

Part A Introduction**2 ACCOUNTABILITY AND REVIEW OF DECISIONS**

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

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2.1 PURPOSE

2.1.1 The chapter is designed to ensure that staff are aware of the various decision-making review mechanisms available to taxpayers. It reinforces the professionalism (that is, standards of behaviour) expected of Tax Office staff. Topics covered in this chapter are:

- the Taxpayers' Charter and Compliance Model;
- informal review processes;
- the Special Tax Adviser to the Ombudsman;
- the Inspector-General of Taxation (NB: The focus of the Inspector-General will be on systemic tax administration matters rather than individual taxpayer issues. Individual taxpayer issues will continue to be handled by the Special Tax Adviser to the Ombudsman);
- the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act);
- the *Judiciary Act 1903* (Judiciary Act);
- the *Privacy Act 1988* (Privacy Act); and
- the *Freedom of Information Act 1982* (FOI Act).

2.2 INTRODUCTION

2.2.1 Taxpayers and/or their representatives can expect officers to uphold the APS Values and Code of Conduct, and to meet the commitments in the Taxpayers' Charter.

2.2.2 Because of the nature of the tasks they are required to perform, officers taking action to secure outstanding taxation returns and statements, or to recover outstanding taxation debts, can expect that their efforts will not always be appreciated by taxpayers. Some of their decisions may have a significant personal impact on taxpayers. Understandably, these may be queried. Taxpayers have rights to pursue various avenues for review if they are not satisfied with decisions made and these rights must be respected by tax officers. It is important in this context that officers:

- obtain the relevant facts before making decisions;
- understand the specific requirements of the legislation administered by the Tax Office when exercising statutory powers;
- are impartial and maintain high standards of professional integrity;

- treat taxpayers with courtesy and are sensitive to their rights, taking into account their individual circumstances;
- make fair and equitable decisions;
- apply the principles of natural justice (refer to 2.7.6);
- work with skill, care, diligence and impartiality; and
- avoid conflicts of interest.

2.2.3 In all cases it is expected that the officer dealing with the taxpayer will be in a position to explain the decision and the reasons for their decision. Note, it is less likely for a decision to be overturned if it is made by an officer acting in a professional manner considering the merits of the individual case in the light of Tax Office policy (see, for example *Harts Fidelity Pty Ltd & Ors v. Chapman, DFC of T (1999) 99 ATC 4797*). However, there may be cases where a taxpayer remains dissatisfied with the decision and the explanations given and wishes to proceed further with the matter.

2.2.4 In these cases, a taxpayer has a number of options available, including:

- (i) making an approach to a team leader, a Director, ATO Complaints, an Assistant Commissioner, or the Commissioner;
- (ii) seeking the assistance of the local Federal Member of Parliament (who is not a Minister);
- (iii) lodging a complaint with the Special Tax Adviser to the Commonwealth Ombudsman;
- (iv) raising the issue with the Inspector-General of Taxation, if the issue appears to be of a systemic nature;
- (v) seeking a statement of reasons for certain decisions in terms of section 13 of the AD(JR) Act;
- (vi) seeking a review of certain decisions by the Federal Court or the Federal Magistrates Court under the provisions of the AD(JR) Act;
- (vii) seeking a writ of mandamus or prohibition or an injunction under the Judiciary Act to prevent the Tax Office from recovering the debt;
- (viii) review of certain decisions by the Administrative Appeals Tribunal (eg, section 14Y *Taxation Administration Act* (TAA) re Departure Prohibition Orders (DPOs)); The [Administrative Appeals Tribunal Act 1975](#) allows the Small Taxation Claims Tribunal to review hardship release cases, including where the liabilities in question exceed the Small Taxation Claims Tribunal's usual ceiling of \$5000.
- (ix) lodging a complaint about an issue of privacy with the Privacy Commissioner; and/or
- (x) requesting copies of documents relating to a decision under the provisions of the FOI Act.

2.2.5 A taxpayer has the option of choosing from the available alternatives, and may pursue various of these actions sequentially or concurrently. Tax officers are expected to advise taxpayers of the relevant avenues for review.

