FEDERAL COURT OF AUSTRALIA

Australia and New Zealand Banking Group Ltd v Konza and Another

[2012] FCAFC 127

Kenny, Edmonds and Robertson JJ

8, 9 August, 12 September 2012

Taxation — Income tax — Commissioner's powers — Notice requiring persons to furnish information — Validity of — Where two notices issued to Australian bank requiring it to furnish information concerning customers of a related entity in Vanuatu — Where notices not limited to information directly relating to assessable income of Australian taxpayers — Whether compliance with notices would involve contravention of laws of Vanuatu — Whether notices authorised even if compliance would contravene laws of Vanuatu — Whether notices issued for an improper purpose — Whether notices void for uncertainty — Income Tax Assessment Act 1936 (Cth), s 264(1)(a) — Taxation Administration Act 1953 (Cth), ss 8C, 8G.

The appellant (ANZ) was an Australian bank that sought to challenge the validity of two notices (the Notices) issued by the first respondent, as delegate of the second respondent (the Commissioner), under s 264(1)(a) of the *Income Tax Assessment Act 1936* (Cth) (the ITAA). The Notices required ANZ to furnish information to the Commissioner from a database maintained by ANZ in Australia (the Database) concerning bank accounts held by customers of ANZ (including its subsidiaries and affiliates) in Vanuatu. The information was obtained by ANZ from a subsidiary (ANZ Vanuatu) that carried on banking business in Vanuatu.

ANZ argued that the Notices were invalid because compliance with the Notices would involve ANZ breaching common law confidentiality obligations owed by it to the customers of ANZ Vanuatu, as well as statutory secrecy provisions contained in various laws of Vanuatu. ANZ contended that s 264 of the ITAA did not authorise the Commissioner to issue a notice that would require it to breach these obligations or provisions.

ANZ also argued that the Notices were not issued for a proper purpose under the ITAA or the *Income Tax Assessment Act 1997* (Cth), because they sought information in respect of all customers in certain categories without limiting the information sought to customers who were or may have been liable to pay income tax in Australia.

Finally, ANZ argued that the Notices were uncertain. In particular, ANZ argued that the second Notice was "uncertain" insofar as it required ANZ to provide information about the "officers" of ANZ Vanuatu's corporate customers. Under the Notice, "officer" was defined, by reference to a number of provisions of Vanuatu legislation, to include "any equivalent provisions under the relevant legislation where the entity has been incorporated, established, licensed and/or registered".

Section 264(1)(a) of the ITAA provided that the Commissioner could, by notice in writing, require any person, whether a taxpayer or not, to furnish him with such information as he might require. Under s 8C of the *Taxation Administration Act 1953* (Cth) (the TAA), a failure to comply with a notice under s 264(1)(a) of the ITAA was an offence. Under s 8G of the TAA, a person convicted of an offence under s 8C could be ordered to comply with the notice.

Held: By the Court: (1) As the evidence below did not establish that the disclosure of any information by ANZ to the Commissioner was not authorised or permitted under the terms and conditions agreed to by customers, the judge at first instance correctly concluded that ANZ had not discharged its onus of establishing that the disclosure of particular information sought by the Notices would involve a breach of any non-statutory obligation of confidence owed by ANZ to ANZ Vanuatu or its customers. [19]

(2) It was open to the judge at first instance to find that compliance by ANZ with the Notices would not involve ANZ or any of its employees committing an offence under the statutory obligations of secrecy created by the laws of Vanuatu. The findings of the judge at first instance as to the content and operation of the laws of Vanuatu were based on the evidence before the Court and there is no basis to disturb those findings. [23], [26]

Obiter: (i) Any non-statutory duties of confidentiality under the laws of Vanuatu, and the correlative rights of customers, are displaced by the requirement to furnish information under s 264(1)(a) of the ITAA. [30]

(ii) Under the legislative framework, the question of whether provision of the information by ANZ would contravene any statutory obligations under the laws of Vanuatu is not relevant to the validity of the Notices, although it may be relevant to whether a court would order the recipient of a notice to furnish the information under s 8G of the TAA, if the person were prosecuted and convicted of an offence against s 8C of the TAA. [31]

(iii) In any event, s 264(1)(a) abrogates any right not to be compelled to contravene the law, including a foreign law. [32]

Federal Commissioner of Taxation v De Vonk (1995) 61 FCR 564, followed.

(3) There is no requirement that a notice under s 264(1)(a) must be limited (expressly or otherwise) to information directly relating to the assessable income of Australian taxpayers. It is sufficient that the Commissioner is seeking to ascertain information in relation to persons who may be subject to an Australian tax liability. The fact that some information furnished may not in the end relate to Australian taxpayers does not invalidate the notice. [40]

Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation (1998) 40 ATR 435; *McCormack v Deputy Commissioner of Taxation* (2001) 114 FCR 574, considered.

(4) In this case, the Notices (read in isolation or with their covering letters) are clearly directed to the investigation of persons who may have a liability to Australian taxation. Accordingly, they were issued for a permitted purpose and the judge at first instance was correct to reject the challenge to the validity of the Notices on this ground. [42]-[43]

(5) The judge at first instance correctly concluded that the first Notice is not invalid on the ground of uncertainty. The terms of the first Notice are sufficiently certain to enable ANZ to identify the information sought by the Notice. [50]

(6) However, the second Notice is uncertain insofar as it seeks information which relates to "officers" or an "officer" of the customer. It requires the addressee to work out what are the positions in a corporate customer which, under the various systems of law that are applicable, would fall within the concept of an "officer", and then to work out who are the persons within the Database who occupy those various positions. [61]

(7) The second Notice is invalid for the uncertainty of the information it requires ANZ to furnish, and this uncertainty so infects the second Notice that its invalidity cannot be cured by severance of the offending parts. [66]

Appeal against the decision of Lander J, [2012] FCA 196, allowed in part.

Cases Cited

Australia and New Zealand Banking Group Ltd v Konza (2012) 289 ALR 286.

Australian Securities Commission v Bank Leumi Le-Israel (1995) 134 ALR 101.

Australian Securities Commission v Bank Leumi Le-Israel (Switzerland) (1996) 69 FCR 531.

Bank of Valletta plc v National Crime Authority (1999) 164 ALR 45.

Bank of Valletta plc v National Crime Authority (1999) 90 FCR 565.

Binetter v Deputy Commissioner of Taxation (No 3) (2012) 2012 ATC 20-331.

Brannigan v Davison [1997] AC 238.

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543.

Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation (1998) 40 ATR 435.

Donovan v Federal Commissioner of Taxation (1992) 34 FCR 355.

Fieldhouse v Deputy Commissioner of Taxation (1989) 25 FCR 187.

Geosam Investments Pty Ltd v Australia and New Zealand Banking Group Ltd (1979) 9 ATR 836.

Lipohar v The Queen (1999) 200 CLR 485.

May v Deputy Commissioner of Taxation (1999) 92 FCR 152.

McCormack v Deputy Commissioner of Taxation (2001) 114 FCR 574.

Pyneboard Pty Ltd v Trade Practices Commission (1982) 57 FLR 368.

Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328.

