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AN ORWELLIAN SPECTRE

A REVIEW OF THE COMMISSIONER OF TAXATION'S POWERS TO SEEK INFORMATION AND EVIDENCE UNDER SECTION 264 OF THE INCOME TAX ASSESSMENT ACT 1936 AND UNDER SECTION 10 OF THE CRIMES ACT 1914 (CTH)

1.INTRODUCTION

In the United States, the information and evidence gathering powers of the Internal Revenue Service have been described as '... 'the Orwellian spectre of a Government regularly intruding into the thought processes by which taxpayers and their advisors determine tax obligations''.[1] Similar concerns were expressed in Canada where an enquiry concluded that '...the extremely wide ranging powers of Revenue Canada to search the premises of taxpayers...have been abused'.[2] Early in 1988, debate erupted in Australia concerning the Australia Taxation Office's access to accountants' working papers. This debate, combined with recent assertions that the use of the Commissioner's access powers in a 'raid' was akin to ' 'blowing up the door' before knowing',[3] have given rise to fears that the Commissioner's investigatory powers (including his powers of interrogation) are a real threat to individual privacy and personal liberty.

In order to evaluate whether these fears have any basis, I propose to examine the ambit and limitations of the Commissioner's investigatory powers. However, due to the pending Full Federal Court decisions on appeals lodged against the decisions in *Citibank v Federal Commissioner of Taxation*[4] and *Allen, Allen and Hemsley v Deputy Commissioner of Taxation (NSW)*[5] it is not appropriate to consider the Commissioner's access powers under s263 of the Income Tax Assessment Act 1936 in this paper. Therefore, I will limit my examination primarily to the powers conferred under s264 of the Income Tax Assessment Act 1936 and search warrants issued pursuant to s10 of the Crimes Act 1914 (Cth).

2.THE COMMISSIONER'S INFORMATION AND EVIDENCE GATHERING POWERS

Under s264 of the Income Tax Assessment Act 1936 the Commissioner is empowered to require any person to furnish information or to attend before him to give evidence and to produce books, documents or other papers in his custody or under his control. These powers under s264 are also the information and evidence gathering powers for the Trust Recoupment Tax Assessment Act

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1 'Accountants move to curb Tax Office' *Financial Review* (Australian) 15 January 1988, 1; citing Internal Revenue Manual (US).

2 Canada Progressive Conservative Party Task Force on Revenue Canada, *Report* (1984), 46.

3 Editor, 'ATO Raid on Citibank 'like blowing up the door' ' *The Australian* 16 August 1988, 20.

4 (1988) 19 ATR 1479.

5 (1988) 19 ATR 1462.

1985 and the Taxation (Unpaid Company Tax) Assessment Act 1982. Other Acts administered by the Commissioner also have similar information and evidence gathering provisions, for example, s128 of the Fringe Benefits Tax Assessment Act 1986 and s23 of the Sales Tax Assessment Act (No 1) 1930. Although these provisions vary, in their scope and in the form and content of the notices issued, from s264, the differences are not major. Thus, given this fact and the limited scope of this paper, I will be limiting my consideration to the Commissioner's information and evidence gathering powers under s264.

Section 264 specifies the following:-

> 264(1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority -
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> (a) to furnish him with such information as he may require; and
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> (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in custody or under his control relating thereto.
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> 264(2) [Oath] The Commissioner may require the information or evidence to be given on oath and either verbally or in writing, and for that purpose he or the officers so authorized by him may administer an oath.
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> 264(3) [Expenses] The regulations may prescribe scales of expenses to be allowed to persons required under this section to attend.

Scope of s264

I now propose to examine the major elements of s264 in order to reveal the scope of the Commissioner's information and evidence gathering powers. Also, I will highlight any inherent limitations imposed upon these powers.

(a) Who is authorised to exercise the powers?

Section 264 authorises the Commissioner to exercise these information and evidence gathering powers. The Commissioner may delegate this power, via an instrument of delegation, to a Deputy Commissioner or any other person under s8(1) of the Taxation Administration Act 1953 (Cth). However, it is not practical for the Commissioner to delegate these powers to every officer needing them. Also, the Deputy Commissioners are stopped from delegating their powers by the maxim 'delegatus non potest delegare' (ie he who himself is a delegate of a certain power cannot further delegate the exercise of that power to a sub delegate). To overcome these problems and to ensure efficient administration, a procedure has been adopted, whereby a Deputy Commissioner authorises certain officers to exercise the powers on his behalf.

These delegation and authorisation procedures received judicial approval from the High Court in *O'Reilly v Commissioner of the State Bank of Victoria*[6] (Lawson 1). The High Court rejected the argument that the powers under s264 were only intended to be exercised personally by the Commissioner or his delegated officers. The Court concluded that the s264 powers could be exercised

6 13 ATR 706.

by any duly authorised officer. Subsequently, judicial approval has been given to the use of these authorisation and delegation procedures in respect of the exercise of the Commissioner's other powers under the Act. Two examples of this judicial approval, are the delegation and authorisation of the exercise of powers under ss221YDA in the *Deputy Commissioner of Taxation (SA) v Saddler*[7] and the powers under s218 in *Kerrison v Acting Deputy Commissioner of Taxation (SA).*[8]

Despite these strong judicial statements, the validity of these procedures has been recently questioned, following the decision of the Full Federal Court in *Sharp and Anor v Deputy Commissioner of Taxation (NSW) and Anor.*[9] The Court found that an arguable case existed that ss263(2) required the authorities, which authorise access, to be signed by the Commissioner personally. Whether the decision in the *Sharp* case applies to s264 notices is uncertain as there is no express requirement in ss264(1) that the notices must be signed. However Kluver and Woellner[10] state that s264 speaks in terms of the notice being signed by the Commissioner. This implicit signature requirement seems to have been accepted by the High Court in the *Lawson 1* case,[11] as the Court concluded that a facsimile signature of a delegated officer was sufficient to validate the s264 notice.

However, it is submitted that the fact that s264 does not expressly require that a notice be signed, is sufficient to distinguish it from ss263(2) and the decision in the *Sharp* case. Support for this contention is found in the decision of *Kerrison v Acting Deputy Commissioner of Taxation (SA).*[12] Fischer J declined to consider the arguments in the *Sharp* case as he felt that, as a notice issued under s218 was not expressly required to be signed, the *Sharp* decision was not relevant. Thus the absence of an express signature requirement in s264 means that the delegation and authorisation procedures are valid and not affected by the decision in the *Sharp* case.