- 2.2.6 Not every decision is subject to a formal administrative review, but all should stand up to scrutiny. This means the decision-making process and the decision must be appropriately recorded.
- 2.2.7 Binding Oral Advice is provided for by Division 360 of the TAA. These provisions permit an individual to apply for an oral ruling about a limited range of matters under an income tax law. These matters relate to the assessment of income, the deductibility of expenses, and the applicability of tax offsets (sections 360-65 to 360-85 TAA). Further, as part of the Review of Aspects of Income Tax Self-Assessment, the Government has expanded the regime that governs binding advice, including binding oral advice, to cover some matters of administration and collection.
- 2.2.8 Binding Oral Advice powers can only be exercised by properly delegated officers (section 360-60 TAA). It is important to be clear when Binding Oral Advice may be provided. Although Binding Oral Advice may not apply in some situations, there is still a need to act professionally in accordance with the Taxpayers' Charter (see below). In any review of a decision, not only will the matter raised by the taxpayer be considered, but by implication, so will the professional standards of the person dealing with the case.
- 2.2.9 Division 280 of Schedule 1 to the TAA introduced a new liability, the shortfall interest charge (SIC). A taxpayer is liable to pay SIC on an additional amount of income tax payable as a result of an amended assessment for the 2004-2005 or later income years (subsection 280-100(1) of Schedule 1 to the TAA). A shortfall does not exist unless the taxpayer's overall liability is increased – even though the Commissioner might have increased a particular element of the earlier assessment.
- 2.2.10 A taxpayer may object against a decision of the Commissioner not to remit an amount of SIC where the amount not remitted is more than 20% of the additional amount of income tax on which it is calculated (section 280-170 of Schedule 1 to the TAA) under the objection and review rules Part IVC of the TAA.
- 2.2.11 The rights to a statement of reasons and the formal objection rights relating to decisions not to remit an amount of SIC are in addition to, and do not replace, existing rights under the *Administrative Decisions (Judicial Review) Act 1977 (AD(JR)A 1977)*.
- 2.2.12 The fact that a decision is being reviewed will not stop additional charges accruing on the taxpayer's account for late lodgment or late payment. Any representations to have the additional charges that accrued during this period remitted are to be considered under the normal guidelines for the remission of failure to lodge penalties or additional charges/General Interest Charge (GIC).
- 2.2.13 Where a decision is incorrect, action should be taken to correct that decision, with an apology to be given to the taxpayer in appropriate cases.
- 2.2.14 Where a decision is being reviewed the action on the case is not necessarily halted.

2.3 TAXPAYERS' CHARTER AND COMPLIANCE MODEL

- 2.3.1 The Taxpayers' Charter and Compliance Model guide our actions. They direct the way tax officers behave towards the community and what the community can expect from them.
- 2.3.2 The Taxpayers' Charter articulates the relationship the Tax Office seeks with the community – one that is and is based on mutual trust and respect. It outlines taxpayers' rights under the law, the service and other standards they can expect from the Tax Office and their taxation obligations.
- 2.3.3 The Compliance Model helps us to understand taxpayers' compliance behaviour so that we can develop appropriate and differentiated responses. An underlying objective is to maximise the proportion to the community who are both able to, and choose to, comply.
- 2.3.4 For more information about the Taxpayers' Charter and the Compliance Model, [click here](#).
- 2.3.5 Members of the public can access the Taxpayers' Charter on our website, ato.gov.au under the link "[Your rights](#)".

