

# Access, exchange of information and privilege



**INCREASED COMPLIANCE INVESTIGATIONS ARE RAISING CONCERNS WITH THE ATO'S APPROACH TO SME CLIENTS.**

“Quarter past four  
A knock at the door  
I wonder who could be there”<sup>1</sup>

## INTRODUCTION

The Australian Taxation Office (ATO) has released the *ATO Compliance Program 2010-11*,<sup>2</sup> which identifies extensive data matching programs, automated review programs, industry benchmarking programs, increased focus on wealthy Australians, executives and directors, tax agents and professional firms and the continuing focus on highly wealthy individuals (HWI), small to medium enterprises (SME) and international profit shifting activities.

The increasing incident of compliance investigations means advisers and taxpayers are facing the complexity of taxation administration procedures with greater regularity.

While most compliance investigations are conducted informally and in a spirit of cooperation, the ATO has extensive coercive powers of access and information exchange. The procedures and limitations on the ATO's access and information exchange powers are complex. The extent to which the ATO must comply with the ATO's *Access and Information Gathering Manual (Access Manual)* and *Guidelines to Access Professional Accounting Advisors' Papers (Accountant's Guidelines)* has been the subject of recent court cases.

This article discusses the ATO's powers of access to taxpayer's information prior to the assessment, objection and appeal stages. This article also discusses how

advisers and taxpayers can best maintain legal professional privilege (LPP), client legal privilege (CLP) and client accounting privilege (CAP) which may protect the confidentiality of taxation advice. The Inspector General of Taxation (IGOT) will review HWI and SME audit activities, including the ATO's use of access and information exchange powers, LPP, CLP and CAP.<sup>3</sup>

Legislative references are to the *Income Tax Assessment Act 1936 (ITAA36)*, the *Taxation Administration Act 1953 (TAA53)*, the *Administrative Decisions (Judicial Review) Act 1977 (ADJR77)*, the *Judiciary Act 1903 (JA03)* and the *Evidence Act 1995 (EA95)*.

## ACCESS, EXCHANGE OF INFORMATION AND EVIDENCE

### Introduction

The ATO has very broad powers to investigate compliance with tax legislation. Most compliance investigations occur in a spirit of cooperation. The role of the adviser is generally to manage the exchange of information. However, the adviser is also obliged to maintain LPP, CLP and CAP and ensure that the ATO is exercising the ATO's investigation powers appropriately.

Advisers and custodians of documents may want to conduct the compliance investigation formally as it protects them from allegations of breach of confidentiality by the taxpayer. The ATO may exercise the ATO's powers formally to ensure compliance or where there is a history of non-compliance with informal procedures.

The ATO may exercise coercive powers to access information and documents for income tax purposes, such as by:

- entering premises (s 263 ITAA36);
- demanding provision of information in writing or by interview (s 264(1)(a) ITAA36);
- demanding provision of documents (s 264(1)(b) ITAA36); and
- issuing an offshore information exchange demand for documents which affects the admissibility of documents not produced in response to the notice (s 264A ITAA36).

The ATO has similar (but differently worded) investigation powers under other legislation. Some of the more common provisions are:

- section 353-10 TAA53 for indirect taxes such as GST and PAYG withholding and debt recovery;
- section 127 of the *Fringe Benefits Tax Assessment Act 1986* for fringe benefits investigations;
- section 76 of the *Superannuation Guarantee (Administration) Act 1992* for superannuation guarantee charge investigations;
- sections 256 and 268 of the *Superannuation Industry (Supervision) Act 1993* for superannuation fund investigations; and
- section 13F of the TAA53 for trans-boarder investigation.

This article discusses the powers under the income tax acts. Care is required in applying the principles from the income tax provisions to similar provisions in other legislation.

🔗 *Examples: Access and information exchange provision differences*

1. The access power in s 256 SISA93 requires the occupier's consent.
2. The access power in s 353-15 TAA53 permits the ATO to access goods and other property and take samples.
3. Section 162 ITAA36 can only be used on the taxpayer and not third parties.

The *Access Manual* states the recommended access and information gathering procedures for ATO officers to follow.

### Section 263 Access Powers

Section 263 ITAA36 grants authorised ATO officers full and free access to enter and search premises, and to review and copy documents for the purposes of the tax acts. The power is very broad, but does have some limitations.

The ATO can undertake a **fishing expedition** and the access does not have to be in respect of a named taxpayer

or class of taxpayers.<sup>4</sup> Once the ATO has exercised formal access, it can be difficult to effectively control and limit the informal extension of the access (investigation creep).

An ATO officer is not permitted to enter premises unless authorised. Authorisation is usually recorded in a specific authority from the Commissioner or in the ATO officer's wallet authority. An ATO officer is not permitted to remain on the premises if upon request the ATO officer fails to show the occupier a written authority. Failure to produce a s 263 written or wallet authority upon demand may make subsequent access activities invalid and unlawful.<sup>5</sup>

The ATO can copy documents but cannot seize or confiscate documents. Accordingly, the ATO will often attend access with their own scanning equipment so that documents can be copied.

The term "document" includes hard copy and electronically stored records.<sup>6</sup> Effectively managing access to electronically stored documents is very difficult.

