

# Controlling the Tax Commissioner's Powers of Investigation

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*The Australian Tax Commissioner's powers of investigation should be fully enshrined in legislation and placed on a similar footing to the corresponding powers of police and customs authorities, according to Justin Dabner and Mark Burton, Lecturers in Law at the University of Tasmania, and Luke Neal, Lecturer in Law at Deakin University (Burwood Campus).*

To what extent should the Tax Commissioner's need for taxation-related information justify powers of search and access that impinge upon the individual's right to privacy?

Australian parliaments and judiciaries have tried to protect the privacy of the individual where this principle is not outweighed by other considerations. This has engendered such legal principles as trespass (to the person and property) and the right of an individual not to disclose information or past communications in certain circumstances. Policy decisions to promote social objectives that allegedly should take precedence over individual rights therefore attract considerable critical attention.

An efficient tax system must include mechanisms for detecting, punishing and deterring tax fraud. However, the Australian Commonwealth's income-tax legislation raises the issue of the amount of individual liberty and privacy we are prepared to sacrifice to these ends.

It should be acknowledged at the outset that the Commissioner's investigative powers as currently exercised are a response to the huge tax-avoidance industry of the 1970s and early 1980s and the realisation by the pay-as-you-earn taxpayer that he was unfairly shouldering the consequent extra tax burden. The continuing problem of tax evasion and avoidance and the self-assessment basis of determining tax liability require that the Tax Office be empowered to obtain all necessary information to determine a proper assessment.

This article examines the powers of investigation vested in the Commissioner of Taxation under sections 263 and 264 of the Income Tax Assessment Act 1936 (the 'Act'), with a view both to reaching some conclusions as to the policy considerations underlying the breadth of those powers and to making some recommendations for improvement. The related issue of placing the onus of proof on taxpayers in the event of disputes is also discussed. (The relevant provisions of the Act are displayed in Panel 1.) In the following sections it is proposed to highlight the preparedness of the judiciary to give full effect to the broad terms of the provisions and to enforce the Commissioner's powers of investigation in all but a limited range of circumstances.

## The Commissioner's Powers under Section 263

**Type of authorisation required.** The Commissioner, or his authorised officers, need have no warrant or written authority to invoke the protection of s.263 against claims of trespass. Only if requested to do so by an occupier must the taxation officer produce written authorisation. Such authorisation need not specify such details as the premises to be searched and the document or class of documents sought.

Taxation officers carry 'wallet authorisations' that preclude any close judicial or quasi-judicial supervision over their issue. This is quite different from the issue of search warrants to police authorities and other government authorities.

**Access authorised by section 263.** The High Court has held that the 'full and free access' granted under s.263 is not to be circumscribed by any limited interpretation. However, the High Court held in the same decision that, under s.263 as it then stood, an occupier was obliged to do no more than allow such full and free access. Amendments enacted in 1987 require an occupier to render positive assistance to the Commissioner or an authorised officer. Section 263 now vests remarkably broad powers in authorised taxation officers to compel both the particular taxpayer concerned and third parties to assist in Tax-Office searches.

**Limitations on the powers contained in section 263.** Given the broad terms of s.263, it is not surprising that the Courts have been loth to restrict the Commissioner's powers. Only in certain limited circumstances is the Commissioner constrained from exercising the access powers in s.263:

- **Access must be 'for any of the purposes of the Act'.** An officer need only have a belief formed on reasonable grounds that the requested access is 'for a purpose' of the Act; it is not necessary for the officer to believe that the documents will relate to the taxation affairs of the occupier.
- **Legal professional privilege.** This operates to restrict the Commissioner's powers of access under s.263, irrespective of the broad terms of the provision.