2.4 INFORMAL REVIEW PROCESSES

- 2.4.1 Taxpayers' Charter Booklet 08 '*If you're not satisfied*', provides an overview of taxpayers' rights of review (both formal and informal). Formal review processes such as taxpayers' rights to objection are not usually a matter for tax officers who deal with the *ATO Receivables Policy*. However, tax officers need to be aware there are a number of informal review processes available to taxpayers who are not satisfied with a decision or the manner in which they have been treated.
- 2.4.2 Taxpayers may seek an informal review and bring their concerns to the attention of the Tax Office via a team leader, a Director, ATO Complaints, an Assistant Commissioner, the Commissioner.
- 2.4.3 Taxpayers may also bring their concerns to a Member of Parliament. (It can be accepted that a Member of Parliament making representations on behalf of a taxpayer has been authorised to do so by the taxpayer). Tax officers should refer such representations to the Parliamentary Liaison Unit in the first instance.
- 2.4.4 There are some restrictions on the disclosure of information to Ministers. See the discussion of secrecy later in this chapter under the heading 'Disclosure of information to Ministers and Members of Parliament'.
- 2.4.5 In most cases, the concerns of the taxpayer will be discussed with the officer who originally dealt with the matter before any response is provided to the taxpayer or the taxpayer's representative. This should ensure all views are taken into consideration and provides additional input to support the integrity of the process.
- 2.4.6 Responses to enquiries of this type can be by mail, by telephone or by personal interview.
- 2.4.7 Officers should not change a decision because of the informal review process unless the decision is clearly inappropriate (for example where the decision was illegal, inequitable, unethical, or was not overt, not sensible or did not conform to principles of natural justice). Nor should recovery action be stayed or deferred solely on the basis of the informal review process. Changing a decision in these circumstances implies a

faulty decision-making process in the first instance. Officers should be in a position to explain any decision they have made, while at the same time, be open to any suggested alternatives that may also achieve the desired result.

2.5 SPECIAL TAX ADVISER TO THE COMMONWEALTH OMBUDSMAN

2.5.1 The role of the Commonwealth Ombudsman is to provide an independent and impartial review of complaints about the administration and actions of Commonwealth Government Departments and Authorities. The Special Tax Adviser to the Ombudsman deals specifically with issues raised about the Tax Office and has the same powers as the Ombudsman.

2.5.2 The Ombudsman has a wide range of powers conferred by the *Ombudsman Act 1976* (Ombudsman Act). These powers, which take precedence over the secrecy provisions of the taxing statutes, enable the Ombudsman to:

- (i) make preliminary enquiries to assess whether to investigate or not (subsection 7(A));
- (ii) make such investigations as thought fit (subsection 8(3));
- (iii) bring breaches or misconduct to the notice of the Commissioner of Taxation (subsection 8(10)); and
- (iv) require persons to answer questions and produce documents (section 9).

2.5.3 The Ombudsman does not conduct a formal investigation into all complaints received, but evaluates the information provided and makes a decision about how best to deal with the particular issue, if it is decided there is an issue to address. The Special Tax Adviser operates in the same way.

2.5.4 Invariably, the Special Tax Adviser will attempt to determine whether the action or decision complained about:

- was justified;
- was unreasonable, unjust, oppressive or improperly discriminatory;
- appeared to have been made contrary to law;
- was in accordance with a rule of law, a legislative provision or practice, but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
- was, in all the circumstances, wrong.

2.5.5 Upon the receipt of a complaint, the Special Tax Adviser will usually either telephone or write to a nominated Tax Office contact officer (or the officer dealing with the case) and set out details of the complaint. The Special Tax Adviser will give the Tax Office the opportunity to respond to the matters raised in the complaint and to put forward its views and reasons for adopting a particular course.

2.5.6 In most cases, the matter can be resolved without the need for the Special Tax Adviser to resort to more formal remedies, which can include a report to Parliament. Matters the Special Tax Adviser will generally canvass (depending on the nature of the complaint) would be:

- the reasons a particular action was taken and whether there was a more appropriate action that could have been taken;
- whether there is now some particular alternative action that could and should be taken to rectify, mitigate or alter the effects of the action complained of;
- whether a particular decision could or should be varied or cancelled;
- whether a rule, provision or practice upon which the action was based should be altered; and
- whether further action is warranted by the Special Tax Adviser.

2.5.7 It is important to recognise the Special Tax Adviser, while not being empowered to overturn a decision (the Special Tax Adviser can only make recommendations), plays a very important independent role in ensuring the integrity of the tax system.