Smorgon v Australia and New Zealand Banking Group Ltd (1976) 134 CLR 475.

Stergis v Boucher (1989) 20 ATR 591.

SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214.

Taxation, Deputy Commissioner of v De Vonk (1995) 61 FCR 564.

Taxation, Federal Commissioner of v Australia and New Zealand Banking Group Ltd (1979) 143 CLR 499 at 515.

Tournier v National Provincial and Union Bank of England [1924] 1 KB 461.

Transurban City Link Ltd v Allan (1999) 95 FCR 553.

Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society (1934) 50 CLR 581.

Westpac Banking Corporation, Re [1992] VUSC 7.

Appeal

AC Archibald QC with *DJ Batt* SC and *LG De Ferrari*, for the appellant.

PJ Hanks QC with *T Murphy* SC and *CJ Horan*, for the respondents.

Cur adv vult

12 September 2012

The Court

Introduction

1 This is an appeal from the orders of a judge of this Court (*Australia and New Zealand Banking Group Ltd v Konza* (2012) 289 ALR 286) dismissing an application for relief in relation to two notices ("Notices") issued by the first respondent, as delegate of the second respondent ("Commissioner"), to the appellant ("ANZ"), pursuant to s 264(1)(a) of the *Income Tax Assessment Act 1936* (Cth) ("ITAA 1936").

2 The Notices require ANZ to furnish information from a digital database of ANZ called the "Global Information Warehouse" ("GIW") that ANZ maintains in Australia. The information relates to particular bank accounts held by customers with ANZ (including its subsidiaries or affiliates) in Vanuatu. The information was obtained by ANZ from ANZ Bank (Vanuatu) Ltd ("ANZ Vanuatu"), a subsidiary of ANZ that carries on banking business in Vanuatu.

Before the primary judge

3 Before the primary judge, ANZ challenged the validity of each of the Notices on three grounds:

(1) That compliance with the Notice would involve ANZ breaching certain common law confidentiality obligations owed by it to the relevant customers of ANZ Vanuatu, as well as certain secrecy provisions enacted in Vanuatu. ANZ submitted that s 264 of the ITAA 1936 did not authorise the Commissioner to issue a notice that would require it to breach these obligations or provisions. ANZ argued that each Notice was invalid because s 264 did not confer a power on the Commissioner to issue a notice that infringed upon foreign sovereignty, impinged upon fundamental rights, or required the addressee to direct its employees to commit criminal offences;

(2) that the Notice was not issued for the purposes of either the ITAA 1936 or the *Income Tax Assessment Act 1997* (Cth) ("ITAA 1997") because the Notice sought information in respect of all customers in certain categories who have or have had an account in Vanuatu without limiting the information sought to customers who are or might be liable to pay income tax in Australia; and

(3) that the Notice was uncertain.

4 In addition to seeking a declaration that each of the Notices was invalid on the basis that they were not authorised by s 264 of the ITAA 1936, and consequential orders in the nature of prohibition and *certiorari*, ANZ sought a declaration that it "is not capable of complying" with the Notices within the meaning of s 8C(1B) of the *Taxation Administration Act 1953* (Cth) ("TAA"). The respondents cross-claimed seeking a declaration or, alternatively, an order pursuant to s 16(1)(c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act") that both Notices were valid, and a declaration or, alternatively, an order pursuant to s 16(1)(d) of the ADJR Act requiring ANZ to furnish the Commissioner with the information sought in each of the Notices.

5 In dismissing ANZ's application, the primary judge concluded that:

(1) Section 264 authorises the first respondent to issue a notice to an Australian company requiring it to furnish information that is stored in Australia;

(2) there is no reason to read s 264 as subject to a foreign law purporting to have extra-territorial effect in circumstances where the relevant information is held by an Australian company in Australia;

(3) in any event, such disclosure of the information would not breach the non-statutory or statutory obligations of confidence under the law of Vanuatu.

6 The primary judge also rejected ANZ's arguments that the Notices were not issued for a proper purpose or that they were uncertain.

7 Finally, the primary judge concluded that it was not appropriate to make any declarations or orders as to whether ANZ is or "is not capable of complying" with the Notices, within the meaning of those words in s 8C(1B) of the TAA. In his Honour's view, whether ANZ is not capable of complying with the Notices will only arise if a prosecution is brought under s 8C of the TAA. It will be a matter for the Court that has jurisdiction to hear the prosecution to determine whether ANZ is not capable of complying with the Notices.

8 Additionally, the primary judge concluded that it was not necessary to make the first declaration or order sought in the cross-claim and that the second declaration or order sought in the cross-claim should not be made.

Issues on appeal

9 The issues on appeal are whether the primary judge was correct in deciding that:

(1) Each of the Notices was authorised by s 264(1)(a) of the ITAA 1936 and was valid irrespective of whether disclosure of the information would "infringe foreign sovereignty" by requiring ANZ or ANZ Vanuatu to contravene the law of Vanuatu: Reasons (R) [81], [126], [187];

(2) in any event, disclosure by ANZ of the information would not contravene the law of Vanuatu: R [100], [122], [187];

(3) each of the Notices was issued for a valid purpose of ascertaining whether persons or entities are or might be liable to pay income tax in Australia, and that ANZ had not discharged its onus of establishing that each of the Notices was issued for an improper purpose: R [137]-[139], [188];

(4) each of the Notices was sufficiently clear to enable a reasonable addressee in the position of ANZ to identify the information from the GIW that was required to be furnished: R [186], [159]; and

(5) it was unnecessary to consider ANZ's claim for a declaration that it "is not capable of complying" with the Notices within the meaning of s 8C(1B) of the TAA: R [40]-[46], [190].

The facts

10 The Court below was provided with a statement of agreed facts to which was attached the Notices. A supplementary statement of agreed facts to which was attached two letters dated 17 December 2010 written by the first respondent to ANZ and which accompanied the Notices was also provided. The facts are not

in dispute and the findings of the primary judge at R [11]-[25], [118] and [119] are drawn from the statements, Notices and letters, the evidence contained in the statements of the lay and expert witnesses and the oral evidence.

11 It is not necessary to replicate these facts. The terms of the Notices and the covering letters are, however, set out below to assist an understanding of these Reasons.

First Notice

Australia and New Zealand Banking Group Limited
Attention: Nick Adams
Head of Tax — ATO Relationship
ANZ Centre
Level 8B, 833 Collins Street
DOCKLANDS VIC 3008

NOTICE PURSUANT TO SECTION 264 OF THE *INCOME TAX ASSESSMENT ACT 1936*

Pursuant to section 264 of the *Income Tax Assessment Act 1936*, I require you to furnish the information described in Schedule A:

1. to me,
2. in electronic format,
3. at the Australian Taxation Office, PO Box 9977 Civic Square ACT 2608 marked to the attention of Teresa Muccilli,
4. not later than Friday 21 January 2011

The powers of the Commissioner of Taxation under section 264 of the *Income Tax Assessment Act 1936* and section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* have been delegated to me as Deputy Commissioner of Taxation pursuant to section 8 of the *Taxation Administration Act 1953*.

