It followed from the High Court's overruling of the O'Reilly decision that the privilege was not excluded by s.264 of the Assessment Act. In the Citibank case the Full Federal Court unanimously held that s.263 did not override the privilege.

As a consequence the present position is that:

(a) A privileged document cannot be subject to the right of access under s.263(1); and

(b) A privileged document cannot be the subject of compulsory production pursuant to a notice issued under s.264(1)(b).

In one of the more recent High Court cases concerning the privilege, Attorney-General for the Northern Territory v. Maurice (1986) 161 CLR 475, Mason and Brennan JJ., perhaps with a degree of prescience, observed (at 487) that:

> "Legal professional privilege is an ancient doctrine which has assumed a life of its own."

They went on to describe the doctrine in the following terms:

> "Succinctly stated, the privilege protects from disclosure 'communications made confidentially between a client and his legal adviser for the purpose of obtaining or giving legal advice or assistance': R v. Bell (1980) 146 CLR 141 at 144 per Gibbs J. The raison d'etre of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client. The privilege is based on:
>
> > 'The need of laymen for professional assistance in the protection, enforcement or creation of their legal rights. They should have the benefit of that

> assistance, free of any restraint which fear of the disclosure of their communications with those advisers would impose.' (R. v. Bell per: Stephen J. at 152)."

Those passages succinctly identify the rationale behind the doctrine. Its justification is the perceived need for persons to be able to obtain advice as to their legal rights confident that such advice will not be subject to compulsory disclosure.

In Baker v. Campbell (supra) Deane J. identified the key features of the doctrine of privilege (at 4639/40):

(a) It protects a person from disclosure of oral or written confidential communications, between himself and his legal adviser, made or brought into existence:

(i) for the sole purpose of seeking or giving advice; or

(ii) for the sole purpose of use in existing or anticipated litigation.

Grant v. Downs (1976) 135 CLR 674, and O'Reilly v. State Bank of Victoria (supra).

(b) There is no requirement that the advice be sought or given in the course of, or in anticipation of, litigation;

(c) It is the privilege of the client, and protects him from being compelled to make disclosure of such communications either by producing the document or in oral testimony;

(d) The doctrine also protects the client by preventing compulsory disclosure by his legal adviser;

(e) Privilege does not, however, extend to communications which are themselves part of a criminal or fraudulent proceeding or course of conduct, or part of an actual dealing or transaction;

(f) Neither does the privilege extend to protect things lodged with the legal adviser for the purpose of obtaining immunity from production;

(g) The privilege may be lost by waiver and, arguably, by the contents of the communication ceasing to be confidential.

It is not my intention in this paper to seek to chart exhaustively the boundaries or parameters of the doctrine of legal professional privilege. Of the more recent cases which have considered it in some detail, the most instructive are Baker v. Campbell (supra), Grant v. Downs (supra), O'Reilly v. State Bank of Victoria (supra), Waterford v. The Commonwealth (1987) 71 ALR 673 and Attorney-General (NT) v. Maurice (supra).

Establishing that a document satisfied the relevant requirements and comes within the doctrine of privilege is, however, not conclusive. If there has occurred, at some time, a waiver of privilege in relation to that document, privilege may not thereafter be claimed in respect of it.

Waiver of privilege is a matter which can give rise to difficult and complex problems. Those problems may well go to essentially factual matters. In the context of an audit of a large company, where privilege is claimed in respect of a large number of documents, it may become necessary to consider the question of waiver separately in respect of each document. That may require consideration of the manner in which each document has been dealt with over a substantial period of time. It is not difficult to see that disputes between the Taxation Office and a large company could become bogged down in a morass of detail which may take a substantial amount of time to resolve.

Consideration of cases dealing with waiver suggests that there exist two categories of waiver, being express and implied. Implied waiver may be deliberate or inadvertent.