2.5.8 Officers should not change a decision solely on the basis of an approach by the Special Tax Adviser. The decision will be reviewed, taking into account any additional information provided. Nor should recovery action be stayed or deferred solely on the basis of an approach by the Special Tax Adviser. Changing a decision in these circumstances implies a faulty decision-making process in the first instance. Officers should be in a position to explain any decision they have made, while at the same time, be open to any suggested alternatives that may also achieve the desired result.

2.5.9 The Tax Office supports the role of the Special Tax Adviser and expects staff to be cooperative and frank when dealing with the Ombudsman's office (officers should discuss any proposed response to the Special Tax Adviser with their manager). The feedback that is provided by this independent review process can highlight best practice and identify areas where there are deficiencies that should be addressed.

2.6 INSPECTOR-GENERAL OF TAXATION

2.6.1 The role of the Inspector-General of Taxation is to provide an independent and impartial review of systemic tax administration issues and to report to the Government with recommendations for improving tax administration for the benefit of all taxpayers. The focus for reviews by the Inspector-General will be on tax systems rather than individual taxpayer matters or the handling of individual cases. The Commonwealth Ombudsman will continue to deal with individual complaints about tax administration. However, the Inspector-General may conduct a review of a tax system where a systemic tax administration issue has been raised with the Inspector-General by taxpayers, tax professionals, the Commonwealth Ombudsman or any other party.

2.6.2 Corporate Management Practice Statement PS CM 2005/01 outlines the obligations of Tax Office employees to assist the Officer of the Inspector-General of Taxation in fulfilling its statutory obligations to undertake reviews of the Tax Office.

2.7 ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977 (AD(JR)A 1977)

- 2.7.1 Broadly, the purpose of the AD(JR) Act is to provide for a review by the Federal Court or the Federal Magistrates Court of administrative decisions and to ensure that a decision maker has acted fairly and within powers when reaching a decision. To facilitate this broad purpose, the AD(JR) Act contains provisions that structure the judicial review process. The important provisions are:
- section 13 (request for a statement of reasons for the decision that has been taken);
 - sections 5, 6 and 7 (applications for an order of review); and
 - section 16 (powers of the Federal Court or the Federal Magistrates Court in respect of applications for an order of review).

- 2.7.2 A key term in the AD(JR) Act is 'decision to which this Act applies' (see sections 5, 6, 7 and 13). This term dictates which types of decisions will be open to the judicial review process. The definition of the term (see section 3) limits those decisions to ones of an 'administrative character' made 'under an enactment'. The term would thus include decisions made under any taxation law:

- when considering applications for additional time to lodge;
- when considering whether to remit administrative penalties/additional charges imposed for the late lodgment of returns or statements;
- when considering applications to defer the time for payment or to permit payment by instalments;
- when considering whether to remit additional charges imposed for the late payment of a debt;
- to issue a 'garnishee' notice;
- to require people to attend and give evidence or to obtain further information about a taxpayer (for example, for tracing purposes); or
- to issue a departure prohibition order or not to issue a departure authorisation certificate.

The term is extended to cover:

- (i) decisions which an officer may refuse to make; and
- (ii) decisions which an officer proposes to make or is required to make;

but does not include decisions:

- (i) to vote against a motion for acceptance of a composition of debts at a meeting of creditors called under Part X, *Bankruptcy Act 1966* (*Hutchins v. DFC of T 96 ATC 4372*);
- (ii) to demand payment of outstanding taxes (*Century Yuasa Batteries Pty Ltd v. FC of T 97 ATC 4299*);
- (iii) to commence proceedings for recovery of outstanding taxes by way of winding up summons (*Strictly Stainless Pty Ltd v. Deputy Commissioner of Taxation* (Unreported, Federal Court of Australia, Davies J, 5 November 1993)); or

- (iv) to issue a writ for recovery (*Ruddy v. DFC of T 98 ATC 4369*); (*Golden City Car & Truck Centre Pty Ltd & Anor v. DFC of T 99 ATC 4131*).

(In the following paragraphs, the discussion is confined to situations where a decision has been made. The discussion has equal application to the other two aspects of the extended definition above).