The Australian Taxation Office (ATO) is charged with the administration of Australia's taxation and other related revenue legislation. An effective revenue administration instils community confidence into the environment in which the tax system operates. The gathering of information, strategic research and risk assessment processes are important ingredients in the proper administration of both the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* and in ensuring community expectations around the tax system are met. In this regard it is requested the information requested hereunder be provided.

Schedule A

For each customer who has and/or have had account/s with the Australia and New Zealand Banking Group Limited in Vanuatu, and who:

1. have stated on account opening forms that their nationality is Australian, and/or
2. have stated their domicile is Australia; and/or
3. have given a residential or business address in Australia, an Australian address for correspondence and/or have any other Australian contact details; and/or
4. have an account whose currency code is recorded as Australian dollars.

please provide the following information relating to the period of 1 July 2008 to 30 November 2010 inclusive from the "Global Information Warehouse" for each account:

1. the account number;
2. any identifiers of the customer including the name, date of birth, gender, telephone number, residential address, business address, address for correspondence of the customer;

3. nationality of the customer;
4. domicile and/or country of residence of the customer;
5. the Tax File Number or Australian Business Number (if any) of the customer;
6. the name, address, address for correspondence, date of birth, gender and Tax File Number or Australian Business Number (if any) of each authorised signatory to the account;

FOR THE PURPOSES OF THIS NOTICE:

"*account*" includes but is not limited to:

— everyday banking account
— foreign currency account
— private bank account or private banking account
— cash investment account or cash management account
— multi-currency deposit account
— bank-only account
— custody accounts in which securities or other investment assets were held
— offshore company nominee accounts through which an individual indirectly held beneficial ownership in the accounts
— trustee account
— client account
— capital account
— investment trust account
— wealth management account
— discretionary account
— loan account
— overdraft account
— credit cards

"*Global Information Warehouse*"

— The Global Information Warehouse was identified in a position paper that ANZ (by Mr Stephen Green, ANZ General Manager, Taxation) provided to the ATO via email to Malcolm Allen, ATO Assistant Commissioner (International Relations) on 2 December 2009.

"*Australia and New Zealand Banking Group Limited*" means:

— Australia and New Zealand Banking Group Limited and any subsidiary or affiliates of the Australia and New Zealand Banking Group Limited as defined in *Division 6, Part 1.2* of the *Corporations Act 2001* (see Appendix 1).

Dated this 17th of December 2010.

Yours sincerely

Mark Konza

Deputy Commissioner

Large Business and International

Per: Malcolm Allen

Appendix 1

Corporations Act 2001

Chapter 1 — Introductory

Part 1.2 — Interpretation

Division 6 — Subsidiaries and related bodies corporate

Section 46

46 What is a Subsidiary

A body corporate (in this section called the first body) is a subsidiary of another body corporate if, and only if,

(a) the other body:

(i) controls the composition of the first body's board; or

(ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or

(iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first body is a subsidiary of a subsidiary of the other body.

PENALTIES FOR FAILURE TO COMPLY WITH THE NOTICE

TAKE NOTICE THAT A PERSON who, when and as required pursuant or under a taxation law, refuses or fails to:

- furnish information or
- produce a book, paper, record or other document or
- attend (and answer questions), or
- take an oath or make an affirmation when attending

to the extent that the person is capable of doing so, that person will be guilty of an offence or offences under sections 8C and/or 8D of the *Taxation Administration Act 1953*.

That person will be liable, under sections 8E or 8ZF of the *Taxation Administration Act 1953* to:

- a fine not exceeding $2,200 for a first offence or
- a fine not exceeding $4,400 for a second offence, or
- a fine not exceeding $5,500, and/or imprisonment not exceeding 12 months, or $27,500 for a company, for a third or subsequent offence.

Covering Letter dated 17 December 2010 to First Notice

Australia and New Zealand Banking Group Ltd

Attention: Nick Adams

Head of Tax — ATO Relationship

ANZ Centre

Level 8B, 833 Collins Street

DOCKLANDS VIC 3008

Dear Mr Adams

We refer to our recent discussions regarding the Bank Transparency Strategy, in particular accessing Vanuatu related banking information stored in Australia and New Zealand Banking Group Limited's (ANZ) Global Information Warehouse (GIW), and to Mr Stephen Green's (General Manager, Taxation, ANZ) email of 26 February 2010 to Mr Malcolm Allen (Assistant Commissioner, Australian Taxation Office (ATO)) that included profiles of a number of jurisdictions, including Vanuatu. The information ANZ supplied for Vanuatu stated that as at 31 December 2009, the total number of Vanuatu accounts was 21,618 and the number of accounts held by Australian nationals was 1,331.

Further we understand (from ANZ's legal position paper provided to the ATO via email on 2 December 2009) that the Vanuatu information is stored in Australia on the ANZ's GIW in a "masked" format. The ATO discussed the nature and extent of the masking with the appropriate ANZ staff via teleconference on 1 April 2010 and via subsequent emails. Following these discussions we understand that while the names of the account holders are "masked", other details, such as the account holder's address, account numbers, transaction details,

and in some cases, gender, date of birth and country of residence, are not masked and that there is at least two years of transaction data recorded on your GIW.

We have enclosed a notice pursuant to Section 264 of the *Income Tax Assessment Act 1936* (ITAA) which formally requires you to furnish information to us. We would prefer the information to be provided to us in electronic form in either Excel or Tab delimited text file format.

If you have any questions concerning the notice, or what you are required to do to comply with the notice, you should contact Teresa Muccilli on *13 28 69* or *(02) 6216 2234* as soon as possible.

If you have difficulty complying with the notice in the time allowed you should write to Teresa Muccilli as soon as possible and tell her why. It is important that you do this before the date stated in the notice.

Penalties can apply if you do not comply with all of the requirements of the notice. These penalties are set out with the notice.

You cannot refuse to comply with this notice on the basis of self-incrimination. However, section 264 of the ITAA does not override legal professional privilege. We may also allow some advice to remain in confidence between you and your professional accounting adviser. The ATO has adopted a series of proformas that you are requested to complete in respect of every communication for which you make a claim. If you complete the proformas, this will enable the ATO to make an informed decision whether to concede or resist the claim. If you think any of the documents requested falls into either category, please contact Teresa Muccilli on *13 28 69* or *(02) 6216 2234* as soon as possible.

The information required in the attached notice is for the purposes of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997*.

In very limited circumstances, some of the Information may be given to certain parties as prescribed in taxation law. Further details on privacy can be found in the *Taxpayers' Charter* explanatory booklet *Your privacy and the confidentiality of your tax affairs*, available by request from the Tax Office or from our website at *www.ato.gov.au*.

The *Taxpayers' Charter* explanatory booklet *Fair use of our access and information gathering powers* explains our access and information gathering powers in more detail. This booklet is also available by request from the ATO or from our website at *www.ato.gov.au*.

