

February 1993

## The Investigatory Powers of the Commissioner Under the Income Tax Assessment Act and Individual Rights

Bernard McCabe  
*Bond University*

Follow this and additional works at: <http://epublications.bond.edu.au/rlj>

---

### Recommended Citation

McCabe, Bernard (1993) "The Investigatory Powers of the Commissioner Under the Income Tax Assessment Act and Individual Rights," *Revenue Law Journal*: Vol. 3 : Iss. 1 , Article 2.  
Available at: <http://epublications.bond.edu.au/rlj/vol3/iss1/2>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:ePublications@bond). It has been accepted for inclusion in Revenue Law Journal by an authorized administrator of [ePublications@bond](mailto:ePublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

---

# The Investigatory Powers of the Commissioner Under the Income Tax Assessment Act and Individual Rights

## **Abstract**

The Federal Government has foreshadowed another crackdown on tax avoidance as part of its attempts to fund the "One Nation" economic package. This article examines the investigatory powers at the disposal of the Commissioner for this purpose and asks whether those powers are unacceptably wide.

# THE INVESTIGATORY POWERS OF THE COMMISSIONER UNDER THE INCOME TAX ASSESSMENT ACT AND INDIVIDUAL RIGHTS



**Bernard McCabe**

Solicitor of the Supreme Courts  
of New South Wales and Queensland  
Assistant Professor, Bond University

*The Federal Government has foreshadowed another crackdown on tax avoidance as part of its attempts to fund the "One Nation" economic package. This article examines the investigatory powers at the disposal of the Commissioner for this purpose and asks whether those powers are unacceptably wide.*

## Introduction

The recent cases of *Citibank v Deputy Federal Commissioner of Taxation*<sup>1</sup> and *Allen, Allen & Hemsley v Deputy Federal Commissioner of Taxation*<sup>2</sup> along with *R v Inland Revenue Commissioners, Ex Parte Rossminster*,<sup>3</sup> have focused attention upon the wide ranging powers of search and entry that are available to the Commissioner in the performance of his duties under the Income Tax Assessment Act ("the Act"). The purpose of this article is to analyse two of his most important powers, the right of access conferred by s 263 of the Act, and the power to compel production of documents and to require evidence under s 264.

After briefly examining the terms of ss 263 and 264, the article will focus upon the serious implications of the use of these powers for the liberty of the individual. Thereafter, an explanation will be proffered as to why the exercise of the powers has prompted less of an outcry than one might expect. Finally, the question of reform will be considered with reference to Adam Smith's Four Canons of Good Taxation.

## Operation of investigatory powers

Section 263 confers a statutory right of access upon the Commissioner or any person authorised by him. The Commissioner has virtually unlimited rights of access to any place or thing, subject only to the requirement that the

1 89 ATC 4268 (Full Court); 88 ATC 4714 per Lockhart J.  
2 89 ATC 4294 (Full Court); 88 ATC 4734 per Pincus J.  
3 [1980] AC 952.

(1993) 3 Revenue L J

entry be effected for the purpose of the Act.<sup>4</sup> Since 1987, when the section was amended to include s 263(2) and (3), the occupants of the place to which the Commissioner has sought access have been under a duty to render “reasonable assistance” to the Commissioner or his officers in effecting access. Although the precise scope of this duty is unclear, it is likely to extend to the provision of photocopying facilities, information as to the whereabouts of the keys to locked spaces and even guidance in the retrieval of data from computer records.<sup>5</sup>

The right of access conferred by s 263 is remarkably wide. Apart from the requirement referred to above that access be for the purposes of the Act, the only express limit on the power that appears on the face of the statute is the requirement in s 263(2) that an officer must produce written proof of his authority upon request.

Some limits to the operation of the section have been recognised.<sup>6</sup> For example, the section provides for copying but not seizure of original books or documents. The courts have also construed the statute to imply certain procedural limitations on the exercise of the rights conferred by the section. Most importantly, the courts have held that the decision to effect access in each case may be made the subject of judicial review.<sup>7</sup> The courts have also found that the right of access does not extend to documents in respect of which a claim for legal professional privilege has been validly made.<sup>8</sup>

Section 264 is the more commonly used of the two provisions. It includes a power to require any person to furnish the Commissioner with information,<sup>9</sup> and the power to compel the attendance of any person for the purpose of giving evidence or to produce any books or documents concerning his own or any other person's income or assessment.<sup>10</sup> Where

---

4 *Southwestern Indemnities Ltd v Bank of New South Wales* (1973) 129 CLR 512 at 519 per Barwick CJ.