(b) Information gathering powers

Under ss264(i)(a) the Commissioner is empowered to require, by a notice in writing, any person to furnish him with such information as he may require. It is clear from the plain wording of the provision that its scope is extremely wide. As Murphy J in *Smorgon v Federal Commissioner of Taxation*[13] (Smorgon 3) observed, '...the power to require information contained in para (1)(b) is not...limited'.

However, despite reading the provision widely the Courts have noted a number of limitations on its scope. Gibbs ACJ in *Geosam Investments Pty Ltd v Australian and New Zealand Banking Group Ltd and Anors*[14] (Smorgon 4) stated that ss264(i)(a) '...must be limited to information which is required for the purposes of the Act'. Further, Leslie DCJ in *Walsh v Deputy Commissioner of Taxation (NSW)*[15] observed that the provision relates to requesting information only. It does not authorise the Commissioner to request books,

7 14 ATR 616.
8 (1988) 19 ATR 1361.
9 (1987) 19 ATR 1045.
10 Kluver and Woellner, *Power of Investigation in Revenue, Companies Trade Practices Law* (1983), 315.
11 Supra n 6.
12 Supra n 8.
13 9 ATR 483, 497.
14 9 ATR 836.
15 12 ATR 470.

documents or papers, nor does it authorise him to request information which amounts to the full contents of such books, documents or papers.[16]

The provision is an important weapon in the Commissioner's armoury as it enables the Commisioner to discover the existence of documents in order to enable a request under ss264(1)(b) to be made. In *Smorgon 4*,[17] Gibbs AJ stated that the provision could be used to obtain a description of books, documents and papers to enable him to identify its contents. Murphy J in *Smorgon 3*[18] went further, stating that the provision enables the Commissioner to 'fish' for information in order for him to carry out his duties under the Act. Consistent with this discovery role is the finding of Leslie DCJ in *Walsh's case*,[19] that the Commissioner does not need to prove that the information requested actually exists for a notice to be valid. A belief or suspicion based on fact is sufficient to validate a request.

Although ss264(1)(a) does not expressly require the Commissioner to nominate, in the notice a time or place for the information to be delivered to him, Nagle J in *Ganke v Deputy Commissioner of Taxation*[20] found that because non compliance with a notice can result in a taxpayer being subject to penalties or prosecution, the provision '...calls for a statement as to the time and place at which the information must be provided'.[21] Thus it follows from this implicit requirement, that in order to enable the taxpayer to comply with a notice, the time limit imposed and the place specified for the production of the information in the notice must be reasonable in all the circumstances. What is reasonable is a matter of fact, objectively determined by the nature of the information requested and the work involved in its collation. The onus of proving whether a prescribed time limit (and presumably, the place specified for the production of the information) is reasonable, lies with the Commissioner.[22] Although the parameters of this reasonableness requirement under ss264(1)(a) have not been judicially considered, the issue has been considered in respect of s162 of the Act. In *Ganke v Deputy Commissiner of Taxation (NSW) (No 2)*,[23] Yeldham J found that a request under s162 for a public company to lodge seven years of income tax returns within 14 days was unreasonable, given the work and time required to prepare such returns.

Despite the requirements to specify a time limit and a place for production of the information, the notices issued pursuant to ss264(1)(a) are not as specific as notices issued pursuant to ss264(1)(b). For example, in the *Walsh case*[24] Leslie DCJ found that provided a notice adequately identified the persons from whom the information is sought, they need not be named. The reason why notices under ss264(1)(a) are less specific than ss264(1)(b) notices is probably due to the discovery nature of the ss264(1)(a) notices.

In summary, although ss264(1)(a) is subject to a number of limitations, it remains a very wide power. However, the fact that similar provisions are found in many foreign revenue Acts[25] indicates that its scope is not unusually wide.

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16 Supra n 14 at 837.
17 Ibid.
18 Supra n 13 at 504.
19 Supra n 15.
20 5 ATR 292.
21 Ibid 296.
22 Ibid 298.
23 13 ATR 440.
24 Supra n 15.
25 Supra n 10 at 337 citing s17(1)(ii) of New Zealand's Inland Revenue Department Act 1974 and s48(1) of the United Kingdom's Income and Corporation Taxes Act 1970.

The existence of such a discovery power is essential for the proper administration of the Act, and provided that it is exercised bona fide, for the purposes of the Act, it should not be oppressive.

(c) Evidence gathering powers

Under ss264(1)(b) the Commissioner is empowered to, by notice in writing, require any person to attend and give evidence concerning his or any other person's income or assessments and to require the production of documents under his custody or control. From the plain wording of ss264(1)(b) there appears two separate powers ie the power to compel attendance to give evidence and a power to require documents. This interpretation of ss264(1)(b) was advanced by Stephen J in *Smorgon v Australian and New Zealand Banking Group Ltd and Federal Commissioner of Taxation*[26] (*Smorgon 1*) who concluded

> '[t]he repetition there of the words 'may require', first used in the first line of s264(1), gives to the whole subsection two distinct limbs, each describing distinct powers possessed by the Commissioner to require certain conduct on the part of the other.'[27]

For the purposes of this analysis, I will consider each of these distinct powers separately.