Yours sincerely

Mark Konza

Deputy Commissioner

Large Business and International

Per: Malcolm Allen

Second Notice

Australia and New Zealand Banking Group Limited

Attention: Nick Adams

Head of Tax — ATO Relationship

ANZ Centre

Level 8B, 833 Collins Street

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Schedule A

For each customer who has and/or have had account/s with the Australia and New Zealand Banking Group Limited in Vanuatu, and who:

1. have an account whose currency code is recorded as any currency other than the Vanuatu Vatu; and
2. have provided one or more of the following elements as a part of any address recorded for the customer:
    a. PKF Vanuatu;
    b. P.O. Box 95;
    c. PKF House;
    d. Moores Rowland;
    e. P.O. Box 257;
    f. Windsor House;
    g. The Melanesian Hotel;
    h. Geoffrey Gee and Partners;
    i. Raffea House;
    j. P.O. Box 782;
    k. Barrett and Partners House;
    l. P.O. Box 240;
    m. Hawkes Law house;
    n. P.O. Box 212;
    o. P.O. Box 1401;
    p. Moore Stephens House;
    q. Transpacific Haus; or
    r. International Corporate Services Ltd

please provide the following information relating to the period of 1 July 2008 to 30 November 2010 from the "Global Information Warehouse" for each account:

1. the account number;
2. any identifiers of the customer including the name, date of birth, gender, telephone number, residential or business address, address for correspondence;
3. in the case of an entity other than natural persons, any identifiers of the officers of the customer including name, date of birth, gender, telephone number, address, address for correspondence;
4. nationality of the customer and/or the officer of the customer;
5. domicile and/or country of residence of the customer and/or the officer of the customer;

6. the Tax File Number or Australian Business Number (if any) of the customer and/or the officer of the customer; and
7. the name, address, address for correspondence, date of birth, gender and Tax File Number or Australian Business Number (if any) of each authorised signatory to the account.

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"*account*" includes but is not limited to:

— everyday banking account
— foreign currency account
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— custody accounts in which securities or other investment assets were held
— offshore company nominee accounts through which an individual indirectly held beneficial ownership in the accounts
— trustee account
— client account
— capital account
— investment trust account
— wealth management account
— discretionary account
— loan account
— overdraft account
— credit cards

"*Global Information Warehouse*"

— The Global Information Warehouse was identified in a position paper that ANZ (by Mr Stephen Green, ANZ General Manager, Taxation) provided to the ATO via email to Malcolm Allen, ATO Assistant Commissioner (International Relations) on 2 December 2009.

"*Australia and New Zealand Banking Group Limited*" means:

— Australia and New Zealand Banking Group Limited and any subsidiary or affiliates of the Australia and New Zealand Banking Group Limited as defined in Division 6, Part 1.2 of the *Corporations Act 2001* (see Appendix 1).

"*Officer*"

— Refers collectively to the following provisions provided under Vanuatu legislation, or any equivalent provisions under the relevant legislation where the entity has been incorporated, established, licensed and/or registered:
    - Definition of officer, Section 1 Trust Companies Act [Cap 69];
    - Definition of officer, Section 1 Companies Act [Cap 191];
    - Definition of Director, Section 1 International Companies Act [Cap 222]; and/or
    - Officer or Agent of the company, as referred to in Section 47, International Companies Act [Cap 222];

  as the context requires, and includes reference to a Director, Secretary and/or a servant of the customer

Dated this 17th of December 2010.

Yours sincerely

Mark Konza

Deputy Commissioner

Large Business and International
Per: Malcolm Allen
Appendix 1
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Chapter 1 — Introductory
Part 1.2 — Interpretation
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to the extent that the person is capable of doing so, that person will be guilty of an offence or offences under sections 8C and/or 8D of the *Taxation Administration Act 1953*.

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Further we understand (from ANZ's legal position paper provided to the ATO via email on 2 December 2009) that the Vanuatu information is stored in Australia on the ANZ's GIW in a "masked" format. The ATO discussed the nature and extent of the masking with the appropriate ANZ staff via teleconference on 1 April 2010 and via subsequent emails. Following these discussions we understand that while the names of the account holders are "masked", other details, such as the account holder's address, account numbers, transaction details, and in some cases, gender, date of birth and country of residence, are not masked and that there is at least two years of transaction data recorded on your GIW.

We note that while ANZ have identified 1,331 accounts with an identified link to Australia (based on information regarding the customers [sic] nationality provided to the ANZ), the ATO's investigations, including Project Wickenby, have indicated that there may be a larger number of Australians attempting to avoid their Australian taxation obligations. This is due to the extensive use of interposed entities including International Business Corporations (IBCs) and local trust companies. These entities often have addresses care of local or other international promoters, disguising any Australian connection. We would expect that the "know your customer" rules operative at the relevant times would not necessarily identify all such Australians. Accordingly, we require information not limited to the 1,331 Australians ANZ have identified.

We have enclosed a notice pursuant to Section 264 of the *Income Tax Assessment Act 1936* (ITAA) which formally requires you to furnish information to us. We would prefer the information to be provided to us in electronic form in either Excel or Tab delimited text file format.

If you have any questions concerning the notice, or what you are required to do to comply with the notice, you should contact Teresa Muccilli on *13 28 69* or *(02) 6216 2234* as soon as possible.

If you have difficulty complying with the notice in the time allowed you should write to Teresa Muccilli as soon as possible and tell her why. It is important that you do this before the date stated in the notice.

Penalties can apply if you do not comply with all of the requirements of the notice. These penalties are set out with the notice.

You cannot refuse to comply with this notice on the basis of self-incrimination. However, section 264 of the ITAA does not override legal professional privilege. We may also allow some advice to remain in confidence between you and your professional accounting adviser. The ATO has adopted a series of proformas that you are requested to complete in respect of every communication for which you make a claim. If you complete the proformas, this will enable the ATO to make an informed decision whether to concede or resist the claim. If you think any of the documents requested falls into either category, please contact Teresa Muccilli on *13 28 69* or *(02) 6216 2234* as soon as possible.

The information required in the attached notice is for the purposes of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997*.

In very limited circumstances, some of the Information may be given to certain parties as prescribed in taxation law. Further details on privacy can be found in the *Taxpayers' Charter* explanatory booklet *Your privacy and the confidentiality of your tax affairs*, available by request from the Tax Office or from our website at *www.ato.gov.au*.

The *Taxpayers' Charter* explanatory booklet *Fair use of our access and information gathering powers* explains our access and information gathering

powers in more detail. This booklet is also available by request from the ATO or from our website at *www.ato.gov.au*.

Yours sincerely
Mark Konza
Deputy Commissioner
Large Business and International
Per: Malcolm Allen

(Underlining added.)

12 The information sought in the Second Notice was different from that sought in the First Notice. The covering letter to the Second Notice also contained an additional paragraph which we have underlined, namely the third paragraph. ANZ has not provided the information sought in either of the Notices. Instead it brought these proceedings.