The ATO will usually attend access with computer audit specialists to access computer systems to extract and copy data. The ATO will usually seek access to the main computer storage systems, desk top and lap top storage systems, personal digital assistants and other storage systems. The ATO is entitled to password and log in information and assistance in navigating software.

Although it is easy for the ATO to bulk copy electronic files, the ATO must make some assessment of the relevance of documents to be copied and cannot bulk copy all documents (eg email folders<sup>7</sup> or document folders<sup>8</sup>). The ATO will usually do key word searches to identify relevant documents.

The ATO will generally provide a copy of all hard copy documents and an electronic copy of all scanned and extracted documents upon request so that a post access analysis can be undertaken of the documents taken to identify any tax matters for further consideration.

✓ *Tip: Access procedures*

The adviser should:

1. have a premises access protocol which clearly identifies the procedures and person responsible for managing any access;
2. prepare a premises access protocol for appropriate clients which identifies the client's rights in an access;
3. train their staff in the procedures to be adopted for any access;
4. explain to staff before the access their rights not to answer questions and advise staff to clearly identify personal documents and information on their computer and work area so their privacy is not infringed;
5. obtain the name of the ATO access specialist for the access and discuss the scope and procedures for the access (such as copying or scanning documents, claims for LPP, CLP or CAP and obtaining copies of copied or scanned documents);
6. at the commencement of access, ask to see the wallet or other authority of each ATO officer and record their details;
7. appoint a staff member to file note all discussions with the ATO;
8. allocate a staff member to escort the ATO officers as they move around the office;
9. conduct a tour of the office to explain systems, location of documents and identify relevant documents;
10. locate documents and secure them in a lockable meeting room so the ATO officers do not need to roam the office;
11. advise the client immediately of any access and recommend to the client to obtain legal advice;
12. request deferral of inspection until legal advice is sought and LPP, CLP and CAP claims can be made;
13. request deferral of inspection until legal advice is sought on possible judicial review entitlements;
14. request an access explanation letter from the ATO to provide to the client to protect the adviser from breach of confidentiality or privacy;
15. request file copies of all documents copied so subsequent analysis of areas of interest can be undertaken;
16. dedicate desks, chairs, a photocopier, consumables, telephones and computer terminals in an isolated area for the ATO's use;
17. restrict/avoid answers to questions not directly concerning the location and access to documents;
18. clearly record and receipt any documents, goods or things agreed to be seized and removed from the premises; and
19. record any procedural irregularities or complaints about the access and report these to the ATO access specialist.

Whether LPP, CLP or CAP attach to a document has been the subject of many court cases. The courts have stated that the ATO can have access to:

- banks records;<sup>9</sup>
- family court proceedings discovery;<sup>10</sup>
- lawyer's trust account records;<sup>11</sup>
- lawyer's bills of costs;<sup>12</sup>
- lawyer's fax transmission book;<sup>13</sup>
- lawyer's advice never sent or relied upon;<sup>14</sup>
- lawyer's client lists;<sup>15</sup> and
- accountant's client lists.<sup>16</sup>

These classes of documents may contain tax advice information, but by their nature, LPP, CLP or CAP does not apply. Care should be taken in administrative documents such as file titles, descriptions in bills, descriptions in letter or fax transmission books and document references so that the nature of the advice is not inadvertently disclosed.

Further matters that should be noted include that:

- reasonable force can be used by the ATO to gain access to premises and documents (eg destruction of locks<sup>17</sup> or windows and doors to gain access to a building<sup>18</sup>);
- access must occur at reasonable times (which is particularly relevant for access to private premises);
- the ATO is entitled to a cursory view of LPP, CLP and CAP documents to determine privilege;<sup>19</sup>
- a capriciously executed search may invalidate a notice where the right to claim LPP or CLP is abrogated;<sup>20</sup>
- access after commencement of an appeal to the Administrative Appeals Tribunal (**AAT**) or Federal Court of Australia (**FCA**) may constitute an abuse of process/contempt of court permitting a stay of the access.

Failure to provide the necessary level of assistance may increase penalties<sup>21</sup> or may be a criminal offence such as for the occupier to:

- fail to provide the ATO reasonable facilities and assistance to exercise the access;<sup>22</sup>

- fail to produce books or attend on the ATO;<sup>23</sup> or
- hinder or obstruct the access.<sup>24</sup>

### Section 264 Information, document and evidence powers

Section 264 ITAA36 permits the ATO to require a person in respect of that person or any other person's taxation affairs to:

- provide such information in writing as required;
- produce all documents as required in the person's custody or control; or
- attend and give evidence, including on oath.

A clear distinction exists between a request for information, for provision of documents and for giving evidence.

An adviser's role is to review the notice to identify any procedural or validity issues and to negotiate with the ATO to serve revised notices. It is not usually appropriate to refuse to comply with a notice because of procedural or validity issues since non-compliance may increase penalties or constitute a criminal offence. For example, it is an offence for the client to:

- make false or misleading statements;<sup>25</sup>
- refuse to answer questions or provide documents;<sup>26</sup> or
- hinder or obstruct the access.<sup>27</sup>

A s 264 notice may be invalid where:

- the issuing ATO officer is not authorised;
- issued to the wrong authorised person for a company;

- it is a composite notice under different acts and the requirements for service are inconsistent;<sup>28</sup> or
- it fails to specify the correct statutory access power.

