

Part G Miscellaneous**111 INFORMATION-GATHERING (INCLUDING TRACING A TAXPAYER)**

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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111.1 PURPOSE

111.1.1 This chapter outlines:

- the Commissioner's powers to obtain information while undertaking lodgment and collection activities; and
- the various methods that may be used in locating or tracing debtors.

111.1.2 Tax Officers should refer to the Tax Office's *Access and Information Gathering Manual* for a more detailed discussion of these matters.

111.2 LEGISLATION

111.2.1 The various statutes administered by the Commissioner enable Tax Office officers to gather information by requiring persons to respond to their legitimate requests. The powers of investigation can be divided into two categories:

- (i) Access: the power to gain access to premises and documents; and
- (ii) Notices: the powers to require a person to:
 - furnish information;
 - attend at a specified place and give evidence (under oath or by affirmation if warranted); and
 - produce documents.

111.2.2 The respective provisions of the more common taxing statutes that enable the Commissioner to obtain information, etc. are:

- section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (TAA);
- sections 263 and 264 *Income Tax Assessment Act 1936* (ITAA1936);
- sections 108 and 109 *Sales Tax Assessment Act 1992* (STAA1992);
- sections 127 and 128 *Fringe Benefits Tax Assessment Act 1986* (FBTAA1986);
- sections 76 and 77 *Superannuation Guarantee (Administration) Act 1992* (SGAA1992);

- sections 38 and 39 *Superannuation Contributions Tax (Assessment & Collection) Act 1997* [SCT(A&C)A1997];
- sections 32 and 33 *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Act 1997* [SCT(CP)(A&C)A1997];
- sections 26 and 27 *Terminations Payment Tax (Assessment & Collection) Act 1997* [TPT(A&C)A1997];
- sections 65 and 66 TAA (in regard to indirect tax obligations);
- part 9 – (Information-gathering powers, sections 41 to 45) and part 11 – (Access to premises, sections 47 to 49) *Diesel and Alternative Fuels Grants Scheme Act 1999* (DAFGSA1999); and
- part 9 – (Information-gathering powers, sections 42 to 46) and part 11 – (Access to premises, sections 48 to 50) *Product Grants and Benefits Administration Act 2000* (PGBAA2000).

111.2.3 It should be noted that the 'Access Powers' available under section 263 ITAA1936 also apply to collection activities and other matters covered in Schedule 1 to the TAA due to the definition of 'this Act' in subsection 6(1) ITAA1936.

111.2.4 These powers cannot be used to obtain information for the purposes of prosecution or to ascertain whether a prosecutable offence has occurred. Further, taking access or the issuing of notices pursuant to all these sections is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

111.2.5 There are also provisions to ensure that information obtained by the Commissioner is not disclosed to unauthorised persons. The respective provisions under the more common statutes that are designed to ensure the security of information obtained by the Commissioner are:

- section 16 ITAA1936;
- section 30 *A New Tax System (Australian Business Number) Act 1999*;
- sections 3C and 8XB TAA;
- section 5 FBTA1986;
- section 45 SGAA1992;
- section 32 SCT(A&C)A1997;
- section 28 SCT(CP)(A&C)A1997;
- section 23 TPT(A&C)A1997;
- section 68 TAA (in regard to indirect tax obligations);
- part 10 (section 47) PGBAA2000; and
- the *Privacy Act 1988*;
- section 159 of the *Excise Act 1901*.

111.3 INTRODUCTION

- 111.3.1 Extensive information, including the Commissioner's policy about the use of information-gathering powers and formal notices is available in the '*Tax Office Access and Information Gathering Manual*' (the Access Manual). The manual covers all aspects of information-gathering eg legal professional privilege. While that publication refers specifically to sections 263 and 264 ITAA1936, the underlying principles also apply to the use of section 353-10 of Schedule 1 to the TAA, and other sections like sections 221YAA, 221YHX, and 221YHZO ITAA1936.
- 111.3.2 The various access and information-gathering provisions can be used, inter alia, to enhance the Commissioner's ability to collect liabilities incurred under a tax law, or to make estimates or default assessments.

