Inquiry into tax disputes

This submission addresses the way that taxation laws, in particular certain provisions in the *Taxation Administration Act* 1953 (Cth) (**TAA**), could be reformed.

Firstly, the submission will identify the relevant provisions and briefly describe their operation. Secondly, it will outline the deficiencies in these provisions. Thirdly and finally, the submission will propose reforms which could restore appropriate rights for taxpayers.

This submission considers the following aspects of taxation laws:

i. Information gathering powers

ii. The burden of proof on the taxpayer, particularly in relation to allegations of fraud or evasion

iii. Anti-avoidance rules

iv. Judicial review and the Commissioner's satisfaction

v. Garnishee orders

vi. Departure prohibition orders

vii. Collection of tax prior to Part IVC appeals

viii. Australian Crime Commission

1. Relevant encroachments on traditional rights freedoms and privileges

In the context of taxation laws, the following encroachments on traditional common law rights freedoms and privileges are notable:

- Reversal of the burden of proof;
- denial of procedural fairness to persons affected by the exercise of public power;
- exclusion of the right to claim privilege against self-incrimination;
- interference with vested property rights;
- interference with freedom of movement;
- disregard for common law protection of personal reputation; and
- retrospective change to legal rights and obligations.

The relevance of these powers to the conduct of tax disputes is that, under s.64 of the Judiciary Act 1903, the Commonwealth is meant to occupy the same position, as a civil litigant, as does an ordinary member of the public.

2. Information gathering powers

The Commissioner of Taxation's (**Commissioner**) statutory information gathering powers are some of the most intrusive investigative powers outside of criminal investigations. Moreover, while criminal investigative powers are in some respects stronger than the powers available to the Commissioner there are more safeguards in relation to the use of criminal investigative powers, such as search warrants and compulsory examinations, than there are in relation to the Commissioner's powers.

Section 263 of the Income Tax Assessment Act 1936 (**ITAA 1936**) allows authorised officers of the Commissioner to have 'full and free' access to premises and inspect and copy any books, documents or papers. The occupiers of those premises (which may also be third parties, not just taxpayers) are required, on pain of penalty, to assist the tax officers in exercising their powers.[1] The only procedural requirement before the power can be exercised is that the inspecting officers must have a written authority signed by the Commissioner[2] which they have to produce on request by the occupier.[3] Access visits by ATO officers under s 263 can last for many days, and occupy a significant amount of the occupier's time. There is no ability for affected occupiers to recover any compensation from the ATO for the costs or losses they suffer as a result, even if the access visit produces no useful information.

Under s 264 ITAA 1936, the Commissioner can require any person, whether or not a taxpayer, to provide any information he requires.[4] The Commissioner can also require any person to attend and give evidence on oath[5] before an authorized officer in relation to any person's income.[6] In practice, these interrogations are often conducted by Queens Counsel/Senior Counsel representing the Commissioner.

The taxpayers or third parties may not refuse to give information under s263 and 264, except in relation to information which is protected by operation of client legal privilege. There is no privilege against self-incrimination[7] and the powers override any contractual or equitable obligations of confidentiality.[8] The Commissioner allows for certain accounting documents to be withheld under an administrative concession or policy known as the Accountants' Concession.[9] The Accountant's Concession only operates at the Commissioner's discretion however, and it can be lifted with the approval of an ATO manager, allowing access to those papers.

A significant side-effect of the exercise of these powers is that a person may be required to incriminate himself or herself. The information the person is required to disclose could

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[1] s 263(3) ITAA 1936
[2] These authorities are in practice signed by a delegate of the Commissioner
[3] s 263(2) ITAA 1936
[4] s 264(1)(a) ITAA 1936
[5] Under s 264(2) ITAA 1936, the Commissioner may require that evidence be given on oath or affirmation, and either orally or in writing
[6] s 264(1)(b) ITAA 1936
[7] *Binetter v DCT (No 3)* [2012] FCA 704
[8] *ANZ Banking Group Ltd v Konza* [2012] FCAFC 127
[9] 'Guidelines to accessing professional accounting advisors' papers', Australian Taxation Office https://www.ato.gov.au/General/Gen/Guidelines-to-accessing-professional-accounting-advisors--papers/

be incriminating in relation to possible criminal offences, or in relation to alleged non-compliance with taxation laws, which may have serious consequences for the person. The access powers under s263 ITAA 1936 also represent a major intrusion in the property rights of the occupier to enjoy the use of their property without interference.