The notice must refer to the correct statutory power. A notice that simply requires production of documents cannot require the creation of a document. The ATO will generally issue multiple or composite notices to cover these circumstances.

A s 264 notice to provide information is not limited to a particular taxpayer so may be used to obtain lists of clients or transactions. The ATO may request not only facts but opinions.<sup>29</sup> The ATO cannot require a specific format of answer.<sup>30</sup>

A notice to produce documents must identify a taxpayer by name or description and the class of documents to be produced. Broad phrasing of required documents is permitted.<sup>31</sup> The documents must be in the possession and control of the recipient of the notice.

In addition to the above, a s 264 notice to produce documents may be invalid where:

- it is not limited to specified taxpayers;<sup>32</sup>
- it demands oppressively excessive production of documents;<sup>33</sup>
- it contains an oppressively or excessively vague or ambiguous description of documents;<sup>34</sup> or
- the compliance time is not reasonable.<sup>35</sup>

In determining whether a s 264 notice compliance period is reasonable, court cases regarding s 162 lodgment notices and the time periods under s 8C TAA53 for failure to comply offences may be relevant.

### Example: Reasonable production period

1. 28 days is the usual period specified to produce documents and is generally reasonable.<sup>36</sup>
2. 21 days to produce 10 year old documents was unreasonable.<sup>37</sup>
3. 5 days to produce documents was not unreasonable.<sup>38</sup>
4. Consider the surrounding circumstances to determine reasonableness including:
  - access to and availability of the information;<sup>39</sup>
  - business holiday periods such as the Christmas period;<sup>40</sup>
  - health issues and inability to action matter;<sup>41</sup>
  - periods overseas and inability to action matter; and
  - extent of any previous extensions of time.<sup>42</sup>

If unable to comply within time: substantially comply with the notice to raise an argument of reasonable action; and ensure extension of time is negotiated or make a judicial review application in FCA (not AAT).

A notice to give sworn evidence must specify that an oath will be given at the interview. The ATO and the interviewee are entitled to legal representation.<sup>43</sup> The ATO is entitled to use a barrister for the interview and the barrister can ask the questions.<sup>44</sup> A s 264 interview may be stayed to avoid self incrimination until criminal proceedings are determined.<sup>45</sup>

In addition to the above, a s 264 notice to give evidence may be invalid where it fails to specify the commencement time and sole place for attendance to give evidence.

The issue of a s 264 information or interview request after commencement

of an appeal to the AAT or FCA may constitute an abuse of process/contempt of court permitting a stay on the notice.<sup>46</sup>

The s 264 notice is irregular but not invalid where the notice:

- requests LPP and CLP documents or does not expressly exclude LPP and CLP documents;<sup>47</sup>
- requests documents not in the custody or control of the person;<sup>48</sup>
- requests person to copy documents;<sup>49</sup> or
- issues in contempt of court.

### Search warrants

Search warrants may be executed by the Australian Federal Police (**AFP**) with ATO officers in attendance.<sup>51</sup> Search warrants are used where the AFP and the ATO suspect criminal activities. Accordingly, advisers should obtain specialist criminal legal advice if served with a search warrant.

The AFP have published *Search Warrant Guidelines* and *Search Warrant Procedures*. The search warrant should be reviewed to determine if the AFP have complied with the guidelines and procedures.

### ✓ Tip: ATO Interview

1. Ensure no objection will be raised by the ATO in respect of the particular legal or accountant adviser being present before the interview.
2. Prepare the taxpayer for the formalities of an interview by explaining the warnings given as to voluntary disclosure, claim for LPP, CLP and CAP, abrogation of self incrimination and spousal privilege and offences for false statements, introduction of the persons present for transcript purposes and to the attending adviser not to interfere with the interview.
3. Prepare client for the formality of questions and emphasise the best practice to only answer the question, not to offer additional information that may confuse the ATO, request clarification of ambiguous questions, maintain composure, don't speculate, and distinguish between statements made with knowledge, information or belief.
4. Explain tape recording and transcription process and obtain the client's instructions for the ATO to provide transcripts to the representative rather than the client.
5. Explain the presence of the ATO case officer, the ATO technical officer and the ATO rights compliance officer (when a female is being interviewed).
6. Confirm the client's preference for oath or affirmation of evidence.
7. Provide any voluntary disclosure statement before proceedings commence.
8. Provide any statement of facts or evidence in respect of which the client wishes to take an active position before proceedings commence.
9. Ensure the client answers all questions and not the adviser.
10. Actively maintain LPP, CLP and CAP.
11. Explain to the client that the ATO will give an opportunity at the end of the interview for the client to provide any complaints.

