

ATO RECEIVABLES POLICY

PART H Miscellaneous

Chapter 111

INTRODUCTION TO INFORMATION GATHERING

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.

Date of effect: 24 July 2008 (This version replaces the 2006 version.)

Key legislation: Section 353-10 of Schedule 1 to the *Tax Administration Act 1953*; sections 263 and 264 of the *Income Tax Assessment Act 1936*

PURPOSE

1. This chapter introduces:

- 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 activity.

(The *Access and Information Gathering Manual* is the principal reference in relation to these matters and should be referred to by Tax Office staff if a more detailed discussion of underlying policy and procedure is required).

INTRODUCTION

2. The various Acts administered by the Commissioner enable Tax Office staff to gather information by requiring persons to respond to their legitimate requests. The information gathering powers 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.

3. The various access and information gathering provisions can be used to enhance the Commissioner's ability to obtain lodgment, collect liabilities incurred under a tax law, or to make estimates or default assessments.

4. It should be noted that the access powers available under section 263 of the *Income Tax Assessment Act 1936* (ITAA 1936) also apply to collection activities and other matters covered in Schedule 1 to the *Tax Administration Act 1953* (TAA) due to the definition of 'this Act' in subsection 6(1) of the ITAA 1936.

5. These access 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*.
6. Provisions of the *Privacy Act 1988* and various statutes ensure that information obtained by the Commissioner is not disclosed to unauthorised persons.
7. The law gives the Commissioner wide-ranging access powers, and Tax Office staff are charged with the responsibility to use those powers in a fair and professional manner

Guidelines to access powers

8. Decisions of the Courts highlight the need for all officers to be conscious of the wide ranging nature of the access and notice powers and the rights of taxpayers and third parties. Extensive information, including the Commissioner's policy about the use of information gathering powers and formal notices is available in the *Access and Information Gathering Manual* (the Access Manual). Another source of information is the taxpayers' charter explanatory booklet *Fair use of our access and information gathering powers* (NAT 2559).

POLICY

A. ACCESS

9. 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, and
 - what transactions have occurred.
10. In most 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.

Information from third parties

11. The Commissioner is bound by the *Privacy Act 1988* and because of the obligations contained in this Act, it is generally not appropriate to seek documents held by third parties unless the formal access powers are being used.
12. In most circumstances, when making enquiries of third parties, the Tax Office will give prior notification before the enquiry is made. However, there are circumstances where such notification would not be provided for example, where such advice would severely compromise the subsequent actions to be taken by the Tax Office.

B. POWERS REQUIRING PROVISION OF INFORMATION

13. Subsection 353-10(1) is a very useful tool to enable properly authorised 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.
14. Any use of a section 353-10 notice (for example, 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.
15. Section 353-10 of the TAA is the preferred information gathering power used in debt collection work. The powers under this section enable a wider range of enquiry than the powers available under oral examinations/enforcement hearings or section 264 of the ITAA 1936.
16. Paragraphs 264(1)(a) and (b) of the ITAA 1936 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 a person's income or assessment, this paragraph has rather limited use in debt work, but may have more extensive application in work such as annual return lodgment work.

Court proceedings

17. 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. The use of the more general statutory power may be seen as interfering with the court's processes. For example, the use of a section 353-10 of the TAA to obtain information for use in a court hearing (after proceedings have commenced) could be held to be a contempt of court.
18. Section 353-10 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.
19. These powers must not be used to gather information for prosecution purposes.

Legal professional privilege

20. Certain communications between lawyer and client are privileged and neither the client nor the lawyer can be compelled to disclose details of the communication. Legal professional privilege (LPP) is much more limited than the general notion of confidentiality.
21. The High Court decision in *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 the ITAA 1936) did not abrogate LPP.

Consequently, it is accepted that the Commissioner's access and information gathering powers do not override LPP.

22. Thus, if a communication is subject to LPP, the Tax Office is not entitled to use its statutory powers such as section 353-10 of the TAA to obtain or informally request the information. Conversely, if a communication is not privileged, the Tax Office is entitled to use its powers.
23. When claims for LPP are made in the course of an information gathering exercise, Tax Office staff are to follow the procedures set out in the Access Manual. All such cases should be referred to the attention of a local access specialist or Legal Services Branch.

