

eJournal of Tax Research

Volume 11, Number 2

December 2013

CONTENTS

114

Editorial Announcement

Binh Tran-Nam and Nolan Sharkey

115

The developing international framework and practice for the exchange of tax related information: evolution or change?

Michael Dirkis and Brett Bondfield

138

Interpreting tax statutes: imposing purpose on a results based test

Rodney Fisher

157

Attitudes toward municipal income tax rates in Sweden: Do people vote with their feet?

Niklas Jakobsson

176

Strengthening the validity and reliability of the focus group as a method in tax research

Vince Mangioni and Margaret McKerchar

191

Taxing capital gains – views from Australia, Canada and the United States

John Minas and Youngdeok Lim

216

Tax experiments in the real world

Lisa Marriott, John Randal and Kevin Holmes

eJournal of Tax Research

EDITORS OF THIS EDITION

Associate Professor Binh Tran-Nam

School of Taxation and Business Law (Atax), University of New South Wales

Associate Professor Nolan Sharkey

School of Taxation and Business Law (Atax), University of New South Wales

PRODUCTION EDITOR

Edmond Wong

School of Taxation and Business Law (Atax), University of New South Wales

EDITORIAL BOARD

Professor Robin Boadway

Department of Economics, Queen's University

Professor Cynthia Coleman

University of Sydney Business School

Professor Graeme Cooper

Faculty of Law, University of Sydney

Professor Robert Deutsch

School of Taxation and Business Law (Atax), University of New South Wales

Professor Chris Evans

School of Taxation and Business Law (Atax), University of New South Wales

Professor Judith Freedman

Faculty of Law, Oxford University

Professor Malcolm Gammie

Chambers of Lord Grabiner QC, London

Professor John Hasseldine

Paul College of Business and Economics, University of New Hampshire

Professor Jeyapalan Kasipillai

School of Business, Monash University Sunway Campus

Professor Rick Krever

Department of Law and Taxation, Monash University

Professor Charles McLure Jr

Hoover Institution, Stanford University

Professor Dale Pinto

Curtin Business School, Curtin University

Professor John Prebble

Faculty of Law, Victoria University of Wellington

Professor Adrian Sawyer

Department of Accounting and Information Systems, University of Canterbury

Professor Joel Slemrod

University of Michigan Business School

Professor Jeffrey Waincymer

Faculty of Law, Monash University

Professor Neil Warren

School of Taxation and Business Law (Atax), University of New South Wales

Professor Robin Woellner

School of Taxation and Business Law (Atax), University of New South Wales

eJournal of Tax Research

PUBLISHER

The School of Taxation and Business Law (Atax) is part of the Australian School of Business at the University of New South Wales. We are the largest tax school in any university in Australia, bringing together a team of expert academic staff with backgrounds in law, commerce, tax, accounting and economics. At Atax, we're working towards building excellence in the tax profession, looking at tax from both a theoretical and practical perspective.

EDITORS' NOTE

The *eJournal of Tax Research* is a refereed journal that publishes original, scholarly works on all aspects of taxation. It aims to promote timely dissemination of research and public discussion of tax-related issues, from both theoretical and practical perspectives. It provides a channel for academics, researchers, practitioners, administrators, judges and policy makers to enhance their understanding and knowledge of taxation. The journal emphasises the interdisciplinary nature of taxation.

SUBMISSION OF ORIGINAL MATERIAL

Submission of original contributions on any topic of tax interest is welcomed, and should be sent as an email attachment (Microsoft Word format) to the Production Editor at <ejtr@unsw.edu.au>.

Submission of a manuscript is taken to imply that it is an unpublished work and has not already been submitted for publication elsewhere. Potential authors are requested to follow the "Notes to Authors", which is available from the journal's website.

WEBPAGE

Current and past issues of the *eJournal of Tax Research* are available via the journal's website:
<http://www.asb.unsw.edu.au/research/publications/ejournaloftaxresearch/Pages/default.aspx>

The developing international framework and practice for the exchange of tax related information: evolution or change?

Michael Dirkis* and Brett Bondfield[#]

Abstract

In an increasingly globalised economy it becomes more likely that taxpayers under investigation are not necessarily in the country of the relevant tax agency and the impacted revenues may be those of several jurisdictions. In order to ensure a rational consideration of this important issue in Australia it is crucial to understand the international organisational context and international instruments that underpin the practice of the Commissioner of Taxation's investigatory powers and their place in an internationalised commercial environment.

The areas of focus in this paper are: the increasing collaboration between Australia's domestic agencies when investigating tax minimisation that has an international dimension; the growth of international collaborative initiatives to improve the transparency and exchange of tax information (mainly driven through the Organisation for Economic Co-operation and Development (OECD)); developments in information exchange including Australia's comprehensive double taxation agreements; tax information exchange agreements; and the relevance of domestic legislative provisions such as ss 263, 264 & 264A of the *Income Tax Assessment Act 1936* (ITAA 1936).

1. INTRODUCTION AND CONTEXT¹

In an increasingly globalised economy it becomes more likely that taxpayers under investigation are not necessarily in the country of the relevant tax agency and the impacted revenues may be those of several jurisdictions. In order to ensure a rational consideration of this important issue in Australia it is crucial to understand the international organisational context and international instruments that underpin the practice of the Commissioner of Taxation's investigatory powers and their place in an internationalised commercial environment.

This paper explores this issue in the context of the current concerns over the use of globalised commercial transactions to avoid or minimise domestic tax. These concerns are often put in terms of the abuse of tax havens and/or bank secrecy and the responses often summarised in the term: minimising harmful tax competition.

* Professor of Taxation Law, Sydney Law School, The University of Sydney.

[#] Senior Lecturer in Business Law, The University of Sydney Business School.

¹ This paper draws upon earlier work by Michael Dirkis published as "Looking beyond Australia's Horizon: The internationalisation of Australia's domestic taxation information gathering and debt collection powers" in Michael Walpole and Chris Evans (Eds) *Tax Administration: Safe Harbours and New Horizons* (2009), 79.

The areas of focus in this paper are: the increasing collaboration between Australia's domestic agencies when investigating tax minimisation that has an international dimension; the growth of international collaborative initiatives to improve the transparency and exchange of tax information (mainly driven through the Organisation for Economic Co-operation and Development (OECD)); developments in information exchange including Australia's comprehensive double taxation agreements; tax information exchange agreements; and the relevance of domestic legislative provisions such as ss 263, 264 & 264A of the *Income Tax Assessment Act 1936* (ITAA 1936).

The paper commences with a brief consideration of the tax information gathering powers available to the Commissioner under the ITAA 1936. Following that the domestic collaborative tax investigatory arrangements are detailed to provide a comparison to the international tax information gathering and exchange initiatives in which Australia is involved. The purpose of this approach is to explore the expanding internationalised framework for the exchange of tax information and its relevance to Australia.

2. THE AUSTRALIAN DOMESTIC PERSPECTIVE

2.1. Historic limitations of access to international information using the *Income Tax Assessment Act 1936*

The Commissioner of Taxation has three broad statutory powers to collect information in respect of income tax. The Commissioner has a general power of access to information under s 263 of the ITAA 1936² and to gather information and evidence under s 264 of the ITAA 1936³. Despite the breadth of these provisions it was believed that they were ineffective where information was located offshore⁴ therefore s 264A was enacted in 1991.⁵

² A similar access power also is available in respect of the Goods and Services Tax (GST) under s 353-15 of the Taxation Administration Act 1953 (Tax Administration Act). For a more detailed analysis of the operation of s 263 see Robin Woellner, "Section 263 powers of access - why settle for second-best?" (2005) 20 Australian Tax Forum 365 and Michael Dirkis, "1984 Revisited? - Review of the Commissioner of Taxation's powers under section 263 of the Income Tax Assessment Act 1936" (1989) 12 Adel LR 126.

³ A similar information and evidence gathering power also is available in respect of the GST under s 353-10 of the Taxation Administration Act. See generally: Ken Lord, "International tax cooperation: Recent trends and challenges (Part 1)" (2010) 13 The Tax Specialist 272. For a more detailed analysis of the operation of s 264 see Michael Dirkis, "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)" (1989) 12 Adel LR 63. Search warrants are now issued by a Court to the police under s 3E of the Crimes Act 1914 and can be used to search premises and seize documents where there is evidence of a tax law crime, but as it is not a power exercised by the Commissioner they are not discussed.

⁴ Paul Keating, Commonwealth, *Taxation of Foreign Source Income: An Information Paper* (1989). As regards their use within DTAs see B L Jones, "The Use of the Commissioner's Formal Powers and Requests for the Exchange of Information under Double Tax Agreements" (2001) 30 Australian Tax Review 39.