- **Exercise of access powers cannot be in contempt of court.** Thus, the Commissioner cannot use the powers under s.263 to obtain access to documents relating to court proceedings in which the Commissioner is involved, since such access would be in contempt of the Court. However, no such restriction applies to Administrative Appeals Tribunal matters, as no judicial power is exercised at the Tribunal level.
- **Administrative-law restrictions.** The exercise of access powers may be challenged under general administrative-law principles. These principles impose restraints upon the exercise of administrative powers unless the legislation conferring the relevant administrative power excludes the application of such administrative law principles. One such principle is that those exercising administrative powers must generally comply with the requirements of natural justice, which essentially means that a person who may be adversely affected by an exercise of an administrative power be given the opportunity of a fair hearing.
- **Section 263 does not include a power of seizure.** Although s.263 allows the relevant officer only to inspect, extract and/or copy documents, the absence of a power of seizure is generally immaterial given the presence of s.264.

#### **The Commissioner's Powers under Section 264**

**Written notice.** In contrast to s.263, s.264 expresses the requirement that the Commissioner must exercise the powers of s.264 by serving a written notice upon the person from whom the information is sought. Further, for the notice to be valid it must specify with sufficient clarity the information sought, since a failure to comply with the notice may render the recipient liable to prosecution under the Taxation Administration Act (see ss.8C and 8D). Additionally, a notice under s.264(1)(b) must show that the documents sought relate to a person's (whether the recipient's or a named other's) income or assessment.

**Documents sought must be in the recipient's custody or under his control.** Obviously, a document sought by the Commissioner must at the least be under the control of the recipient of the notice at the time the notice is served for that person to be in a position to comply with the notice. Section 264 does not compel a recipient to produce copies of documents where those copies were not already in existence.

**Privilege against self-incrimination not available.** According to current judicial thinking, the privilege against self-incrimination is impliedly excluded, having regard to the purpose of s.264 and the terms of ss.8C and 8D of the Taxation Administration Act.

#### **Panel 1**

### **The Tax Commissioner's powers of investigation in the Income Tax Assessment Act 1936**

#### **Section 263(1)**

The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.

#### **Section 263(2)**

An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorized to exercise powers under this section.

#### **Section 263(3)**

The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.

#### **Section 264(1)**

The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority

- (a) to furnish him with such information as he may require; and
- (b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

#### **Onus of proof**

#### **Section 190**

In proceedings under this Part on a review before the Tribunal or on appeal to a court . . .

- (b) the burden of proving that the assessment is excessive shall lie upon the taxpayer.

**Limitations on the powers contained in section 264.** Aside from the limited incursions to the broad powers of access to information under s.264 identified in the case law discussed above, restrictions similar to those applicable to s.263 apply to s.264. Thus, legal professional privilege would appear to be the only salient restriction upon the Commissioner's otherwise broad powers, since the other limitations placed upon the powers under s.264 apply to the machinery of ensuring that the notice is valid (i.e. it is sufficiently specific in its terms, it identifies a taxpayer to whom notice relates and so on).

**The Commissioner's Access to External Accountant's Papers**

Owing to the limited scope of legal professional privilege, it would be only in the rarest of circumstances that papers held by an accountant would be subject to privilege and therefore not accessible (for example, where such papers had been prepared at the request of lawyers in contemplation of litigation). As such, therefore, the Commissioner is empowered by ss.263 and 264 to enter upon the premises of accountants and to seek information related to a taxation assessment.

<b>Panel 2</b>				
<b>Comparison of governmental authority powers</b>				
<b>Country</b>	<b>Statute &amp; provision</b>	<b>Scope of access authorised</b>	<b>Basis upon which access allowed</b>	<b>Controls upon exercise of access powers</b>
<b>Australia</b>	Income Tax Assessment Act 1936, ss. 263 and 264	Minimal restrictions apply.	Must be for any of the purposes of the Act.	Few controls upon issue and use of powers.
	Police powers: Crimes Act 1914, s.10	Restrictions upon scope of access generally apply.	There must be reasonable grounds to suspect that there is in the premises evidence of the commission or intended commission of an offence against the Commonwealth.	Judicial issue of search warrant.
	Customs Act 1901, ss. 198, 199, 214	Restrictions upon scope of access generally apply.	Substantial restrictions apply.	Judicial issue or by Comptroller or Collector of Customs.
	Social Security Act 1991	No power of access within the legislation. Power to require attendance to answer questions and produce documents and other information.	(Not applicable)	(Not applicable)
<b>United Kingdom</b>	Taxes Management Act 1970	Restrictions upon scope of access apply.	Substantial restrictions apply.	Judicial issue of warrants.
<b>New Zealand</b>	Inland Revenue Department Act s.17	Similar to those of Australian Income tax Assessment Act.	Similar to those of Australian Income Tax Assessment Act.	Similar to those of Australian Income Tax Assessment Act.