- 2.7.3 The AD(JR) Act applies to a decision made under an enactment. Officers frequently report on particular matters and recommend decisions to other officers authorised to act in the name and on behalf of the Commissioner or a delegate. It is the decision of the authorised officer that can be reviewed under the AD(JR) Act.
- 2.7.4 The AD(JR) Act does not apply to reports or recommendations - it applies to decisions taken by properly authorised officers. A decision, made by an officer who is not authorised to make such a decision, is invalid at law.
- 2.7.5 Where a taxpayer applies to the Federal Court or the Federal Magistrates Court for an order of review of a decision, that taxpayer is entitled to copies of documents (including computer records) recording the decision and copies of documents taken into account when making the decision. Those documents can then be tendered as evidence during the hearing of the application before the Court.
- 2.7.6 Documents recording the decision-making process and the decision should reflect the professional standards of every officer involved, including the fact that:
 - (i) the taxpayer has been given an appropriate opportunity to present a case;
 - (ii) only relevant considerations have been taken into account;
 - (iii) any procedures required by law to be followed, have been followed;
 - (iv) the officer who made the decision was authorised to make the decision;
 - (v) the decision was not made for an improper purpose;
 - (vi) the decision was correct in law, was supported by the evidence and was based on the circumstances of the individual case; and
 - (vii) the decision was reasonable, having regard to the facts of the particular case.
- 2.7.7 Officers must **not**:
 - (i) deliberately or inadvertently conceal their decision-making processes. The decision-making process should:
 - be recorded and disclose the findings on material questions of fact;
 - relate the findings to the evidence or other material on which the finding is based; and
 - explain the reasons for the decision (that is, commentary or narrative in relation to a particular case must contain sufficient detail to enable a person unfamiliar with the case to readily establish why a decision was made);

- (ii) permit any frustration to influence or undermine their decision-making processes. Decisions should not be influenced by taxpayers who are abusive, manipulative or who attempt to bring pressure to bear. Any decision should stand on the merits of the particular case;
- (iii) exercise their discretion with a punitive outcome in mind. The role of officers is to ensure that returns and statements are lodged, or that outstanding debts are collected, in the most efficient and cost effective manner and to respond appropriately to risks to the revenue. It is not to punish those who do not want to pay the taxes levied by Parliament; or
- (iv) make decisions in a way that could reasonably be perceived as an abuse of power. Such a perception can arise if commentary or narrative associated with the case is emotive, includes sweeping generalisations or unflattering/derogatory remarks or includes loose, ambiguous statements that suggest a decision was taken for reasons other than lodgment of the return or statement, or ensuring collection of the debt. Such perceptions can be avoided if officers do not state conclusions alone, without supporting reasoning.

A Section 13 statements

- 2.7.8 A person is entitled to a statement of reasons under section 13 only in respect of decisions that are in fact amenable to review under the AD(JR) Act (see 2.7.2 above).
- 2.7.9 Under section 13 of the AD(JR) Act, a person who is affected by a decision can, within 28 days, request from the decision-maker a statement in writing, setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The statement has to be provided within 28 days of receipt of the request.
- 2.7.10 The responsibility for preparing a section 13 statement lies with the officer who made the decision (if necessary, with the assistance of a team leader/manager or an officer from the Legal Practice). Officers preparing a statement should ensure that it is complete (it should be cleared by the Legal Practice or other appropriate area). Should the taxpayer decide to apply for an order for review under section 5 of the AD(JR) Act, the Commissioner is limited to the contents of the statement and cannot introduce further material pertaining to the decision at the hearing of the application.
- 2.7.11 Detailed advice on how to prepare section 13 statements is contained in Taxation Ruling MT 2037 which should be read by any officer required to prepare a statement. It is important for all officers to recognise that a statement must set out the actual reasons relied upon by the decision maker at the time the decision was made, and not other reasons or facts which may subsequently have come to light or which may appear, upon review, to be more desirable.

