

## ATO RECEIVABLES POLICY

### PART H Miscellaneous

# Chapter 111

## INTRODUCTION TO INFORMATION GATHERING

*The policy in this chapter is to be followed by ATO 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 ATO.*

**Date of effect:** 4 February 2011

**Key legislation:** Section 353-10 of Schedule 1 to the *Tax Administration Act 1953* (TAA); sections 263 and 264 of the *Income Tax Assessment Act 1936* (ITAA 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* (the Access Manual) is the principal reference in relation to these matters and should be referred to if a more detailed discussion of underlying policy and procedure is required.

### INTRODUCTION

2. The various Acts administered by the Commissioner enable ATO staff to gather information by requiring persons to respond to a valid request for information. The access and information gathering powers can be divided into two categories:
- (i) Access: the power to gain access to premises and documents;
  - (ii) Information gathering notices: there are three distinct powers to require a person (defined to include a corporation) to:
    - give information
    - attend at a specified place and give evidence (under oath or by affirmation if warranted)
    - 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 taxation law, or to make estimates or default assessments.
4. It should be noted that the access powers available under section 263 of the ITAA 1936 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) 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. The *Privacy Act 1988* and the secrecy provisions in the various taxation laws ensure that information obtained by the Commissioner is not disclosed to unauthorised persons.
7. The law gives the Commissioner wide-ranging access and information gathering powers, and certain ATO staff are authorised to use those powers in a fair and professional manner.

### **Guidelines to access and information gathering powers**

8. Decisions of the courts highlight the need for all ATO staff to be conscious of the wide ranging nature of the access and information gathering 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 Manual. Another source of information is the explanatory booklet *Taxpayers' charter - 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
  - 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.

#### **Access to documents held by third parties**

11. The Commissioner is bound by the Privacy Act 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 ATO 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 ATO.

## **B INFORMATION GATHERING POWERS**

13. Subsection 353-10(1) of Schedule 1 to the TAA is a very useful tool to enable authorised officers to: require documents (such as books of account) to be produced; require information to be given; or to interview persons (including 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
  - operating structures: for example; corporate structures, directorships or shareholdings; or trust, trustees and beneficiaries relationships
  - asset holdings and disposals
  - monies owed to the debtor
  - 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 taxpayer), must only focus on information relative to the taxpayer's tax debts and not for the purpose of obtaining unrelated information.
15. Section 353-10 of Schedule 1 to the TAA is the preferred information gathering power used in debt collection work.
16. Paragraphs 264(1)(a) and (b) of the ITAA 1936 provide different 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 power has rather limited use in debt work, but may have more extensive application in work such as annual return lodgment work.

### **Information sought from third parties**

17. The Commissioner is authorised to make relevant enquiries of taxpayers and third parties in the administration of taxation laws. The circumstances of the case will determine whether an informal or formal approach to information gathering is required. For example, the use of formal powers may be warranted where the third party is another Government Department and is also bound by the provisions of the Privacy Act). It may also be warranted where an informal approach has not been successful. This is discussed further in the section entitled 'Tracing action'

### **Court proceedings**

18. Caution should be exercised in using section 353-10 of Schedule 1 to the TAA or section 264 of the ITAA 1936 for purposes other than tracing action once litigation has commenced (refer to Chapter 1 of the Access Manual for further detail).
19. As a general rule, once legal proceedings have commenced against a tax debtor, sections 353-10 or 264 notices should not be used to obtain information relevant to those proceedings as to do so may constitute a contempt of court (refer to paragraph 1.18 of the Access Manual for more information in relation to contempt of court).
20. Accordingly, any proposed use of information gathering powers between the time when a statement of claim is issued and judgment obtained, or between the time when a creditor's petition is issued and a sequestration order is made, **must not**

proceed without prior advice being sought from Legal Services Branch and the endorsement of an Assistant Commissioner in that Branch.

21. In certain high risk cases, it may be appropriate to use these powers even where litigation is underway. For example, where summary judgment proceedings are in progress and information is required to trace the flow of funds to third party assets for the purpose of an application for a mareva injunction. In that situation the mareva injunction proceedings in which it is intended to use the information being sought has not yet commenced. Additionally, such information would not be used to obtain judgment in the proceedings, but rather to identify property against which a judgment in favour of the Commissioner may subsequently be satisfied.
22. Further, if another Commonwealth agency (for example, Australian Securities and Investments Commission) is involved in litigation (civil or criminal) with the person to whom it is proposed to issue an information gathering notice, ATO staff must seek advice from Legal Services Branch **prior** to issuing the notice.
23. Notwithstanding the above, these powers must not be used to gather information for prosecution purposes.