To alleviate fears in the accounting profession, the Commissioner has released guidelines relating to access to accountants' working papers. These guidelines seek to establish some degree of de facto professional privilege for external accountants' working papers. The guidelines are administrative in nature, and the Commissioner is legally empowered to enforce ss.263 and 264 notwithstanding their contents.

### **The Powers of the Commissioner vs the Powers of Other Australian Authorities**

**Police powers.** The extremely broad powers conferred on the Commissioner are in stark contrast to police powers.

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assist them; and there is a general right to refuse to answer questions without any implication of guilt. The presumption of innocence ensures that the onus of proof is on the Crown to establish an offence beyond reasonable doubt. Again, the police require a search warrant (for example, the general warrant pursuant to s.10 of The Crimes Act 1914 (Cth)) to enter premises and search and seize books, papers and documents.

**The Customs Act 1901.** The Customs Act 1901 provides that the authority to search, seize and remove documents must be authorised by warrant. A **Writ of Assistance** (s.198), authorises, pursuant to s.200, the named officer and assistants to enter premises at any time and search and seize. The writ remains in force for so long as the person named therein is an officer of Customs. A **Customs Warrant** (s.199) remains in force until the expiration of the period specified in the warrant or until the warrant is revoked, whichever first occurs. Finally, where a Notice to Produce pursuant to s.214 of the Customs Act is served and not complied with, then the Comptroller or Collector of Customs for a State or Territory may issue a **Schedule V Customs Warrant**, which authorises the Customs officer or

police officer to enter premises at any time and search and remove and impound any books and documents found. It remains in force for one month from the date of the warrant unless sooner revoked.

Section 220 provides that no person shall be liable for any seizure for which there has been no reasonable cause. Seizures without reasonable cause thus expose persons to liability for wrongful seizure.

**The Social Security Act 1991.** Fourteen days after providing appropriate written notice under s.1304, s.1305, s.1306 or s.1307 of the Social Security Act 1991, the Secretary of the Department of Social Security may require a person to produce documents, give information and appear before a specified officer and answer questions. Although a person is not excused from compliance with such notice on the ground of self incrimination, s.1309(2) provides that the information given or document produced is not admissible in proceedings other than for offences arising under or out of s.1304(7), s.1305(5), s.1306(5) or s.1307(10).

The Act grants no power to access premises, but a general warrant pursuant to s.10 of the Crimes Act 1914 would be granted where there are reasonable grounds for suspecting the commission or intended commission of an offence under the Social Security Act. The onus of proof in a criminal prosecution under the Act remains on the Crown.

The requirement of a warrant for entry into premises and search and seizure under police powers, the Customs Act 1901 and the Social Security Act 1991 carries a significant body of case law protecting individual rights. The issuing of, and powers contained within, the warrant may all be subject to judicial review. The powers contained within a general warrant must not be too broad, while those contained within other warrants must be specific and their terms in accordance with the law. The exercise of the warrant must be in strict compliance with the terms of the warrant, and action not authorised exposes the officer and all those present under the warrant to liability. None of these safeguards applies in the case of the Tax Commissioner's powers.

