

# ANZ BANK LTD v KONZA

Case Note

*The Hon. Justice Davies,  
Federal Court of Australia*

# Revenue's need for information

- Project Wickenby
  - From 2006
    - A\$1,791 Billion in liabilities raised
    - A\$850 million collected
    - 75 charges of indictable offences (fraud)
    - 45 convictions to August 2014
- Project Do It
  - Amnesty closes 14 December 2014

# Information collecting powers

- Power
  - to enter premises (s 263)
  - Power to obtain information and documents (s 264)
  - Power to examine on oath (s 264)
- Only limitations
  - Purposes of tax legislation
  - Legal professional privilege

# ANZ Bank Ltd v Konza

Konza is the Deputy Commissioner

ANZ Bank:

- Australian resident company holding an Australia banking licence
- Australian IT systems collect information from world-wide subsidiaries (Global Information warehouse)

# Facts:

## ANZ Vanuatu

- Subsidiary of ANZ Bank
- Vanuatu customers details entered in “Beam Net” IT system in Vanuatu
- Beamnet information stored on “Finenet” IT system in Vanuatu

# Some information transferred

- “Masked” Finenet information transferred to ANZ’s GIW in Australia
- Information to be used for regulatory compliance and Bank’s worldwide financial functions
- Information includes some customer details.

# Section 264 notices issued to ANZ

First Notice seeks account numbers, names and details of customers:

- whom when opening their account:
  - states they are Australian nationals
  - states their domicile wa Australia
  - gives an Australian address
- or whom holds accounts with currency code marked in A\$.

# Second Notice

Seeks account numbers, names and details of customers who provided as part of any address certain elements (eg “PKF Vanuatu”, PO Box 95, “Moore Stephens House”)

AND

Seeks in the case of entities, “**any identifiers of the officers of the company**”, including names., nationality, addresses, etc.



# Second Notice (cont.)

Defines “officer” by reference to Vanuatu legislation:

- Trust Companies Act, s 1 *officer*
- Companies Act, s 1 *officer*
- International Companies Act, s 1 *director*, s 47 *officer or agent*

AND

- “Under any equivalent provisions under relevant legislation where the entity was incorporated, established, licensed and/or registered”

AND

- “As the context requires, includes a reference to a Director, Secretary and/or a servant of the customer”

# Challenge to Notice

Federal Court of Australia (Lander J) upholds both notices

- Hears evidence on Vanuatu law of confidentiality and secrecy provisions

# Appeal to Full Court

Q1

Did the Notices require the Bank to breach Vanuatu Law?

A1

- No evidence by Bank that there would be a breach of any non-statutory confidential information
- Expert evidence on secrecy in conflict; hence primary Judge's decision upheld

# Notices valid even if disclosure contravened Vanuatu law

- Notices did not require any breach of international law, or international comity
- Notices would override any duty of confidentiality in Australia
- Notice would abrogate right not to self-incriminate in Australia

# Notices were for proper purpose

- Section 264 did not require the person about whom information was sought to be an Australian taxpayer
- The Commissioner was entitled to “fish” in a “pool” of person who *might* be subject to an Australian tax liability

# Were the notices uncertain?

- First Notice was sufficiently clear to convey to the addressee what information was sought
- First notice only required information on GIW in Australia
- If Bank could not “unmask” there was no obligation to supply it
- Hence, the First Notice was valid

# But the Second Notice was NOT sufficiently certain

- By referring to an “officer” and setting out definitions in Vanuatu legislation, the Bank was required to determine
  - the jurisdiction in which each corporate customer was located or registered; and
  - to identify who might be an officer within the relevant jurisdiction
  - by reference to the law of that jurisdiction
- Hence, that requirement was not sufficiently certain

# Reference to “officer” not severable

The Court held that:

- the request in respect of “officers” was central to the operation of the notice;
- hence, if that reference was severed, the Notice would be given a different meaning;
- the Bank should not be required to disentangle that reference or meaning.

Hence, the whole Notice was invalid.



# Some conclusions

- If information or documents are physically or electronically held in Australia, they are subject to the Commissioner's domestic jurisdiction to gather information.
- The Commissioner's information gathering powers in respect of domestic information or documents overrides foreign confidentiality laws.

# Some more conclusions

- Hence, if information about the use in tax havens is held in Australia, foreign bank and other secrecy laws may be defeated without recourse to treaty powers.
- But the Commissioner's information gathering powers are dependent upon his ability to precisely define the persons in respect of whom he seeks information.

# Comments

- The decision encourages multinational corporations to store information about offshore customers outside of Australia.
- Recipients of notices holding confidential information may consider themselves commercially obliged to challenge the validity of the notices on any arguable grounds.

# Impact for tax haven activity

- Where the Commissioner obtains information, there is no restriction on its use in further investigations, or as to its use as evidence in the courts.
- Moreover, there is no prohibition on any derivative use. Hence, for example, documents might be used in criminal proceedings against a taxpayer notwithstanding that they were obtained without warrant.