Legislative framework

13 At the relevant time, s 264(1) of the ITAA 1936 provided:

> (1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority:
>
> (a) to furnish him with such information as he may require; and
>
> (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

14 Section 264 does not provide for any sanctions or processes for non-compliance with a notice of the kind referred to therein. Rather, the consequences of non-compliance are addressed in Subdiv A of Div 2 of Pt III (ss 8B to 8HA) of the TAA. Section 264 of the ITAA 1936 and ss 8B to 8H of the TAA together constitute a statutory scheme for obtaining information, which balances Australia's national interest in obtaining the information with any particular difficulty that the recipient of the notice may have in providing the information by separating the requirement to furnish information (by the giving of a notice under s 264(1)(a) of the ITAA 1936) from:

(1) the consequences of a failure to comply, namely, prosecution for an offence against s 8C of the TAA, to which the recipient may raise as a defence that it is not capable of complying with the requirement within s 8C(1B); and

(2) the compulsion to comply, which may be ordered by the court under s 8G of the TAA (in addition to imposing a penalty under s 8C), only if the recipient is convicted of an offence against s 8C.

15 Accordingly, the question whether ANZ is capable of complying with the Notices only arises if, and when, ANZ is prosecuted under s 8C. It does not affect the validity of the Notices.

Whether disclosure by ANZ of the information would contravene the law of Vanuatu?

16 Insofar as ANZ's challenge to the Notices was grounded on a claimed infringement of "foreign sovereignty" or denial of "fundamental rights", that challenge was predicated on the basis that the disclosure by ANZ of the information in the GIW would constitute a contravention of the law of Vanuatu.

Non-statutory duty of confidentiality

17 The respondents accepted for present purposes that ANZ Vanuatu was subject to a non-statutory duty of confidentiality under the law of Vanuatu in respect of the account information of its customers: *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, applied by the Vanuatu Supreme Court: *Re Westpac Banking Corporation* [1992] VUSC 7. They also accepted that assuming that the information was transmitted by ANZ Vanuatu to ANZ in circumstances that maintained confidentiality, ANZ is subject to a similar non-statutory duty of confidentiality in respect of that information held in the GIW.

18 However, the evidence below did not establish that the disclosure of any information by ANZ to the Commissioner as required by the Notices was not authorised or permitted under the terms and conditions agreed to by customers with ANZ Vanuatu, and therefore did not establish that such disclosure would breach any non-statutory obligation of confidence arising under either the law of Vanuatu or the law of Australia.

19 Both experts called by ANZ accepted that the source of ANZ Vanuatu's obligation of confidentiality to its customers was contractual and that the express terms and conditions of the agreements between ANZ Vanuatu and its customers were relevant in determining the extent of ANZ Vanuatu's obligation of confidentiality under the law of Vanuatu: R [109]-[111]. In some cases, customers of ANZ Vanuatu had expressly consented to or authorised disclosure of their account information to regulatory and taxation agencies outside Vanuatu: R [114]. The primary judge concluded, correctly in our view, that ANZ had not discharged its evidentiary onus of establishing that the disclosure of particular information sought by the Notices would involve a breach of any non-statutory obligation of confidence owed by ANZ to ANZ Vanuatu or its customers: R [116].

Statutory obligations

20 The evidence about the statutory obligations of secrecy under the law of Vanuatu was less than satisfactory. The experts adopted different approaches to the question whether the disclosure of information by ANZ might constitute an offence against s 125 of the *International Companies Act* of Vanuatu or s 9 of the *Trust Companies Act* of Vanuatu (insofar as the customers of ANZ Vanuatu were international companies or trust companies), and their conclusions were not consistent.

21 Mr Ellum gave evidence that the offence provisions were subject to the application of s 2, para (a) of the *Penal Code* of Vanuatu, pursuant to which the criminal law of the Republic of Vanuatu is to apply to "any offence of which an element has taken place within the territory of the Republic". On that approach, if ANZ were to disclose the information in the GIW that is the subject of the Notices, no element of any offence under s 125 of the *International Companies Act* of Vanuatu or s 9 of the *Trust Companies Act* of Vanuatu would take place in Vanuatu. Plainly, any disclosure or divulging of information by ANZ to the Commissioner in compliance with the Notices would take place in Australia. The primary judge found, correctly in our view, that the obtaining of the information (by ANZ Vanuatu in Vanuatu) is not an element of the offence created by either s 125 of the *International Companies Act* of Vanuatu or s 9 of the *Trust Companies Act* of Vanuatu.

22 Dr Corrin did not address the application of s 2, para (a) of the *Penal Code* of

Vanuatu. She gave evidence that the presumption against extra-territorial operation was displaced by s 125 of the *International Companies Act* of Vanuatu, but not by s 9 of the *Trust Companies Act* of Vanuatu.

23 On the evidence before him, it was open to the primary judge to find that (R [128]):

(1) Section 9 of the *Trust Companies Act* of Vanuatu does not have an extra-territorial operation;

(2) while s 125 of the *International Companies Act* of Vanuatu was intended to operate extra-territorially, no element of any offence against that section will take place in Vanuatu; and

(3) "[i]n these circumstances compliance by ANZ with the notices will not mean that ANZ or any of its employees will have committed an offence against s 9 or s 125".

24 On the appeal, ANZ argued that s 2, para (a) of the *Penal Code* of Vanuatu should be given a different operation in that it is not concerned with when a law of Vanuatu has an extra-territorial operation or the requirements for such operation, but rather is directed to a separate and anterior question, namely, the location of offences and what is required as a matter of Vanuatu law for a particular offence to be committed within Vanuatu: *Lipohar v The Queen* (1999) 200 CLR 485 at [15]-[39], especially [19]-[20], and at [78]-[108]. Where its requirements are not met, consideration of extra-territoriality is not germane.

25 That submission is directly contrary to the evidence of Mr Ellum, who identified s 2, para (a) as the critical factor in determining the extra-territorial reach of criminal offences under the law of Vanuatu. Insofar as ANZ argued that the presumption against extra-territoriality is rebutted by s 9 of the *Trust Companies Act*, that submission is directly contrary to the evidence of Dr Corrin.

26 The content and operation of the law of Vanuatu involved questions of fact, and the findings of the primary judge were based on the evidence before the Court on those questions. There being no basis to disturb those findings, this ground of appeal must fail.

Whether the Notices are authorised by s 264(1)(a) even if disclosure by ANZ of the information contravenes the law of Vanuatu?

27 The Notices require ANZ to furnish information from the GIW — a database that ANZ maintains in Australia. The Notices are neither directed to ANZ Vanuatu nor to any information held in Vanuatu. The primary judge held that s 264(1)(a) authorised the Commissioner to issue a notice to an Australian company requiring that company to furnish information that is held by it in Australia: R [81], [83], [95], [129], [187].

28 In authorising the Notices, s 264(1)(a) is not given an effect that extends to "cases governed by foreign law": cf *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601, where a provision in the *Interest Reduction Act 1931* (NSW) referring to "an obligation to pay interest" was construed as applicable only to obligations for which the governing or proper law was that of New South Wales. Section 264 of the ITAA 1936 does not deal with a subject matter that, according to the rules of private international law, is governed by foreign law (such as the law of Vanuatu). Section 264 does not regulate or deal with banking relationships or obligations arising under contracts between bank and customer. The disclosure of

information by ANZ in Australia is governed by the law of Australia and not by foreign law (irrespective of whether ANZ might contravene a foreign law which purports to have extra-territorial operation).