Another related issue of concern is the Commissioner's collection and use of information which has been sourced in contravention of foreign laws. In *Denlay v FCT*[10] it was held that the Commissioner could use confidential information stolen by an employee of a Lichtenstein bank as the basis for making amended assessments. In obiter dicta remarks in the first instance decision in *Denlay*, Logan J suggested it would be lawful under Australian law for the Commissioner to use secret information obtained by Australian Secret Intelligence Service officers overseas (in contravention of foreign law) to make assessments.[11] Writing extra-curially, Logan J has questioned how the courts would deal with the Commissioner using information obtained by foreign intelligence services through the use of torture, or privileged client information stolen from law firms.[12] Noting that carrying out and procuring torture are criminal offences, his Honour poses these troubling questions:

> *You might think that the procuration or commission of such acts is conscious maladministration or bad faith as explained by the Full Court in Denlay. But what if, as is the more likely case, the Commissioner is but a passive but knowing recipient and user of information so obtained. Would it make any difference if his officers were, conveniently or otherwise, disposed to shut their eyes to the obvious as to how the information in their possession came to be obtained? The possibility of having to decide such an issue can seem remote until the very moment it happens.*[13]

Recommendations

The Committee should consider the following recommendations:

a) ***Introduce restraints on the use of the investigative powers when litigation is imminent or likely, and introduce restraints that prevent material, gathered in breach of the privilege against self-incrimination, from being tendered in court proceedings.*** As a matter of policy the advantages that enure to the Commissioner from the availability of these powers is outweighed by their inconsistency with s.64 of the Judiciary Act 1903.

b) ***Require the prior approval of a court for use of ss263 & 264 ITAA1936 powers.*** Given their intrusive nature, their impact on individual rights and the consequences for affected persons, a system of judicial oversight of the Commissioner's access powers, similar to the granting of search warrants is needed. The Federal Circuit Court may be the appropriate jurisdiction, as it would give the Commissioner a relatively low cost means of obtaining the necessary approval.

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[10] (2011) 193 FCR 412
[11] *Denlay v FCT* (2010) 81 ATR 644 at [100]
[12] Logan J, *An international dimension to the politics of tax*, (2014) 43 AT Rev 10 at 14
[13] Ibid at 18

c) ***Prevent the Commissioner from obtaining information in breach of overseas laws or using that information.*** Allowing the Commissioner to obtain information unlawfully under foreign law and use that information in Australia creates dangerous incentives for the ATO to encourage breaches of overseas law. Any frustration that revenue authorities have with foreign banking confidentiality laws should be dealt with through inter-governmental and multilateral negotiations, not by encouraging the theft of private property. Unlike for national security issues, in relation to taxation there are no imperatives of public safety or the protection of life which warrant the law condoning criminal conduct overseas on behalf of revenue authorities.

3. The burden of proof on the taxpayer

3.1. Burden of proof at common law

It is important to bear in mind the distinction which has been drawn, between the evidential burden of proof, and the legal burden of proof.

The evidential burden of proof has been described as "the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such an obligation."[14]

The legal burden of proof, on the other hand, has been defined as "the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved)..."[15]

The distinction is best understood by considering the position of the plaintiff or prosecution in proceedings tried by a jury. Firstly, they must adduce sufficient evidence that the judge does not withdraw that issue from the jury's consideration (the evidentiary burden). Once the evidentiary burden is satisfied, they must secondly convince the jury of the proof of that issue (the legal burden) to the relevant standard[16].[17]

In most instances, the evidential and the legal burden in relation to an issue will be borne by the same party; however this is not always the case.