### ★ Important: Validity of Notice

1. Check the notice carefully against the requirements in the *Access Manual* particularly to:
  - ensure the full name of the issuing officer is stated;
  - ensure the issuing officer is a Second Commissioner or a Deputy Commissioner or obtain evidence from the ATO that the person was authorised;
  - ensure the notice clearly states the relevant section under which the notice is issued;
  - ensure the service address is in accordance with statutory service rules;
  - ensure the name of the recipient is correct;
  - ensure the ATO signature is correct and execution complete;
  - ensure the date of signing the notice is stated; and
  - ensure each page is consecutively numbered.
2. Determine if the scope of request or time period for compliance is unreasonably excessive.
3. Any invalidity of a notice should be raised as early as possible to ensure invalidity is rectified and the client is not placed in a position of potential breach.
4. If the ATO refuses to withdraw/replace the notice then consider administrative review.
5. Respond to the valid part of the notice (even if it is not possible to sever the invalid part of the notice).<sup>50</sup>
6. Responses should be appropriately qualified where assumptions have been made or response is based on information or belief.

The search warrant may be invalid where the warrant does not specify the:

- alleged offences;<sup>52</sup> or
- classes of items to be searched and seized.<sup>53</sup>

Under a search warrant otherwise privileged documents may lose LPP or CLP if they relate to advice to facilitate a fraud and the search warrant expressly states that the fraud exception applies to the search.<sup>54</sup>

## PRIVILEGE

### Introduction

The law provides a number of privileges which can be used as a reason to refuse to comply with coercive powers of government agencies. The tax legislation has abrogated some of these.

Legal privilege has its source in Common Law and the uniform evidence acts, including the EA95. Common Law legal privilege is distinct from legal privilege under the EA95.<sup>55</sup> Common Law legal privilege is usually referred to as legal professional privilege (**LPP**) and legal privilege under the EA95 is usually referred to as client legal privilege (**CLP**).

LPP and CLP<sup>56</sup> and public interest immunity<sup>57</sup> apply to the ATO's access and information exchange powers. However, the privilege against self-incrimination<sup>58</sup> and spousal privilege<sup>59</sup> are abrogated by the ATO's access and information exchange powers, so cannot be used as a reason to refuse to comply with a valid notice.

In the *Accountant's Guidelines*, the ATO has provided an administrative concession or privilege for accountant's taxation advice and some other documents which can be overridden by the ATO where exceptional circumstances exist. The extent of the protection provided by this administrative privilege is unclear in practice.

For completeness, privilege attaches to documents; and objects (such as cash or bullion) cannot be privileged.<sup>60</sup> Copy documents of non-privileged documents may be subject to LPP or CLP if created for a relevant privileged purpose.<sup>61</sup>

### Legal privilege

LPP and CLP are divided into advice privilege and litigation privilege, the scope of each is different.<sup>62</sup>

The scope of LPP and CLP in taxation matters is currently being tested by cases and is the subject of a review by the IGOT into the ATO's handling of HWI and SME audits and litigation.<sup>63</sup>

“

... the adviser is also obliged to ... ensure that the ATO is exercising the ATO's investigation powers appropriately.

”

The scope of advice privilege for taxation advice requires clarification.

To be covered by LPP, a communication must be, or a document must be brought into existence, for the dominant purpose of giving or obtaining legal advice.<sup>64</sup> The dominant, ruling, prevailing, paramount or most influential purpose<sup>65</sup> is a question of fact determined at the time the document was brought into existence.<sup>66</sup> It is possible for only part of a document to be covered by LPP.<sup>67</sup> It is unclear whether the lawyer's factual observations and investigations of factual matters concerned in structuring are covered by LPP.<sup>68</sup>

The extent to which documents prepared by a third party are for the dominant purpose of providing legal advice was discussed in *FCT v Pratt Holdings P/L*.<sup>69</sup>

*Pratt Holdings P/L* established that LPP may extend to cover third party documents (for example accountant's documents) where those documents are prepared for the dominant purpose of enabling a client to obtain legal advice from their lawyers and that the request for preparation of the third party advice may be made by the lawyer or the client.<sup>70</sup>

The court gave the following examples of circumstances where advice privilege will not apply to third party documents:<sup>71</sup>

- where advice prepared by a third party is about the commercially advantageous ways to structure a transaction<sup>72</sup> (note

that in contrast commercial advice prepared by an external lawyer for the purpose of structuring a transaction is captured by advice privilege);<sup>73</sup>

- where communications which are not otherwise connected with legal advice are lodged with a legal adviser for the purpose of claiming advice privilege;<sup>74</sup> and

- where the client of the lawyer exercises discretion over which of the third party documents should be communicated to the lawyer.<sup>75</sup>

Generally, CLP granted by the EA95 is much narrower than LPP. For example communications between two witnesses (neither a lawyer) to prepare witness statements was not privileged under s 118 EA95 (advice privilege) nor s 119 EA95 (litigation privilege) as neither party asserted that they considered the communication to be privileged.<sup>76</sup>

The interaction between LPP and CLP is unclear. For example, to what extent does the EA95 limit or abrogate LPP. As the EA95 applies to court proceedings and not to tribunal proceedings,<sup>77</sup> it is unclear whether, or to what extent, the forum of the ultimate appeal in a tax matter will affect the scope of LPP and CLP.

Accordingly, if CLP abrogates LPP, the legal privilege protection would be very limited and more closely accord to CAP.