A difficult and contentious class of cases concerns loss of privilege where the document falls into the hands of a third party, even through dishonest means, so that secondary evidence of it may be given. That issue was commented upon by Mason J. (as he then was) in Baker v. Campbell (supra) in the following terms:

> "According to authority, its seems that the availability of the claim for privilege is lost once the document passes into the possession of another who may then tender it in evidence (Waugh v. British Railways Board (1980) AC 521 at 536). The same holds true for a copy (see generally Bell v. David Jones Limited (1948) 49 SR (NSW) 223 at 227-8; Karuma v. The Queen (1955) AC 197 at 203-4; Calcraft v. Guest (1898) 1 QB 759). These rules have been criticized and the decisions on which they are based may perhaps require some qualification, particularly in relation to documents obtained by illegal means or by deception (see ITC Film Distributors Ltd v. Video Exchange Ltd (1982) 3 WLR 125 at 132-3; ...). And in a very recent decision the New Zealand Court of Appeal has held that a third party who overheard a communication made between a solicitor and an accused person for the purpose of giving or obtaining legal advice or assistance in confidence should not be allowed to give evidence of it unless the client waived the privilege (R. v. Uljee (1982) 1 NZLR 561). In arriving at its decision the New Zealand Court of Appeal, acknowledging that Calcraft v. Guest seems to point in a contrary direction, held that no valid distinction could be drawn between oral and documentary evidence in this context. However it is not necessary for us to resolve all these difficulties in the present case."

In my view such cases are perhaps not properly to be viewed as circumstances in which there has been a waiver of privilege. They concern mainly situations where a document, which would be entitled to the benefit of privilege in the hands of a person, has come into the hands of a third person who seeks to use it in evidence in litigation proceedings. Such cases are perhaps most accurately described as merely inability to claim privilege in respect of a document which is in the hands of others who wish to use it. The particular rule is concerned with the admissibility of secondary evidence. The principle is explained in Phipson on Evidence, (13th ed.), para. 15-05 in the following terms:

> "But unlike the rule as to affairs of state, if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for it has been said the Court will not inquire into the methods by which the parties have obtained their evidence."

It is difficult to see that principle arising in the context of access under s.263. The circumstances of a s.263 dispute would naturally be that the document would be in the possession of a person, and not in the possession of the Commissioner, and a tax officer would be seeking access. The facts differ substantially from the "secondary evidence" cases.

Cases concerning the true waiver of privilege fall into two categories, being express and implied waiver. As already noted, implied waiver may be inadvertent (ie. unintentional). The leading recent Australian authority on waiver is the decision of the High Court in Attorney-General (NT) v. Maurice (supra) in which Mason and Brennan JJ. observed that (at 487):

> "A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication."

In the same case Gibbs C.J. commented on implied waiver in the following terms (at 481):

> "There was of course no express waiver in the present case and there is nothing to suggest that the claimants had any actual intention to waive privilege in the source documents. The principle applicable in these circumstances seems to me to be well stated in Wigmore on Evidence, Vol. VIII, para. 2327:

> 'In deciding it, regard must be had to the double elements that are predicated in every waiver, ie. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'"

Statements in those terms are clearly directed towards implied waiver in relation to documents relevant to litigation proceedings between parties. To the same effect, see the comments on waiver of privilege in Phipson on Evidence, (13th ed.), para. 15-20. Those principles have perhaps limited scope for application in the context of waiver issues that might arise in relation to s.263. In s.263 cases, the issue is likely to be whether making a privileged document available to other persons in particular circumstances gives rise to a general waiver of privilege in respect to the document. Principles concerned with fairness as between parties involved in litigation proceedings are of little assistance.

In the context of general waiver for the purposes of s.263, it would seem necessary to discard the "fairness" principle and apply a test which looks to the express or implied intention of the party entitled to claim privilege. On that approach, the mere fact that the document or a copy has been made available by the person entitled to claim privilege to other persons will not, by itself, be determinative. It will be necessary to examine the circumstances in which the document was made available, and ascertain from those circumstances whether there can be implied an intention to waive privilege as against the world at large. Only if such an intention can be implied, I would suggest, should it be found that privilege has been waived for the purposes of s.263.

The issue of waiver of privilege outside the context of litigation proceedings is one upon which there is scant authority. Having regard to current attitudes of the Commissioner in relation to the auditing of large companies, I would expect that we may shortly see the question arise before the Federal Court.

8. What are the "purposes of this Act" for which section 263 permits access?

Section 263(1) permits access "for any of the purposes of this Act". Not surprisingly, the Commissioner takes a wide view as to the meaning of that expression. It is to be expected that in a

number of instances taxpayers will take a narrower view. At the level of individuals, it may be expected that some may take the view that information relating to personal or private matters can have no relevance to the purposes of the Assessment Act. At a commercial level, management of a company may take the view that particular confidential information concerning its business activities, or plans, has no relevance to the purposes of the Assessment Act.