5 Bitomsky and Chappell, “The Commissioner's Right of Access to Records – Recent Cases on ss 263 and 264 of the Income Tax Assessment Act” (1990) 1 Revenue LJ 96 at 105.

6 It has also been argued by Coleman, “Section 263 @ The Commissioner's Statutory Search Warrant?” (1988) 17 Aust Tax Rev 221 that the section does not create a power of search, as distinct from a right of access. Cynthia Coleman points out, at 223, that in the High Court cases in which s 263 has been discussed, the references have almost always been to the Commissioner's *right*, rather than his power. The practical result of the distinction would appear to be that an officer is not permitted to look about for a document when exercising his right of entry; if he cannot readily locate documents either from his own knowledge or with the “reasonable assistance” of the occupier, he is left to utilise his powers to order compulsory production of the documents under s 264. It appears, however, that the Commissioner does not recognise the distinction, and his approach has been accepted by the Federal Court in *Citibank* (Full Court) above n 1, *Allen* (Full Court), above n 2 and *Clyne v Deputy Federal Commissioner of Taxation* 85 ATC 4597.

7 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5; also *Southern Farmers Group Ltd v Deputy Federal Commissioner of Taxation* (1989) 20 ATR 1783 per O'Loughlin J. See also *Deputy Federal Commissioner of Taxation v Clarke and Kann* 84 ATC 4273.

8 *Citibank* (Full Court), above n 1 at 4276 per Bowen and Fisher JJ.

9 Section 264(1)(a).

10 Section 264(1)(b).

information or evidence is sought, the officer may require that it be supplied under oath.

Exercise by the Commissioner of his powers under s 264 is subject to more procedural limits than s 263. To begin with, the section requires that notice of the Commissioner's requirements be in writing. A notice must name the taxpayer whose income or assessment is in issue;<sup>11</sup> if the request is for documents, then the documents sought must be identified with sufficient clarity and the notice must show (either expressly or by necessary implication) that the documents relate to the assessment or income of a named taxpayer.<sup>12</sup> The Commissioner may use his power to compel the provision of information under s 264(1)(a) to assist him in identifying a document which will be the subject of a notice under s 264(1)(b).<sup>13</sup>

It appears that the Commissioner's powers under s 264 extend only to documents which the recipient of the notice has in his custody or control. Before the High Court's decision in *Yuill's* case,<sup>14</sup> it also appeared to be clear<sup>15</sup> that the Commissioner's powers under s 264 did not extend to documents in respect of which a valid claim for legal professional privilege had been made on behalf of the owner. In *Yuill's* case, however, the majority of the Court held that a claim of privilege was not available in relation to documents sought under s 295 of the Companies Code (NSW), which was drafted in similar terms to s 264 of the Income Tax Assessment Act.

Both ss 263 and 264 operate independently; there is no requirement that either one be used in preference or priority to the other.<sup>16</sup> In practice, of course, the two are often used concurrently.

## The impact of the provisions

Systems of taxation inevitably require large quantities of information if they are to successfully ensure the compliance of sometimes reluctant taxpayers. The demand for data becomes acute in a system of income taxation with its wide class of taxpayers, and is particularly serious when it is a relatively complex system that incorporates voluntary self assessment.<sup>17</sup> In those circumstances, the logic of the system requires that the

---

11 *Federal Commissioner of Taxation v ANZ Banking Group Ltd; Smorgon v FCT* 79 ATC 4039 at 4047 per Gibbs ACJ.

12 *Ibid.*

13 *Geosam Investments Pty Ltd v ANZ Banking Group Ltd* 79 ATC 4418 at 4419 per Gibbs ACJ.

14 *Commissioner for Corporate Affairs v Yuill* (1990) 8 ACLC 872.

15 See *Baker v Campbell* (1983) 153 CLR 52, in which the High Court overruled its earlier decision in *O'Reilly v Commissioner of the State Bank of Victoria* (1983) 153 CLR 1, wherein the Court had held that legal professional privilege was not available in administrative proceedings.

16 *Perron Investments Pty Ltd v Deputy Federal Commissioner of Taxation* 89 ATC 4310 at 4315 perinfeld J.