(i) Attend and give evidence

The Commissioner, under the first limb of ss264(1)(a) is empowered to request a person to appear before him or an authorised officer to give evidence concerning his income or assessment. The provision also empowers the Commissioner to compel a taxpayer to give evidence concerning a third party's income or assessment. Although the information requested is limited to the income or assessment of a person, the scope of the provision is still extremely wide. This is particularly so given that the word 'assessment' has its usual meaning under ss6(1) ie the ascertainment of the amount of taxable income and of the tax payable thereon.[28]

However, as with ss264(1)(a), a number of implicit limitations are imposed upon the scope of the power under the first limb of ss264(1)(b). In order for a notice to be valid it must specify the time and place for attendance[29] and the time limit specified must be reasonable in the circumstances.[30] Also, it has been argued that in order to be valid a notice must also specify the name of the officer authorised to receive the evidence.[31] In finding that more than one officer can be authorised and named in a notice to receive evidence, Davies J in the *Holmes v Deputy Commissioner of Taxation (NSW) (No 2)*[32] seems to have implicitly recognised this requirement. Burt CJ in *Snow v Keating*[33] found that in order for a notice to be valid it must also specify on its face the name of the person whose income or assessment is the subject matter of the enquiry. Although a notice need not specify the precise subject of the enquiry, Stephen J in *Smorgon*

26 6 ATR 690.
27 Ibid 696.
28 *Smorgon 1* supra n 26 at 693.
29 *Ganke's* case supra n 10.
30 *Walsh's* case supra n 15.
31 Horsnell 'The Commissioner's investigatory powers including legal professional privilege' (1988) University of Adelaide Taxation Administration lecture paper, 5.
32 (1988) 19 ATR 1173, 1177.
33 8 ATR 507.

1[34] infers that the Commissioner must be disadvantaged, as the taxpayer can only answer questions that are within his unrefreshed memory and cannot be penalized for lack of knowledge or failure to remember. A valid notice does not need to refer to the penalties provided for under the Act for non compliance with the notice.[35]

A notice, under the first limb of ss264(1)(b), can only be served upon a natural person.[36] A notice will be invalid if served on a corporation and presumably, if served on a trust or partnership. However, this does not mean that corporations or their officers escape the scope of the first limb of ss264(1)(b). Stephen J in *Smorgon 1*[37] stated that

> '[i]f the Commissioner is concerned to elicit facts he believes to be known to officers of a company (and, as I have said, it will always be they and not the company itself which has such knowledge) he may require those officers to attend and give evidence; he may ask them not only as to those facts but as to the identity of all those others who may have knowledge of them.'

In summary, despite the imposition of the above mentioned limitations upon the scope of the power contained in the first limb of ss264(1)(b), the provision still grants wide powers to the Commissioner. However, the fact that similar powers are found in many foreign revenue Acts[38] indicates that its scope is not unusually wide or oppressive.

(ii)Production of documents and books

The second limb of ss264(1)(b) empowers the Commissioner to require, by a notice in writing, a person to produce all books, documents and other papers whatever in his custody or under his control relating thereto. The power can be exercised independently of the power contained in the first limb of ss264(1)(b), as it is a self contained provision.[39] Thus, a person does not have to be called to give evidence before the power can be exercised. As with the other information and evidence gathering powers discussed, the wide ambit of the powers under the second limb of ss264(1)(b) is subject to similar express and implicit limitations. In order to indicate its scope, I will initially examine a number of key words in the provision, before reviewing the implicit limitations imposed.

The phrase 'books, documents and other papers' has not been subject to judicial consideration. Despite this lack of judicial review, what is obvious from the plain meaning of these words is that they catch within their scope written accounts, diary and notebook entries, file cards and other records in a written form. Hard copies of computer printouts, telexes and other electronically stored information would also be caught (*Baker v Wilson*[40]). What is not certain is whether the phrase extends to catch modern forms of information storage (ie microfilm, film, computer, tape or disc, tape recordings), given the fact that ss264(1)(b) was drafted prior to the advent of such technology. In fact, some commentators have argued that the Commissioner's powers are in fact limited to books and documents in paper form only.

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34 Supra n 26 at 701.
35 Ibid 700.
36 Ibid 696.
37 Ibid.
38 Supra n 10 at 343 citing s18 of New Zealand's Inland Revenue Department Act 1974 and s7602(a)(2), (b), (c) of the United States Internal Revenue Code.
39 Supra n 26 at 696.
40 [1980] 2 All ER 81.

These arguments are based upon competing principles of statutory interpretation. It is argued that, by applying the dicta in *Prior v Sherwood*[41] (ie a word of wide connotation will be limited by the context in which it appears), the word 'document' is limited by the antecedent words in the phrase, 'and other papers', and the preceding word, 'books'. Thus the Commissioner's access powers are limited to books and documents in paper form only. However, as no one principle of statutory interpretation is applicable in every situation, this argument is not necessarily correct. An alternative conclusion could be achieved if the 'dictionary' or 'commonsense meaning' methods of statutory interpretation were applied to interpret the word 'documents' in isolation.

In fact, the courts have considered the meaning and ambit of the word 'document'. Humphreys J in *Hill v R*[42] stated,

'I think the meaning of the word "document" which originates, no doubt, from the latin word 'doceo', is that it must be something which teaches you, something from which you can learn something; in other words, something which gives you information...I think the form which the so called documents takes is perfectly immaterial so long as it is information conveyed by something or other, it may be anything, upon which there is written or inscribed information.'[43]

Hoare J in *Cassidy v Engwirda Construction Company*[44] cited Humphreys J[45] and applied the wide interpretation of 'document', stating that a tape recording was a document for the purposes of discovery. This decision was approved of by Mason J in *Australian National Airlines v Commonwealth of Australia*,[46] who concluded, obiter, that a tape recording was a document.[47] Using this wide interpretation, the Courts have held that a film was a 'document'[48] and that a micro film was part of 'bankers' books'.[49]

However, the wide interpretation is not universally accepted. McInerney J in *Beneficial Finance Corporation Co Ltd v Conway*[50] stated that for the purposes of discovery, a tape recording was not a document. This view was also approved of by the Full Victorian Supreme Court in *R v Matthews and Ford*[51] who held that a tape recording '...is not a document as generally understood'.[52]

Despite these adverse authorities, the balance of authority suggests that the wide interpretation of the word 'document' (ie anything which conveys information) is favoured. Thus, electronically stored information would be caught by the phrase 'books, documents and other papers'.