The Commissioner has not, as yet, given any public indication (so far as I am aware) as to his views on documents which may be relevant to the purposes of the Assessment Act. Following the evidence given by taxation officers in the Citibank case, it would perhaps be wise for all officers of banks and other financial institutions to assume that the Commissioner may take the view that any document whatsoever in their possession may have relevance to the purposes of the Assessment Act, and may be accessed under s.263.

The facts in Citibank were that the 37 taxation officers copied a large quantity of documents, the bulk of which were not related to the particular arrangement which they attended the premises to investigate. The emphasis at the time of the search was not on considering the contents of documents which were accessed, but on forming a quick view as to whether it would be "of interest", and if so copying it, and removing it from the premises as quickly as possible. At first instance Lockhart J. concluded that (at 4732):

> "I am satisfied that documents were copied by taxation officers on 15 June where they formed the view, be it soundly based or otherwise, that the documents were relevant to the preference share arrangement or to some other taxation purpose."

His Honour did not comment upon what the legislation meant by the "purposes" of the Assessment Act.

In the Full Federal Court the subject was not discussed by the majority (Bowen C.J. and Fisher J.). However an interesting comment was made by French J. (at 4293):

> "The right of access may only be exercised for the purposes of the Act. On premises such as those occupied by the bank, there will be many documents the subject of a contractual duty of confidence between banker and customer, the examination and copying of which would serve no purpose contemplated by the legislation. In my opinion, the Commissioner and his officers in planning an exercise such as that presently in issue, must take into account those limits on their rights to ensure that so far as is practicable they are not exceeded."

His Honour did not give any further indication as to the nature of the types of documents which "would serve no purpose contemplated by the legislation".

In conclusion, the issue as to what documents will be relevant to the purposes of the Assessment Act is at this time still relatively unexplored. Having regard to the Commissioner's present policy in respect of audits, it is yet another issue which we might expect to see ventilated before the courts in the not too distant future.

9. Can a taxation officer use section 263 to mount a fishing expedition?

In FCT v. Australia & New Zealand Banking Group Limited 79 ATC 4039 (a case concerned with s.264 notices, in the context of which the High Court made reference to s.263) Murphy J. suggested (at 4058) that "section 263 enables the Commissioner to 'fish' for information". His Honour apparently based that conclusion on the prior High Court decision in Southwestern Indemnities Limited v. Bank of New South Wales 73 ATC 4171. In that latter case, the High Court had held that s.263 could be used by the Commissioner to gain access to documents for the purposes of ascertaining whether a person might have a liability to tax. The proposition that the decision in Southwestern Indemnities approved "fishing" is, with respect, doubtful.

The word "fishing" is, in this context, not a term of art. Its use gives rise to some difficulties, in that different people may have different ideas as to what amounts to fishing. For present purposes, I would take it as meaning searching without any particular objective in mind. For example, in the audit of a company taking access to documents not for the purpose of pursuing any particular matter, but merely for the purpose of inspecting the documents to see whether they disclose some matter which the taxation officer might then wish to investigate further.

Having regard to remedies presently available under the ADJR Act, whether or not fishing is permissible in a particular case may depend, in the final analysis, upon whether the particular facts have the consequence that the decision to embark upon the fishing expedition has the consequence that, for the purposes of s.5 of the ADJR Act:

(a) there was no evidence or other material to justify the making of the decision - paragraph (1)(h);

(b) the taxation officer failed to take into account relevant considerations, namely the impact of the fishing expedition on the person affected - paragraph (2)(b);

(c) whether the exercise of the power was so unreasonable that no reasonable person could have so exercised it - paragraph (2)(g).

Whether or not a particular decision to take access is open to attack on one or more of those grounds will depend upon the facts of the particular case, and upon the administrative law principles established in relation to those provisions.

10. **Is a taxation officer who seeks access to documents for a particular purpose entitled to copy documents which he comes across which relate to other matters relevant to taxation?**

I have already referred to the views of Lockhart J. at first instance in the Citibank case where he answered the above question in the affirmative. In the Full Federal Court Bowen C.J. and Fisher J. indicated agreement, but on the assumption that sufficient warning of the search had been given so as to enable adequate claims to be made that certain of the documents were covered by privilege (at 4279).