17 See, generally, the comments of Professor Russell Matthews, cited in Davis, "United States Taxes and Tax Policy" Sydney 1986 at 19-20. See also Krever, "Avoidance, Evasion and Reform: Who Dismantled and Who's Re-Building the Australian Income Tax System?" (1987) 10 UNSWLJ 215 at 218ff. See also Levi, "The Powers of Revenue Agencies: An Overview" (1982) *Brit Tax Rev* 36 at 51.

(1993) 3 Revenue L J

administrators of the system have at their disposal adequate powers to secure information.

The role for a provision in the terms of s 264 is both clear and necessary in the context of the existing system of self assessment. The Commissioner must have some means at his disposal whereby he can compel a taxpayer to justify his own self assessment. Without some means of policing compliance by individual taxpayers, self assessment – indeed, the system of personal income taxation itself – might become unworkable.<sup>18</sup> Notwithstanding this, it is the submission of this paper that the exigencies of the income tax system should not be used to justify the compromise of ancient common law rights of personal liberty and privacy. The principal objection to the operation of s 264 from a civil liberties viewpoint is that, when required to give evidence or provide information to an officer, the taxpayer is not entitled to invoke the privilege against self incrimination. Although the authorities are by no means unanimous on the point, it would appear that the common law right to silence has been effectively dispensed with by the 1984 amendments to the Taxation Administration Act.<sup>19</sup> In *Stergis v Federal Commissioner of Taxation*,<sup>20</sup> a single judge of the Federal Court concluded that the right to silence was not available to individuals being questioned pursuant to s 264. The Court's reasoning was based on an analysis of s 8D of the Taxation Administration Act and the Explanatory Memorandum accompanying the amendments, which made it clear that the privilege against self incrimination would not be an adequate defence to a prosecution for failing to provide information as required.<sup>21</sup>

The Income Tax Assessment Act is not unique in excluding the right to silence: the Corporations Law and the Trade Practices Act contain similar provisions.<sup>22</sup> Nonetheless, it would seem unsatisfactory that a right that has been entrenched in the common law since at least the 19th century<sup>23</sup> should be over-ridden for other than the most extraordinarily compelling reasons. It is submitted that the protection of the Revenue can never justify the abandonment of this vital protection for the individual against the powers of the state.

While it is possible to justify at least the concept of s 264 in the context of our existing system, the place of s 263 is far less clear. Although not as widely used as s 264, it is far more intrusive in its operations.

By its very nature, s 263 involves interference in the individual's physical domain. The operation of the provision was most dramatically

---

18 Dirkis, "An Orwellian Spectre: A Review of the Commissioner of Taxation's Powers to Seek Information and Evidence Under s 264 of the Income Tax Assessment Act 1936 and Under Section 10 of the Crimes Act 1914 (Cth)" (1989) 12 Adel LR 63 at 78.

19 See, generally, A Buchanan, "Commentary on Section 264" in *Australian Income Tax Law and Practice* (Butterworths, Sydney, 1991) at para 4390.482. The author cites the Treasurer's Explanatory Memorandum which accompanied the amendments that introduced ss 8C and 8D.

20 89 ATC 4442.

21 At 4455 per Hill J.

22 ASC Law s 68; Trade Practices Act 1974 (Cth) s 155.

23 See generally *Hammond v Commonwealth* (1982) 152 CLR 188 at 203 per Brennan J.

demonstrated in 1988 when the offices of Citibank were “raided” by Taxation officers acting under the authorisation of the Commissioner. In a remarkably well co-ordinated action, a group of 37 officers, equipped with photocopiers and accompanied by a locksmith, conducted a systematic search of files held by the bank. The taxation officers had been divided into teams which were assigned to search different areas of the bank premises.<sup>24</sup> The express aim was to complete the visit and depart within two hours so that the bank would have insufficient time to approach the courts for injunctive relief.<sup>25</sup>

The bank sought judicial review of the decision to invoke s 263 and also challenged the form of the authorisations, of which there were some 4000 on issue at the time of the Citibank raid.<sup>26</sup> In the *Citibank* case, Lockhart J held at first instance that the authorisations were invalid for want of specificity as to the premises to be searched, and for a lack of particularity as to what books or documents were sought.<sup>27</sup> His Honour sought to imply into s 263 certain procedural requirements from the common law – most notably, a requirement of particularity. In His Honour's view, particularity would assist both the searchers and the occupier by enabling them:

to better understand the nature of the search, the rights of the searcher and the duties of the occupier under sub-section 263(3).<sup>28</sup>