### **Some International Comparisons**

**The United Kingdom.** In the United Kingdom the management of the tax laws is under the control of the Commissioners of Inland Revenue ('the Board'). Where the Board has reasonable grounds for believing that the proper assessment or collection of tax is seriously prejudiced, it may, by notice in writing, require a person to produce to a named officer documents in the power or possession of that person. The documents must be reasonably relevant to the tax liability of a taxpayer. Under s.20(2) of the Taxes Management Act 1970, the notice may require the production of the taxpayer's own documents. Furthermore, an inspector may, by written notice to a person, require the production of documents, in the power or possession of that person, where

### Panel 3

#### Summary of Tax Commissioner's guidelines relating to access to accountants' working papers

1. Tax officers are to have full and free access to all **source documents**, i.e. documents that record a transaction or arrangements entered into by the taxpayer.
2. Access will be sought only in exceptional circumstances to **restricted-source documents**, i.e. advice papers prepared by an external accounting adviser solely for the purpose of advising a client on matters associated with taxation where they are prepared prior to or contemporaneously with the relevant transaction or arrangement.
3. Access will be sought only in exceptional circumstances to **non-source documents**, i.e. other tax advice papers.
4. Where the Tax Office seeks access to restricted-source and non-source documents, a procedure exists whereby the client or tax adviser has an opportunity to obtain legal advice, and details of the documents at issue are categorised and listed. Access to restricted documents may then be sought only with the written approval of the local Deputy Commissioner of Taxation.
5. The Tax Office may seek access to restricted-source and non-source documents (with the approval of the Deputy Commissioner) without following the above procedure in certain circumstances; for example, where there are reasonable grounds for believing that fraud or evasion has been committed, where the taxpayer cannot be located, or where the records of the taxpayer are maintained abroad.
6. During disputes as to whether access to documents is permitted, the documents are to be placed in a sealed container pending a decision by the relevant Deputy Commissioner of Taxation as to whether access to those documents, in accordance with the guidelines, should be sought.

the documents are reasonably relevant to the assessment of the person's own or another taxpayer's tax liability. Such notice must be authorised by the Board.

With the authorisation of the Board, an Inspector may apply for a notice that relates to a taxpayer or class of taxpayers whose identities are unknown where there are reasonable grounds for believing that a failure to comply with tax legislation has led to a serious prejudice

in the proper assessment of tax liability. These powers of investigation do not extend to 'personal records' or 'journalistic material' (s.20(8C)).

With the approval of the Board, an officer of the Board may obtain a warrant to enter and search premises from a circuit judge in cases of serious tax fraud. The court must be satisfied that there are reasonable grounds to suspect that the evidence is on the premises; the officer must give information on oath; and details must be provided of the number of officers who are to exercise the warrant and whether or not a constable in uniform is required. The warrant must be exercised within 14 days of issue and in accordance with its specified terms.

Generally, the protection of professional privilege remains but is not granted to papers necessary to the understanding of a tax return or to the working papers of a tax accountant, other than auditors' working papers. Legal professional privilege applies to all communications between legal advisers and their clients with the exception of those made with the intention of furthering a criminal purpose. The onus is on a taxpayer to upset an assessment.

**New Zealand.** The Inland Revenue Department Act 1974 empowers the New Zealand Commissioner of Taxation to require written information and/or the production of documents necessary or relevant to the administration and enforcement of the Inland Revenue Act or other functions lawfully conferred on the Commissioner. If reasonable, he may require a statutory declaration to verify furnished written information or particulars and may retain produced documents for so long as is necessary for a proper inspection. This is an extension of the equivalent power conferred on the Australian Commissioner under s.263 of the Act.

The New Zealand Commissioner's powers of access are considerable. He is granted full and free access to all land, buildings and places and to all books and documents where inspection is necessary or relevant to the collection of any tax or duty under the Inland Revenue Act or other function lawfully conferred on him. Like the Australian taxpayer, the New Zealand taxpayer is required to give 'all reasonable assistance' and answer all proper questions relating to the investigation.