⁵ *Taxation Laws Amendment (Foreign Income) Act 1991*. The following analysis of s 264A updates earlier work in Michael Dirkis, "Australia: Over there, but undeclared - offshore information" (1995) 49 Bulletin for International Fiscal Documentation 466-71.

The first problem is that the general access power under s 263 relies on the documents or person being located in Australia, as does the Commissioner's power under s 264 to compel a person to submit to an oral examination. Therefore, they are inapplicable where the materials or persons are located offshore. Similar problems arose with the Commissioner's powers to compel production of documents under s 264. These powers are based on the presumption that the person served with a s 264 notice has control of the documents. Even though the High Court has held that s 264 "is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce: it is concerned with the ability of the person to whom the notice is addressed to produce the documents"⁶ it is often difficult to establish who has control in complex commercial structures.⁷ However, it has been held that a s 264 notice can be effective in accessing information held domestically that relates to a foreign jurisdiction.⁸

The Full Federal Court has recently held that a bank was required to produce certain information, held in Australia, relating to clients' accounts in an offshore subsidiary and it was no defence to the validity of the notice that such disclosure may conflict with the bank secrecy laws of the foreign state.⁹

To overcome limitations with ss 263 and 264 when the powers were applied to international transactions, s 264A was introduced in 1991. In general, s 264A empowers the Commissioner to issue an "offshore information notice" to a taxpayer requiring the taxpayer to produce information in a specified period. Failure to comply will trigger evidentiary exclusionary sanctions that deny the admission of information that was the subject of the notice (or secondary evidence of that information) in proceedings where the taxpayer challenges their assessment. As the evidentiary sanction is only available where the taxpayer seeks to challenge an assessment issued by the Commissioner, s 264A's coercive impact may also be limited in cases where the requested information, if provided, is considered by the taxpayer likely to increase their liability. However, a s 264A notice may be effective in causing relevant information that may be adverse to the Commissioner's position to be disclosed early in the investigatory process.¹⁰

Since being introduced in 1991 there has been some judicial consideration of s 264A. In *FH Faulding and Co Ltd v FCT* (1994) 54 FCR 75 s 264A was held to be constitutionally valid with the court also considering the administrative law that underpinned the issue of a notice.¹¹

⁶ *Federal Commissioner of Taxation v Australia & New Zealand Banking Group Ltd* ("Smorgon case") [1979] HCA 67 Gibbs ACJ at 5.

⁷ For a detailed discussion on the international limitations of Australia's information gathering powers see Michael Dirkis "Foreign Income: Out of sight: not out of mind" (1992) 1(1) *Taxation in Australia Red Edition*, 26-33.

⁸ *Australia and New Zealand Banking Group Limited v Konza* [2012] FCAFC 127 (12 September 2012). See also: Angela Lee "The Commissioner's power to obtain foreign bank account details under s 264" (2012) 47 *Taxation in Australia* 331.

⁹ *Ibid.*

¹⁰ Ken Lord (2010), above n 3 at 280.

¹¹ *Pilnara Pty Ltd v FCT* 99 ATC 5343 considered *FH Faulding* and provided further guidance on the required substance of a s 264A notice. A similar provision in Canada's tax legislation has been considered to have a broad scope: s 231.6 of the *Income Tax Act 1976* (Can.) in *John Merko v The Minister of National Revenue* (1990) 90 DTC 6643.

In conclusion, it can be seen that the domestic information gathering powers of the ATO under the *ITAA 1936* have remained unamended for a considerable time. Before exploring the more dynamic international environment the development of collaborative investigatory techniques within Australia is considered.

2.2. Wickenby: the collaborative present

Recently there has been an increased public profile of the Australian Taxation Commissioner's access and information gathering powers, with widespread media coverage of the ongoing cross agency taskforce: Project Wickenby that is led by ATO¹² and was established in 2006.¹³ The stated overall objective of this project is to:

“Make Australia unattractive for tax fraud and evasion, as both promoters and potential participants perceive the risk/benefit ratio as weighing heavily against them. To achieve this objective, four primary goals have been identified:

- a. Reduce international tax avoidance and evasion on the Australian taxation system.
- b. Enhance strategies and capabilities of Australian and international agencies to collectively deter detect and deal with international tax evasion.
- c. Improve community confidence in Australian regulatory systems, particularly confidence that the Australian Government addresses serious non-compliance with taxation laws.
- d. Reform administrative practice, policy and legislation.”¹⁴

The government asserts that Project Wickenby remains important to its “fight against the use of secrecy jurisdictions by people to avoid paying tax” and allocated the agencies involved in it additional funding totalling \$76.8 million in the 2012 budget.¹⁵ This should not be confused with the high profile prosecutions¹⁶ that arise from

¹² The taskforce includes the ATO, the Australian Crime Commission (ACC), the Australian Federal Police, the Australian Securities and Investments Commission, the Attorney-General's Department, the Commonwealth Director of Public Prosecutions, and the Australian Transaction Reports and Analysis Centre.

¹³ For example: Hannah Low, “Wickenby target Agius jailed for seven years”, *The Australian Financial Review*, 24 August 2012, 6. A section of the ATO website lists major Project Wickenby announcements from its inception in 2006 at URL: <http://www.ato.gov.au/corporate/content.aspx?menuid=0&doc=/content/00220075.htm&page=20&H20> accessed on 26 January 2013.

¹⁴ Project Wickenby terms of reference at paragraph 4. Located at URL: http://www.ato.gov.au/corporate/content.aspx?menuid=0&doc=/content/00220075.htm&page=24#P751_49658 located on 26 January 2013.

¹⁵ This additional funding is for the period to 30 June 2015 and includes funding for an independent review of Project Wickenby, see: Assistant Treasurer and Minister Assisting for Deregulation, “Maintaining the cross-agency approach to preventing abuse of secrecy jurisdictions (Project Wickenby) and other tax compliance measures”, Press Release No 24, 8 May 2012 located at URL: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/024.htm&pageID=003&min=djba&Year=&DocType=0> on 26 January 2013.

¹⁶ The last media release of a prosecution referring to Operation Wickenby was in May 2010: Australian Crime Commission and Australian Tax Office, “Operation Wickenby—Tax fraud jails Perth accountant for 13 months”, Joint Media Release, 13 May 2010 located at URL: <http://www.crimecommission.gov.au/media/operation-wickenby%E2%80%94tax-fraud-jails-perth-accountant-13-months> on 10 September 2012. For an example prior to this see: Mark Dunn, “Wealthy battle Operation Wickenby tax probe”, *Heraldsun.com.au*, 5 June 2009 located at URL:

Operation Wickenby that was led by the Australian Crime Commission (ACC) since 2004 that is a component of Project Wickenby. Operation Wickenby was in place to develop intelligence on, investigate, and prosecute promoters and participants who facilitate and profit from abusive tax haven arrangements. It also provided for the application of the ACC's investigative and intelligence resources in close collaborations with agencies including the ATO and the Australian Federal Police.¹⁷

Regardless of whether it is Operation or Project Wickenby many of the significant transactions under investigation are across international borders. Thus information gathering needs to be able to follow and substantiate each step in a transaction regardless of the jurisdiction. This complexity was focussed on in late 2011 as part of the ACC's announcement that it was discontinuing its high profile investigation relating to the Australian born actor Paul Hogan and his business associate John Cornell:

The ACC has been investigating this matter since 2005. The delay in resolving this long running investigation hinges on the international complexity of the structures put in place by those who are the subject of the investigation *and a clear strategy by those being investigated to legally challenge the ACC's attempt to establish the facts in the case.* [emphasis added]¹⁸

Paul Hogan, litigated aspects of the ACC's investigation into his tax affairs twice in the High Court.¹⁹ He and his associates also litigated the legality of the ATO's gaining access to information relating to their tax affairs. This litigation focussed on the fact that much of the information was originally obtained by the ACC and it was argued that the ATO was not entitled to have obtained the material on the grounds of administrative law and practice²⁰ as well as claims of legal professional privilege.²¹ Though some claims of legal professional privilege were upheld, the ATO's power to access the information in the circumstances was upheld.

Given that collaborative investigations are very often complex, relationships between agencies are tested. In the case of Paul Hogan and his associates it is reported that the ATO had taken steps to progress matters independently of its Wickenby partners,

<http://www.heraldsun.com.au/news/wealthy-battle-operation-wickenby-tax-probe/story-0-1225721980979> on 26 January 2013.