B Applications for orders of review

- 2.7.12 Taxpayers can apply under sections 5, 6 or 7 of the AD(JR) Act for an order of review of decisions. Jurisdiction to hear the applications for orders of review rests with the Federal Court of Australia or the Federal

Magistrates Court. Certain decisions can be the subject of an application for an order of review. Without being exhaustive, the following decisions are reviewable:

- (i) decisions to grant or refuse additional time for the lodgment of returns (*Balnaves v. FC of T* 85 ATC 4592);
- (ii) decisions refusing to permit payments by instalments or to defer the payment time of tax-related liabilities (*Ahern v DFC of T* 83 ATC 4698; *The Hells Angels Ltd v. DFC of T* 84 ATC 4683);
- (iii) decisions to issue 'garnishee' notices (*Huston & Anor v. DFC of T* 83 ATC 4525);
- (iv) decisions requiring a person to either attend and give evidence or to furnish information (*Clarke and Kann v. DFC of T* 83 ATC 4764 confirmed on appeal 84 ATC 4273);
- (v) decisions refusing to grant release from liability in cases of hardship (*Rollo v. Morrow* 92 ATC 4364); and
- (vi) decisions to issue departure prohibition orders or not to issue departure authorisation certificates (*Briggs v. DFC of T* 85 ATC 4569; *Edelsten v. DC of T* 20 ATR 238).

2.7.13 Service of an application for an order of review can be accepted by the officer dealing with the case on behalf of the Commissioner, but it is preferable that the document be served on an officer of the Legal Practice. If a document is served on the officer dealing with the case, the served documents, together with any files, papers and computer records should be immediately referred to the Legal Practice or other appropriate area which should assume carriage of the application. The decision maker must be prepared to consult frequently with the officer dealing with the application until the application is finalised.

2.7.14 The original decision maker may be called as a witness to give evidence on the decision taken if an application for an order of review is lodged. The benefits of proper decision-making processes are very evident at this point. Decisions that are properly made and appropriately documented (discussed earlier in this part of the chapter) are rarely challenged by applications for orders of review. Those that are challenged can be satisfactorily explained even under the most rigorous cross examination.

2.7.15 Under judicial review, the question for the Court to decide is whether:

- (i) the decision is lawful, in the sense that it is within the power conferred by the legislation;
- (ii) prescribed procedures have been followed; and
- (iii) the general rules of law, such as conformity with the principles of natural justice, have been observed.

2.7.16 The Court cannot substitute its own decision for that of the original decision maker. It is empowered by section 16 of the AD(JR) Act to:

- (i) quash or set aside a decision it finds unlawful;
- (ii) refer the matter back to the decision maker for further consideration 'subject to such directions as the Court thinks fit';
- (iii) direct any of the parties to do, or refrain from doing, any act which the Court thinks necessary to do justice between the parties; or

- (iv) compel a person, who ought to have acted but did not, to act.

2.8 JUDICIARY ACT 1903

- 2.8.1 Proceedings commenced by a taxpayer under section 39B of the Judiciary Act will typically be on the basis that the Tax Office has acted in bad faith and/or that the actions of the Tax Office are invalid. The grounds for a challenge are not limited by statute (unlike the AD(JR) Act which limits and defines the category of reviewable administrative decisions). Judiciary Act proceedings are often taken concurrently with AD(JR) Act proceedings as the bases for the respective actions can be fairly similar.
- 2.8.2 Provided that the Tax Office acts lawfully and in accordance with the rules of natural justice there should be no adverse consequences arising from any Judiciary Act challenges.
- 2.8.3 Judiciary Act challenges necessarily involve Federal Court proceedings. Any cases arising must be referred to the relevant technical area for action.
- 2.8.4 The Judiciary Act is not referred to in paragraph 2.2.3 above as taxpayers would ordinarily have real difficulty in obtaining the relief sought. The avenues noted in paragraph 2.2.3 should be seen as routinely available to taxpayers. Taxpayers who pursue orders under section 39B of the Judiciary Act run the risk of incurring substantial legal costs on an action which, based on a number of court decisions, is unlikely to be successful.