*Esso Australia Resources Ltd v FCT*<sup>78</sup> rejected the ATO's arguments that the EA95 limited the scope of LPP. LPP advice privilege operates unaffected by the EA95.<sup>79</sup> However, Kirby, J did state that over time, the influence of the EA95 may have an effect on the development of LPP.<sup>80</sup>

Currently, LPP applies separately to CLP so there is a clear distinction between legal

privilege and CAP, which can be overridden by the ATO where exceptional circumstances exist.

There is also conflicting law on whether communications by in-house lawyers are privileged or whether legal privilege is abrogated by the employment relationship. The better view is that legal privilege applies.<sup>81</sup> Care must be taken in relying on advice of in-house lawyers, as there are recent authorities indicating that whilst legal advice of an in-house lawyer is privileged, commercial advice and comment is not.<sup>82</sup>

In *ACCC v Cadbury Schweppes Ltd* the Full Federal Court stated:<sup>83</sup>

The scope of the confidentiality arising from litigation privilege is different from advice privilege. We say this because when dealing with third parties, such as potential witnesses, unless there is a separate confidentiality agreement with such third parties, then, subject to the principle in *Harman* [implied undertaking in relation to court proceedings] (as explained in *Hearne v Street* (2008) 235 CLR 125; 248 ALR 609; [2008] HCA 36 at [109] (*Hearne*) per Hayne, Heydon and Crennan JJ), such potential witnesses would be free to discuss with others their potential evidence. Of course, the position would be different if there was a confidentiality agreement with such a potential witness, because in that case the client might seek to enforce the obligation of confidentiality arising out of such an agreement.

When consulting third parties for advice or when preparing for tax litigation, the lawyers should prepare and distribute a LPP/CLP protocol that establishes the procedures and consultancy or litigation group amongst which privilege must be maintained. The procedures should include the mandatory identification of privileged communications and an acknowledgment by the members to maintain confidentiality of the communications. This should be sufficient to preserve legal privilege without a written confidentiality agreement in respect of advice CLP.

Legal privilege may be lost where the documents were created for an improper purpose, such as evidenced by the application of Part IVA ITAA36<sup>84</sup> or where the communications facilitate a crime of fraud.<sup>85</sup>

Legal privilege may also be expressly or impliedly waived by the client.<sup>86</sup> Where

documents have been circulated amongst multiple parties, joint privilege can apply but waiver is more likely.<sup>87</sup>

Communication of legal advice to a third party, and reproduction of parts of that advice by a third party, for the purpose of obtaining advice about budgeting, or to obtain litigation funding will not ordinarily be a waiver of privilege provided the communications are made on a confidential basis.<sup>88</sup>

Implied waiver of legal privilege must be considered carefully and may occur by:

- delivery and reading of the document by the ATO;
- disclosure of the contents of a document whilst giving evidence;
- provision of the disclosure in statement of facts, issues and contentions; or<sup>89</sup>
- filing and or serving final proofs of evidence in litigation on the court or the opposing party.<sup>90</sup>

Waiver may also extend to documents and information which were taken into account in formulating legal advice that a client has chosen to disclose, if that disclosure is a waiver of CLP in the legal advice.<sup>91</sup>

#### Accountant's privilege

The *Accountant's Guidelines* provide an administrative concession or privilege under the ATO power of general administration in s 8 ITAA36.<sup>92</sup> Therefore, the ATO is the only party affected by the concession.<sup>93</sup> The accountant's privilege does not have a legislative or common law basis. The Australian Law Reform Commission recommend a form of statutory accountant's privilege be adopted,<sup>94</sup> however, this recommendation has not been adopted.

Accountant documents are divided into:

#### ■ source documents

All documents prepared in connection with the conception, implementation and formal recording of a transaction, traditional accounting records and the permanent file for statutory audits.

Client lists are source documents.<sup>95</sup>

Accountant's corporate diagrams may be source documents.<sup>96</sup>

#### ■ restricted source documents

All advices prepared by external professional accountants for the sole purpose of advising a client on taxation and prepared in connection with the conception and implementation of a transaction (front end advice at the time of conception or implementation).

#### ■ non-source documents

All advices (other than restricted source documents) created post transaction including documents in the current audit file, prudential tax advice and due diligence advices.

The concession applies to restricted source documents and non-source documents, but not source documents.

The concession is not absolute. The ATO maintains that access to restricted source documents and non-source documents may be sought in exceptional circumstances. The ATO considers "exceptional circumstances" include where:

- source documents do not provide sufficient factual information or information as to purpose and the taxpayer or their professional accounting advisers have not adequately responded to information requests;
- there are reasonable grounds to believe that fraud or evasion or criminal or other illegal activities have occurred;
- the taxpayer and the taxpayer's records cannot be located;
- source documents have not been provided, have been destroyed or cannot be located or have not been provided under an offshore information request;<sup>97</sup> or
- Part IVA ITAA36 applies (it is unclear whether there needs to be reasonable grounds for the belief that Part IVA applies).<sup>98</sup>

The extent to which the *Accountant's Guidelines* limit the ATO's powers to obtain access to documents generally or because of exceptional circumstances is unclear.