If this analysis is applied to the second limb of ss264(1)(b), it is clear that the Commissioner is empowered to request paper documents, tape recordings, micro-films, and arguably computer tapes and discs. However, information stored electronically is of little use to the Commissioner unless it can be translated into a useable form. The Commissioner is not empowered by the second limb

41 (1906) 3 CLR 1054.
42 [1945] 1 All ER 414.
43 Ibid 417.
44 [1967] QLR 30.
45 Ibid 31.
46 (1975) 132 CLR 582.
47 Ibid 594.
48 *Senior v Holdsworth Ex parte Independent Television News Ltd* [1976] 1 QB 23, 36.
49 Supra n 40.
50 [1970] VR 321.
51 [1972] VR 3.
52 Ibid 12.

of ss264(1)(b) to require that the information contained on tapes or discs be converted into a useable form. The provision only empowers the Commissioner to request documents that actually exist. A possible solution to this problem lies with s25A of the Acts Interpretation Act 1901 (Cth) which states that where an Act requires the production of documents, the information contained in those documents must be in a readable form. Thus, by relying on this provision, the Commissioner can require the production of hard copies of electronically stored information.

The meaning of the phrase 'custody or under his control' was considered by Gibbs ACJ in *Smorgon 3*.[53] He noted that the second limb of ss264(1)(b) is concerned with the ability of a person to produce documents and not with the legal relationship between the person served and the documents requested. Thus, the words 'custody' and 'control' are intended to have a wide meaning in the context of this provision. Gibbs ACJ concluded that

> '[t]he word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account...'control' in s264(1) is not limited to physical control, and in the example the notice could be given to the master, who has legal control of the documents, as well as to the servant. Indeed I see no reason why a notice cannot be given to a person who wrongfully has physical control of the documents or to a person who has parted with possession but retains a right to legal possession; the question is has the person to whom the notice is given such custody or control as renders him able to produce the documents?'[54]

In applying these principles to the facts before him, he found that a bank does have control over documents in a safety deposit box and is able to produce them.[55] Further, where a person is required to produce documents contained in a sealed container, which he does not have a right to open, then the container must be delivered to the Commissioner.[56]

Gibbs ACJ in *Smorgon 3*[57] also considered the meaning of the word 'thereto'. He found that the word refers to the words 'income or assessment' contained in the first limb of ss264(1)(b). Thus, the Commissioner's powers are limited to requiring the production of documents which relate to a person's income or assessment.

Due to the existence of penalties for non-compliance with a notice, the Courts have also specified strict requirements for the form and content of the notice issued. A notice must specify a time and a place[58] to deliver the documents. The time set must be reasonable in the circumstances to enable compliance with the notice.[59] Although the usual place for production of documents will be the Australian Taxation Office, the Commissioner has indicated in Taxation Ruling IT2072 that

> '...favourable consideration may be given to a request to nominate in a notice a place at which production of records is required other than a Deputy Commissioner's office, provided that such an

53 Supra n 13 at 487.
54 Ibid.
55 Ibid 488.
56 Ibid 489.
57 Ibid.
58 Supra n 20.
59 Supra n 15.

arrangement is convenient to us and the party concerned is co-operative and facilitates the inspection and copying of the documents in question.'

A notice must also '...specify with some degree of particularity...what documents are being sought. Failing this, there will be no valid requirement'.[60] Thus, a notice will be invalid if it merely repeats the words of the second limb of ss264(1)(b), as those words only describe the ambit of the Commissioner's power, not the actual documents required.[61] The wording of the notice must also make it clear to the person upon whom it is served, that the documents required fall within the terms of s264 (ie they relate to the income or assessment of a person).[62] The notice must also identify or name the person to whom the documents relate.[63] It also follows that greater particularity is required where the documents required relate to the income or assessment of another person, than if they relate to the affairs of the person served. To ensure a sufficient degree of particularity, the onus of proving that a document described has not been produced, is imposed on the Commissioner.[64]

Finally, Stephen J in *Smorgon I*[65] found that, unlike notices issued under the first limb of ss264(1)(b), notices issued under the second limb could be served on a company. He based his decision on the fact that the law had developed concepts of custody, control, possession and ownership applicable to companies and that the act of producing documents was a mechanical one, capable of being carried out by the officers of the company on its behalf.

In summary, the importance of the powers under the second limb of ss264(1)(b) to the Commissioner's administration of the Act, is indicated by the existence of similar powers in other foreign revenue Acts.[66] However, given the fact that an offence is committed, if even one document requested is not supplied,[67] there is a need to impose limitations on the form and content of notices in order to protect the rights of the individual. Thus to ensure that the powers are not oppressive, the Courts have attempted to balance the competing needs of the Commissioner with the rights of the individual, by imposing such limitations.

(d) The Oath

The Commissioner is empowered under ss264(2) to require that the evidence or information requested under ss264(1) be given on oath, either verbally or in writing. The oath can be administered by a duly authorised officer. When administering the oath, the authorised officer is not required under s264 to warn the person that the evidence or information given, may be used against him in subsequent proceedings or that the giving of false information is an offence. However, the Australian Taxation Office has adopted a practice of warning the person attending of the possibility of penalties for breaches or non compliance with the Act.[68]

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60 Supra n 26 at 700.
61 Ibid.
62 Supra n 13 at 489.
63 Supra n 33.
64 Supra n 13 at 499.
65 Supra n 26 at 697.
66 Supra n 10 at 352 citing s17(1) of New Zealand's Inland Revenue Department Act 1974.
67 Supra n 31 at 9.
68 Supra n 10 at 346.

Despite the existence of these informal procedures, Kulver and Woellner argue that s264 should be amended to provide for a police style warning or to adopt procedures similar to those used in tax fraud cases in the United States.[69] The existence of criminal proceedings under the Crimes (Taxation Offences) Act 1980 (Cth) seems to add further weight to their argument that s264 should have formal warning or cautionary requirements. However, as the powers under s264 can only be exercised for the purposes of the Act, it is unlikely that they can be utilised for the purposes of obtaining prosecutions under the Crimes (Taxation Offences) Act.[70] Thus, although the information obtained for the purposes of the Act would be conceivably used in a subsequent prosecution, it is arguable that the absence of a direct threat of criminal prosecution indicates that s264 does not need amendment. The current procedures are adequate as they warn a person giving evidence or information of the likely consequences of breach or non-compliance.

In summary, unless these procedures are abandoned, I believe that there is no need to enact formal warning or cautionary requirements.