¹⁷ Australian Crime Commission, "What is the difference between Project Wickenby and Operation Wickenby?", located at URL: <http://www.crimecommission.gov.au/node/108> on 7 September 2012. The ACC's ability to apply its coercive powers to Wickenby matters is now covered by the *Targeting Criminal Wealth Special Investigation* approved by the ACC Board on 15 June 2011 located at URL: <http://www.crimecommission.gov.au/our-work/determinations> on 12 September 2012.

¹⁸ Australian Crime Commission, "Investigation Update", Media Release, 23 November 2010, located at URL: <http://www.crimecommission.gov.au/media/investigation-update> on 7 September 2012.

¹⁹ *Hogan v Australian Crime Commission & Ors* [2009] HCATrans 252 (2 October 2009), *Hogan v Australian Crime Commission & Ors* [2010] HCATrans 4 (4 February 2010), culminating with *Hogan v Australian Crime Commission* [2010] HCA 21 (16 June 2010).

²⁰ *Stewart & Ors v DCT* [2011] FCA 336 (8 April 2011).

²¹ *Australian Crime Commission v Stewart & Ors* [2012] FCA 29 (30 January 2012) affirmed by the Full Federal Court in: *Stewart v Australian Crime Commission* [2012] FCAFC 151 (29 October 2012).

frustrated with the slow progress of the ACC.²² As set out previously the ACC discontinued its investigations citing cross border complexities and it is reported that the ATO has reached a confidential settlement in its dispute with Paul Hogan.²³

The internationalisation of transactions noted above requires an international approach to support investigating those transactions. In the tax context this was historically supported by bilateral tax treaties.

2.3. Historic limitations of domestic access to, and exchange of, international information using Article 26 of the OECD Model Convention

The current OECD exchange of information article is Article 26 in the Model Tax Convention on Income and Capital (the Model Convention).²⁴ Exchange of information articles have been an essential aspect of the various OECD Model Conventions (Double Tax Agreements (DTAs)) since 1963 and were part of many earlier DTAs.²⁵ Thus, the process in respect of enhancing exchange of information between tax authorities has had a long history.

According to Burns and Woellner the scope of these exchange of information articles could be historically classified as ranging from a narrow or limited exchange model (such as the Swiss DTA), a United Kingdom colonial model (such as 1968 United Kingdom and the 1969 Japan DTA), the 1977 and 1992 OECD models (the modern models) and a compulsion model (the 1982 United States DTA).²⁶

The historic express limitations on these exchange of information articles include:

- The fact that the information requested can only relate to taxes to which the agreement applies. For example, a request for GST information need not be complied with by the foreign State, as GST lies outside the agreement.²⁷
- That a Contracting State is not obliged to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.
- That the exchange of information articles may be limited by the Convention and by any other ". . . subsequent agreement or practice of the parties or

²² Susannah Moran, "ATO's Paul Hogan probe to defy Operation Wickenby" 22 July 2008, *The Australian*. Located at URL: <http://www.theaustralian.com.au/news/nation/atos-hogan-probe-to-defy-wickenby/story-e6frg6nf-1111116978762> at 26 January 2013.

²³ Adele Ferguson, "Tax Office leads surplus cash drive", 10 September 2012, *The Sydney Morning Herald*, Business Day page 1.

²⁴ The history and operation of Article 26 is briefly explained on the OECD website at URL: <http://www.oecd.org/ctp/taxtreaties/article26oftheoecdmodeltaxconventiononincomeandcapital.htm> located on 26 January 2013.

²⁵ An exchange of information clause was part 1928 League of Nations model convention and included as Article XIII of Australia's first DTA with the United Kingdom. The DTA was signed on 29 October 1946 and incorporated into the Third Schedule of *ITAA 1936* by the *Income Tax Assessment Act 1947* (Cth).

²⁶ Lee Burns and Robin Woellner "Bilateral and Multilateral Exchanges of Information" (1989) 23 *Taxation in Australia* 656, 658. Under Australia's current DTA policy a number of earlier existing DTAs would not be negotiated as the countries do not have robust internal information gathering powers and bank secrecy rules operate (e.g. the Philippines and Indonesia).

²⁷ OECD, *Model Double Tax Convention on Income and on Capital, Report* (1977), 184.

relevant rules of international law".²⁸ However, the extent to which the treaties limit the operation of such articles will depend upon their incorporation into Australian law.²⁹

There are three fundamental principles which underlie the use of these articles: secrecy, necessity and reciprocity.³⁰ However, due to the undermining of these three fundamental principles by governments, practical limitations have historically arisen. In many jurisdictions revenue authorities' access powers can be extremely limited by domestic judicial restraint and/or their having a narrow scope (i.e. specific categories of information being exempted) and/or by local laws (i.e. bank secrecy and privacy laws).³¹

How the treaty powers are used is the other practical limitation on the effectiveness of treaties to obtain information held offshore. Often governments and tax administrators will have a strong arsenal of information gathering and exchange powers but are either incapable or unwilling to use them. Examples of operational weakness in the international context could include:

- the reluctance of some governments to provide information;
- the lack of power to ensure that the treaty partner provides timely information; and
- that some revenue offices may not pursue information from third parties.

From the foregoing it is demonstrated that there were very real constraints for the Commissioner to obtain overseas information. The followings sections of the paper explore whether the most current developments in tax information exchange represent significant change or evolution and then consider their effectiveness.

3. THE EVOLVING INTERNATIONALISED ENVIRONMENT OF TAX ADMINISTRATION

3.1. Introduction

The scale of domestic exposure to tax minimisation and evasion through the use of tax havens alone is demonstrated by Australians sending an estimated \$16 billion to offshore tax havens in just one year (2008).³²

²⁸ Article 31(3) of the *Vienna Convention on the Law of Treaties*. This follows from the acceptance by the High Court in *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 356 that the *Vienna Convention on the Law of Treaties* could be used in interpreting Australian treaties.

²⁹ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 275.

³⁰ Lee Burns and Robin Woellner (1989) above n 26, 660.

³¹ Some specific examples of these protected categories are the papers of a tax adviser or statutory appointed auditor are safe from disclosure in the United Kingdom and in the United States, the Internal Revenue Service is only given limited access to Church papers. Similar limitations also occur in Australia where the information sought on behalf of a Contracting State is subject to legal professional privilege.

³² Assistant Treasurer, "Anti-Tax Evasion Strategy Paying Major Dividends", Press Release No 73, 20 October 2009 located at URL: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/073.htm&pageID=003&min=njsa&Year=2009&DocType=0> on 26 January 2013.

An evolutionary driver in the tax environment is the challenge of the design of a nation's tax system being "generally structured around national jurisdictions but economic activity and the flow of people and finance [are] becoming increasingly global."³³ While, in theory, public international law does not impose any limitations on a government's power to tax, under private international law sovereign nations cannot enforce the laws of foreign governments in a home jurisdiction to collect taxes levied in a foreign country,³⁴ except where formal reciprocal enforcement agreements exist between states.³⁵ This creates a substantial limitation on the ability of revenue authorities to exercise the essential taxation administrative processes (such as information gathering) needed to counter cross border tax avoidance and evasion.³⁶

With the trade in services outstripping the trade in goods and the communications revolution there is a reduced need for traditional physical linkages to tax jurisdictions. These developments in this increasingly borderless world have given rise to concerns about the increase in the risk of cross border tax avoidance and evasion and the ability of revenue authorities to counter these activities.³⁷

This challenge is in part being met through the formalisation of the international relationships between revenue authorities, which has aided in the internationalisation of domestic taxation information gathering and debt collection powers through unilateral and bilateral treaties.

These initiatives are discussed in the following sections of this paper after a review of current international trends in responding to offshore tax evasion through transparency and information exchange. In doing so the parallel to the domestic landscape should not be forgotten. The identified challenge of offshore tax evasion to Australia has led to a change in approach with Project Wickenby that brought with it advantages and tensions.

3.2. Evolution of cooperative organisms within the internationalised tax administration environment

Australia's active involvement in forums and bodies seeking to deal with tax administration issues raised by trans-border transactions can be traced back to 1919.³⁸

³³ Item 5 National Tax Liaison Group (NTLG) minutes 20 March 2007 referencing Michael D'Ascenzo, "Commissioner's reflections on 2006 and thoughts for the coming year" (2006).

³⁴ Eg see United Kingdom precedent (*In re Visser* [1928] 1 Ch 877, 884, *Government of India v Taylor* [1955] AC 491) and in Australia (*Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324 and *Foreign Judgments Act 1991* (Cth), ss 3(1) and 5(4)).

³⁵ Eg, see *The Reciprocal Enforcement of Judgments Act, 1959 (Qld)* and *Hunt v BP Exploration Co. (Libya) Limited* (1979) 144 CLR 565.