3.2. Standard of proof

In order to satisfy the trier of fact that the legal burden has been discharged, a party must meet the relevant standard of proof. In civil proceedings, the standard of proof is the balance of probabilities.[18]

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[14] JD Heydon, Cross on Evidence, 7th ed at [7015]
[15] Ibid at [7010]
[16] See below, ie the balance of probabilities or beyond reasonable doubt.
[17] See Cross, above n2, at [7015].
[18] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at [2]

When a serious allegation, such as fraud, is made in civil proceedings, the standard of proof remains the civil standard, however the strength of the evidence required to fins that fact proved may be higher,[19] and the court must not rely on 'inexact proofs, indefinite testimony, or indirect inferences'.[20]

3.3. Burden of proof in taxation appeals

The taxpayer bears the burden of proof in taxation appeals to the Administrative Appeals Tribunal[21] or the Federal Court.[22] They must establish that a tax assessment is excessive or incorrect and what assessment should have been made.

The taxpayer is always the applicant in tax appeals, and so at first glance it is perhaps not surprising that they, like the plaintiff in other proceedings, bear the (legal) burden of proof. The difficulty arises because the taxpayer must prove that the assessment, made by the Commissioner of Taxation (**Commissioner**) is excessive. That essentially requires disproving or refuting the various propositions of fact[23] and law[24] which the Commissioner has founded the assessment upon.

The rationale for placing the burden of proof on the taxpayer is that facts about the taxpayer's income are peculiarly within their own knowledge.[25] It has been noted, however, that this burden of proof has its origins in s 35 of the old *Income Tax Assessment Act* 1915 (Cth), the precursor to the current s177 ITAA 1936. Dabner, Burton and Neal make a sound argument that the burden must be understood in the context of 1915, when there was no sophisticated record-keeping or computers, and only limited regulation of and disclosure by business entities.[26]

3.4. Allegations of fraud/evasion against taxpayers

The taxpayer's difficulties in satisfying the burden of proof are amplified when the Commissioner alleges fraud or evasion against them. Ordinarily, the Commissioner has a time limit, beyond which he may not issue amended assessments: two years for individuals and small businesses or four years otherwise.[27] The policy behind the time limits is to give taxpayers certainty about their past tax affairs, and to avoid taxpayers having to keep their tax records indefinitely. Where the Commissioner is of the opinion there has been fraud or evasion, there is no time limit on amending the assessment.[28]

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[19] Id
[20] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362
[21] Section 14ZZK(b) TAA
[22] Section 14ZZO(b) TAA
[23] For example, that certain amounts of money were received by the taxpayer
[24] For example, the legal character of those monies in the hands of the taxpayer
[25] *Trautwein v FCT* (1936) 56 CLR 63 at 87
[26] Justin Dabner, Mark Burton and Luke Neal; "*Controlling the Tax Commissioner's Powers of Investigation*"; Policy; Summer 1992/3
[27] Items 1 and 4 in the table in s170 ITAA 1936
[28] Item 5 in the table in s170(1) ITAA 1936

The consequence of this is that the Commissioner can form the opinion there has been fraud or evasion and make amended assessments a very long time after the income year in dispute. It is not uncommon for amended assessments to be made 10 years or more after the income tax year. As outlined above, the taxpayer then bears the burden of proof of establishing that the assessment is excessive. It can be almost impossible for the taxpayer to discharge this burden when, as is often the case, they no longer have records from more than a decade before. The taxpayer bears the public opprobrium of being labelled a 'tax fraud' by the Commissioner, and even if they do manage to successfully challenge the assessment, the irreparable damage to their reputation has already been done.