The decision of Lockhart J echoes in part the judgment of the Court of Appeal in *Rossminster*, and in particular the decision of Lord Denning MR to which His Honour referred. In that case, the Master of the Rolls railed against the practice of issuing general warrants which lacked particularity.<sup>29</sup> He summarised his attitude by citing the famous dictum of Pratt CJ in *R v Wilkes*:<sup>30</sup>

To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour ...

In addition to confirming the scope of the search, particularity was held in both *Rossminster* (in the English Court of Appeal) and *Citibank* (at first instance) to ensure procedural fairness. Lockhart J was of the view that forcing the authorising officer to condescend to particulars would require him to turn his mind to the circumstances of the exercise of the powers in each case.<sup>31</sup>

In contrast, Pincus J in *Allen's*<sup>32</sup> case held that general authorisations in the same form as those used in the Citibank raid were valid. In a judgment delivered on the same day as Lockhart J's decision in *Citibank*, Pincus J

24 See generally, above n 1 at 4718-4719.

25 Ibid 4730-4731.

26 Ibid 4723.

27 Ibid 4716-4717.

28 Ibid 4724-4725.

29 Above n 1 at 973ff.

30 (1763) 2 Wils 151 at 207, cited by Lord Denning MR in *Rossminster*, above n 3 at 970.

31 *Citibank* per Lockhart J, above n 1 at 4723. See *Allen* (Full Court), above n 2 at 4297.

32 Above n 2.

expressly declined to imply into the broad language of s 263 any of the procedural requirements from the common law which would necessitate any degree of particularity.<sup>33</sup>

The Full Court in both *Citibank* and *Allen's* cases on appeal adopted the reasoning of Pincus J.<sup>34</sup> They took the view that general warrants were, in effect, authorised under the terms of s 263. The House of Lords in *Rossminster* adopted similar reasoning in overruling the Court of Appeal in that case. In the leading judgment, Lord Wilberforce pointed out that, where a statutory provision was clear as to its purpose and effect, it was not for the courts to modify its operation, no matter how unpleasant the consequences. To allow the courts to frustrate the intention of parliament in this way, he continued, would subvert parliamentary democracy.<sup>35</sup>

It is submitted that his Lordship's approach in *Rossminster* is the correct one in principle. In the absence of an entrenched Bill of Rights to afford guidance to the courts in supervising the exercise of administrative powers such as those in s 263, responsibility for the consequences of their exercise must be sheeted home to parliament.

The decisions in the *Citibank* and *Allen's* cases also demonstrate the limits of the usefulness of judicial review in relation to s 263. Commentators such as Dirkis<sup>36</sup> have placed considerable faith in the efficacy of judicial review; it is the submission of this paper that faith cannot be justified.

In *Allen's* case, judicial review was sought on the grounds that the Commissioner's decision to seek access to a firm of solicitors' trust account records was, in the circumstances, unreasonable. Pincus J confirmed<sup>37</sup> that the relevant test for reasonableness was that laid down in *Associated Provincial Picture Houses v Wednesbury Corporation*<sup>38</sup> that the decision in question was so unreasonable that no reasonable authority could have arrived at it. The standard imposed by this test is relatively high; given the wide scope of the powers conferred by s 263, it is submitted that the test will not readily be satisfied in relation to decisions to exercise the right of access.

Lockhart J in *Citibank* also adverted to the general duty incumbent upon decision makers to exercise their powers in good faith.<sup>39</sup> Unfortunately, the wide nature of the discretion available under s 263 makes proving bad faith on the part of the decision maker almost impossible.<sup>40</sup>

A challenge based on the duty to exercise a power for proper purposes will also be fraught with difficulties. The Commissioner's discretion under s 263 is only subject to a requirement that the exercise of powers be for the

---

33 Ibid at 4746.

34 See above n 1 at 4724. See above n 2 at 4297 per Bowen CJ and Fisher J.

35 Above n 3 at 997.

36 Above n 18 at 81.

37 88 ATC 4734 at 4744-4745.

38 [1948] 1 KB 223 at 230.