29 In authorising the Notices, s 264(1)(a) does not have effect in the territory of another country, nor does it impose obligations on a foreigner (or any person) to take steps in another country that would involve contravention of the law of that country. The application of s 264(1)(a) to require a company in Australia to furnish information held in Australia does not involve any breach of international law or international comity. The decisions in *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 134 ALR 101 and *Australian Securities Commission v Bank Leumi Le-Israel (Switzerland)* (1996) 69 FCR 531, relied on by ANZ, therefore, have no relevance to the circumstances of the present case: R [96]-[99].

30 Any non-statutory duties of confidentiality under the law of Vanuatu, and the correlative rights of customers, are displaced by the requirement to furnish the information under s 264(1)(a) of the ITAA 1936. In particular:

(1) Section 264(1) abrogates contractual and equitable obligations of confidentiality that the recipient of the notice might owe to third parties under Australian law: the powers conferred by s 264 are not read down or qualified so as to exclude confidential information: *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 486-490; *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 521-522 (*Smorgon No 2*); *Fieldhouse v Deputy Commissioner of Taxation* (1989) 25 FCR 187 at 208; *May v Commissioner of Taxation* (1999) 92 FCR 152 at [17]. There is no reason to reach a different result where duties of confidence might arise under the law of Vanuatu.

(2) Accordingly, any duty of confidentiality under the law of Vanuatu cannot affect the obligation of ANZ to provide information in the GIW to the Commissioner as required by the Notices. A fortiori, the existence of any duty of confidentiality cannot affect the validity of the Notices.

31 Under the legislative framework, the question whether provision of the information by ANZ would contravene any statutory obligations under the law of Vanuatu (including s 125 of the *International Companies Act* or s 9 of the *Trust Companies Act*) is not relevant to the validity of the Notices: *Binetter v Deputy Commissioner of Taxation (No 3)* (2012) 2012 ATC 20-331 at [26]. Rather it may be relevant to whether a court would order the recipient of the notice to furnish the information under s 8G of the TAA, if the person were prosecuted and convicted of an offence against s 8C of the TAA.

32 In any event, just as this Court held that s 264(1)(a) abrogates the privilege against self-incrimination in *Federal Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, s 264(1)(a) abrogates any right not to be compelled to contravene the law, including a foreign law. In this regard:

(1) If the requirement to furnish information sought by a notice under s 264(1) abrogates the privilege against self-incrimination, it would be anomalous to qualify the power conferred by s 264(1) by reference to potential criminal liability under a foreign law: compare *Brannigan v Davison* [1997] AC 238 at 247-251.

(2) The correctness of the decision in *De Vonk* does not directly arise in this appeal, given that the privilege against self-incrimination is not available to a corporation.

(3) Nevertheless, the decision in *De Vonk* should be followed because it is a unanimous decision of this Court which is not clearly or plainly wrong. See generally *Transurban City Link Ltd v Allan* (1999) 95 FCR 553; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [8], [146] and [187]-[192].

(4) In the light of the character and purpose of the power conferred by s 264(1) as a coercive power in a revenue statute, the retention of the privilege against self-incrimination would make it impossible to interrogate a taxpayer about sources of income and would "totally stultify" the collection of income tax: *De Vonk* at 583D; see also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341-343; *Stergis v Boucher* (1989) 20 ATR 591; 86 ALR 174; *Donovan v Federal Commissioner of Taxation* (1992) 34 FCR 355 at 360-362. In such circumstances, s 264(1) abrogates the privilege against self-incrimination by necessary implication. Nothing in the High Court's decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, which concerned the effect of s 155 of the *Trade Practices Act 1974* (Cth) on legal professional privilege, is inconsistent with the reasoning or the result in *De Vonk* on the construction and operation of s 264(1)(a) in relation to the privilege against self-incrimination: *Binetter* at [22]-[23].

33 The contention that s 264(1)(a) of the ITAA 1936 should be read down by reference to foreign law is also inconsistent with the decision in *Bank of Valletta plc v National Crime Authority* (1999) 164 ALR 45 *(Bank of Valletta)*; upheld on appeal in *Bank of Valletta plc v National Crime Authority* (1999) 90 FCR 565, in which it was accepted that a notice was validly issued under s 29(1) of the *National Crime Authority Act 1984* (Cth) requiring a foreign bank to produce documents that were held in Malta: *Bank of Valletta* at [35]. The Court concluded that the bank did not have a "reasonable excuse" which entitled it to refuse to produce the documents, even if there was a real and appreciable risk that the production of the documents by the bank would involve the commission of an offence against secrecy provisions under the law of Malta: *Bank of Valletta* at [60]-[61] and [115].

34 It would be an unwarranted limitation on the power conferred by s 264(1)(a) if that power could be ousted by any foreign law that purported to prohibit the disclosure of information in Australia to the Commissioner. To give such primacy to foreign law would be "an unacceptable encroachment on the domestic country's legitimate interest in the conduct of its own judicial (and presumably, inquisitorial) proceedings": *Bank of Valletta* at [44], referring to *Brannigan* at 249-250.

35 In any event there is no "fundamental right" of a recipient not to be compelled to contravene a foreign law that purports to have extra-territorial operation. Cases dealing with the exercise of coercive powers to compel the production of documents or the provision of information in breach of foreign laws contemplate a balancing process rather than any absolute restriction on power. Consistently, the legislative framework enables any potential contraven-

tion of a foreign law to be taken into account in the context of the balancing exercise to be performed by a court when considering whether or not to make an order under s 8G of the TAA if the recipient has been prosecuted and convicted of an offence under s 8C of the TAA.

Whether the Notices were issued for a proper purpose?

36 It is trite law that a notice issued in reliance on s 264(1)(a) of the ITAA 1936 will only be a valid notice if it is issued for the purpose or purposes for which the power under the section was conferred.

37 In *Smorgon No 2* at 535, Mason J (as his Honour then was) said:

> Except in one respect the powers given by s 264 should be circumscribed only by reference to the limitations which are expressed in that section. Thus, in s 264(1)(b) the power to compel evidence is restricted to evidence "concerning his or any other person's income or assessment" and the power to require production is confined to documentary records "relating thereto", that is, to "his or any other person's income or assessment". However, the power to require information contained in par (1)(a) is not similarly limited. As it is a power given to the Commissioner for the purposes of enabling him to perform his functions under the Act it must be circumscribed by reference to this purpose.

38 What is said in the last sentence of this extract from his Honour's reasons is the only relevant constraint on the exercise of the power conferred by s 264(1)(a).

39 A notice under s 264(1)(a) is not required to identify the person or persons in connection with whose income or assessment the request for information is made: *Fieldhouse* at 207 per Hill J; and it does not need to be evident in advance that the information sought in fact relates to the assessment of a particular person or persons: *McCormack v Deputy Commissioner of Taxation* (2001) 114 FCR 574 at [70]. There is no requirement that an issue or dispute of fact must first arise between a taxpayer and the Commissioner before the Commissioner can invoke s 264: *Smorgon No 2* at 536, see also at 524, 546; *May* at 159; *McCormack* at [31]-[33]. A notice may be issued under s 264(1)(a) for the purposes of a "preliminary inquiry" — that is, in order to obtain information necessary for further investigations directed to the ascertainment of the taxable income of Australian taxpayers and the assessment and recovery of income tax: *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* (1998) 40 ATR 435 at 451; *Geosam Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* (1979) 9 ATR 836 at 836-837; 25 ALR 445 at 446.