11. **What is the extent of the power of access? Does it effectively give a power of search, and does it permit a taxation officer to use force?**

Whether or not s.263 conferred a power of search had been a matter of some controversy prior to the Citibank case. At first instance Lockhart J. concluded that it did (at 4723):

> "This section does not confer in terms a power of search; but plainly the power of search exists, whether it be an express power or an implied power necessarily arising from the power of full and free access to buildings, places, books, documents and other papers and the power for that purpose to make extracts from or copies off such books, documents or papers."

In the Full Federal Court no express reference was made to the matter. On the facts, what occurred clearly amounted to a search. The fact that the Full Court did not find the exercise of the power to be bad on that basis perhaps indicates acceptance of the views of Lockhart J.

There has been reference to the use of force in a number of cases. In FCT v. Australia & New Zealand Banking Group Ltd 79 ATC 4039 Gibbs J. suggested that s.263 did not authorise the use of force to gain access. In his Honour's view, clear words would be necessary before force could be used. However in O'Reilly v. State Bank of Victoria 83 ATC 4156, the majority of the High Court (Mason, Murphy, Brennan and Deane JJ.) discussed the meaning of full and free access, and concluded (at 4162):

> "Implicit in the grant of full and free access which the section contains is a grant of power to the Commissioner or an authorised officer to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction to that access. Like all statutory powers, the power must be used bona fide for

the purposes for which it was conferred and that involves that its exercise be not excessive in the circumstances of the case."

That passage was relied upon by Bollen J. in Kerrison v. FCT 86 ATC 4103 to conclude that the Commissioner was entitled to use reasonable force to open locked bank safe deposit boxes.

12. **Can a taxation officer seek access, under section 263, to information stored on a computer?**

In short, yes. Section 263(1) gives a power of access to, inter alia, "documents". Section 25 of the Acts Interpretation Act, 1901 provides that in any Act, unless the contrary intention appears, "document" includes:

> "(c) Any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;"

See also the provisions of s.25A, dealing with the production of records kept on computers.

13. **Is a taxation officer required to provide to a person whose documents have been accessed copies of, or information as to, those documents which he has copied?**

This is yet another issue which arose in the Citibank case. Bowen C.J. and Fisher J. concluded, in the light of the lack of warning given as to the nature and extent of the search, that "the refusal to supply copies of documents which had previously been copied was unreasonable".

14. **Guidelines to taxation officers - what is the effect of those recently issued by the Commissioner?**

The guidelines issued by the Commissioner to taxation officers in December 1988 (reproduced in the CCH Publication Australian Income Tax Rulings) were of course issued after the first instance judgments in the Citibank case and the Allen Allen & Hemsley case, but before the judgments of the Full Court in both cases. It remains to be seen how those guidelines will be modified following the Full Court judgment. Those guidelines which would appear to be of continuing significance deal with the following matters:

(a) Taxation officers should bear in mind that the exercise of s.263 powers necessarily involves an interference with common law rights, and the power should never be used in an arbitrary or oppressive way, or resorted to capriciously;

(b) Taxation officers should consider all the relevant facts and circumstances. However it is not necessary for other powers (such as s.264) to be exhausted first;

(c) Taxation officers should be clear as to the purpose for which information is being sought. Thus it would seem that the Commissioner's direction is that the power not be used for random fishing;

(d) Taxation officers should determine, to the extent practicable, the particular documents sought and whether information likely to be disclosed in them is necessary for the purposes for which access is sought;

(e) Taxation officers should consider the effect of a proposed search on those whose interests are, or may be, affected. Access by a large team of auditors (more than 5) should not be conducted unless arrangements have been made with the occupier, or alternatively exceptional circumstances exist;

(f) Taxation officers should not take into account irrelevant or improper considerations, such as achieving publicity or preventing the occupier from effective exercise of legal rights. The guidelines suggest that it would not be improper "to decide on a surprise access exercise where there is genuine concern that documents may disappear if advance warning is given". That statement must now be read subject to the comments of the majority in the Full Court in the Citibank case as the circumstances in which advance notice should be given;

(g) Where the possibility of a claim for legal professional privilege may arise, officers should ensure that any claims may effectively be made. The opportunity should be given for privilege claims to be raised;

(h) A request by the occupier for a delay of access to enable legal advice to be obtained should be granted;

(i) If officers, in the course of their search for targeted documents, come across other documents "relevant to taxation legislation", those other documents may be inspected and copied;

(j) It is not necessary for officers to show their authorities to some person in authority before entering premises;

(k) There is no obligation for officers to abandon attempts at access where the occupier advises that the records contain nothing relevant to the purposes of the exercise. The officer should form his own view as to whether access should be sought.