39 Above n 1 at 4725. See above n 11 at 4057 per Murphy J.

40 Dirkis, "1984 Revisited? Review of the Commissioner of Taxation's Access Powers Under Section 263 of the Income Tax Assessment Act 1936" (1989) 12 Adel LR 126 at 136.



purposes of the Act.<sup>41</sup> The wide nature of this discretion, together with the fact that no other criteria governing the exercise of the power are laid down in the statute, combine to create formidable problems of proof. These problems were amply demonstrated in *Citibank*,<sup>42</sup> where suggestions that the decision under s 263 was motivated by a desire to “send a message” to the bank and to the community at large about co-operation with the Commissioner could not be substantiated.

The Full Federal Court noted in both *Citibank*<sup>43</sup> and *Allen*<sup>44</sup> (following the decision in *Baker v Campbell*<sup>45</sup>) that the powers under s 263 were subject to legal professional privilege. The difficulty in the case of the raid on Citibank was that the officials in question did not afford to the officers of the bank an adequate opportunity to claim privilege on behalf of their clients, or to obtain legal advice in this connection. The Full Court in *Citibank* found against the Commissioner on this point but declined to specify any procedure that should be followed in order to give effect to the privilege.<sup>46</sup>

The requirement that the powers available under s 263 be exercised for the purposes of the Act would presumably comprehend investigations of taxpayers whom the Commissioner suspects of misstating their income. There need not be, however, any dispute in existence between the Commissioner and the taxpayer,<sup>47</sup> nor any suspicion of wrong-doing before the powers under the section may be invoked. In *Industrial Equity Limited v Deputy Commissioner of Taxation*,<sup>48</sup> the High Court found that a notice issued to uncover information in connection with a random audit of a taxpayer was valid. The Court held that a random audit was one of the purposes of the Act where it was directed to determining the taxpayer's assessable income.<sup>49</sup> As the Full Court conceded in *Citibank*, the power might therefore be used to *fish*.<sup>50</sup>

In short, so long as the Commissioner has the appropriate *purpose* in mind, he need not have any *cause* when he decides to exercise the power. It is difficult to imagine a statutory formulation that more readily lends itself to arbitrary use.

It is not possible within the scope of this paper to detail every circumstance in which the Commissioner's powers under s 263 might be invoked. It might be useful, however, to consider briefly the British equivalent to s 263, s 20C of the Taxes Management Act (UK), so as to illustrate the wider operation of the Australian provision. The search and

---

41 Above n 5 at 97.

42 88 ATC 4717 at 4729 per Lockhart.

43 89 ATC 4268 at 4274 per Bowen CJ and Fisher J.

44 89 ATC 4294 at 4297 per Bowen CJ and Fisher J.

45 Above n 13.

46 Above n 1 at 4280 per Bowen CJ and Fisher J.

47 *Clyne v Deputy Federal Commissioner of Taxation* 85 ATC 4592. See also Bitomsky and Chappell, above n 5 at 103.

48 90 ATC 5008.

49 At 5014 per Mason CJ, Brennan, Dean, Dawson, Toohey and McHugh JJ.

50 89 ATC 4268 at 4287 per French J. See also Coleman, above n 6 at 235-236.

(1993) 3 Revenue L J

seizure powers contained in s 20C were discussed at some length in the *Rossminster* case.

Section 20C provides for searches to be conducted with a warrant. A warrant can only be applied for in relation to each search with the permission of one of the Commissioners of Inland Revenue – in other words, each exercise of the statutory power will have been given personal attention by one of the most senior members of the Revenue.<sup>51</sup> This process contrasts sharply with that which is adopted in Australia. The Commissioner delegates his power to give authorisations to the Deputy Commissioners under s 8 of the Taxation Administration Act, and the Deputy Commissioners in turn authorise more junior officers to exercise the power on their behalf. While this process was questioned in *Sharp v Deputy Federal Commissioner of Taxation*,<sup>52</sup> it was accepted in *Citibank*.<sup>53</sup> Clearly, fewer procedural restraints apply to the exercise of power under s 263.