(e) Services of Notices

In order for a notice pursuant to ss264(1) to be effective, it must be served in accordance with the requirements prescribed under reg 59 of the Income Tax Regulations. Regulation 59 specifies the following -

> Any notice or other communication by or on behalf of the Commissioner may be served upon any person -
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> (a) by causing it to be personally served on him; or
> (b) by leaving it at his address for service; or
> (c) by posting it by pre-paid letter post, addressed to him at his address for service;
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> and in any case to which paragraph (c) of this regulation applies, unless the contrary is proved, service thereof shall be deemed to have been effected at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed.

Given that reg 59 is a general provision which specifies the three modes of service of all notices or communications issued under the Act, and the scope of this paper is limited, I do not propose to examine each mode of service in detail. Rather, I will examine the major issues which have arisen from judicial consideration of reg 59.

Firstly, the courts, as evidenced by the decision of Everett J in *Deputy Commissioner of Taxation (Tas) v Naidoo*,[71] have adopted a strict interpretation of reg 59. Everett J found the service of notices of assessment upon the taxpayer's accountant at his office to be ineffective in terms of para (b) as the address for service was the accountant's post office box. He concluded that

> '[i]t is obviously an advantage to the Australian Taxation Office in some cases to be able to serve notices and other communications by following the method prescribed by either para (b) or para (c)

69 Ibid.

70 O'Connor, 'The Powers of the Commissioner of Taxation, the Attorney General and Officers of the Australian Taxation Office under the Crimes (Taxation Offences) Act 1980 (1981) 14 Taxation in Australia 710, 712.

71 12 ATR 348.

> of Reg 59, but I consider that, if it does so, it is bound to adhere to the letter of the regulation.'[72]

He felt that to permit departure from the strict application of the regulation would result in doubt or uncertainty.

However, Kulvner and Woellner believe that Everett J's interpretation is unduly restrictive, as similar provisions in other Acts have been held to be facilitary in nature rather than mandatory.[73] They cite the decision of Cross J in *Sterling v CAC*[74] as illustrative of this fact. In analysing a provision of the Companies Act 1961 (NSW) which provided for personal and postal service, Cross J concluded '...any method which results in the document being placed in the hands of the defendant is sufficient to amount to service on him'.[75]

Although their argument has meant, the subsequent ruling of Master Seaman in *Thiel and Ors v Federal Commission of Taxation*[76] and the decision of Davies J in *Holmes*[77] seem to confirm the strict interpretation of reg 59. The rationale behind this strict interpretation seems to be a desire by the Courts to ensure that taxpayers receive the request, as failure to respond can result in loss of rights or penalties and prosecution. Thus, in order to ensure the validity of a s264 notice served by post or delivered to the address for service, the Commissioner must ensure that the mode of service complies strictly with the wording of reg 59.

In paragraph 5(b) and (c) of reg 59, the meaning of the phrase 'address for service' is defined by reg 29. Regulation 29 provides that the address for service is the last address for service given to the Commissioner by the taxpayer or, where no address is given or where records reveal that the address has changed and the Commissioner has not been notified, then the address of the person is that described in any record in the custody of the Commissioner. The relationship between reg 29 and 59 was considered by Davies J in *Holmes*.[78] He found that '...the address for service specified in a taxpayer's personal return is an address for service for all purposes under the Act and Regulations with respect to documents requiring service upon him in that capacity'.[79] Thus, it is not the address for service of a s264 notice where the evidence of information sought does not relate to the personal affairs of that person, but relates to the income or assessment of a third person. He held that personal service was the most appropriate mode of service in such circumstances.

The difficulties facing the Commissioner in situations where no address for service has been supplied, are illustrated by the facts of *Thiel's case*.[80] The taxpayer, a Swiss resident, argued that the service of notices of assessment on an accountant who had prepared a tax clearance application for him was invalid, as he had never supplied an address for service nor represented that his address for service was that of the accountant. Despite these arguments, Master Seaman found that the Commissioner, in relying on the second limb of reg 29, had an arguable case that the taxpayer's address for service was that of the accountant.

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72 Ibid 356.
73 Supra n 10 at 319.
74 Ibid (1980), Unreported decision of Cross J in the Supreme Court of New South Wales.
75 Ibid.
76 (1985) 16 ATR 651.
77 Supra n 32.
78 Ibid.
79 Ibid 177.
80 Supra n 76.

Where a notice is served by post, reg 59 deems that service is effective at the time that the notice would have arrived at the taxpayer's address, unless the contrary is proved. White J in *Van Reesma v Mills*[81] held that the effect of this deeming provision was to shift the onus on to the taxpayer to prove non receipt of the notice on the balance of probabilities ie the taxpayer had to provide an explanation that was reasonably possibly true. Clearly where the notices are returned unclaimed to the Commissioner, as in *Deputy Commissioner of Taxation (Vic) v Ericksen*,[82] the presumption of due service is rebutted and service is ineffective.

In summary, where a person does not comply with a s264 notice because he did not receive it, the Courts play a role in ensuring that he is not penalised. However, by adopting a narrow interpretation of reg 59, the courts have widened the scope for individuals to avoid service of notices. I can see no logical reason for excusing a taxpayer from complying with a s264 notice because of a minor defect in service such as the delivery of that notice to the office of an accountant rather than his post office box. I believe that the approach to proof of service adopted by Cross J in *Sterling*[83] is the preferred approach, as it protects the rights of individuals without opening the floodgates to avoidance of service.

(f) Summary

The Commissioner is granted wide powers to gather information and evidence by s264. These powers, which are complimented by his access powers under s263, can be used whether or not he has sought access under s263.[84] They play an important role in the administration of the Act as evidenced by the existence of similar powers in foreign revenue Acts.[85] However, the Courts have recognised the need to balance the requirements of the revenue with the need to protect the rights of the individual in light of the existence of penalties for non compliance. As a result, they have imposed specific requirements on the form and content of notices and on their mode of service. Despite these limitations, the ambit of the powers remains wide. This is illustrated by the fact that if part of a s264 notice is invalid, and provided that part can be severed, the balance of the notice will remain effective.[86]

Limitations on the Information and Evidence Gathering Powers

As well as the limitations discussed above, a number of other legal principles limit the scope of the Commissioner's powers under s264. Due to the limitations on this paper, I will in the main be restricting my analysis to a brief discussion of the effects of these limitations on the ambit of the powers under s264.