40 Accordingly, there is no requirement that the Notices must be limited (expressly or otherwise) to information directly relating to the assessable income of Australian taxpayers. That would effectively preclude an exercise of the investigatory power for the purpose of ascertaining whether persons may have assessable income. The Commissioner may "fish" in a "pool" that contains (or might contain) persons who are subject to an Australian tax liability — that is sufficient to attract the purpose necessary to exercise the power. The fact that some information furnished may not in the end relate to Australian taxpayers does not invalidate the notice: as was illustrated in *Deloitte* at 440, 441, 451, 452; and *McCormack* at [1] and [79].

41 In determining whether the power to issue a notice under s 264(1)(a) has been exercised for a permitted purpose (that is, for the purposes of enabling the Commissioner to perform his or her statutory functions: *McCormack* at [73]), it is not necessary for the notice to reveal on its face that the Commissioner is

entitled to require the information specified: it is enough for the notice or the covering letter to record that the information is required for the purposes of the ITAA 1936 or ITAA 1997, that being the only relevant constraint on the exercise of the statutory power: *McCormack* at [46], [47].

42 The Notices (read in isolation or with the covering letters) are clearly directed to the investigation of persons who may have a liability to Australian taxation. The criteria are not "indiscriminate", and the likely consequence that the information sought will be relevant to the assessment and collection of income tax is much more than "incidental or fortuitous", as ANZ submitted.

43 In our view, this ground of appeal has no foundation and the primary judge was correct in rejecting it as a basis of invalidity of the Notices.

Whether the Notices are uncertain?

44 It was common ground that a notice under s 264(1)(a) "should be so framed as to be sufficiently clear to convey to the addressee what information is sought", and that the question is "whether a reasonable man in the position of the addressee of the notice can fairly comply with it and not be thereby exposed to the possibility of penalty for non-compliance having regard to the manner in which the notice is formulated": *Fieldhouse* at 208 per Hill J.

45 The requirement of clarity "is not to be applied in a precious or hypercritical fashion": *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 57 FLR 368 at 375; see also *McCormack* at [54], [56], nor "by engaging in a narrow analysis of each word in an attempt to find some latent ambiguity in it": *Fieldhouse* at 208 per Hill J.

46 As the learned primary judge observed by way of principle at R [143]-[146]:

> A party to whom a s 264(1)(a) notice is directed may be requested to furnish information that the addressee is aware of but which is not recorded in documents in the possession of the addressee.
>
> For the purpose of clarity the notice may identify the taxpayer or the class of taxpayer whose affairs are the subject of the Commissioner's inquiry. However, the notice need not necessarily contain that information because in some circumstances the particular taxpayer or group of taxpayers will not be known to the Commissioner. In other circumstances the Commissioner may not want to identify the person or persons the subject of the Commissioner's notice to the addressee. However, if the absence of that information makes the notice unintelligible to the addressee because the addressee is unable to reasonably identify the information that is sought to be furnished then the notice will be invalid for uncertainty.
>
> The notice must give sufficient information to the addressee to allow the addressee to identify the information that is sought without requiring the addressee to guess or speculate upon the information that is required. The notice must be intelligible to an addressee who is prepared in good faith to respond to it. Whilst an addressee has an obligation to comply with the notice and furnish the information, the addressee must not approach the notice in the carping way referred to by Hill J in *Fieldhouse v Commissioner of Taxation*. The addressee is not entitled to embark upon an overzealous examination of the notice in an attempt to find an ambiguity which would allow the addressee to say that the addressee might be at risk of committing a criminal offence because the addressee might not fully comply with the notice.
>
> Of course no addressee should be put in a position whereby the addressee is at risk of committing a criminal offence. However, a reasonable addressee would not approach a consideration of the notice by reasoning that because non-compliance

with the notice is a criminal offence the addressee should attempt to avoid having to comply with the notice.

47 We agree with these observations of principle and turn to apply them to each Notice.

The First Notice

48 The terms of the First Notice do not, in our view, create any uncertainty for ANZ as to the information it is required to furnish; namely, that contained in the GIW.

49 As the primary judge reasoned at R [170]-[179]:

> ANZ knows that the customers to whom reference is made in the preamble to the First Notice are all customers of ANZ Vanuatu. The evidence suggests that the only information that ANZ has in its records of the business of ANZ Vanuatu is that which has been collected by ANZ Vanuatu in its Finet system and provided to ANZ for storage in its GIW. ANZ knows that the information it has is contained in the GIW, and on a reading of the First Notice it would understand that the only information which it must furnish is that contained in the GIW and no other information. That follows from the words "please provide the following information relating to the period of 1 July 2008 to 30 November 2010 inclusive from the Global Information Warehouse for each account", which appear in the Schedule in both notices. These words make it clear that the only information that is sought is that contained in the GIW and for the period mentioned, 1 July 2008 to 30 November 2010.
>
> Because the First Notice is restricted to the information contained in the GIW, a reasonable reading of the customer accounts to which the notice is directed are those customers and those accounts which ANZ Vanuatu has provided to ANZ for inclusion in the GIW.
>
> …
>
> Once it has determined the customers and the accounts to which the notice refers, it is clear enough, on a reasonable reading of the notice, that the only information ANZ has to provide is that contained in the GIW. In other words, if ANZ has other information in relation to the customers and accounts that is not contained in the GIW that information need not be provided.
>
> In the First Notice the customers will have a connection with Australia, either because they are Australian, or are domiciled in Australia, or have a residential or business address in Australia, or an Australian address for correspondence, or Australian contact details, or have an account in Australian dollars. None of those criteria necessarily mean that the customer will be an Australian taxpayer. An Australian national may not be a taxpayer because that person may not have a taxable income. The same is true of a person who matches the other criterion.
>
> …
>
> It is wrong to assume that these notices are bad because they may require ANZ to furnish information about a person who is not an Australian taxpayer. A notice under s 264(1)(a) when directed to a bank is not limited to customers of the bank who are known to be Australian taxpayers. As I have said, to impose such a restriction would render the powers given in s 264(1) nugatory insofar as the powers might be used to require banks to furnish information about their customers.
>
> What the First Notice requires ANZ to address is persons who possess one of the criteria in paragraphs 1-4. If so far as ANZ knows a customer is not one who possesses any of the criteria in paragraphs 1-4 then ANZ need not furnish the information sought in respect of that customer.
>
> The criteria that has been adopted is criteria which would more likely mean that the customer is an Australian taxpayer because he or she is an Australian national

> or domiciled in Australia or has a residential or business address in Australia or uses an account in Vanuatu in Australian dollars. Alternatively, the criteria would make it more likely that the customer would have relationships with Australian taxpayers. The First Notice requires ANZ in respect of a customer of that kind to furnish the information referred to in paragraphs 1-6 of the notice, but only if that information is contained in the GIW.
>
> Indeed, as I have said, if ANZ has that information within it, but the information is not included in the GIW, ANZ is not obliged to furnish the information. The information that is sought must be in the GIW, which means that it must have been supplied by ANZ Vanuatu through the Finet system.