Professional accounting advisor's papers

24. While recognising that the Commissioner has the statutory power to access most documents, it is acknowledged there is a class of documents which should, in all but exceptional circumstances, remain confidential to taxpayers and their professional accounting advisors.
25. The Commissioner has granted administrative concessions regarding some of these communications. These concessions are outlined in Chapter 7 of the Access Manual and must be adhered to by Tax Office staff provided:
 - the taxpayers and their advisor use the guidelines in the spirit in which they were formulated, and
 - the documents were prepared by advisors who are independent of the taxpayer.

The restrictions contained in these guidelines do not apply if a taxpayer decides to make available to the Tax Office any documents covered by the guidelines. They also do not apply to documents that relate to non-tax purposes.

Government departments

26. Special problems may also arise in the use of access or information gathering powers to gain access to, or obtain information from, government departments, agencies or authorities. These include:
 - possible differences between the department's legislation and the legislation administered by the Commissioner
 - the view that the Commissioner's powers may not bind the Crown
 - the department may rely on the doctrine of public interest immunity to withhold information, and
 - other reasons such as agreements, written or oral, not to disclose information to third parties.
27. Government departments may also be constrained from disclosing information due to the legislation they operate under or administer. (Further information can be found in Chapter 1 of the Access Manual.)

Compliance costs

28. Expenses 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. The relevant regulations (for example, Income Tax Regulations 1936 regulation 174) set out the scale of expenses.

C. TRACING ACTION

29. 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:
- (i) are tailored to the behaviour of the taxpayer
 - (ii) are sensitive to the balance between the costs incurred and the potential benefits for the Tax Office
 - (iii) give a weighting to the urgency of the case
 - (iv) are allocated to an officer with the relevant skills and experience, and
 - (v) ensure that up-to-date addresses are recorded on the client register, case management systems, any other relevant corporate systems and relevant paper files.
30. Action to locate taxpayers should generally involve the following process:
- (i) Research:
An examination of the information held by the Tax Office, including return form information, addresses on file and any other corporate information.
 - (ii) Phone:
Contact by telephone of all potential information sources. This tool is generally preferred over other methods of contact due to its timeliness, cost effectiveness and informality.
 - (iii) 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 (for example, Electronic White Pages) and other information sources including the electoral rolls.
 - (iv) Requesting information from external sources:
Tax legislation authorises the Commissioner to make relevant enquiries of taxpayers and others in the administration of tax laws. Provided the level of disclosure is kept to a minimum, requesting information to establish the whereabouts of a taxpayer is appropriate in the performance of an officer's legitimate duties.
31. When a third party provides advice indicating that a taxpayer may have changed address, that advice is to be tested for accuracy before records are updated. (It is recognised that taxpayers can elect to have a different postal address for all or some of their dealings with the Tax Office.)
32. 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. Informal enquiries are the preferred approach
33. Officers should advise the taxpayer 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 policy behind the sections authorising the Commissioner to make formal enquiries has specific requirements that need to be satisfied). While taxpayers 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.

34. There are situations where a formal approach may be warranted, including where:

- the recipient does not respond to an informal letter
- it is not possible to obtain reliable information through informal enquiries
- an individual is reluctant to cooperate fully to questions put without compulsion, or
- a formal request is demanded.

The documentary requirements and procedures for issuing a formal notice are set out in the Access Manual.

35. Information may be requested from any sources, which may include, but is not limited to: neighbours; employers; business associates; friends; accountants; solicitors; trade organisations; industry associations; 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.

36. A formal notice may also be served on a relative of the taxpayer, 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.

37. Information received from a third party should be treated carefully unless that third party was reasonably in a position to know the facts for example, parents or an employer. 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.

38. 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.

39. Tracing action is permissible 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.

D. NON-COMPLIANCE WITH NOTICE PROVISIONS

40. Non-compliance with a section 353-10 or section 264 notice is a prosecutable offence under sections 8C, 8D, or 8E of the TAA. These cases should be discussed with the in house prosecution staff. For further detail please refer to the guidelines contained in the Corporate Management Practice Statement PS CM 2007/02 Fraud Control and the Prosecution Process.

Chapter 111 - Archived version

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