The *Accountant's Guidelines* set out procedures for access to documents based on exceptional circumstances. How the procedures are to be applied is the subject of a current federal court matter.<sup>99</sup>

The decision to grant access to documents ordinarily covered by the accountant's privilege may be made by an ATO officer by issuing a notice:

- under the access or inspection power under a taxation law;<sup>100</sup> or
- to produce in the course of litigation between the taxpayer and the ATO.<sup>101</sup>

The basis for access determines the avenues of appeal available for the taxpayer to dispute the decision to allow access to the accountant's documents.

The *Accountant's Guidelines* are not an enactment for the purpose of s 3(1) ADJR77 so a decision based on them cannot be directly challenged.<sup>102</sup>

If access is sought under an access or inspection power under a taxation law it will be reviewable under s 39B JA03 and may also be reviewable under the ADJR77. It is unclear whether the decision is reviewable under the ADJR77. *On-Tel v FCT*<sup>103</sup> assumed that the ADJR77 applied. *White Industries P/L v FCT*<sup>104</sup> considered it was possible that ADJR77 applied because the ATO's delegates are required to have regard to the *Accountant's Guidelines* in deciding to issue a notice for inspection under the ITAA36.<sup>105</sup>

If access is sought under a notice to produce, the decision will only be reviewable under s 39B JA03.<sup>106</sup> Review under the ADJR77 is not available because the decision to produce is made by the court under the court's rules and not by the ATO. The ATO's decision to apply for a notice to produce is not the relevant decision to be reviewable under ADJR77.<sup>107</sup>

If the decision to lift the concession is subject to review under ADJR77, it has been recognised that the *Accountant's*

*Guidelines* do give rise to a legitimate expectation that the ATO will comply with them.<sup>108</sup> The existence of the legitimate expectation means that if the ATO does intend to depart from the *Accountant's Guidelines* based on exceptional circumstances the taxpayer affected should be given an opportunity of arguing that no exceptional circumstances exist.<sup>109</sup> A letter to a taxpayer notifying them of the intent to access documents covered by the accountant's concession and giving the taxpayer an opportunity to respond will be sufficient to satisfy the requirements of procedural fairness even if it does not provide full particulars of why access is sought,<sup>110</sup> it is only an un-notified departure that is likely to be a breach of procedural fairness.<sup>111</sup>

## CONCLUSION

The increasing incident of compliance investigations means advisers and taxpayers are facing the complexity of taxation administration procedures with greater regularity.

Experience suggests that SME and HWI clients are becoming increasingly dissatisfied by the ATO's approach to compliance investigations and the exercise of the ATO coercive powers of access and information exchange.

The IGOT review will hopefully clarify a number of uncertainties regarding the scope of the ATO's powers and moderate the ATO's use of those powers.

*Ron Jorgensen FTIA  
Principal, Harwood Andrews Lawyers  
Accredited Specialist in Tax Law*

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## Reference notes

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- 2 *ATO Compliance Program 2010-11 NAT 7769-07.2010.*
- 3 *Inspector General of Taxation, Review into the ATO's small and medium enterprise audit and risk review policies, procedures and practices terms of reference, April 2010.*
- 4 *Smorgon v FCT (1979) 9 ATR 483 (HCA).*
- 5 *FCT v Citibank Ltd (1989) 20 ATR 292 (FCFCA).*
- 6 *TD 2005/16; TR 2005/9.*
- 7 *JMA Accounting P/L v FCT (2004) 57 ATR 365 (FCFCA).*
- 8 *Prescience Communications Ltd v FCT (2006) 64 ATR 664 (FCA).*
- 9 *Simonato Holdings P/L v FCT (No 2) (1995) 32 ATR 298 (FCA).*
- 10 *Atkinson v FCT (2000) 44 ATR 204 (FCA).*
- 11 *Allen Allen & Hamsley v FCT (1989) 20 ATR 321 (FCFCA).*
- 12 *Packer v FCT (1984) 15 ATR 1038 (FCQSC).*
- 13 *Sharp v FCT (1988) 19 ATR 904 (FCA).*
- 14 *May v FCT (1999) 42 ATR 270 (FCFCA).*
- 15 *FCT v Coombes (No 2) (1989) 40 ATR 403 (FCA).*
- 16 *Deloitte Touch Tohmatsu v FCT (1998) 40 ATR 435 (FCA).*
- 17 *Kerrison & Banish Management P/L v FCT (1986) 17 ATR 338.*
- 18 *O'Reilly v CSBV (1983) 14 ATR 64 (HCA).*
- 19 *JMA Accounting P/L v FCT (2004) 57 ATR 365 (FCFCA).*
- 20 *FCT v Citibank Ltd (1989) 20 ATR 292 (FCFCA).*
- 21 *Section 288-35 TAA53.*
- 22 *Section 263(3) ITAA36 (\$3,300 (30 penalty units)).*
- 23 *Section 8C TAA53 (\$3,300 (30 penalty units)).*
- 24 *Section 149.1 Criminal Code Act 1995 (penalty: two years imprisonment).*
- 25 *Section 136.1 Criminal Code Act 1995.*
- 26 *Section 8D TAA53.*
- 27 *Section 149.1 Criminal Code Act 1995 (penalty: two years imprisonment).*
- 28 *Section 28A of the Acts Interpretations Act 1901 takes priority.*
- 29 *Perron Investments P/L v FCT (1989) 20 ATR 1299 (FCA).*
- 30 *Access Manual at [2.4.37]*
- 31 *Perron Investments P/L v FCT (1989) 20 ATR 504 (FCA).*
- 32 *Clarke v FCT (1988) 20 ATR 701 (FCA).*
- 33 *Smorgon v FCT (1979) 9 ATR 483 (HCA).*
- 34 *Smorgon v FCT (1979) 9 ATR 483 (HCA).*
- 35 *Ganke v FCT (1975) 5 ATR 292 (FCFCA); Ganke v FCT (No. 2) (1982) 13 ATR 440 (FCA).*
- 36 *Holmes v FCT (No 2) (1988) 19 ATR 1173.*
- 37 *Elliott v FCT (1990) 21 ATR 283.*