50 We adopt these reasons and agree with the primary judge's conclusion that the First Notice is not invalid on the ground of uncertainty; in short, the terms of the First Notice are sufficiently certain to enable ANZ to identify the information sought by the First Notice.

The Second Notice

51 The primary judge accepted that the Second Notice is less explicit insofar as it attempts to identify the customers the Notice seeks to address: R [180].

52 Before the primary judge (R [157]), and again on appeal, ANZ contended that in paragraph 2, second appearing, the expression "any identifiers", and the expression in paragraph 3 "any identifiers of the officers of the customer", where the customer is not a natural person, are too uncertain to make the Notice capable of being complied with.

53 At R [185] the primary judge concluded:

> I do not accept ANZ's submission that the reference to "any identifiers" in paragraphs 2 and 3 of the Second Notice is uncertain.

54 We agree with the primary judge's conclusion that the references to "any identifiers" in both paragraphs 2 and 3 do not render uncertain the information sought from ANZ; as his Honour went on to say (at R [185]):

> … it means any piece of information in the GIW that ANZ can identify, that might be used to identify the customer, such as the customer's date of birth, gender, telephone number or address [and] [w]here the customer caught by the criteria is a company, and ANZ has details of "identifiers" of officers of that company in the GIW, then it must provide that information.

55 On the other hand, in the case of paragraph 3, it is in the Second Notice's use of the defined term "Officer", that uncertainty arguably arises. At R [158], the primary judge said:

> Paragraph 3 [of] the second notice requires ANZ to identify the officers of the customer. ANZ argued that it would have to know where each corporate customer was incorporated or registered so as to identify who might be an officer within the meaning of the legislation which authorises the incorporation or registration. That, it was said, would require ANZ to search in any jurisdiction in which the corporate customer might have been incorporated.

56 Having regard to the definition of "Officer" for the purposes of the Second Notice, in particular the words:

> or any equivalent provision under the relevant legislation where the entity has been incorporated, established, licensed and/or registered

the submission of ANZ recorded at R [158] must be correct, but his Honour does not seem to have returned to address the submission.

57 The validity of the Notice on the ground of the certainty of the information it requires to be furnished, must stand or fall on the terms of the Notice.

58 If the Notice had defined "Officer" as being any person designated in the GIW as a director, secretary and/or servant of the customer, there may well have been sufficient certainty and no difficulty. But that is not this case.

59 The Second Notice is, in our view, uncertain in relation to so much of the information it seeks in paragraphs 3, 4, 5 and 6 which refers to "officers" or "officer" of the customer. While the recipient of the Second Notice may without difficulty have assumed that the references to "officer of the customer" in paragraphs 4, 5 and 6 were limited to cases where the entity was other than a natural person and may have assumed further that "officer" in those paragraphs included the plural "officers" as referred to in paragraph 3, that is only the beginning of the task.

60 The Second Notice requires the recipient of it to go to the relevant Vanuatu legislation to work out which of the three statutes applies and then to examine the definitions of "officer", "director" or "agent" bearing in mind that the definition in the Second Notice includes reference to a "director, secretary and/or a servant of the customer". For a corporate entity which is not incorporated in Vanuatu, having ascertained the place of incorporation, establishment, licensing or registration the recipient is in each case to go to the other body of legislation identified by that place. Having worked out what is the relevant equivalent legislation, the recipient is then required to work out what are the provisions in that legislation equivalent to the matters in the Vanuatu legislation, and then work out from that legislation whether a person is or is not an officer under those definitions "as the context requires", again bearing in mind that the definition includes reference to a "director, secretary and/or a servant of the customer".

61 We accept the appellant's submission that the Second Notice requires the addressee to work out what are the positions in a corporate customer which, under the various systems of law that are applicable, would fall within the concept of "officer", and then to work out who are the persons within the GIW who occupy those various positions. That being the case, in our opinion, subject to severance, the Second Notice is uncertain.

62 The respondent submitted that the recipient of the Second Notice was required to go to the GIW and to see whether there was any entry in any of the fields in the GIW which matched the definition of "Officer" but, in our opinion, that is merely to restate the problem.

63 The Second Notice is uncertain because it does not sufficiently delineate, by criteria provided in the Notice and by reference to information known by the appellant, the information that the appellant is to produce. Rather, in order to answer the Notice, the appellant must undertake the task we have described above involving permutations and combinations to determine information not already known to it or otherwise identifiable from the GIW. The Second Notice essentially requires the appellant to undertake the task that was cautioned against in *Fieldhouse*, namely, to construe provisions of legislation, rather than answer the Notice by reference to words of ordinary English usage: see at 198 per Lockhart J; see also 211-212 per Hill J. The Second Notice is not therefore framed in terms consistent with the clarity which the parties accepted was required of it. It leaves too much of its meaning and application to be worked out by the appellant. The issue is not one of the mere difficulty of the task or the

mere burden of compliance but is the number and nature of the judgments or appraisals which the appellant is required by the Second Notice to make.

64 The question which then arises is whether the uncertain parts of the Notice can be severed or whether the uncertainty infects the whole of the Notice. In our opinion it is not possible to delete the references to "officers" or "officer" in paragraphs 3, 4, 5 and 6 nor the material under the word "Officer". The latter material cannot be disentangled. As to the former references, a contrary view would involve deleting paragraph 3 entirely and all references to entities which were not natural persons. On the face of the Second Notice this requirement is central. To sever would be to give the Second Notice a new operation for the purpose of saving it. Further, in this respect, we are of the view that we are entitled to have regard to the covering letter to the Second Notice, not to construe the terms of the Second Notice, but to identify its purpose. The purpose of the Second Notice is identified in the third paragraph of the covering letter and it is clear that the information sought in paragraphs 3, 4, 5 and 6 of the Second Notice is central to that purpose.

65 In these circumstances, we are of the view that ANZ should not be put to the task of disentangling the valid and invalid components "by delicate papyrian exercises with scissors and paste" or undertaking "abstruse questions of construction demanding the extraction (and performance) of some valid obligation from a matrix of invalidity": *Fieldhouse* at 195 per Lockhart J and at 204 per Burchett J.

66 For these reasons, we conclude that the Second Notice is invalid for the uncertainty of the information it requires ANZ to furnish and that that uncertainty so infects the Second Notice that the invalidity cannot be cured by severance of the offending parts.

Conclusion

67 We would set aside the Second Notice but otherwise dismiss the appeal. The appellant should within seven days file short minutes to that effect. In relation to costs, if the parties are unable to agree within seven days from the date of these reasons on the appropriate costs orders for the proceedings before the primary judge and for the appeal, we direct the appellant to file and serve its written submissions as to the appropriate costs orders within a further seven days and the respondents to file their written submissions within seven days thereafter. In either case those submissions should not exceed three pages.

Orders accordingly

Solicitors for the appellant: *Allens*.

Solicitors for the respondents: *Australian Government Solicitor*.

STEPHEN REBIKOFF