2.9 SECRECY

- 2.9.1 The various statutes administered by the Commissioner include provisions to safeguard the information held by the Tax Office. For example, subsection 16(2) *Income Tax Assessment Act 1936* (ITAA 1936) provides that “.....an officer shall not either directly or indirectly, either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer as mentioned in the definition of ‘officer’ in subsection (1).”
- 2.9.2 The secrecy provisions of other Acts administered by the Commissioner (eg sections 3C and 8XB TAA, section 5 *Fringe Benefits Tax Assessment Act 1986* (FBTAA), and section 45 *Superannuation Guarantee (Administration) Act 1992* (SG(A)A) are similar to section 16 ITAA 1936.
- 2.9.3 These provisions impose secrecy obligations on 'officers'. An officer is defined as any person who is, or has been, appointed or employed by the Commonwealth or a State who, by reason of that employment, or in the course of it, acquires information about the affairs of any other person, disclosed or obtained under the provisions of any Act relating to income tax (and other taxes). The term 'officer' also includes persons performing services for the Commonwealth. This includes people such as consultants, process servers, valuers, the ATO General Counsel (*Simionato Holdings Pty Ltd v. FC of T* (No 2) 95 ATC 4720) and insolvency practitioners engaged to undertake reviews (*Consolidated Press Holdings Limited & Ors v. FC of T* 95 ATC 4231).
- 2.9.4 The Commissioner can also forward relevant information to liquidators or trustees, provided the information is incidental to maximising the return to unsecured creditors in liquidations or bankruptcies where the

Commissioner is a creditor (*Simionato Holdings Pty Ltd* (supra) at page 4728). Caution should be exercised where it is unlikely the provision of information will enhance the prospect of a dividend, or an increased dividend for unsecured creditors.

- 2.9.5 There are a number of exceptions to the subsection 16(2) ITAA 1936 requirements:
- (i) release of information in the course of duty as an officer (see subsection 16(2A) ITAA 1936). The duties of an officer are not just those performed due to legal obligation. 'Duties' extends to all the functions and actions which your employment authorises (see Dixon CJ in *Canadian Pacific Tobacco Co Ltd v. Stapleton* (1952) 86 CLR 1 at page 6);
 - (ii) release of information to a court where it is necessary to allow the administration of the ITAA 1936 and other taxation statutes (see subsection 16(3) ITAA 1936);
 - (iii) release of information to the people and agencies listed at subsection 16(4) ITAA 1936. Subsection 16(4) provides that information can be released to these people or agencies regardless of the general prohibition in subsection 16(2) ITAA 1936. An officer must be authorised before they can release information under this subsection; and
 - (iv) although not strictly an exception to section 16 ITAA 1936, sections 3E and 3F TAA will allow disclosure of information in some circumstances. Any requests for information under these sections (that refer to providing information to defined law enforcement agencies that is relevant to investigations of serious crime or making proceeds of crime order) should be referred to your team leader or to the Legal Practice.
- 2.9.6 In *Consolidated Press Holdings* (supra), the Federal Court held that the Tax Office's engagement of an accountant from a firm of chartered accountants (to assist the Commissioner in considering and determining applications by the taxpayer under sections 206 and 207) was lawful and not in breach of section 16 ITAA 1936. The court also held that the relevant partners and employees of the accountancy firm engaged by the Tax Office were brought within the extended definition of officer in subsection 16(1) ITAA 1936. As such, any disclosure to an external consultant of relevant information covering the affairs of a taxpayer is permissible if it is given for the purpose of the external consultant providing advice or assistance to the Tax Office.
- 2.9.7 The Federal Court also decided in that case that highly sensitive and important information should not be revealed to external experts without the Tax Office first considering whether the taxpayer should be advised. Dealings between the taxpayer and the Tax Office can give rise to a reasonable expectation that the Commissioner will not furnish confidential information to people outside the Tax Office. In most cases, it would be prudent to advise the taxpayer that their information is being given to an expert for advice in case they wish to withdraw, say, their application for an extension of time. See the 'Guidelines for Obtaining Assistance from External Advisers' in National Office Minute dated 26 September 1995 from the Chief Tax Counsel.