(a) Administrative review arguments

The decision to issue a s264 notice was found by the Full Federal Court in *Deputy Commissioner of Taxation v Clarke and Kann*[87] to be a decision which is reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Subsequently, it has been argued that the grounds for review set forth in s5 of the Act limit the scope of the Commissioner's powers under s264. Despite

81 12 ATR 263.
82 (1988) 19 ATR 980.
83 Supra n 14.
84 Supra n 13 at 490.
85 Supra n 25, 38, 66.
86 Supra n 26 at 700.
87 (1983) 15 ATR 483.

rejecting any argument that the principles of Natural Justice must be complied with when issuing a s264 notice,[88] the Courts have accepted that some of the other criteria in s5 do limit the scope of s264 (eg the Commissioner must exercise his powers in good faith and reasonably). However, despite this judicial acceptance, taxpayers have had little success in pursuing this avenue of review. The lack of success arises from the fact that, because s264 contains no express criteria to be taken into account when deciding to issue a notice, a heavy burden is placed on the taxpayer to show that the notice should not have been issued.[89]

The difficulties facing a taxpayer in establishing his case are illustrated in *Smorgon 1*.[90] Stephen J held that despite the fact that seven categories of books, relating to various members of the Smorgon family and their many hundreds of companies or trusts, were requested, the notice was not oppressive or unreasonable because of the extent of the obligations imposed.[91] Further, the Full Federal Court indicated in *Eight Oupan Pty Ltd v Deputy Commissioner of Taxation (Vic)*[92] that they will not tolerate the review procedures being used as a delaying tactic. They described the taxpayer's application as being in the nature of a fishing expedition which disclosed no reasonable grounds, and as frivolous, vexatious and an abuse of the court's process.[93]

In summary, it is clear from the above discussion that given the heavy burden of proof placed on the taxpayer, the avenue of administrative review '...shall be a sterile ground for challenges to such notices in the future'.[94] Thus, the administrative law remedies are notional rather than practical limitations on the Commissioner's powers under s264.

(b) Statutory secrecy provisions

The operation of most government departments or statutory authorities are regulated by Acts, which in many instances contain provisions which prevent them from disclosing any information. Whether these provisions provide immunity from s264 or whether s264 overrides them, are issues which have not been judicially considered. However, it is submitted that given the fact that ss264(1) authorises the service of a notice on 'any officer employed in or in connexion with any department of a Government or by any public authority', it is arguable that ss264 expressly purports to bind the Crown. Thus, s264 does override these secrecy provisions.

(c) Contract

It is clear from the decision in *Smorgon 3*[95] that contractual arrangements, which purport to restrict the parties from disclosing information or releasing documents, cannot be relied upon to resist compliance with a s264 notice, as such contracts do not limit the scope of s264.

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88 *Sixth Ravini Pty Ltd v Deputy Commissioner of Taxation (Vic)* 16 ATR 499.
89 Cohen 'The Commissioner's Powers of Investigation and Collection' (1984) Taxation Institute of Australia (NSW) Conference Papers 27.
90 Supra n 26.
91 Ibid at 700.
92 (1986) 17 ATR 540.
93 Ibid at 546.
94 Wood, 'The Validity of Notices for the Production of Documents Under Section 264 of the Income Tax Assessment Act 1936' (1988) 22 Taxation in Australia 641, 642.
95 Supra n 13 at 488.

(d) Legal professional privilege

Legal professional privilege means that a person is protected from disclosing

> '...oral or written confidential communications, between himself and his solicitor or barrister, made or brought into existence for the sole purpose of seeking or giving advice or for the sole purpose of use in existing or anticipated litigation...It is privilege of the client and protects him from being compelled to make such disclosure of such communications either in testimony or by the production of documents...'[96]

If the privilege applies to s264, then any documents brought into existence for the sole purpose of them being submitted to legal advisors for advice or for use in legal proceedings would be privileged and excluded from its scope. However, in 1969, the English Court of Appeal in *Parry-Jones v Law Society*[97] determined that legal professional privilege related only to judicial and quasi-judicial proceedings. Since then, a debate has ensued in Australia concerning the issue of whether the Commissioner's powers under s264 are subject to the privilege as they are not judicial or quasi-judicial proceedings. I propose to examine the various arguments advanced in order to determine whether s264 is subject to the limitation of legal professional privilege.

Initially, it was argued that if the principle enunciated in *Potter v Minahan*[98] (ie where the Common Law has granted an exemption on public policy grounds, express wording is required to abrogate it) is applied, then it appears that s264 is subject to the privilege as it does not expressly exclude it. But, Mason, Aicken and Wilson JJ in *Lawson 1*[99] held that s264 was not subject to the privilege as legal professional privilege is only a rule of evidence, available only in the context of disclosure in judicial and quasi-judicial proceedings. The situation is further complicated by the fact that some 11 months later, the High Court in *Baker v Campbell*[100] found by a majority of 4 to 3, that the privilege was applicable to all compulsory disclosures of evidence, unless the legislation expressly or impliedly excludes or confines it. Thus, arguably s264 is subject to the privilege. But, because the issue before the Court involved a review of warrants issued under s10 Crimes Act 1914 (a judicial proceeding), the above statement is obiter. Therefore, the law is still as stated by the *Lawson 1* case[101] and s264 is not subject to the privilege.

However, although most of the subsequent authorities have avoided deciding the issue, their deliberations appear to have proceeded on the premise that privilege does apply to s264, eg *Holmes and Others v Deputy Commissioner of Taxation (NSW) (No 1).*[102] Further, most recent writings also argue that the privilege does apply to s264. Thus, I respectfully submit that *Lawson 1* no longer represents the law.

Given the likely applicability of the privilege, it is necessary to define its scope and highlight the resultant limitations imposed upon the Commissioner's powers under s264. The application of the privilege to s264 means that although the

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96 *Baker v Campbell* (1983) 14 ATR 713, 753 per Deane J relying on *Grant v Downs* (1976) 135 CLR 674.
97 [1969] 1 Ch 1.
98 (1908) 7 CLR 277.
99 Supra n 6.
100 Supra n 96.
101 Supra n 99.
102 (1988) 19 ATR 1278.