ISSUES CONCERNING SECTION 264

1. General comments

Many of the comments already made in respect of s.263 are applicable to s.264. It has been stated by the courts on a number of occasions that the sections must be construed together (O'Reilly v. State Bank of Victoria (supra)).

Decisions by taxation officers to issue notices under s.264 are administrative decisions capable of review under the ADJR Act. The Commissioner initially argued that those were decisions leading up to assessments, thus excluding them from review pursuant to Schedule 1(e) of the Act. However that argument was rejected by the Full Federal Court in Clarke & Kann v. DFCT 84 ATC 4273. The consequence of such decisions being susceptible to review is to open up the possible application of one or more of the grounds specified in s.5 of the ADJR Act whenever a s.264 notice is issued. Whether the decision may be susceptible to review will, of course, in the final analysis depend significantly upon the particular facts of the case. ADJR review raises issues of taking into account all relevant considerations, not taking into account any irrelevant considerations etc. Those are matters that I do not propose to deal with further in this paper.

Before looking at some particular issues, there are some principles established in relation to s.264 which can be briefly noted:

(a) As is the case with s.263, s.264 overrides a bank's contractual duty of confidence to its customer (ANZ Banking Group v. FCT (1979) 143 CLR 499);

(b) The Commissioner may only issue a notice under s.264(1)(a) to obtain information for the purposes of the Assessment Act (Geosam Investments v. ANZ Banking Group 79 ATC 4418). Thus there is implied a similar restriction to that made express in s.263;

(c) A person may be required to attend and give evidence before more than one taxation officer. The expression "before any officer" in s.264(1)(b) is, pursuant to the Acts Interpretation Act, to be read as including the plural (Holmes v. DFCT 88 ATC 4906);

(d) Obligations imposed on persons who receive notices under s.264 are subject to the application of the doctrine of legal professional privilege (Baker v. Campbell (supra), and Citibank v. FCT (supra));

(e) Information stored on a computer may be obtained by the Commissioner pursuant to s.264, by virtue of the provisions of ss.25 and 25A of the Acts Interpretation Act;

(f) The Commissioner is entitled to obtain an injunction to enforce compliance with a s.264 notice (Attorney-General of the Commonwealth v. Thomas 83 ATC 4071);

(g) The Commissioner can use a s.264 notice to obtain information for the purpose of identifying documents concerning a particular matter (Geosam Investments v. ANZ Banking Group (supra)).

2. Section 264(1)(b) - the obligation to attend and give evidence, or to produce books, documents, etc.

An issue recently considered by the Full Federal Court in relation to notices issued under s.264(1)(b) concerned the manner in which notices should be served upon persons to whom they are addressed. In Holmes v. FCT (supra) the notices were addressed to employees of a company, and required them to attend and give evidence in relation to the taxation affairs of the company. The notices had been posted to the addresses for service of those persons as shown in their personal returns. The court held that the question is whether the notices have reached the persons to whom they are addressed. Personal service is not required. In the result, while service by post may be sufficient, if a dispute arises as to whether the notice has been received, the onus may be upon the Commissioner to prove that the notice reached the person to whom it was addressed.

A notice issued under s.264(1)(b) must concern "his or any other person's income or assessment". It was held by the High Court in ANZ Banking Group v. FCT (supra) that the notice must indicate the taxpayer in respect of whose assessment the Commissioner seeks information.

A further matter arising from the ANZ Banking Group case is that a notice under s.264(1)(b) to attend and give evidence must be addressed to a named person. It may not be addressed to a corporation, nor to a person identified merely in the capacity of an officer of a corporation - eg. "The Public Officer, X Pty Limited".

A notice under s.264(1)(b) requiring the production of documents must identify with sufficient clarity the documents required to be produced. It must also show that the documents are ones the production of which the Commissioner is entitled to require. In the case of notices addressed to one person requiring the production of documents relating to a second person, the notice must show that the documents relate in some way to the income or assessment of that second person. Those matters also emerge from the ANZ Banking Group case.

A notice under either of paragraph (1)(a) or paragraph (1)(b) must give a reasonable time for compliance. That was established in Ganke v. DFCT 75 ATC 4097. See, however, the decision of the Full Federal Court in Holmes v. DFCT (supra) which indicates the

difficulty of obtaining judicial review on grounds of unreasonableness merely because the time specified is inconvenient to the person to whom a notice is addressed.