- 2.9.8 Exceptions aside, the effect of the secrecy provisions is that officers are prohibited from communicating information about the affairs of a taxpayer to anyone but the taxpayer, or to an appointed agent or representative of the taxpayer. It is important that the agent or representative has been appointed as an agent or representative for purposes which would entitle them to receive the information to be released. Officers must clearly identify the identity of an individual to whom information is to be released. If there is any doubt as to the authority of an agent, written confirmation should be sought from the taxpayer that the person is their agent or representative for those particular purposes.

Disclosure of information to Ministers and Members of Parliament

- 2.9.9 Apart from the circumstances detailed below, tax officers can provide Members of Parliament and Ministers with taxpayer information, where that disclosure is within the performance of the officer's duties eg in response to the representations by the Member of Parliament or Minister. It should be noted, however, that the secrecy provisions contained in the taxation legislation referred to below preclude an officer from disclosing information to a **Minister** even if the Minister is the taxpayer's elected representative. Thus, in no circumstances can tax officers provide taxpayer information to a Minister if the information has arisen from the operation the following Acts:

- *A New Tax System (Australian Business Number) Act 1999* (section 30);
- *Excise Act 1901* (section 159);
- *Products Grants and Benefit Administration Act 2000* (section 47);
- *Sales Tax Assessment Act 1992* (section 110); and
- *Taxation Administration Act 1953* (section 68 – relating to GST and other indirect taxes).

2.10 PRIVACY ACT 1988

- 2.10.1 The Tax Office Privacy Information Kit provides an introduction to the Privacy Act, outlines and discusses the Information Privacy Principles and outlines Tax Office procedures for dealing with privacy complaints. Further information is found in the Taxpayers' Charter Booklet 05, '*Your privacy and the confidentiality of your tax affairs*' (NAT 2552). All officers should be aware of their obligations under the Privacy Act.
- 2.10.2 The following points pertaining to lodgment and debt collection situations are intended to reinforce the policy positions outlined in the Information Kit:
- (i) officers' computer passwords are their responsibility and for their exclusive use. They should immediately report any unauthorised use of their passwords to their manager;
 - (ii) officers are entitled to access information if they need to know it as part of the performance of their duties. Officers are not entitled to browse or to undertake enquiries for others who have no need to know the information sought (indeed, it is an offence to do so);

- (iii) the Privacy Act requires the Tax Office to keep taxpayer information secure, to restrict tax file number information to authorised staff, to restrict the use of tax file numbers to situations permitted by law and to ensure recorded information is of good quality;
- (iv) officers are entitled to request information from taxpayers, but must ensure that the information sought is relevant and complete. Taxpayers are entitled to know why information is being sought;
- (v) officers must not place themselves in a position of conflict of interest. There are two aspects to this issue:
 - under no circumstances should officers access information about themselves, relatives, friends or other acquaintances; and
 - unless in the course of their duties, officers should not discuss cases with other staff or permit their judgment to be influenced by the actions of other staff. Approaches by other officers on behalf of taxpayers should be brought to the attention of a manager to avoid any possible conflict between professionalism and possible loyalty to others.
- (vi) the Tax Office can only provide personal information about a taxpayer to a court where it is necessary to do so for the purposes of carrying into effect the provisions of a taxation law or a law the Commissioner administers; and
- (vii) officers should ensure that any commentary or narrative recorded on a case is accurate and reflects a professional standard.

2.10.3 Any complaint about privacy issues is to be immediately referred to a manager and the Privacy Contact Officer.

2.11 FREEDOM OF INFORMATION ACT 1982

2.11.1 Tax Office policy and practice concerning the application of the FOI Act is contained in the 1993 '*FOI Handbook: A Guide to Understanding and Applying the FOI Act*' and '*Accessing information under the Freedom of Information Act, Taxpayers' Charter Booklet 06*', (NAT 2554). The regulations to the FOI Act provide for fees and charges to generally apply to requests for access to documents.

2.11.2 Officers should refer any enquiries or requests for documents under the FOI Act to the FOI section.