POLICY

111.4 ACCESS

- 111.4.1 There are access provisions in numerous Acts administered by the Commissioner. Most of these provisions give the Commissioner, or any officer duly authorised, the right to enter and remain on premises and to have full and free access to documents for any purpose of the applicable Act, and to make copies of, or extracts from those documents. For example, these powers could be used for the purposes of ascertaining:
- whether a taxpayer derived assessable income;
 - whether returns provided are correct;
 - the asset and liability position of a taxpayer;
 - what transactions have occurred.
- 111.4.2 In many situations it will be unnecessary to use the access powers in order to inspect records. An informal request by telephone or letter will often provide the necessary information needed. An important factor in the decision to use access powers is whether the records are held by the taxpayer or a third party.
- 111.4.3 The Commissioner is bound by the *Privacy Act 1988* and because of the Commissioner's obligations contained in that Act, it is generally not appropriate to seek documents held by third parties unless the formal access powers are being used.
- 111.4.4 In most circumstances, when making enquiries of third parties, the Tax Office will give prior notification to taxpayers before the enquiry is made. However, there are circumstances where such notification would not be provided eg where such advice would severely compromise the subsequent actions to be taken by the Tax Office. The law gives the Commissioner wide-ranging access powers, and the Tax Office is charged with the responsibility to use those powers in a fair and professional manner.
- 111.4.5 It is important to follow the principles outlined in the Taxpayers' Charter explanatory booklet number 09 on '*Fair use of our access and information gathering powers*', and also, the '*Guidelines – Access and Information Gathering Powers*'. It may be necessary in some circumstances to refer to '*Guidelines for Access to Accounting Advisors' Papers*'.

111.5 POWERS REQUIRING THE PROVISION OF INFORMATION, ATTENDANCE BY A TAXPAYER OR THIRD PARTY, THE GIVING OF EVIDENCE AND THE PRODUCTION OF BOOKS OR DOCUMENTS.

- 111.5.1 Section 353-10 of Schedule 1 to the TAA allows properly authorised officers to issue a written notice to require any person (natural or corporate) to furnish information and/or to attend and give evidence (under oath, or by affirmation if warranted), and/or to produce documents in their custody, for collection or recovery purposes. Section 353-10 is the preferred information-gathering power used in debt collection work.
- 111.5.2 Similar powers exist under section 264 of the ITAA1936 and section 77 of the SGAA1992, but due to the limited scope of those provisions, they are not often used in debt work, but may be more suitable to lodgment activities.
- 111.5.3 Under paragraph 353-10(1)(a) of Schedule 1 to the TAA, an officer may require a taxpayer or third party to provide information relating to the collection and recovery of tax from a debtor. Pursuant to paragraphs 353-10(1)(b) and (c), an officer may require a debtor or third party to attend before a properly-authorized officer and produce books or documents and answer questions relating to the collection and recovery of tax from the debtor. These powers enable a wider range of enquiry than the powers available under Oral Examinations/Enforcement Hearings or section 264 ITAA1936.
- 111.5.4 Paragraphs 264(1)(a) and (b) provide similar powers. However, in view of the requirement in paragraph 264(1)(b) that the questions to be asked, or books to be produced, must relate to the debtor's income or assessment, this paragraph has rather limited use in debt work, but may have more extensive application in annual return lodgment work.
- 111.5.5 Subsection 353-10(1) is a very useful tool to enable properly-authorized staff to examine books of account and other documents or to interview taxpayers or third parties in order to gather information relevant to the collection and recovery of tax, such as:
- bank account and loan application details;
 - debtor's current and previous financial arrangements and transactions including overseas transactions;
 - corporate structures and directorships;
 - asset holdings and disposals;
 - monies owed to the debtor; and
 - avenues for tracing the debtor.
- 111.5.6 The High Court decision of *The Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission* [2002] HCA 49 held that section 155 of the *Trade Practices Act 1974* (a similar power to that in section 353-10 of Schedule 1 to the TAA and section 264 of ITAA36) did not abrogate legal professional privilege. Consequently, it is accepted that section 353-10 of Schedule 1 to the TAA does not override legal professional privilege.
- 111.5.7 Officers need to be aware of Tax Office procedures when claims for legal professional privilege are made in the course of an information-gathering

exercise. These procedures are set out in the Tax Office's *Access and Information Gathering Manual*, and all cases where legal professional privilege is claimed should be referred to the attention of an Access Specialist.