³⁶ For a detailed discussion on the international limitations of Australia's information gathering powers see Michael Dirks (1992) above n 7 and Michael Dirks (1995) above n 5.

³⁷ Jeffrey Owens, Director of the Center for Tax Policy and Administration at the Organisation for Economic Co-operation and Development (OECD), testifying before the United States of America's Senate Finance Committee on Offshore Tax Evasion (May 2007) cited in Australian Taxation Office, *Tax havens and tax administration* (October 2007), 6. Copy located at URL: <http://www.ato.gov.au/businesses/content.aspx?doc=/content/46908.htm> accessed on 26 January 2013.

³⁸ As early as 1919 the then Dominions of Australia (represented by Mr GH Knibbs CMG (Commonwealth Statistician)), Canada, India, New Zealand and South Africa participated in a sub-committee of the United Kingdom's Royal Commission on the Income Tax to discuss their views on double taxation within the empire – see Commonwealth, Royal Commission on Taxation, Reports

A current feature of this international context is the rate of their proliferation and power, especially in the burgeoning field of transparency and information exchange. As will be explored in the following sections, these initiatives include standing bodies under the umbrella of the OECD, multilateral arrangements between revenue authorities and the impact of US unilateral action on bank secrecy.

The OECD is the most active international organisation in the area of transparency and tax information exchange. The OECD's involvement in this area can be traced from the OECD Committee on Fiscal Affairs (CFA) that was established in 1971 and the various forums, sub groups, technical advisory groups established under this initiative, in particular, five working parties on specific taxation topics.³⁹

The main OECD tax administrative forum is the Forum on Tax Administration (FTA), which was created by the CFA in June 1997 (as the "Forum on Strategic Management") to act as the focal point for CFA work on tax administration.⁴⁰ The FTA seeks to enhance co-operation between revenue bodies at commissioner-level with participation from 43 countries, including every G20 member and selected non-OECD countries.⁴¹ It provides a forum through which tax administrators "can identify, discuss and influence relevant global trends and develop new ideas to enhance tax administration around the world".⁴²

The following section illustrates the evolution of a major international forum in response to international tax avoidance and harmful tax competition. This OECD body will be used as illustrative of initiatives that focus on transparency and exchange of tax information. The issues of the expense and effort required to obtain and use tax related information in the domestic context discussed earlier in this paper need to be borne in mind when reflecting on the potential effectiveness of these international initiatives.

3.3. The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes

Australia is a member of the OECD's Forum on Harmful Tax Practices, another subsidiary body of the CFA. The forum was established following the endorsement by OECD Ministers in May 1999 of the April 1998 OECD report on harmful tax competition entitled *Harmful Tax Competition: An Emerging Global Issue*.⁴³ The report was prepared following a request by the OECD countries to "develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases."⁴⁴

(1920-24), 32, Edwin RA Seligman, , Double Taxation and International Fiscal Cooperation (1928), 47-50, and United Kingdom, Report of the Royal Commission on the Income Tax Cmd 615 (1920).

³⁹ For a detailed discussion of these forums see Michael Dirkis (2009) above n 1 and Jan Farrell "Current cross border arrangements with revenue authorities", presented at the Taxation Institute of Australia's NSW Corporate Intensive, 2 November 2007.

⁴⁰ The CFA changed the Forum's name and modified its mandate in June 2002.

⁴¹ OECD, Forum on Tax Administration website located at URL: <http://www.oecd.org/site/ctpfata/> on 26 January 2013.

⁴² Ibid.

⁴³ OECD, *Harmful Tax Competition: An Emerging Global Issue*, 1998, located at URL: <http://www.oecd.org/tax/harmfultaxpractices/1904176.pdf> on 26 January 2013.

⁴⁴ Jeffrey Owens, "Curbing harmful tax practices" (January 1999) *OECD Observer*, 215.

The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes⁴⁵ (formerly the Global Forum on Taxation),⁴⁶ was established in 2000 by the OECD. Since 2000 the Global Forum has played a central role in the development and promotion of what are now internationally accepted standards of transparency and exchange of information across tax issues.⁴⁷ The internationally agreed tax standard was developed by the OECD in co-operation with non-OECD countries and endorsed by G20 Finance Ministers at their Berlin Meeting in 2004, then by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting.

The standard requires exchange of information *on request* in all tax matters where it is *foreseeably relevant* to the administration and enforcement of the domestic tax laws of the requesting jurisdiction without regard to domestic tax interest requirements or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.⁴⁸

The Forum consists of some 122 jurisdictions drawn from OECD countries and non-OECD members (referred to as committed jurisdictions) plus the European Union and 12 international organisations as observers. It is committed to the process of achieving the objective of a global level playing field based on high standards of transparency, effective exchange of information in tax matters and removing limitations such as excessive bank secrecy.

As part of a reform and strengthening process the Forum gained independent funding and a dedicated secretariat. Australia was elected for a two-year term as the inaugural chair of the reformed Global Forum.⁴⁹ The Global Forum's main achievements have been the development of the standards of transparency and exchange of information through the publication of the Model Agreement on Exchange of Information on Tax Purposes (TIEA) in 2002⁵⁰ and the issuance of a paper setting out the standards for the maintenance of accounting records.⁵¹

On an ongoing basis the main work of the Forum is to ensure that high standards of transparency and exchange of tax information are met through a comprehensive, rigorous and robust peer review process conducted by teams of expert, independent

⁴⁵ OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes website located at URL: <http://www.oecd.org/tax/transparency/> on 26 January 2013.

⁴⁶ Treasurer, "Treasurer Opens 2005 Global Forum on Taxation", Press Release No 98, 15 November 2005, located at URL: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2005/098.htm&pageID=003&min=njsa&Year=2005&DocType=0> on 26 January 2013.

⁴⁷ OECD above n 45.

⁴⁸ Global Forum on Transparency and Exchange of Information for Tax Purposes, *Restoring Fairness to the Tax System (Information Brief April 2013)*, located at URL: <http://www.oecd.org/tax/transparency/> on 26 April 2013.

⁴⁹ Assistant Treasurer, "Australia Elected Chair of Global Forum", Media Release 58, 24 August 2009. Located at URL: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/058.htm&pageID=003&min=njsa&Year=&DocType=0> on 26 January 2013.

⁵⁰ OECD, *Model Agreement on Exchange of Information on Tax Purposes*, 2002, located at URL: <http://www.oecd.org/ctp/exchangeofinformation/2082215.pdf> on 26 January 2013.

⁵¹ Joint Ad Hoc Group on Accounts, *Enabling Effective Exchange of Information: Availability Standard and Reliability Standard*, 2005, located at URL: <http://www.oecd.org/ctp/harmfultaxpractices/42179473.pdf> on 26 January 2013.

assessors and overseen by a 30 member Peer Review Group.⁵² Considerable effort and resources have been devoted to this work since the Global Forum was restructured in 2009, with the following results:

- More than 1,100 exchange of information relationships have been established that provide for the exchange of information in tax matters to the international standard have been entered into since 2008;
- 126 peer reviews have been launched;
- 100 peer review reports have been completed and published;
- 652 recommendations have been made for jurisdictions to improve their ability to cooperate in tax matters;
- More than 68 jurisdictions have already introduced or proposed changes to their laws to implement the standard; and
- There has been continuous support by the G20, with 5 progress reports sent, including 1 for the G20 Leaders' Summit in Los Cabos, Mexico in June 2012.⁵³

3.4. Non-OECD initiative: Joint International Tax Shelter Information Centre (JITSIC)

A key arrangement to supplement the on-going work of identifying and curbing tax avoidance and shelters and those who promote them and invest in them was the creation of JITSIC in September 2004.⁵⁴ JITSIC consists of the tax administrations from nine member countries: Australia, Canada, Japan, United Kingdom, United States, South Korea, China, France and Germany and has offices in Washington and London.⁵⁵ The Commissioners have also made plans for the future development of JITSIC, along with measured expansion to cover Asia in addition to North America and Europe.⁵⁶

JITSIC was established to support international co-operation for the identification, understanding and mitigation of risk arising from those who promote or take part in abusive tax schemes. JITSIC's focus is not limited to schemes involving tax secrecy jurisdictions nor to facilitating exchange of information. It extends to:

- obtaining and providing intelligence to support broader communication strategies aimed at increasing the community's awareness of the potential risks of promoting and investing in tax schemes;
- sharing practices and ideas on how to identify and address schemes; enhancing capability to use technology for the early identification of promoters and investors involved in schemes;

⁵² Global Forum on Transparency and Exchange of Information for Tax Purposes, *Restoring Fairness to the Tax System (Information Brief April 2013)*, above n 48.