Recommendations

The Committee should consider the following recommendations:

a) ***Place a formal evidential burden on the Commissioner in relation to challenges to amended assessments when the Commissioner alleges fraud or evasion. If the Commissioner satisfies this evidential burden by demonstrating a prima facie case, then the legal burden would be on the taxpayer to show the assessment is excessive.*** This is a reasonably modest change, which would strike an appropriate balance and recognise the seriousness of an allegation of fraud against a taxpayer. Although it relates to criminal law, and so would need to be adapted to a tax context, the way in which Chapter 2, Part 2.6, Division 13 of the *Criminal Code Act* 1995 (Cth) deals with evidential and legal burdens is illustrative of how this could work.

b) ***Limit to 8 years the time period for the Commissioner to make an amended assessment where he believes there is fraud or evasion.*** Whilst the Commissioner may need longer time periods to make amended assessments where there are genuine cases of fraud or evasion, some time limit is still required. For the reasons outlined above, the difficulty for taxpayers, of producing records from the distant past, places them at a real disadvantage in challenging amended assessments which are based on fraud or evasion. A time limit of 8 years, double the longest current period where fraud is not alleged, would be appropriate.

4. Anti-avoidance rules

In broad terms, the general anti avoidance rules in Part IVA of the ITAA 1936 give the Commissioner a discretionary power to cancel the **tax benefit** the taxpayer receives in connection with **a scheme**, where the **dominant purpose** of entering into the scheme was to obtain a tax benefit. Under amendments which commenced from November 2012, the tax benefit is determined by two approaches, where the court compares the scheme against an alternative postulate, either:

- that comprises the events or circumstances that actually happened or existed (other than those that form part of the scheme) (**annihilation approach**); or

- that is a reasonable alternative to entering into the scheme, having regard to the substance of the scheme and any non-tax results the scheme achieves for the for the taxpayer (**reconstruction approach**).

The practical effect of Part IVA is to allow the Commissioner the discretion to retrospectively re-characterise the tax outcomes that the letter of the law would otherwise have produced for the taxpayer.

There are a number of problems with Part IVA from a rights perspective, including:

- it is being applied to ordinary commercial transactions and arrangements, rather than the blatant, artificial, contrived schemes it was originally aimed at;
- it creates uncertainty for taxpayers that past transactions and arrangements, the tax consequences of which are otherwise known, will be altered;
- it commonly takes well over 10 years from the original transaction to final resolution for large Part IVA disputes;
- it is being applied in cases where specific anti-avoidance provisions exist in the tax legislation; and
- it makes it difficult for taxpayers to obtain firm advice in relation to their tax affairs.

As with other tax assessments, the taxpayer bears the burden of proof in Part IVA matters. Although the Commissioner is responsible for identifying and particularising the scheme, it is up to the taxpayer to prove that they did not receive a tax benefit in connection with the scheme, or received a smaller tax benefit than the Commissioner determined.[29] This usually involves the taxpayer leading evidence on their own hypothetical alternative postulate: what they would or would not have done in lieu of the scheme.[30] The taxpayer also must put on evidence to show that obtaining a tax benefit was not the dominant purpose of entering into the scheme.

Recommendations

The Committee should consider the following recommendations:

a) ***Place both an evidentiary and a legal burden of proof on the Commissioner in challenges to amended assessments based upon Part IVA determinations.*** This change is appropriate for two reasons. Firstly, Part IVA is a discretionary power which the Commissioner must actively make a determination to apply. It is reasonable to require the Commissioner to justify the determination he has made and show the evidence he relied upon in making that determination. Secondly, it is inherently unfair to require the taxpayer to discharge a burden of proof against hypothetical alternative fact scenarios, particularly given the Commissioner chooses what the scheme in question is. The Commissioner may argue against this change on the basis that the taxpayer has the knowledge of their own affairs, however the

[29] *FCT v Trail Bros Steel & Plastics Pty Ltd* (2010) 186 FCR 410 at [36]
[30] *RCI Pty Limited v Commissioner of Taxation* [2011] FCAFC 104 at [134]