Commissioner can still 'discover' privileged documents under ss264(1)(a), he cannot compel their production nor require evidence to be given about the communications under ss264(1)(b). This limitation would also apply to copies of privileged documents made for record-keeping purposes.[103]

As the privilege only applies to communications between a lawyer and client, it does not extend to other confidential arrangements, like that of an accountant and client.[104] Privileged communications remain privileged in the hands of a third person, provided he is bound by a confidential arrangement (eg an accountant). However, where a document has come into the possession of a third person, outside the lawyer/client relationship, it is arguable that in the absence of a confidential arrangement that the document is no longer privileged. Thus, the Commissioner can compel its production under s264. This argument is based upon the decisions in *Calcraft v Guest*[105] and *R v Tompkins*[106] where secondary evidence of privileged communications was admissible, as the communications had ceased to be confidential in the hands of the third person. The fact that the communications were obtained illegally or wrongfully does not prevent the Commissioner from seeking access.[107] However, the Commissioner may be prevented from tendering or relying on such information by the rules of evidence (in particular, hearsay) or on equitable[108] or public policy grounds.[109]

Where the communication is created as part of an 'entrepreneurial' scheme[110] or is created in the normal course of a lawyer's business (like trust account records[111]), the privilege is not available as the communication was not created for the sole purpose of being submitted for advice. Similarly, the privilege will only protect communications sought for bona fide reasons. Documents created for an illegal purpose or in the furtherance of an illegal activity[112] will not be protected, nor will documents lodged with a legal advisor for the purposes of obtaining immunity from production.[113]

In summary, legal professional privilege although narrow in application, does limit the scope of the Commissioner's information and evidence gathering powers. In situations where legal advice has been sought to create a complicated, artificial tax avoidance scheme, the Commissioner's ability to gain the required information will be dramatically affected by the privilege. However, taking a wider perspective, in the majority of cases the effect of privilege will be minimal.

(e) Privilege against self-incrimination

The High Court in *Pyneboard Pty Ltd v Trade Practices Commissioner and Anor*[114] held that a statute will not be construed to take away a common law right like the privilege against self-incrimination, unless there exists a legislative intent to exclude it, either by express words or by implication. As s264 does

103 *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652.
104 Supra n 82.
105 [1898] 1 QB 759.
106 (1978) 67 Cr App Rep 181.
107 Ligertwood *Australian Evidence* (1988) Butterworths, 167.
108 *Lord Ashburton v Pape* [1913] 2 Ch 469.
109 *Bunning v Cross* (1978) 19 ALR 641.
110 Supra n 31 at 5.
111 *Packer v Deputy Commissioner of Taxation (Qld)* 15 ATR 1038 and *Allen, Allen and Hemsley Case* supra n 5.
112 *Cox v Railton* (1984) 14 QBD 153.
113 Supra n 96.
114 (1983) 57 ALR 236.

not expressly exclude the privilege, it has been argued that the privilege is available to a taxpayer. Further, the Supreme Court of Queensland in *Scanlan v Swan: Ex parte Swan*[115] stated (obiter) that although a person must comply with a s264 notice requiring attendance, he or she may be entitled, while giving evidence, to object to answering any question on the grounds that the answer might be incriminatory.

However, it is argued that the 1984 amendments to the Taxation Administration Act 1953 (Cth) (which introduced the new penalty provisions ss8C and 8D, that deal with breaches of s264) have implicitly removed the availability of the privilege under s264. The argument relies on s15AB of the Acts Interpretation Act 1901 (Cth) which provides that explanatory memoranda are evidence of the intention of the legislation. The Explanatory Memorandum to the Taxation Laws Amendment Bill 1984 (Cth) states that self-incrimination is not a defence to charges under ss8C and 8D. Therefore, if the privilege against self-incrimination does not provide a defence for non-compliance with s264, by implication the privilege is not available under s264.

This reasoning was adopted by Forrest SM in *McKenzie v Kendle*,[116] who '...concluded that self-incrimination is no longer just cause or reason for failure to answer...'.[117] A similar approach was adopted in respect of s23 of the Sales Tax Assessment Act 1930 (Cth) by Ward DCJ in *Wilcocks v Herlihy*.[118] However, Gray J in *R v Collie*[119] found that the privilege still existed.

In conclusion, the balance of authorities suggest that the privilege against self-incrimination is abrogated by s264.

(f)Summary

To enable the Commissioner to effectively administer the Act, the legislature has granted him wide powers to gather information and evidence. In order to ensure that these powers are exercised for a bona fide purpose and that the rights of the individual are protected, the Courts have imposed limitations on the scope of these powers. Despite the imposition of these limitations, it is clear from the above discussion that the Commissioner's powers are still wide. However, I believe that the checks and balances imposed ensure that invasion of privacy is limited to situations where due cause exists.

Miscellaneous Issues

For completeness, it is necessary to briefly discuss the remaining issues which arise under s264.

Firstly, ss264(3) provides that the regulations may prescribe a scale of expenses to be allowed to a person required to attend under s264. However, only persons who are required to give evidence in respect of a third person's income or assessments are entitled to payment of expenses, provided they are not a representative of that third person (reg 64 of the Income Tax Regulations). The Seventh Schedule to the Regulations specifies that the scale of expenses shall be the same as those prescribed under the High Court Rules.

Secondly, if a taxpayer duly served with a valid s264 notice, fails to attend or deliver documents as requested by the notice or having attended, fails to

115 14 ATR 21.
116 (1986) Unreported decision of Forrest SM in the Court of Petty Sessions, Perth.
117 Ibid 4.
118 (1986) Unreported decision of Ward DCJ in New South Wales District Court.
119 (1987) Unreported decision of Gray J in the Victorian Supreme Court.

answer questions, fails to produce books or refuses to take an oath, an offence is committed under either s8C or s8D of the Taxation Administration Act 1953 (Cth). Section 8E specifies fines ranging from $2,000 to $4,000 for individuals and fines up to $25,000 for companies where an offence is committed under ss8C or 8D. In addition, s8E provides that an individual may be imprisoned for a period not exceeding twelve months for a third or subsequent offence.

However, a person will not commit an offence under either s8C or s8D if they have complied with a notice or answered questions to the best of their ability. Further, a breach of s264 will not necessarily lead to a prosecution. In Taxation Ruling IT2246, the Commissioner sets out the factors which will be taken into account in deciding whether to prosecute, whether to allow further time to comply or whether to impose liability for additional tax in lieu of prosecution.