- 111.5.8 Furthermore, under the guidelines for access to professional accounting advisors' papers, communications between professional accountants and their clients may in certain circumstances be protected from disclosure.
- 111.5.9 Provided a section 353-10 notice is used for tracing purposes **only**, it may be used at any time. However, caution should be exercised in using section 353-10 or section 264 for purposes other than tracing action once litigation has commenced; this is because the use of the more general statutory power may be seen as interfering with the court's processes and may constitute contempt (see 111.6.12 for further clarification). For example, the use of a section 353-10 TAA or section 264 ITAA36 notice to obtain information for use in a court hearing (after proceedings have commenced) could be held to be a contempt of court. Section 353-10, section 264, or similar information-gathering powers should not be used between the times when a Statement of Claim is issued and judgment obtained, or between the times when a Creditor's Petition is issued and a sequestration order is made. These powers must not be used to gather information for prosecution purposes.
- 111.5.10 The relevant regulations eg regulation 174 of the *Income Tax Regulations 1936*, prescribe scales of expenses that may be payable when a person, other than the debtor, is required to attend and give evidence or produce books or documents pursuant to sections 353-10, or similar powers. Non-compliance with a section 353-10 or section 264 Notice is a prosecutable offence under sections 8C, 8D, or 8E of the TAA.
- 111.5.11 Similar powers exist under other legislation eg sections 221YAA (PAYE), 221YHK (PPS) and 221YHZO ITAA1936 (certain specified payments). These powers enabled officers to ask questions or require the production of books or documents relating to the administration of Part VI, Div. 2 (PAYE), Div. 3A (PPS) or Div. 3B (certain specified payments).
- 111.5.12 In using these powers, it is important to follow the principles outlined in the Taxpayers' Charter explanatory booklet number 09 on 'Fair use of our access and information gathering powers'. When dealing with tax agents, it is necessary to refer to 'Guidelines for Access to professional accounting advisors' working papers'.

111.6 LOCATING (TRACING) THE TAXPAYER

- 111.6.1 A key process in the activities of ensuring lodgment and collecting outstanding debts is being able to contact taxpayers. Once taxpayers become unlocatable, there is no 'best way' to find (or trace) them. Effective and efficient taxpayer location processes are a blend of activities that:
- are tailored to the behaviour of the taxpayer;
 - are sensitive to the balance between the costs incurred and the potential benefits for the Tax Office;
 - give a weighting to the urgency of the case;
 - are allocated to an officer with the relevant skills and experience; and

- ensure that up-to-date addresses are recorded on the client register, the debt case management system, any other relevant corporate systems and relevant paper files.
- 111.6.2 Details provided by taxpayers in relation to their residential or business address and the address for service, name changes, 'phone contact numbers and the like, whether by 'phone, facsimile, e-mail, in person or by any other means of communication, are to be recorded (or changed) on corporate systems at the time the information is provided. The date the change is made is also to be recorded.
- 111.6.3 When a third party provides advice indicating that a debtor may have changed address, that advice is to be tested for accuracy before records are updated. A letter should issue to the debtor at the new address provided. If that address cannot be confirmed, it should still be recorded on the relevant system (together with the identity of the third party) for checking and tracing purposes at a later stage if necessary.
- 111.6.4 In all cases when an officer is in contact with debtors, the officer is to take steps to verify the information held on file (for example, confirm such things as name and address details, date of birth, 'phone contact numbers, ACN, ABN and the like). It should be recognised that debtors can elect to have a different postal address for all or some of their dealings with the Tax Office (for example, the postal address for income tax purposes may be different to that for Activity Statement purposes).
- 111.6.5 Action to locate debtors should generally involve the following process:
- research
- an examination of the information held by the Tax Office (including return form information, all addresses on file and any other corporate information);
- phone
- contact by 'phone of all potential information sources. The most-frequently utilised tool should be the telephone. It is generally-preferred over other methods of contact due to its timeliness, cost effectiveness and informality;
- use of generally-available data sources
- in addition to obtaining information held on corporate systems, officers should make use of case files, appropriate software systems (eg Oz on Disk and Electronic White Pages) and other information sources including the Electoral Rolls;
- requesting information from external sources
- with limited exceptions, the secrecy provisions of the various acts administered by the Commissioner place obligations on officers not to disclose information about a debtor's affairs. However, the various provisions allow for disclosure of information in the performance of an officer's legitimate duty (see policy chapter entitled 'Accountability and review of decisions').
- 111.6.6 Tax legislation authorises the Commissioner to make relevant enquiries of debtors and others in the administration of tax laws. (The *'Tax Office's Access and Information Gathering Manual'* discusses this in detail.) Provided the level of disclosure is kept to a minimum, requesting

information to establish the whereabouts of a debtor is appropriate in the performance of an officer's legitimate duties.