Commissioner has sufficiently powerful information gathering powers to find the evidence he requires to make the Part IVA determinations and defend them.

b) ***Redraft Part IVA to confine it to schemes that are blatant, artificial or contrived rather than ordinary commercial activity.*** Part IVA has evolved from targeting only the blatant, artificial or contrived arrangements it was originally intended to capture to the point where it can apply to ordinary commercial activity. Experience shows that it is applied by the Commissioner in these circumstances with increasing frequency. This is highly inappropriate where the consequences of applying Part IVA is a 50% administrative penalty. In order to prevent the mis-use of Part IVA an express exception should be introduced into the legislation for schemes that are "ordinary family or commercial activity.'

5. Judicial Review and the Commissioner's satisfaction (Avon Downs)

Where the Commissioner must be satisfied of something before applying a particular provision, his decision cannot be challenged under Part IVC except on narrow grounds:

> *If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review.*[31]

There does not seem to be any obvious policy interest served by narrowing the basis for court review depending on whether a provision from the Act is self-operating, as opposed to depending on the Commissioner's satisfaction.

Recommendations

The Committee should consider the following recommendation:

a) ***Amend the TAA to allow taxpayers to challenge the Commissioner's state of satisfaction within Part IVC proceedings.***

6. Garnishee orders

The Commissioner also has extraordinary statutory powers to recover debts, which are not available to ordinary creditors, and which can have a major impact on taxpayers' rights. Of particular concern are the Commissioner's coercive powers to make a garnishee order against the assets of a taxpayer. Under s 260-5 of Schedule 1 of the TAA, the Commissioner can issue a garnishee order requiring a third party to pay to the Commissioner, money owed to the taxpayer or held by that third party for the taxpayer.

Garnishee orders can even be made against solicitors who hold their client's money on trust for the purposes of representing them in legal proceedings. The orders can prevent a taxpayer from funding their legal challenge to a tax assessment.

[31] *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353 at 360

Recommendations

The Committee should consider the following recommendations:

(a) **Prevent the use of garnishee orders by the Commissioner in relation to tax debts relating to assessments which are being challenged in Part IVC appeals**

(b) ***Or alternatively, require a court to be satisfied that the taxpayer will not be denied the capacity to properly contest the tax liability, before granting a garnishee order for the associated tax debts.***

(c) ***Prevent the use of garnishee orders by the Commissioner against funds held on trust by solicitors for the purpose of providing legal representation.***

7. Departure prohibition orders

Although debtors' prisons were abolished in Australia in the nineteenth century, the modern equivalent lives on in the Commissioner's power to issue a Departure Prohibition Order (DPO) preventing taxpayers from leaving Australia.

The Commissioner may make a DPO under s14S and Part IVA of the TAA, where the Commissioner believes that a person is subject to a tax liability and it is desirable to prohibit their departure in order to ensure they do not depart without discharging their liability.

The forerunner to the DPO regime, former ss210-212A ITAA 1936, prohibited any person leaving Australia without first obtaining a certificate from the Commissioner that they had no taxation liability or had made suitable arrangements to pay. An owner or charterer of a ship or aircraft who allowed taxpayers to depart without the necessary certificate could be personally liable for that person's tax liability. Unsurprisingly, the expansion of mass international travel in the 1960s rendered this regime unworkable, and it was repealed in 1962, with the then Treasurer acknowledging that potential loss of revenue would be offset by other benefits.[32]

DPOs have been described judicially as "a serious intrusion on a person's freedom of movement".[33] DPOs are often used against expatriate Australians who have lived overseas for many years, often in disputes about residency for tax purposes. When the person returns to Australia briefly for personal reasons, such as the illness or death of an elderly parent or family member,[34] the Commissioner takes advantage of the circumstances and imposes a DPO.