Section 20 of the Inland Revenue Department Act retains the protection of legal professional privilege with the exception of financial records such as trust accounts. It appears that s.20 restricts professional privilege, which is therefore unavailable to the accountant-client relationship. Section 36 places the onus of proof on the taxpayer where an objection to a decision or determination of the Commissioner is heard before a review authority established under the Act. But in relation to the assessment of penalty tax the burden of proving the offence beyond reasonable doubt is on the Commissioner.

These comparisons establish that the Australian

Tax Commissioner's powers of investigation are similar to those exercised by the New Zealand Commissioner of Taxation, but less substantial than those exercised by the UK's Commissioners of Inland Revenue. (The powers of the Tax Commissioner, of other Australian authorities, and of British and New Zealand tax authorities are summarised in Panel 2.)

### **The Rationale of the Tax Commissioner's Powers**

The Commissioner's current powers of investigation appeared substantially as ss.55 and 56 in the 1915 Income Tax Assessment Act. Similarly, s.35 of that Act, in providing that an assessment was to be conclusive evidence that the amount and all the particulars of the assessment were correct, thereby cast the onus of proof on taxpayers, and is thus comparable to s.190(b) of the present (1936) Act.

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## **The protection that the law gives to citizens with regard to the powers of the police and of the customs and social-security authorities raises the question of why similar protection is not available with regard to the Tax Commissioner's powers.**

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In 1915 these provisions were not seen as draconian, but simply as necessary to enable the income-tax system to operate effectively. At that time there were no sophisticated record-keeping computers and only embryonic regulation of, and disclosure by, business entities. The Tax Office was not a party to dealings with the taxpayer and so did not have its own documentation and evidence as in civil cases. It therefore seemed sensible at the time to bestow wide powers on the Australian tax office and to cast the onus of proof upon the taxpayer.

But yesterday's solution has become today's problem. The protection that the law gives to citizens with regard to the powers of the police and of the customs and social-security authorities raises the question of why similar protection is not available with regard to the Tax Commissioner's powers.

The application of the Commissioner's powers in relation to prudential audit advice, and tax accountants' advice in general, has been the subject of considerable

debate. As noted above, it was pressure from the accounting profession that prompted the Commissioner to issue a set of guidelines that, if observed, substantially curtail the Tax Office's powers of access to such advice. Nevertheless, these guidelines are simply not binding on the Commissioner. Furthermore, they raise the issue of whether a body charged with collecting the taxes according to the law can legally purport to limit unilaterally its own authority. Arguably, the Commissioner should exercise his powers to the full, since to do any less would be tantamount to exercising legislative powers.

The corollary of this is that there is simply no power to review the exercise of this *de facto* legislative power. Nor is there any power to dispute the guidelines that the Commissioner promulgates, or to force him to comply with them. This is just one example of the 'indiscretions' that have become a feature of the tax system in recent times (see Conwell et al., 1991).

### **Recommendations**

We conclude with three recommendations. First, no matter how difficult the drafting exercise, the full particulars of the Commissioner's powers and, in particular, of the information to which he is entitled access, must be enshrined in legislation. The current guidelines on access to accountants' papers, drawn up as they were by both the Tax Office and the profession, would form an excellent basis for beginning to define these powers. (The guidelines are summarised in Panel 3.)

Second, in further recognition of the need to balance taxpayers' and the Tax Office's rights, the power to enter and search premises should be circumscribed by the requirement to obtain a warrant. In this way the justification for the intended intrusion on the taxpayer's rights can be tested by independent review, and the scope of the intrusion restricted to that which is absolutely necessary. This would remove the bias in favour of the Commissioner and bring the Tax Office in line with similar Australian statutory bodies (and also the UK Inland Revenue).

Third, the onus of proof should be shifted on to the Tax Office. Given the enormous amount of financial data now available to it, its broad powers of investigation, the well tested civil procedures of discovering evidence, and, most recently, the introduction of self-assessment, there is little justification for maintaining the onus on the taxpayer.

### **Reference**

Conwell, R., J. Dabner, & P. Glover (1991), 'The Tax Commissioner's Discretions and Indiscretions', *Policy* 7 (Summer): 2-6.