Where the Commissioner decides to prosecute under the Taxation Administration Act for failure to comply with a notice under s.264, review under the ADJR Act of the decision to prosecute is available. However the courts have said that review of such decisions is generally undesirable (Newby v. Moodie 88 ATC 4881, and Holmes v. DFCT (supra)).

GENERAL ISSUES

1. **What action might be taken in preparation for, or anticipation of, the Commissioner taking access under section 263?**

This issue is clearly subjective, in that attitudes may clearly differ as to what is appropriate having regard to the degree of sensitivity which one has concerning taxation officers poking around in one's collection of documents.

With respect to documents which are covered by legal professional privilege, they clearly have protection against access under s.263 or production under s.264. Any organisation which is concerned about Tax Office access to privileged documents in the course of audit activities should take steps:

(a) to ensure that privileged documents are identified; and

(b) to ensure that they are segregated, or that some other steps are taken, to avoid inadvertent production and a failure to claim privilege.

Experience in some audits has shown that having the lawyers come in to deal with questions of privilege after the audit has commenced may be to seek to lock the stable door after the horse has bolted. Company employees who have no legal training cannot be expected to identify privileged documents, or to take appropriate steps to ensure they are not produced, unless they have been properly instructed and trained. To avoid a failure to claim privilege, it is important that staff be trained, and that systems and procedures be put in place to protect against inadvertent disclosure.

With respect to documents that are not privileged, it must be accepted that they are potentially subject to access under s.263 or production under s.264. The bottom line is that if one does not wish to live with the consequences of that, one should not keep the documents.

There is always open the argument that a document has no relevance to the purposes of the Assessment Act. That is, however, relatively unexplored territory. It would be unwise to place much reliance upon it until it is better understood.

2. What action can be taken in the event of access being sought under section 263 or a notice being received under section 264?

Decisions to take access under s.263 or to issue notices under s.264 are subject to review under the ADJR Act. In that regard, points to note are that:

(a) One must move with appropriate speed to obtain a statement of reasons under s.13 of the ADJR Act, and in commencing proceedings for an order of review under s.11 of the Act.

(b) The scope for review under the legislation is limited to the grounds identified in s.5. In applying those grounds, the court does not put itself in the shoes of the decision-maker and determine whether it would have decided the matter some other way. In essence, the court is limited to reviewing on the basis that the decision is affected by some error of law. For example, it is not unusual for courts to conclude that on an objective basis a decision is in certain respects unreasonable, but is not so unreasonable that no reasonable decision-maker could ever have come to it (which is the test suggested in Associated Provincial Picture Houses Ltd v. Wednesbury Corp (1948) 1 KB 223, which is followed in Australia).

(c) Generally the statements by the High Court in the Peko-Wallsend case (supra) and the Full Federal Court in the Holmes case (supra).

It has often been the case in the past that persons have had no notice of intention on the part of taxation officers to exercise powers of access under s.263. That possibility is now perhaps somewhat decreased in view of the comments made by the Full Federal Court in the Citibank case. Nevertheless, in circumstances where that does occur one is faced with the decision as to whether:

(a) to permit access, and fight about it later - however by the time one achieves any success irretrievable damage may already have been done;

(b) refuse access during such time as it is necessary to obtain legal advice and explore the possibility of approaching the Federal Court for an interim injunction - following the Citibank case there may only be very limited circumstances where it would be inappropriate to refuse access for those reasons; or

(c) refuse access, take no other action, and wait to defend prosecution proceedings if they are subsequently commenced pursuant to the Taxation Administration Act.

It is not my purpose in this paper to explore in any detail the offence provisions contained in Division 2 of Part III of the Administration Act. However particular regard should be had to:

(a) s.8C, which deals, inter alia, with refusal or failure to furnish information or produce documents;

(b) s.8D, which deals with refusal or failure to answer questions or produce documents when attending before the Commissioner or a taxation officer pursuant to s.264;

(c) ss.8K, 8N and 8P which deal with the making of false or misleading statements; and

(d) s.8X, which deals with hindering or obstructing taxation officers in the exercise of their powers.

The danger in refusing access under s.263 or refusing to comply with the s.264 notice, and contesting the matter in prosecution proceedings, is the high probability of conviction of an offence in the event that the court upholds the administrative action. Only in extreme circumstances or in clear cases would it be advisable as the appropriate course of action.