Perversely, fear of having a DPO imposed means that some expatriate Australians are unable to return to Australia to give their evidence in the substantive proceedings

[32] See *Pattenden v Commissioner of Taxation* (Cth) (2008) 175 FCR 1 at [4]-[6] for further detail.
[33] *Ibid* at [51]
[34] For example, a DPO was imposed on actor and comedian Paul Hogan when he returned for his mother's funeral

challenging their tax liability. For instance, in Murray v FCT,[35] the Administrative Appeals Tribunal refused to allow Mr Murray's request to give evidence by videolink because he feared a DPO would be imposed if he returned to Australia to give evidence.

The numbers of DPOs the Commissioner issues is not large. In the course of the entirety of Project Wickenby to May 2014, the ATO report that 23 DPOs were issued.[36]

This major infringement of people's freedom of movement is entirely inappropriate in the context of what are essentially civil proceedings. The courts should not deprive people of their liberty except where there are concerns for public safety (ie detention of forensic patients, accused held on remand) or following conviction for serious criminal offences.

Recommendations

The ALRC should, in my submission, consider the following recommendation:

(a) ***Repeal the DPO regime in Part IVA of the TAA.*** Given the relatively small number of DPOs issued, and the seriousness of their intrusion on a person's freedom of movement, the DPO regime should be repealed.

(b) ***Introduce legislation requiring courts and the AAT to take an individual taxpayer's evidence in a Part IVC appeals by video-link if the taxpayer can show the court or AAT there is prima facie reason for the taxpayer to fear travelling to Australia.*** A taxpayer's right to seek review of his or her tax liability should not be sterilised because he or she has a well-grounded fear of travelling to Australia. The protection of the law should extend to all persons required to pay tax. It is also necessary to recognise that judicial and tribunal decision-making will be of a higher quality if a taxpayer can give evidence by video-link, and that video-link is the preferable alternative to a taxpayer being unable to give evidence at all.

8. Stay of Payment Obligations

Once the Commissioner makes an assessment in relation to a taxpayer, the amount payable under that assessment becomes immediately payable by the taxpayer. The Commissioner does not have to justify the basis for the assessment and accordingly this can result in a situation where a completely unjustified or incorrect debt becomes immediately payable by the taxpayer. Under the present regime, the obligation to pay this debt is not in any way delayed by the filing of a Part IVA Appeal or application for judicial review.

A much fairer outcome would be if, as a result of an interlocutory application by the taxpayer, a court was satisfied that a taxpayer had a prima facie case on a Part IVC Appeal or in judicial review (such satisfaction to be found through the preliminary evidence alone), the court had the power to stay any payment obligations of the taxpayer pending the outcome of that part IVA Appeal or judicial review application.

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[35] *Murray and Commissioner of Taxation* [2011] AATA 837

[36] https://www.ato.gov.au/General/Tax-evasion-and-crime/In-detail/Tax-crime/Project-Wickenby/?page=5 as accessed at 10 June 2014

To some extent the courts already have the power to stay recovery proceedings until the conclusion of Part IVC appeals, but this power is not statutory and the principles governing its exercise are highly contestable.

Recommendations

The Committee should consider the following recommendation:

(a) Providing the court with an express obligation to stay any debt obligations of the taxpayer arising from an assessment, pending the outcome of a Part IVC Appeal or application for judicial review.

9. Australian Crime Commission

One feature of tax disputes and litigation in which Dormer Stanhope has extensive experience relates to the relationship between the Australian Crime Commission and the Commissioner of Taxation. The Australian Crime Commission has, as part of its statutory function, the investigation of serious tax crime. However it is our experience that the powers of the Australian Crime Commission are often deployed, at the request of the Commissioner, for the purpose of revenue raising rather than investigation of tax crime. We have also seen examples of evidence gathered by the Australian Crime Commission being made available to the Commissioner in Part IVC litigation.