If a taxpayer makes a statement which is false or misleading, or omits information from a statement which renders it misleading, an offence is committed under s8K. Section 8M provides for fines ranging from $2,000 to $4,000 for offences under s8K.

Finally, although the penalties for non compliance with s264 are significant, a taxpayer may decide not to comply as the fine is relatively insignificant to the amount of tax involved. However, the Commissioner has two methods available to enforce compliance with the s264 notice. Firstly, once the taxpayer is convicted of an offence under s8C or s8D, he can request the court, under s8G, to make an order requiring compliance. If the taxpayer ignores this order, he is liable for a fine not exceeding $5,000 or imprisonment not exceeding twelve months or both, under s8H. Secondly, the Commissioner may seek an injunction requiring compliance in such cases, following the decision of Derrington J in *Attorney-General of the Commonwealth of Australia and Deputy Commissioner of Taxation (Qld) v Thomas.*[120]

3. SEARCH AND SEIZURE POWERS

Situations arise where the Commissioner is faced with the prospect that unless he acts quickly to seize and secure documents vital to his enquiries, they will cease to exist. As neither s263 nor s264 authorises the seizure of documents, the Commissioner has sought the assistance of search warrants, issued pursuant to ss10(1) of the Crimes Act 1914 (Cth), which provides that

> If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in or upon any premises, aircraft, vehicle, vessel or place -
>
> (a) anything with respect to which any offence against any law of the Commonwealth...or is suspected on reasonable grounds to have been committed;
>
> (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or
>
> (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence,
>
> or that any such thing may, within the next following 72 hours, be brought into or upon the premises...the Justice of the Peace may

120 13 ATR 859.

> grant a search warrant authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises...named or described in the warrant, and to seize any such thing which he or she might find there.

However, due to the wide scope of the provision and its potential effect upon the privacy of individuals, strict requirements have been imposed on the issue, use and form of s10 warrants.[121] From the express wording of the provision, it is clear that a warrant can only be issued to the Federal Police. A warrant will only be issued if there are reasonable grounds, supported by credible facts and circumstances, for believing an offence has been committed. The mere suspicion of wrong doing will not be sufficient to enable a warrant to be issued.[122] Further, a Justice of the Peace must be satisfied that the information given on oath satisfied the grounds in paragraphs (a), (b) and (c) before he can issue a warrant.[123] A warrant, must on its face, state that the Justice of the Peace is satisfied by the information given on oath.[124]

The warrant must also specify the offence in detail, sufficient to enable either the officer executing the warrant or the individual whose premises are the subject of the warrant to evaluate whether the particular things are relevant or not and whether certain actions are authorised or not.[125] Overlapping this requirement is the requirement that the warrant must identify with sufficient particularity the things authorised to be searched for and seized.[126] However, this does not mean that the actual things seized have to be identified in precise terms. Further, provided the offence is sufficiently specified, a search warrant will not be invalid because of an incorrect citing of the offence provision breached.[127] Although ss10(1) limits the things seized to those items which have relevance to or a probative connection with the alleged offence,[128] the common law authorises the seizure of other items discovered, which relate to offences not named in the warrant.[129] A s10 warrant does not need to specify a period for execution, nor the name of the person who is suspected of committing the offence.[130]

A warrant issued pursuant to ss10(1) does not authorise the search for and the seizure of communications subject to legal professional privilege,[131] and the warrant should disclose on its face that privileged communications are immune from the search and seizure.[132] However, a warrant will not be invalid because it authorises search for and seizure of a class of documents, some of which may be proved to be subject to the privilege.[133]

A warrant will be valid even if part of it is invalid, provided that the invalid part can be severed and the balance is able to stand alone.[134] Further, the

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121 *Crowley v Murphy* (1981) 34 ALR 496.
122 Ibid 515.
123 Ibid.
124 *R v Tillett, Ex parte Newton* (1969) 14 FLR 101.
125 *Parker and Others v Churchill and Others* (1985) 63 ALR 326, 330.
126 *Arno and Others v Forsyth* (1986) 65 ALR 125, 140 and 149.
127 Supra n 125 at 331.
128 Ibid 337.
129 Ibid 340.
130 *Trimboli v Onley* (1981) 37 ALR 354.
131 Supra n 96.
132 Supra n 126 at 137.
133 Ibid.
134 Supra n 125 at 332.

unauthorised seizure of documents will not render the whole warrant invalid.[135] In fact, where there has been illegality affecting the search and seizure, provided that the illegality occurred by error and not by design nor gross neglect, the evidence seized is not sullied by its illegal acquisition and the documents may be admitted into evidence.[136]

In summary, given the fact that tax avoidance was held to constitute an offence in terms of s29D of the Crimes Act,[137] it is clear that s10 warrants are extremely valuable tools for the Commissioner, enabling him to secure vital information. The scope of the provision has remained wide despite the restrictions imposed. However, these restrictions do impose limitations on the issue, form and use of s10 warrants and are important safeguards of the privacy of individuals.

4. CONCLUSION

As Murphy J in the *Smorgon 3* case[138] remarked, '[t]here is a long history of the granting of such wide powers to those with duties to carry out revenue laws of the Commonwealth'. Section 264 and warrants issued under s10 of the Crimes Act are examples of such powers. Although the personal privacy of the individual is encroached upon by these provisions, the legislature and the judiciary have limited their scope to ensure that they are exercised only for bona fide purposes and to ensure personal privacy is not unduly interfered with. After reviewing the legislation, I personally believe that the checks imposed ensure that a proper balance between privacy and efficient revenue administration is met. Thus the fear that the Orwellian spectre of Government is descending upon all citizens, through the exercise of the Commissioner's information and evidence gathering powers is as irrational as the fears in the early 1950's of 'reds under every bed'. The reality of the situation is that '...Orwell's Nineteen Eighty Four remains merely a great work of fiction'.[139]

135 Ibid 340.
136 Ibid 343.
137 Ibid 331.
138 Supra n 13 at 503.
139 Woellner and Vella, 'The Commissioner's Powers of Investigation under the Income Tax Assessment Act - the High Court Examines Section 263' (1983) 18 Taxation in Australia 517, 525.