### ✓ Tip: Privilege claim procedure

1. When documents are secured, the ATO will usually permit LPP, CLP and CAP claims to be made. The process varies.
2. The lawyers will review the file under the supervision of the ATO officer.
3. Any LPP and CLP document is identified and a pro forma LPP and CLP claim form is completed with a sequential number and document details such as date, type of document, author, author's role, recipient, recipient's role and legal basis of claim.
4. The pro forma LPP, CLP claim form is photocopied (4 copies), 1 copy is included in the file where the original is removed. 1 x copy is attached to an envelope in which the original is sealed. 1 x copy of LPP/CLP claim form is retained by the lawyers. 1 x copy is retained by the ATO.
5. The original sealed in the envelope is secured and delivered to the court for claim proceedings.
6. ATO officers then review the file and copy any documents.
7. Court processes for challenging LPP and CLP are undertaken.

- 38 *Clarke v FCT* (1989) 20 ATR 701.
- 39 *Waterhouse v FCT* (1986) 17 ATR 997 (FCA); (1988) 19 ATR 883.
- 40 *Perron Investments P/L v FCT* (1989) 20 ATR 504 (FCA).
- 41 *Case 10,532A* (1996) 33 ATR 1005.
- 42 *Perron Investments P/L v FCT* (1989) 20 ATR 504 (FCA).
- 43 *Dunkel v FCT* (1990) 21 ATR 1279 (FCA).
- 44 *Grant v FCT* (2000) 45 ATR 146 (FCA).
- 45 *Watson v FCT* (1999) 43 ATR 549 (FCA).
- 46 Section 43 of the *Administrative Appeals Tribunal Act 1975*; Order 52A Rule 13(2) of the *Federal Court Rules 1979*.
- 47 *Perron Investments P/L v FCT* (1989) 20 ATR 504 (FCA).
- 48 *Perron Investments P/L v FCT* (1989) 20 ATR 1299 (FCA).
- 49 *Hart v FCT* (2005) 61 ATR 519 (FCA).
- 50 *Richards v McDermott* (1986) FLR 48.
- 51 Section 3C *Crimes Act 1914*.
- 52 *Beneficial Finance Corporation Ltd v FCT* (1991) 22 ATR 636 (FCFCA).
- 53 *Beneficial Finance Corporation Ltd v FCT* (1991) 22 ATR 636 (FCFCA).
- 54 *AFP v Propend Finance P/L* (1997) 34 ATR 130; *Arno v Forsyth* (1986) 65 ALR 125.
- 55 *ACCC v Cadbury Schweppes Ltd* [2009] FCAFC 32 [31] (FCAFC); *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 (HCA); *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275, [49] (HCA).
- 56 *FCT v Citibank Ltd* (1989) 20 ATR 292 (FCFCA); see also *Daniels Corporation International P/L v ACCC* (2002) 213 CLR 543 relating to a similar power of the ACCC under s 155 TPA.
- 57 *Middendorp Electric Co P/L v LIV & FCT* (1993) 27 ATR 64 (VSC); *LIV v FCT* (No 2) [2009] VSC 179 (VSC).
- 58 *FCT v De Vonk* (1995) 31 ATR 481 (FCFCA).
- 59 *Stoddart v ACCC* [2009] FCA 1108 (FCA).
- 60 *Baker v Campbell* (1983) 14 ATR 713 (HCA).
- 61 *AFP v Propend Finance P/L* (1997) 34 ATR 130; *Re Perpetual Trustee Company (Canberra) Ltd v CSR (ACT)* (1994) 30 ATR 1087.
- 62 *Brookfield Multiplex Ltd v International Litigation Funding Partners P/L* (No 2) [2009] FCA 449 at [8] (FCA).
- 63 *Inspector General of Taxation, Review into the ATO's small and medium enterprise audit and risk review policies, procedures and practices terms of reference, April 2010*.
- 64 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 (HCA).
- 65 *Mitsubishi Electric Australia P/L v Victoria WorkCover Authority* (2002) 4 VR 332 at 336–337.
- 66 *AFP v Propend Finance P/L* (1997) 188 CLR 501 at 508; *Pratt Holdings P/L v FCT* (2004) 136 FCR 357 (FCAFC).