The Australian Crime Commission (**ACC**) is a specialist body that was created for the purpose of investigating the most serious kinds of criminal activity and facilitating prosecution of criminal offences at the very high end of the scale. To this end the ACC has the power to require a person for a compulsory examination in which the examinee has no privilege against self-incrimination. Examinations occur in secret, and the criminal penalty if a person discloses that he or she has been required for an ACC examination is up to two years' imprisonment. The criminal penalty for a refusal to attend an ACC examination or answer questions at an examination is five years' imprisonment.

In an extreme case, a consequence of the ACC's examination powers is that if a person has committed a crime, and refuses to supply the ACC with all the details of the crime they have committed during their examination, the person can be prosecuted not only for the substantive crime they have committed but also for failing to supply all the information necessary to enable themselves to be prosecuted for the substantive crime.

An examination power of this character is inconsistent with the common law privilege against self-incrimination, and exceptional, and the Australian Crime Commission Act 2002 is clear the power should only be used in criminal matters where ordinary police powers of investigation are unlikely to be effective. The Australian Crime Commission Act also has very provisions that limit the use of information from a compulsory examination in any subsequent criminal prosecution. Most notably, a person's evidence in an Australian Crime Commission examination is not admissible evidence against that person in a criminal prosecution (s.30(5) Australian Crime Commission Act 2002) and the transcript of an ACC examination can only be given to a prosecuting authority that is

external to the ACC in very limited circumstances (see, for example: *R v Seller & McCarthy* [2013] NSWCCA 42 at [99] – [106]).

At the same time the Australian Crime Commission Act provides express restraints on how information collected by the ACC may be used in criminal prosecutions, it also permits the same information to be disseminated to the Commissioner for tax purposes and provides no express restraints on how the Commissioner may then use the information.

It is our experience that this has created two phenomena that were almost certainly not in the contemplation of Parliament at any stage prior to, or since, the formation of the ACC. These phenomena are:

(i) The conduct of ACC examinations at the suggestion of ATO audit officers, for what appears to be the dominant purpose of examination transcripts then being provided by the ACC to the ATO under the ACC's power of dissemination; and

(ii) The Commissioner making use of ACC transcripts, not only to determine whether tax should have been paid, but also to require taxpayers for further examination under the Commissioner's own powers such as s.264, and to use ACC transcripts as evidence in Part IVC appeals.

There is nothing objectionable about employees of the tax office identifying suspicious transactions and referring the matter to the ACC for further investigation. This is a normal part of law enforcement. It also seems very reasonable that, if evidence of illicit profit-making activity comes into the hands of the ACC, the appropriate information can and should be disseminated by the ACC to the Commissioner.

The situation is very different if the ACC is conducting examinations at the request of the Commissioner, if employees of the Commissioner provide questions to the ACC that are then put to witnesses at ACC examinations (in order to perform an evidence-filling function on behalf of civil tax audits), and if ACC examinations occur for the main purpose of the subsequent dissemination of examination transcripts to the Commissioner.

With the permission of a client of this firm we attach a document that was obtained by the client from the ATO under Freedom of Information legislation. The document purports to be the governing document of an ATO-led investigation operating under the name 'Operation Rubix'.

For present purposes the relevant parts of the Operation Rubix document are pp.22, 28 and 29 of 38, from the original pagination of the document.

Page 22 of the document shows that a series of ACC examinations were contemplated as part of the ATO investigation.

The Operation Rubix Project Outline states the following under the heading 'Deliverables and Key Tasks' (at p.28 of 38) (emphasis added):

> *'ACC, via Wickenby Determinations will access their coercive powers, provides strategic intelligence support for Project Wickenby* (sic) *and wider tax fraud issues. Resources will be provided pursuant to Grindelford. Exact resource requirements will be driven by the ATO and AFP. The transcripts or summaries of examinations can be disseminated to Project Wickenby partner agencies subject to examiners' authorisations.'*

The Operation Rubix Project Outline states the following (at p.29 of 38):