### **Legal professional privilege (LPP)**

24. Certain communications between lawyer and client are privileged and neither the client nor the lawyer can be compelled to disclose details of the communications. LPP is much more limited than the general notion of confidentiality.
25. 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.
26. Thus, if a communication is subject to LPP, the Commissioner is not entitled to access such communications through the use of his statutory powers such as section 353-10 of Schedule 1 to the TAA. Conversely, if a communication is not privileged, the Commissioner is entitled to use such powers.
27. When claims for LPP are made in the course of an information gathering exercise, ATO staff are to follow the procedures set out in Chapter 6 of the Access Manual.

### **Professional accounting advisor's papers**

28. 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.
29. 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 ATO staff.
30. The restrictions contained in these guidelines do not apply if a taxpayer decides to make available to the ATO any documents covered by the guidelines.

## **Government departments**

31. 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
  - other reasons such as agreements, written or oral, not to disclose information to third parties.
32. Government departments may also be constrained from disclosing information due to secrecy provisions in the legislation they operate under or administer (further information can be found in Chapter 1 of the Access Manual).

## **Compliance costs**

33. Expenses may be payable when a person, other than the debtor or their representative, is required to attend and give evidence pursuant to section 353-10 of Schedule 1 to the TAA, or similar powers. The relevant regulations (for example, Taxation Administration Regulations 1976 regulation 11) set out the scale of expenses.

## **C TRACING ACTION**

34. 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 ATO
  - 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, case management systems, any other relevant corporate systems and relevant paper files.
35. Action to locate taxpayers should generally involve the following process:
- *Research:*  
An examination of the information held by the ATO, including return form information, addresses on file and any other corporate information.
  - *Telephone:*  
Contact by telephone of all potential information sources. Whilst this method may have advantages over other methods of contact due to its timeliness, cost effectiveness and informality, care needs to be exercised to ensure that

there is no breach of the Privacy Act, particularly when information is being sought from third parties.

- *Use of generally available data sources:*

In addition to obtaining information held on corporate systems, ATO staff should make use of case files, appropriate software systems (for example, Electronic White Pages) and other information sources including the electoral rolls.

- *Requesting information from external sources:*

The Commissioner is authorised to make relevant enquiries of taxpayers and others in the administration of taxation 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 duties. However, given that the Privacy Act may also apply to certain external third parties, it is recommended that such enquiries are conducted through the usage of a formal notice.

36. 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 ATO.)
37. When making enquiries, consideration should be given to whether it is necessary to exercise the formal information gathering powers or whether it is possible and practical to gather the information using a less formal approach. Many taxpayers are willing to respond to requests for information without receiving formal notice. Informal enquiries are the preferred approach
38. ATO staff making informal enquiries should advise the taxpayer of their name and that they work for the ATO 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 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.
39. There are situations where a formal approach may be warranted, including where:
  - the recipient is a third party and there may be privacy considerations
  - there is no response 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
  - a formal request is demanded.

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

40. 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; telecommunication service providers; Australia Post; the Australian Securities and Investments Commission; Comsuper; Department of Immigration and Citizenship; Registrar of Births, Deaths and Marriages; local councils; Land Titles Office; State and Federal Police, and Corrective Services.

41. 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.
42. 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.
43. Some enquiries can only be made if the ATO is prepared to pay for the searches. In these circumstances, ATO staff 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.
44. As previously discussed tracing action may be permissible when court proceedings have commenced. Another example of such a situation would be seeking information upon which to obtain an order for substituted service.

## **D NON-COMPLIANCE WITH NOTICE PROVISIONS**

45. Non-compliance with a section 353-10 or a section 264 notice is a prosecutable offence under sections 8C, 8D, or 8E of the TAA. Further detail is contained in the Corporate Management Practice Statement PS CM 2007/02 Fraud Control and the Prosecution Process.

### **Chapter 111 - Archived versions**

Version 4 – July 2006 (will link to chapter 111 pdf)
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Version 5 – August 2008 (will link to chapter 111 pdf)
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