⁵³ Ibid.

⁵⁴ For a copy of its memorandum of understanding go to URL: <http://www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf> accessed on 26 January 2013.

⁵⁵ Commissioner of Taxation, "Expansion of Joint International Tax Shelter Information Centre (JITSIC)", Media release 2007/17, 23 May 2007. Located at URL: <http://www.ato.gov.au/corporate/content.asp?doc=/content/00100154.htm> on 26 January 2013.

⁵⁶ Fraser Dickinson, "JITSIC: new initiatives on international tax avoidance" (29 January 2009) IBFD Tax News Service.

- identifying emerging trends and patterns to anticipate new abusive tax schemes; and
- improving knowledge of techniques used to promote cross-border abusive tax schemes.⁵⁷

The ATO has invested considerable resources to its involvement in JITSIC and considers that “JITSIC participation is a key part of the Tax Office's overall strategy in dealing with aggressive tax planning.”⁵⁸ By way of concrete example, in the 2010-11 year, the ATO worked with Canadian authorities via JITSIC to investigate a compliance issue with superannuation funds, uncovering \$23.4 million in omitted tax.⁵⁹

3.5. The outcomes of unilateral action: US *Foreign Account Tax Compliance Act* (FATCA)

FATCA was passed in March 2010 to improve compliance with US tax laws by imposing certain due diligence and reporting obligations on non-US financial institutions. The Act imposes a 30% withholding on US source payments to foreign financial institutions that do not participate/cooperate by supplying account information to the US Internal Revenue Service [IRS].

Intergovernmental agreements⁶⁰ (developed with France, Germany, Italy, Spain and the United Kingdom) may be entered into with the US in which the partner country agrees to require local financial institutions to report information on US account holders to local tax authorities. Under Model Agreements⁶¹ local tax authorities will send information to the IRS *automatically*. If this is agreed financial institutions in the partner country are deemed compliant with FATCA and will not suffer nor make withholdings. To date there have been six such bilateral agreements signed by the US with the UK, Denmark, Mexico, Ireland, Switzerland and Norway.⁶² The Treasurer has announced that Australia has entered into discussions with the US to negotiate an

⁵⁷ Commissioner of Taxation, “It's a small world after all - Australia's place in a Global Environment”, Speech to the Australia Israel Chamber of Commerce, Melbourne, 5 July, 2012. Located at URL: http://www.ato.gov.au/corporate/distributor.aspx?menuid=0&doc=/content/00326002.htm&page=1#P89_19603 on 26 January 2013.

⁵⁸ ATO website, “Joint International Tax Shelter Information Centre (JITSIC)”. Located at URL: <http://www.ato.gov.au/atp/content.aspx?doc=/content/00103300.htm&mnu=49276&mfp=001> on 26 January 2013.

⁵⁹ Commissioner of Taxation, (5 July 2012) “It's a small world after all - Australia's place in a Global Environment”, above n 57.

⁶⁰ US Treasury, “Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden”, Press Release 26 July 2012 located at URL: <http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx> on 26 January 2013.

⁶¹ There are two types of Model Intergovernmental Agreement: Reciprocal and Non-Reciprocal and they are located respectively on the US Treasury website at URLs: <http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf> and <http://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf> on 26 January 2013.

⁶² The US Treasury, FACTA Treaty Resource Center website at URL: <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> located on 26 April 2013 contains links to these agreements. The UK agreement was entered into on 12 September 2012 followed by: Denmark (19 November 2012), Mexico (19 November 2012), Ireland (23 January 2013), Switzerland (14 February 2013) and Norway (15 April 2013).

Intergovernmental Agreement.⁶³ Under the negotiated UK/US agreement and the Model Agreements there is a commitment to enhance and expand automatic exchange of information.

3.6. Impact

The activities of the OECD, in particular the Global Forum on Transparency and Exchange of Information for Tax Purposes, have developed an international institutional framework to enhance and monitor tax information exchange. Three outcomes of the OECD's activities will be considered in the following section. These are the revised Article 26 of the Model Convention, the multilateral Convention on Mutual Administrative Assistance in Tax Matters and TIEAs.

As set out above there are initiatives that Australia is actively involved in such as JITSIC and FATCA which are outside the OECD processes. This gives rise to a multiplicity of avenues through which to obtain and provide tax information, spontaneously and/or on request, between jurisdictions. When compared to the Australian domestic environment, specifically Project Wickenby, we see broad parallels with the demonstrated need to develop complementary policy, administrative and legal responses and a tendency to formalise and expand bodies originally set up for a specific short term purpose.

4. THREE OUTCOMES OF THE OECD'S ACTIVITIES

4.1. DTA Reform: Article 26 of the Model Convention

4.1.1. *Setting a context for assessing the evolution of Australia's exchange of information powers*

Before discussing the specifics of Australia's exchange of information powers it is important to sketch the international currents that have shaped the environment in which those powers have grown. OECD forums have shaped DTA reform. From that reform, and informed by the debates that generated them, there have been changes in domestic law in respect of exchange of information between countries and mutual co-operation more generally.

The current OECD exchange of information article is Article 26 in the Model Tax Convention on Income and Capital (the Model Convention).⁶⁴ Exchange of information articles have been an essential aspect of the various OECD Model Conventions since 1963 and were part of many earlier DTAs.⁶⁵ Thus, the process in

⁶³ Deputy Prime Minister and Treasurer, "Australia and the US commence discussions on Foreign Account Tax Compliance Act", Press Release No 110, 7 November 2012 located at URL: <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/110.htm&pageID=003&min=ws&Year=&DocType=0> on 26 January 2013.

⁶⁴ The history and operation of Article 26 is briefly explained on the OECD website at URL: <http://www.oecd.org/ctp/taxtreaties/article26oftheoecdmodeltaxconventiononincomeandcapital.htm> located on 26 January 2013.

⁶⁵ An exchange of information clause was part 1928 League of Nations model convention and included as Article XIII of Australia's first DTA with the United Kingdom. The DTA was signed on 29 October 1946 and incorporated into the Third Schedule of ITAA 1936 by the Income Tax Assessment Act 1947 (Cth).

respect of enhancing exchange of information between tax authorities has had a long history.

In 2002 the CFA undertook a comprehensive review of the exchange of information Article: 26. Both the Model Agreement on Information Exchange on Tax Matters⁶⁶ (TIEA agreements) and the 2000 report on the ideal standard of access to bank information⁶⁷ were used by the Working Party on Tax Evasion and Avoidance as a basis for revising Article 26. A new Article 26 was adopted on 15 July 2005.⁶⁸

The new Article attempts to enable the exchange of information to the widest possible extent adopting a foreseeable relevance test, allowing for the exchange of third party information and allowing the exchange of information outside the taxes dealt with by the convention (i.e. includes indirect taxes). To provide practical assistance to officials dealing with exchange of information for tax purposes the CFA approved a new Manual on Information Exchange on 11 May 2006. The Manual, developed with the input of both member and non-member countries, is also intended to assist in designing or revising national manuals.⁶⁹

4.1.2. Article 26 of the OECD Model Convention

As well as entering TIEAs, the Australian government has placed an increased priority on exchange of information arrangements when negotiating DTAs. Currently Australia has 44 comprehensive DTAs and the special treaty with East Timor (governing activities in the Timor Sea).⁷⁰

The revised Article 26⁷¹ has been generally adopted in the 2009 DTA with New Zealand (that carried forward the 2005 amended provisions), Norway, France and Finland in 2006, Japan and South Africa in 2008, Belgium and Singapore in 2009, Chile, Malaysia and Turkey in 2010 and India 2011. As mentioned above the new article encourages the automatic exchange of information overcoming the short comings of the former Article 26. Further, the scope of the information that can potentially be exchanged under the new Article 26 is wide and includes GST

⁶⁶ The Model Agreement is available on the OECD website at URL: <http://www.oecd.org/dataoecd/15/43/2082215.pdf> at 26 January 2013.

⁶⁷ OECD, *Improving Access to bank information for tax purposes* (2000). Located at URL: <http://www.oecd.org/tax/exchangeofinformation/2497487.pdf> on 26 January 2013.

⁶⁸ OECD, *The 2005 Update to the Model Tax Convention* (2005). It had its basis in a Report (entitled OECD, *Changes to Articles 25 and 26 of the Model Convention* (2004)) adopted by the CFA on 1 June 2004.

⁶⁹ The Manual on Information Exchange can be found at URL: www.oecd.org/ctp/eoi/manual accessed on 26 January 2013.