- 111.6.7 If officers are making enquiries, consideration should be given to whether it is necessary to exercise the formal notice powers or whether it is possible and practical to gather the information using a less formal approach. Many holders of information are willing to respond to requests for information without receiving formal notice. However there are situations where a formal approach is warranted. Examples are where the recipient does not respond to an informal letter, or where an individual is reluctant to cooperate fully to questions put without compulsion, or where a formal request is demanded.
- 111.6.8 Informal enquiries are the preferred approach. Officers should advise the debtor or third party of their name and that they work for the Tax Office, but should be careful not to create the impression that they are making formal enquiries (the Tax Office policy behind the sections authorising the Commissioner to make formal enquiries has specific requirements that need to be satisfied — see the *'Tax Office's Access and Information Gathering Manual'*). While debtors and third parties can be encouraged to provide information under an informal request, they cannot be compelled to do so. They are to be given the opportunity to consult with their advisers if they wish.
- 111.6.9 If it is not possible to obtain reliable information through informal enquiries, a formal notice may be prepared and served on a third party. Officers should follow the documentary requirements and procedures for these notices and the covering letter as set out in the *'ATO's Access and Information Gathering Manual'*. All formal notices require approval by an authorised officer prior to service.
- 111.6.10 Information may be requested from any sources, which may include neighbours, employers, business associates, friends, accountants, solicitors, trade organisations, industry associations, and, *provided the legislation enables formal enquiries to be made of Commonwealth and State Government Departments*, other Government Departments, Telstra, Optus, Australia Post, the Australian Securities and Investments Commission, Comsuper, Immigration, Registrar of Births, Deaths and Marriages local councils, Land Titles Office, Bankruptcy Registrar, State and Federal Police and Corrective Services. Some organisations, such as banks, will not provide information about a debtor unless the Commissioner formally requests the information. Some enquiries can only be made if the Tax Office is prepared to pay for the searches. In these circumstances, officers need to compare the cost (if any) of making the enquiry with the possible return (either in dollar value or in compliance benefit) from the search.
- 111.6.11 Tracing action is permissible even where court proceedings have commenced, provided it is for the purpose of obtaining a current address to which notices may be issued or to enable a claim/summons or creditor's petition to be served so as to allow the proceedings to continue.
- 111.6.12 Any use of a section 353-10 notice on a financial institution, seeking bank account details of a client, must only focus on information relative to the client's tax debts and not for the purpose of obtaining unrelated information. The use of this tool is subject to the qualifications raised in the previous section concerning contempt of court.

- 111.6.13 A formal notice may also be served on a relative of the debtor, if enquiries of other persons and entities have been unsuccessful and the relatives decline to supply the information informally. Care should be taken in issuing notices on family members — other avenues should be tried first, where appropriate, to minimise the tension between complying with the law and supporting the family.
- 111.6.14 Information received from a third party should be treated carefully unless that third party was reasonably in a position to know the facts eg parents, employer etc. If reservations are held about their position to know the facts, further enquiries should be made to see if the information is supported by other material.
- 111.6.15 Steps taken to locate a debtor and the results of enquiries made should be recorded in all cases, as the information obtained may be valuable for subsequent actions eg substituted service applications, and will assist any other officer who may be required to deal with the case. Caution should be taken to ensure that the debtor has been correctly identified, and not another person of identical name.
- 111.6.16 Whenever a debtor is contacted after tracing action, the officer dealing with the case should not only concentrate on obtaining payment, but should also endeavour to ensure the debtor complies with other taxation requirements (for example, lodges outstanding income tax returns).
- 111.6.17 As discussed in the policy chapter entitled 'Accountability and review of decisions', officers are expected to act in a professional manner. If difficulties arise when seeking information from external sources (eg suggestions of an abuse of power), officers should inform their manager immediately.