Warrants under s 20C of the British Act are actually obtained from a Circuit Court judge rather than a justice or a magistrate. Several members of the House of Lords in *Rossminster* recommended that the power to issue warrants be confined to High Court judges.<sup>54</sup>

The judge must be satisfied by evidence on oath that there are reasonable grounds for suspecting that a tax fraud has been committed, and that evidence of the fraud can be found at the premises to be searched.<sup>55</sup> Under the Australian legislation, there is no judicial involvement in the issue of authorities and, as indicated above, no requirement of *cause* before the powers under the section are exercised.

From the civil libertarian's viewpoint, we are left with a bleak picture: an administrative agency that exercises wide ranging powers to intrude into the private domain of individuals without cause or even adequate explanation and which is subject, at best, to limited judicial supervision.

### The civil libertarian's response

The raid on the offices of Citibank in 1989 caused considerable disquiet in the community, which was reflected in particular in the judgment of Lockhart J.<sup>56</sup> Generally speaking, however, the response of the civil libertarians has been relatively muted. This is in marked contrast to the position in Britain, where the powers of the Revenue became an election issue in 1979,<sup>57</sup> and subsequently came up for intense public debate at the time of *Rossminster*. In the United States a power in the terms of s 263 would surely be struck down as being inconsistent with the Fourth Amendment of the Constitution, while the effective removal of the privilege

---

51 Taxes Management Act 1970 (UK) s 20c(1)(b).

52 88 ATC 4259 at 4265 per Bowen CJ, Sheppard and Burchett JJ.

53 88 ATC 4714 per Lockhart J at 4722.

54 Viscount Dilhorne at 1003; Lord Salmon at 1021.

55 Taxes Management Act 1970 (UK) s 20c.

56 See, for example, His Honour's summary of reasons for judgment, above n 1 at 4716-4717.

57 Pyle, *Tax Evasion and the Black Economy* (1989) 167-168.

against self incrimination by s 264 would be struck down as contravening the Fifth Amendment.<sup>58</sup>

Why, then, has the debate in this country been so limited? No doubt the deafening silence may be partly explained by the long history of s 263(1). Provisions in similar terms have appeared in the Commonwealth tax legislation since 1915, and before that in State tax legislation.<sup>59</sup> The apparently relaxed attitude of the community might also be brought about by the optimistic assumption that all statutory powers are, in fact, exercised by administrators in good faith.

Yet the relative ease with which the wide powers in s 263 in particular have been accepted by the community seems curious. Certainly, civil libertarians would never accept a proposal to give similar powers to the police for the investigation of "common" crime. Why are policy makers prepared to accept incursions upon individual liberty in relation to taxation affairs that they would never accept in a different context? Why are taxpayers denied the benefit of protections that are available under the criminal law to suspects in police inquiries?

This apparently inconsistent approach appears to be based on the conviction voiced by some policy makers that the affluent, educated individuals who are thought to be the typical subjects of the Commissioner's powers (and the powers of the Australian Securities Commission and the Trade Practices Commission) should not be entitled to claim the benefit of rights that were designed to protect the "simpler" folk who are likely to come into contact with the police.<sup>60</sup>

It is submitted that any system of law which countenances the differential treatment of citizens is fundamentally incompatible with the rule of law which mandates equality before the law. The heavy emphasis upon individualism that forms a part of our democratic heritage and which manifests itself in the common law should not lightly be set aside in the interests of efficient revenue collection.

## Reform

This paper has sought to explore the implications of the Commissioner's investigatory powers for civil liberties. It should be noted that the Australian Taxation Office has itself attempted to meet the objections raised in the *Citibank* case by introducing internal guidelines which regulate the exercise of the powers under the Act. The guidelines provide, inter alia, for a procedure that is to be adopted in respect of documents which are the subject

---

58 See, generally, LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* (2nd ed) 1987. See also Enright, "Probable Cause for Tax Seizure Warrants" (1988) 55 *Univ Chi L Rev* 210. See also Budner, "The Exclusionary Rule's Application in Tax Proceedings: Reconciling the Rule's Purpose for Tax Defendants" (1990) 68 *Texas L Rev* 789.

59 *Coleman*, *supra* n 6 at 221.

60 See, for example, an address by Rodgers J of the NSW Supreme Court, "A Vision of Corporate Australia", to Rotary District 975 on 14 April 1991.