⁷⁰ Argentina, Austria, Belgium, Canada, Chile*, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hungary, India (but not 2011 Protocol*), Indonesia, Ireland, Italy, Japan, Kiribati, Republic of Korea, Malaysia, Malta Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Romania, Russia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Taipei, Thailand, Turkey*, United Kingdom, United States of America and Vietnam (*indicates that the tax treaty is not yet in force). Sourced from: Treasury, "Australian Tax Treaties", located at URL: <http://www.treasury.gov.au/Policy-Topics/Taxation/Aus-Tax-Treaties/HTML> on 26 January 2013.

⁷¹ Article 26 was adopted by the OECD on 28 January 2003 following the OECD report, *The 2002 Update of the Model Convention* (2002). The history and operation of Article 26 is briefly explained on the OECD website above n 64.

information. However, any information provided under a tax treaty must relate to taxes to which the treaty applies.⁷² Therefore the only jurisdictions with which GST information can be exchanged under DTA's are New Zealand, South Africa, Turkey, Norway, France, Finland and Japan.⁷³

Underlying the new exchange Articles is a requirement for the competent authority (the ATO) to enter into a range of exchange of information protocols (memorandums of understanding) in order to reinforce exchange protocols by providing for a range of mechanisms to facilitate the exchange of information, usually spontaneously.⁷⁴ These protocols are normally supported by internal controls, including instructions to ATO staff.⁷⁵

A number of major limitations remain, including the fact that:

- the exchanged information must be "foreseeably relevant" to the administration or enforcement of the tax laws of the other country (i.e. it must be established that the information is of some demonstrable benefit or assistance to the other country);⁷⁶
- the information must be transmitted through the competent authority;⁷⁷ and
- the secrecy and privacy rules in respect of exchange of any material are generally tighter than that contained in the general Australian tax law.⁷⁸

Thus, there are questions as to whether the new article will have any major impact.⁷⁹ In a recent speech the Commissioner made the point that the ATO was active and

⁷² Practice Statement PS LA 2007/13: "Exchange of information with foreign revenue authorities in relation to goods and services tax under international tax agreements," Para 28(a).

⁷³ The access to information relating to GST and VAT taxes is achieved by either Art 26 prescribing that the exchange of information is not restricted by Art 2 (Taxes covered Article) or by inserting a specific paragraph in Art 2 that widens the scope of taxes covered specifically for the purposes of Art 26 eg: the tax treaties with France (Art 2(3)), Finland (2006) (Art 2(4)), Norway (2006) (Art 2(4)), South Africa (Art 2(4)) and Turkey (Art 2(3)).

⁷⁴ For a more detailed explanation of the process for exchange see Jan Farrell (2007), above n 39 at 5 to 7.

⁷⁵ For example PS LA 2007/13 above n 72 at Paras 7 to 9, identifies two classes of GST information that may be sent to foreign tax authorities or other foreign government agencies outside the express treaty authority. These classes are information that has already been made publicly available and information that does not directly or indirectly identify a taxpayer or other person even if the information is not publicly available (eg statistics about the GST paid by businesses in various industries or a description of a scheme whose participants cannot be identified directly or indirectly). The process for seeking voluntary cooperation from foreign sources for GST information, without the backing of a treaty, is set out in Practice Statement PS LA 2007/14: "Gathering and use of information from foreign agencies or sources in relation to goods and services tax, wine equalisation tax and luxury car tax administration."

⁷⁶ Despite the existence of the new Art 26 in the DTA between Singapore and India the High Court of Singapore in *Controller of Income Tax v AZP* [2012] SGHC 112 could not find the "requirement of foreseeable relevance" despite unsigned transfer instructions remitting funds to Company X's Singapore bank account where an Indian national did not admit to any connection between he and X. This and another transfer were amongst documents seized from the Indian national and three other associates.

⁷⁷ Ibid at Paras. 28(b) and (c).

⁷⁸ It is not possible to divulge the details of specific exchanges that have been made using our tax treaty network, as that would be a breach of Australia's international treaty obligations to foreign governments – see Item 5 of the National Tax Liaison Group meeting minutes of 20 March 2007.

⁷⁹ For example *Controller of Income Tax v AZP* [2012] SGHC 112 above n 76. The impact of the new Article is also dependent on the domestic laws of the relevant jurisdiction as pointed out by Andrew

enthusiastic in its exchange of information under DTAs. In fact some of Australia's major treaty exchange partners had presented the ATO with a series of "meritorious achievement" awards.⁸⁰ In the same speech the Commissioner referred to the use of the DTA provisions by the ATO, including a case where requests were made to multiple treaty partners to establish residency.⁸¹

Legal professional privilege remains as a significant limitation to the effective use of Article 26. In the long running litigation regarding Mr Petroulias relating to his conduct as an Assistant Commissioner of Taxation and as an officer of the ATO the ATO had sought the assistance of the New Zealand Inland Revenue Department (IRD) in 2004 to obtain documents held in New Zealand. In *Petroulias v FCT* [2010] FCA 1464, Mr Petroulias had sought an interlocutory injunction to restrain the Commissioner from accessing the documents received by the Commissioner from the IRD on the basis of a claim of legal professional privilege. As part of this litigation the request made by the ATO under Article 26 of the Australia New Zealand DTA was considered valid. On appeal it has been held that Mr Petroulias be able to argue the claim of legal professional privilege before the Full Federal Court.⁸² This situation does demonstrate the difficulty in using the DTA exchange of information provisions to bring matters to a timely resolution where there are claims of privilege.

In a recent case arising from Project Wickenby the ATO's use of Article 26 (Article 27 in the 2003 Australia United Kingdom DTA in question) was tested from an administrative law perspective. In *Hua Wang Bank Berhad v Commissioner of Taxation (No 2)* [2012] FCA 938 it was claimed that the Commissioner's power to make a request was ultra vires where that request was made where his sole or dominant purpose was to gain an advantage in current legal proceedings (in this case under Part IVC of the *ITAA 1936*). In dismissing this aspect of the proceedings the court held that this proposition may be arguable but on the facts before there was no evidence that this was the sole or dominant purpose of the Article 27 request.⁸³ In considering Article 27 the Court observed that requests for information are made pursuant to the Commissioner's general power of administration⁸⁴ and are not limited

Mills in "International Acts: Current Developments in Tax Treaties" presented at the Taxation Institute of Australia's National Convention, 13 March 2008. Mills argues that, in the context of discovery of documents under New Zealand law, the new Article 26 seems to have little impact. The High Court of New Zealand considered the impact of the new Article in *Avowal Administrative Attorneys Ltd and Ors v District Court at North Shore and CIR CIV-2006-404-007264* (unreported interim judgment delivered in 2007). The case involved the ability of the taxpayers (including Mr Petroulias, a former Assistant Commissioner of Taxation in Australia) to discover pre-trial ATO information supplied to the New Zealand Internal Revenue Department (IRD) under Art 26. The issue before the Court was whether documents containing ATO requests for information, which were the basis upon which searches were performed on the taxpayer's premises, could be the subject of an order for discovery against the Commissioner of Internal Revenue. The High Court concluded they were bound by the decision of the Court of Appeal case of *CIR v ER Squibb* (1992) 14 NZTC 9. Consequently, the law in relation to the discovery of documents by taxpayers containing information requests under the Australia-New Zealand DTA would appear to remain the same as it was prior to the latest protocol.

⁸⁰ The treaty partners referenced were: the US, the UK and Japan: Commissioner of Taxation, (5 July 2012) "It's a small world after all - Australia's place in a Global Environment", above n 57.

⁸¹ The treaty partners included the UK, Netherlands and New Zealand and related to \$26.5 million in undeclared income: Commissioner of Taxation, *Ibid*.

⁸² *Petroulias v FCT* [2011] FCA 795 (18 July 2011).

⁸³ *Hua Wang Bank Berhad v Commissioner of Taxation (No 2)* [2012] FCA 938 para 33-39.

⁸⁴ *Ibid* para 23-24.

to being authorised by s 23 of the *International Tax Agreements Act 1953 (Cth)* (*International Agreements Act*) (considered in the following section of this paper). Further that the DTA information exchange article did not of itself authorise the making of a request, rather it set out the responsibilities of the recipient of that request.⁸⁵ This may provide fertile ground for litigation of the domestic legal basis of Commissioner's decisions to request information through the DTA provisions.