- 67 *GEC Marconi Systems P/L v BHP Information Technology* [2000] FCA 593 at [11]; *Grofam P/L v Australia and New Zealand Banking Group Ltd* (1993) 43 FCR 408 at 414–417.
- 68 *Z v New South Wales Crime Commission* [2007] HCA 7, Gleeson CJ in obiter at [35]; cf *AWB Ltd v Cole* (No 5) [2006] FCA 1234 at [47] and [56].
- 69 *FCT v Pratt Holdings P/L* (2005) 60 ATR 466; *Pratt Holdings P/L v FCT* (2004) 56 ATR 128 (FCFCA).
- 70 *Pratt Holdings P/L v FCT* (2004) 56 ATR 128 at [41] (FCFCA).
- 71 *Pratt Holdings P/L v FCT* (2004) 56 ATR 128 at [46], [47] and [106] (FCFCA).
- 72 *Pratt Holdings P/L v FCT* (2004) 56 ATR 128 (FCFCA) at [106].
- 73 *AWB Ltd v Cole* (No. 5) [2006] FCA 1234 at [47] and [56].
- 74 *Pratt Holdings P/L v FCT* (2004) 56 ATR 128 at [46] (FCFCA).
- 75 *Pratt Holdings P/L v FCT* (2004) 56 ATR 128 at [47] (FCFCA).
- 76 *Brown v Forestry Tasmania* (No 3) [2006] FCA 469 [14]–[18].
- 77 *EA95 (Cth) s 4; SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 [17].
- 78 *Esso Australia Resources Ltd v FCT* [1999] HCA 67.
- 79 *ACCC v Cadbury Schweppes Ltd* [2009] FCAFC 32.
- 80 *Esso Australia Resources Ltd v FCT* [1999] HCA 67 at [91].
- 81 *Waterford v Cth* (1987) 163 CLR 54; *Ritz Hotel Ltd v Charles of the Ritz Ltd* (No 4) (1987) 14 NSWLR 100.
- 82 *Banksia Mortgages Ltd v Croker and Ors* [2010] NSWSC 535.
- 83 *ACCC v Cadbury Schweppes Ltd* [2009] FCAFC 32 at [35].
- 84 *Clements, Dinne & Bell P/L v AFP* (2001) 188 ALR 515.
- 85 *AWB Ltd v Cole* (No. 5) [2006] FCA 1234 [210].
- 86 *Mann v Carnell* (1999) 201 CLR 1 at [29] Gleeson CJ, Gaudron, Gummow and Callinan JJ).
- 87 *Rio Tinto Ltd v FCT* (2006) 64 ATR 63.
- 88 *Tarong Energy Corporation Ltd v South Burnett Regional Council* (formerly *Nanango Shire Council* [2009] QCA 265.
- 89 *FCT v Rio Tinto Ltd* (2006) 63 ATR 79 (FCFCA).
- 90 *ACCC v Cadbury Schweppes Ltd* [2009] FCAFC 32 at [101]–[103].
- 91 *AWB Ltd v Cole* (No. 5) [2006] FCA 1234 at [198], [200]–[205].
- 92 *White Industries P/L v FCT* [2007] FCA 211 at [68].
- 93 *Stewart v FCT* [2010] FCA 402 at [6].
- 94 *ALRC, A Review of Legal Professional Privilege and Federal Investigatory Bodies*, 21 December 2007 at 421.
- 95 *Deloitte Touch Tohmatsu v FCT* (1998) 40 ATR 435 (FCA).
- 96 TD 93/222.
- 97 *One-TEL v FCT* (2000) 44 ATR 52; *PSLA 2004/14 access to board documents; Accountant's Guidelines, Part 6*
- 98 *Access Manual version 1/2010*, at [7.2.4].
- 99 *Stewart v FCT* [2010] FCA 402 at [20].
- 100 See *One-TEL v FCT* (2000) 44 ATR 52 where the documents were accessed under s 108 of the *Sales Tax Assessment Act* and *Stewart v FCT* [2010] FCA 402 where s 264 ITAA36 was the source of access to documents.
- 101 See eg *White Industries P/L v FCT* [2007] FCA 211.
- 102 *White Industries P/L v FCT* [2007] FCA 211 [29]; *Stewart v DCT* [2010] FCA 402 [29], [62]–[75].
- 103 *On-Tel v FCT* [2000] 44 ATR 52.
- 104 *White Industries P/L v FCT* [2007] FCA 211.
- 105 *White Industries v FCT* [2007] FCA 211 [29]; *Stewart v DCT* [2010] FCA 402 [90], [92]–[93].
- 106 *White Industries v FCT* [2007] FCA 211 [29]; *Stewart v DCT* [2010] FCA 402 [29], [62]–[75].
- 107 *White Industries v FCT* [2007] FCA 211 [29]; *Stewart v DCT* [2010] FCA 402 [28], [62]–[75].
- 108 *One-TEL v FCT* (2000) 44 ATR 52 [42].
- 109 *One-TEL v FCT* (2000) 44 ATR 52 [42].
- 110 *One-TEL v FCT* (2000) 44 ATR 52 [43].
- 111 *Stewart v DCT* [2010] FCA 402 [9].