(1993) 3 Revenue L J

of claims of legal professional privilege.<sup>61</sup> They also seek to sensitise decision makers to the issues of privacy and the rights of occupiers.<sup>62</sup>

Yet internal guidelines depend for their efficacy upon the good offices of the Commissioner, and have no binding effect at law. It is submitted that, even when exercised subject to voluntary controls, an access power as wide as that conferred by s 263 will still amount to an unacceptable intrusion upon the liberty of the subject. If the Commissioner wishes to secure access to premises to obtain documents, he should be compelled to submit, at the very least, to the procedural safeguards that apply to the issue of search warrants under the Crimes Act.<sup>63</sup>

It has already been argued in relation to s 264 that the right to silence should be officially recognised as being available to examinees under the section. In the course of that discussion, it was conceded that the logic of our taxation system as it stands requires that the Commissioner have access to relatively large quantities of information. There are those who would argue that to repeal s 263 and to fetter s 264 would starve the Commissioner of the data that he needs to operate the system, leading to its breakdown. The Commissioner needs those powers, they might claim.

At its most basic, the effect of this argument is that the end ("efficient" revenue collection) justifies the means. Expressed in this fashion, the argument is clearly unacceptable in a democratic society.

Yet the criticisms of s 263 and s 264 run deeper than a mere sense of outrage at the powers of the state. By using the analytical tools provided by Adam Smith's Four Maxims of Good Taxation, it is submitted that it can be seen that the very existence of s 263, and aspects of the operation of s 264, are indicative of serious failures on the part of our system of taxation that warrant reform.

Writing over two centuries ago, Adam Smith argued that the merits of any system of taxation, and of any tax, could be measured with reference to four principles.<sup>64</sup> In Adam Smith's view, taxes should be:<sup>65</sup>

- *Equitable*. A supporter of progressive taxation, Adam Smith believed that all citizens were required to share in the burden of taxation that was required for the upkeep of the State "in proportion to their respective abilities";
- *Certain*. Much of Smith's writing was characterised by its hostility to the uncontrolled exercise of power by the State. He argued that, unless the amount of tax required from a citizen could be readily calculated with reference to clear rules, taxation would become arbitrary and extortionate;

---

61 Commissioner's Office Guidelines (OG 66) issued 26 July 1991.

62 Commissioner's Office Guidelines (OG 66) issued 24 October 1988.

63 Coleman, above n 6 at 235-236.

64 Corran, *Tax Philosophers* (1974) 18.

65 Smith "An Inquiry into the Nature and Causes of the Wealth of Nations" in Feilbroner (ed), *The Essential Adam Smith* (1986) 313-314.

## Bernard McCabe Investigatory Powers and Individual Rights

- *Convenient.* Taxes should be levied in a fashion so as to minimise inconvenience to the taxpayer;
- *Economical.* Smith objected to systems of taxation that imposed high costs of compliance upon the taxpayer, and which distorted or acted as a disincentive to economic activity.

To some extent, the goals that Smith's Canons promote are bound to conflict: for example, a truly equitable system of progressive taxation is not likely to be the most economical. Yet the Canons serve as a useful guide for policy makers and for those who design taxes as to what is desirable for a system of taxation.<sup>66</sup> Investigative powers are usually justified with reference to the first Canon, which concerns itself with equity. It is implicit in the concept of equity that not only will taxes be designed to distribute the burden amongst taxpayers in a fashion that might broadly be regarded as "fair", but also that individual taxpayers will not be able to readily avoid taking up their share of that burden. The ability to detect shirking and enforce compliance is therefore essential to any equitable system of taxation.

While the existence of investigatory powers might be justified with reference to the object of equality, it is the submission of this paper that the intrusive nature of the powers under s 263 and s 264 and the potential for arbitrariness that is inherent in the wide scope of the discretion of the Commissioner and the lack of effective judicial supervision all point to a dangerous failure to comply with the second of Smith's maxims, the requirement of certainty.

If our policy makers have faith in the integrity and clarity of our income tax system, then the wide powers provided for under s 263 and s 264 are clearly unnecessary. They will not be missed if they are modified or repealed. Yet the powers remain, and they continue to be used. If coercive state powers that are exercised without regard to the rights of individuals really are necessary to enable the system to work, does that not suggest that the system itself is in serious difficulty?

Powers like s 263 and s 264 are merely symptoms of a deeper crisis in our system of taxation. The challenge presented to the fundamental rights of individuals can and should be addressed by policy makers in the context of a programme of comprehensive reform of our whole tax system.

---

66 Above n 64 at 18.