4.1.3. Section 23 of the *International Tax Agreements Act 1953 (Cth)*

To give support to the new Article 26, a new s 23 of the *International Agreements Act* was enacted in 2006.⁸⁶ Section 23(1) expressly authorises the Commissioner to use the information-gathering provisions for the purpose of gathering information to be exchanged under both DTAs and TIEAs. The information provided is not restricted to information relating to Australian tax.⁸⁷ The "information-gathering provisions" are any taxation law provision that allows the Commissioner to:

- access land, premises, documents, information, goods or other property;
- require or direct a person to provide information; or
- require or direct a person to appear before the Commissioner or an officer and give evidence or produce documents.⁸⁸

The term "taxation law" is also broadly defined in the *Income Tax Assessment Act 1997 (ITAA 1997)* to be any act administered by the Commissioner and any regulation made under such an act; thus, the potential scope of the information that may be exchanged is wide and includes information regarding the GST.

Despite these changes, it is not certain that the new s 23 overcomes the argument that if a request for access under s 263 of the *ITAA 1936* is made for purposes of the *International Agreements Act*, that request is beyond the Commissioner's power. The illegality arises because s 263 may not have been effectively incorporated by s 4 of the *International Tax Agreements Act* as the operation of s 263 is limited to purposes of the *ITAA 1936* (ie "this Act").⁸⁹ However, in reality, any challenge to s 263 will merely gain a taxpayer time and inconvenience the Commissioner. The issue of the validity of incorporation into the *International Tax Agreements Act* does not arise in respect of s 264 as it is not subject to an express restriction.

Finally, the new s 23(2) of the *International Agreements Act* ensures that the disclosures will not violate the secrecy provisions. Consequential amendments have

⁸⁵ Ibid para 21-22. Though not impacting on the point discussed above, in *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28 the Full Federal Court refused leave to appeal by the bank which argued that compliance with a notice would require employees of the bank to breach the *International Banking Act 2005* (Samoa).

⁸⁶ By Schedule 2 of the *International Tax Agreements Amendment Act (No 1) 2006*.

⁸⁷ *International Agreements Act*, s 23(3).

⁸⁸ *International Agreements Act*, s 23(4).

⁸⁹ See: "Limitations on the use of s 263, where access is sought to satisfy the Commissioner's obligations under double tax agreements", [1993] *Butterworths Weekly Tax Bulletin*, Para 158. See also B L Jones (2001) above n 4, 46 and Ken Lord (2010) above n 3, 276-277.

also been made to the *Taxation Administration Act* to ensure that such disclosures are not a breach. These amendments apply to requests for exchange of information made from 15 September 2006, provided the relevant international agreement under which the request was made has entered into force.⁹⁰

4.2. Convention on Mutual Administrative Assistance in Tax Matters

A major development outside of the Model Convention occurred in the late 1980's, when the OECD and the Council of Europe jointly developed a Convention on Mutual Administrative Assistance in Tax Matters.⁹¹ The Convention was opened for signature on 25 January 1988 and entered into force in 1995. It covers all taxes and allows exchange of information, multilateral simultaneous tax examinations and assistance in tax collection. It provides extensive safeguards to protect the confidentiality of the information exchanged.

In April 2009, the G20 called for action "to make it easier for developing countries to secure the benefits of the new cooperative tax environment, including a multilateral approach for the exchange of information."⁹² In response, the OECD and the Council of Europe developed a Protocol that came into effect on 1 June 2011⁹³ amending the multilateral Convention on Mutual Administrative Assistance in Tax Matters. The Protocol made the Convention consistent with the international standard on exchange of information for tax purposes developed by the Global Forum and opened it up to all countries (previously membership was limited to members of the OECD and of the Council of Europe).⁹⁴

Australia has become a signatory to the Convention on Mutual Administrative Assistance in Tax Matters. It has lodged its instrument of ratification with OECD with the Convention to enter into force for Australia on 1 December 2012.⁹⁵ In August 2012 the Joint Standing Committee on Treaties had recommended the Convention be

⁹⁰ The treaties with New Zealand, Norway, Finland, Japan, France and South Africa have all entered into force.

⁹¹ Copy of the Convention and explanatory materials can be found at URL http://www.oecd.org/ctp/exchangeofinformation/Convention_On_Mutual_Administrative_Assistance_inTax_Matters_Report_and_Explanation.pdf accessed on 26 January 2013.

⁹² Referenced on the OECD website at URL: www.oecd.org/ctp/eoi/mutual accessed on 26 January 2013.

⁹³ Copy of the amending Protocol can be found at URL: http://www.oecd.org/ctp/exchangeofinformation/2010_Protocol_Amending_the_Convention.pdf accessed on 26 January 2013.

As at 1 March 2013 there were 43 signatories to the amended Multilateral Convention: Albania, Argentina, Australia, Belgium, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Denmark, Finland, France, Georgia, Germany, Ghana, Greece, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Lithuania, Malta, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Slovenia, South Africa, Spain, Sweden, Turkey, Tunisia, Ukraine, United Kingdom, and United States. Information located at URL:

<http://www.oecd.org/directorates/guatemalacommittointernationalexchangeoftaxinformation.htm> on 26 April 2013.

⁹⁵ Assistant Treasurer and Minister Assisting for Deregulation, "Australia Ratifies Multilateral Tax Cooperation Agreement", Press Release No 114, 5 October 2012 located at URL: <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/114.htm&pageID=003&min=djba&Year=&DocType> on 26 January 2013.

ratified.⁹⁶ In doing so the Committee noted that the Convention will “complement Australia’s network of comprehensive tax treaties and TIEAs by providing an additional tool for detecting and preventing tax evasion as well as recovering outstanding tax debts.”⁹⁷ It was further noted that no new legislation was required to implement the obligations imposed by the Convention.⁹⁸

4.3. TIEAs

The Global Forum on Taxation’s Working Group on Effective Exchange of Information was responsible the Model Agreement on Information Exchange on Tax Matters (TIEA) that countries can use to guide their bilateral negotiations. The Model Agreement is not a binding instrument. It covers information exchange upon request for both civil and criminal tax matters.⁹⁹ The Model Agreement incorporates important safeguards to protect the legitimate interests of taxpayers (i.e. disclosure can be declined if the information would disclose a trade or business secret or if the information is protected by the attorney-client privilege) and the information exchanged has to be treated as confidential.¹⁰⁰ There are now just fewer than 520 exchange of information agreements in place.¹⁰¹

Australia has concluded 34 TIEAs¹⁰² all of which contain specific exchange of information provisions. Less than a third of those negotiations have resulted in a separate “Additional Benefits Agreement” (ABA). The list of countries with which these agreements have been made indicates that they are small and many are popularly

⁹⁶ Joint Standing Committee on Treaties, Report 127 Review into Treaties tabled on 20 March and 8 May 2012, tabled 15 August 2012 located at URL:

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/20march2012/report.htm on 26 January 2013.

⁹⁷ Ibid at paragraph 4.36.

⁹⁸ Ibid at paragraph 4.28: “Australia is able to fulfil its obligations under the Convention under existing legislation, specifically, section 23 of the International Agreements Act in respect of exchange of tax information. Similarly, Division 263 of Schedule 1 to the Taxation Administration Act 1953 applies to any agreement in force between Australia and a foreign country that contains an article relating to assistance in collection of foreign tax debts.”

⁹⁹ The Model Agreement specifically provides that information must be provided even where the requested country itself may not need the information for its own tax purposes. Contracting parties further agree that their competent authorities must have the authority to obtain and provide information held by banks and other financial institutions. However, countries are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a specific taxpayer a requesting country needs to demonstrate the foreseeable relevance of the information requested – see OECD, The OECD’s Project on Harmful Tax Practices: The 2004 Progress Report (2004) at 13.

¹⁰⁰ Ibid.

¹⁰¹ A list of jurisdictions and the TIEAs they have entered is located at: OECD website at URL: <http://www.oecd.org/tax/transparency/exchangeoftaxinformationagreements.htm> accessed on 26 January 2013.

¹⁰² Sourced from: Treasury, Australian Tax Treaties- Tax Information Exchange Agreements, located at URL: <http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML> accessed on 26 January 2013. These are: Bermuda (2005); Antigua and Barbuda and Netherlands Antilles (listed as an agreement with 2 states: Curaçao and Sint Maarten on the Organisation for Economic Co-operation and Development (OECD)’s table of tax treaties) (2007); British Virgin Islands (2008); Aruba, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey and Samoa (2009); Anguilla, Bahamas, Belize, Cayman Islands, Dominica, Grenada, Marshall Islands, Mauritius, Monaco, Montserrat, San Marino, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Turks and Caicos Islands; Vanuatu (2010); Andorra, Bahrain, Costa Rica, Liberia, Liechtenstein and Macao (2011) and Uruguay (2012).

considered “tax havens” (now referred to as “low taxing jurisdictions”), but there may be a significant economic importance of TIEAs to Australia. For example, in 2004 Bermuda was the fourth leading investor into Australia investing \$A2.2 billion.¹⁰³ In a recent speech the ATO Commissioner noted that in the 2010-11 financial year, funds leaving Australia to low taxing jurisdictions had decreased since 2007-08 by 22%,¹⁰⁴ the first TIEAs came into force in 2007.