> *'Kathryn Knappick, Team Leader, will manage Operation Rubix nationally . . . Partner agencies will manage their respective resources and will ensure that they are appropriately allocated to achieve Operation Rubix's outcomes. Resource commitment was received from the AFP and ACC at the ATO/AFP/ACC Planning Day held on 17 December 2009.'*

These passages indicate that representatives of the ACC have undertaken to exercise the ACC examination power in accordance with requests from employees of the Commissioner. It is conceded that the context for these requests is an investigation into what appears, on the face of the Operation Rubix document, to be highly aggressive tax planning. However it is no part of the Commissioner's statutory task to investigate serious or organised crime, or to bring prosecutions for serious and organised crime. Parliament did not intend that the ACC powers of compulsory examination should be used for the purpose of the Commissioner's civil audit work.

It is our view that the extent of the ATO's engagement with the ACC for the purpose of facilitating civil tax audits is a topic requiring very thorough and critical examination.

The second area of concern we identify is the use of ACC transcripts by the ATO, after ACC information been provided to the ATO. On the one hand the Australian Crime Commission Act provides stringent controls on how ACC information may be used by agencies such as the Commonwealth Director of Public Prosecutions, and these controls are intended to preserve citizens' privilege against self-incrimination (where this privilege has been overridden, in a limited respect, by the conduct of an ACC examination). However there is no limitation on how the ATO may use the information, or safeguard to prevent the ATO conducting its own investigations using ACC information and then providing the evidence in its entirety to the Australian Federal Police, or the Commonwealth Director of Public Prosecutions.

Our firm has had clients who have been examined by the Australian Crime Commission, whose transcripts have then been provided to the Commissioner. Some examples of how we have seen the Commissioner use, or attempt to use, ACC material are as follows:

(i) The Commissioner has sought to tender ACC transcripts in open court, in Part IVC proceedings, with the effect of causing these transcripts to enter the public domain with complete loss of the protections that the Australian Crime Commission Act purportedly provides to the persons whose transcripts were provided to the Commissioner;

(ii) The Commissioner provided ACC transcripts to lawyers representing the Commissioner in Part IVC proceedings. The Commissioner's lawyers then attempted to issue a subpoena to give evidence to one of the persons examined by the ACC, with the stated intention of adducing from this person in open court the very substance of the evidence the person had given in an ACC examination, on the basis of assurances that his ACC evidence would remain confidential; and

(iii) The Commissioner required a person who had given evidence in an ACC examination for a s.264 examination, for the stated purpose of requiring this person to elaborate on the matters the person had given evidence of in the ACC. The significance of this is that, in a s.264 examination, a witness has no privilege against self-incrimination, and the Commissioner has an unqualified power to disseminate s.264 transcripts to agencies such as the Australian Federal Police and / or the Commonwealth Director of Public Prosecutions. Here too the natural consequence of the proposed ATO action would be the loss of the protections provided by the Australian Crime Commission Act 2002.

We respectfully suggest these are very serious matters, and should be of the utmost concern to any responsible legislature.

Recommendations

The Committee should consider the following recommendations:

(a) **Introduce express legislative limitation on the use to which Australian Crime Commission information can be used by the Commissioner if it is provided to the Commissioner.** In particular legislation should prevent ACC examination transcripts from being used to conduct taxpayer examinations under s.264, and should prevent ACC transcripts from being tendered as evidence in civil tax proceedings, or provided to the lawyers conducting civil tax proceedings on behalf of the Commissioner.

(b) **Penalties for breach of the Australian Crime Commission Act 2002**. The statute needs to impose penalties where the ACC examination power is deployed in order to facilitate the purposes of a civil agency such as the ATO.

(c) **Legislative restrictions on the dissemination of ACC information.** In the existing legislation the purposes for which ACC information can be disseminated are very broad. It is appropriate to tighten up the statutory criteria in recognition that information gathered by the ACC is frequently sensitive, and indiscriminate dissemination of ACC information can cause great damage.

[redacted]

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