As at 21 December 2009 only two out of the 11 TIEAs then signed had come into force and those were between Australia and Bermuda and the Netherlands Antilles.¹⁰⁵ As at 28 April 2013 only one signed TIEA was yet to come into force: Uruguay (signed 10 December 2012)).¹⁰⁶ TIEAs have not been given domestic force by legislation and it is unclear whether such legislation is required. This is despite the Joint Standing Committee on Treaties having recommended in February 2006 and again on 13 June 2007 that binding treaty action should be undertaken.¹⁰⁷

Legislation is required to give effect to the ABAs.¹⁰⁸ Even though ABA's are not part of the information exchange of a TIEA they are an integrated part of the TIEA negotiation process.¹⁰⁹ ABA's generally cover the allocation of taxing rights over certain income derived by retirees, government employees and students and provide a mechanism to help resolve transfer pricing disputes.¹¹⁰ Australia negotiated these types of agreements alongside the TIEAs in more than half (seven) of those 11 signed to December 2009, but very few ABAs were negotiated after that with nine in total at September 2012.¹¹¹ This change of approach has not been explained but may be linked to the Australian government being less inclined to provide benefits to other countries in more stringent economic circumstances post 2009.

Under the TIEAs a primary obligation exists between Australia and the specific treaty partner to exchange information upon request. There is no provision for the routine or voluntary exchange of information between the two parties. The information sought must be:

- relevant to the determination, assessment and collection of taxes;
- relevant to the recovery and enforcement of tax claims;

¹⁰³See Parliament of Australia, Joint Standing Committee on Treaties, *Report No 73* (2006), 31.

¹⁰⁴Commissioner of Taxation, (5 July 2012) “It's a small world after all - Australia's place in a Global Environment”, above n 57.

¹⁰⁵Sourced from: Treasury, Australian Tax Treaties- Tax Information Exchange Agreements, above n 102.

¹⁰⁶*Ibid.*

¹⁰⁷See *Report No 73* above n 103 at 35, Recommendation 4 and Parliament of Australia, Joint Standing Committee on Treaties, *Report No 87* (2007), 24, Recommendations 3 and 4.

¹⁰⁸International Tax Agreements Amendment Act (No 1) 2009.

¹⁰⁹See: Treasury, Australian Tax Treaties- Tax Information Exchange Agreements, above n 102.

¹¹⁰For example: Treasury, “Australia-Isle of Man Tax Information Exchange Agreement” (30 January 2009) at URL: <http://archive.treasury.gov.au/contentitem.asp?NavId=&ContentID=1467> at 26 January 2013.

¹¹¹Treasury, Australian Tax Treaties- Tax Information Exchange Agreements, above n 102. Assistant Treasurer, above n 32 and Assistant Treasurer, “Another Boost for Tax Transparency Program” Press Release No. 110, 16 December 2009 at URL: <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/110.htm&pageID=003&min=njsa&Year=&DocType=0> at 26 January 2013.

- relevant to investigation or prosecution of tax matters; and
- treated confidentially by all parties.

Countries cannot engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of the specific taxpayer. However, it is irrelevant whether the conduct being investigated is a crime under the domestic law of each treaty partner. Where the information available is insufficient to enable compliance with the request, each partner must use all relevant information gathering methods to furnish details to the other, even where it is not needed for domestic tax purposes.

The TIEAs Australia has negotiated are with states with which Australia does not have DTAs, most of which are considered low taxing jurisdictions. After this initial phase of negotiating and bringing most the TIEAs into force there is evidence they are being used. As at 1 July 2012 the ATO had made 53 exchange of information requests to 13 different TIEA jurisdictions, with several leading to significant assessments being issued by the ATO.¹¹² The Commissioner has also expressed the view that:

In the majority of cases our TIEA partners have shown a high level of co-operation including providing additional information relevant to the request and in processing requests promptly.¹¹³

To date there is no reported litigation related to the garnering of tax information through TIEA requests.

It is apparent from the foregoing that the evolving cooperation between the various tax authorities has led to internationalised, as well as institutionalised, responses to tax evasion focussed on transparency and tax information exchange. As discussed, these initiatives are relatively recent and their effectiveness in protecting the revenue and influencing taxpayer behaviour will, in part, depend on how robust the information exchange measures are when challenged. The Australian domestic experience detailed in section 1 of this paper suggests that such challenges will often arise.

5. CONCLUSION

5.1 The Domestic perspective

Australia's domestic laws as regards ATO information gathering have not significantly changed in recent times. Sections 263 and 264 of the *ITAA 1936* have not been subject to significant revision for over 60 years.¹¹⁴ Section 264A has been the subject of some litigation since its insertion in 1991 but this has not brought into question its validity or operational effectiveness. Finally s 23 of the *International Agreements Act* was inserted in 2006 but, as discussed at 4.1.3 of this paper, this did not represent a significant change.

¹¹²Commissioner of Taxation, (5 July 2012) "It's a small world after all - Australia's place in a Global Environment", above n 57. The main jurisdictions to which TIEA requests were made: British Virgin Islands (16 requests); Bermuda (11 requests); Isle of Man (7); and Jersey (6).

¹¹³Commissioner of Taxation, *Ibid.*

¹¹⁴Robin Woellner (2005), above n 2.

The significant domestic response to accessing tax related information in an internationalised commercial environment has been inter-agency cooperation. Project Wickenby has been deemed a success by government and its continued funding in the 2012 federal budget suggests it will have a permanent presence. This brings with it the tensions of coordination and cooperation between agencies detailed at 2.2 in this paper as well as increased avenues of legal challenge as demonstrated by the Paul Hogan litigation. There have been more recent legal challenges relating to the ATO's accessing international tax information, some of which have been considered in this paper: the Petroulias litigation and Hua Wang Bank Berhad. However, there is no evidence that Australia intends to change its domestic laws.

5.2 The internationalised environment to facilitate the exchange of tax related information

As discussed in part 3 of this paper an international institutional framework is starting to develop to facilitate the exchange of tax related information and promote tax information transparency more generally. This has been driven by the OECD, in particular the Global Forum on Transparency and Exchange of Information for Tax Purposes. The three specific outcomes of this activity considered in part 4 of this paper are: the revised Article 26 of the Model Convention and the multilateral Convention on Mutual Administrative Assistance in Tax Matters and TIEAs. As well there are initiatives outside the OECD processes that Australia is actively involved in such as JITSIC and FATCA.

5.3 Australia's evolving internationalised information gathering powers

By joining the multilateral Convention on Mutual Administrative Assistance in Tax Matters (effective 1 December 2012), adopting the model TIEAs and having enacted the domestic legislation and procedures to support the adoption of the new Article 26 in DTAs entered into since 2005, Australia has, for those new agreements, internationalised its exchange of information powers.¹¹⁵ This represents a step in the evolution of Australia's exchange of information powers rather than some quantum leap. Firstly, this internationalisation only applies to those new agreements. Gradually, through the re-negotiation of pre-existing DTA's (on average a DTA has currency for 30 years) and the entering of new TIEAs this internationalisation will spread (most likely slowly in the case of DTA's). Secondly, internationalisation was occurring prior to these initiatives. They seek to enhance pre-existing measures and strategies in the arena of international information sharing. Thus it is unlikely there will be a marked sudden change of practice.

The ATO appears to have devoted considerable effort to the development and maintenance of these relationships in all its 78 tax information exchange agreements, both DTA and TIEA. There is an overlap between the parties to these 78 agreements and the 41 parties that are currently signatories to the Convention on Mutual Administrative Assistance in Tax Matters with Australia. Yet the ATO will have to

¹¹⁵John McLaren, "The OECD's "harmful tax competition" project: is it international law?" (2009) 24 Australian Tax Forum 423 argues that a number of the projects facilitated by the OECD, such as the OECD Model Tax Conventions and the 1979 OECD report on Transfer Pricing and Multinational Enterprises, have been adopted to a large extent by the Australian Government and transformed into Australian domestic law.

devote resources to the operation this new treaty as well as building relationships with any new counterparties the treaty includes. In addition, the ATO is actively involved in JITSIC and when the FATCA treaty with the US is concluded there will be yet another available source of international tax information. It can be expected that this multiplicity of information sources will be complex and resource intensive to manage.