1. Introduction

The objective of the States and Territories (Revenue) to collect the correct amount of tax, no more no less, has created the need for the Revenue to undertake investigations, or audits, aimed at ensuring that their objective is met.

It is fair to say that the Revenue recognises that audits are time consuming and costly to taxpayers. More importantly, the Revenue recognises the obvious tension which audits can create given that by their very nature, they interfere with a person’s right to confidentiality and freedom to not provide information to the Revenue.

In order to obviate the tension which audits can create, most Revenue offices in some form, have been proactive in publicly informing taxpayers of their rights and obligations in relation to audits, and in some cases developing a taxpayer’s charter, which alerts taxpayers of the high level of service which can be expected from the Revenue. Whilst the theme perpetuated by the Revenue is one of fairness and equity on its part, the Revenue makes a point of lucidly reminding taxpayers of their statutory obligations in relation to the audit process.

This paper considers some of the issues relevant to an audit process with particular focus on the Revenue’s information gathering and access powers.
2. Revenue’s access powers

The access powers of the Revenue are in some cases, found in Taxation Administration Acts\(^1\) and in other cases found in specific taxing Acts\(^2\). Whilst there are some differences between the access powers, a similarity is that they confer on the Revenue fairly broad powers of entry and access without the need for a search warrant\(^3\).

For example, section 76 of the Vic TAA provides:

(1) An authorised officer may exercise powers under this section only if he or she believes on reasonable grounds that there are documents or things on any premises that are relevant to the administration or execution of a taxation law.

(2) Subject to this section, an authorised officer with any assistants and equipment the authorised officer considers necessary may enter, at any reasonable time, any premises and may do any one or more of the following -

(a) search the premises and any thing found at the premises;

(b) inspect and take photographs (including video recordings), or make sketches, of the premises or any thing at the premises;

(c) inspect, and make copies of, or take extracts from, any document kept at the premises;

(d) seize any document or thing at the premises if the authorised officer has reason to believe or suspect that it is necessary to do so in order to prevent its concealment, loss, destruction or alteration.

Under the Vic TAA, the consent of the owner of the premises is a pre-condition to entry only where the premises are residential premises\(^4\).

The access provisions of most jurisdictions bear some similarity to the access powers under the *Income Tax Assessment Act 1936 (C’th)*\(^5\); ie, section 263. In the context of section 263 of the 1936 Act, the access power can only be exercised for the purpose of the 1936 Act, which essentially means that the officer making the request must have a belief on reasonable grounds that the

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\(^1\) Taxation Administration Act 1997 (Vic) *(Vic TAA)* section 76 and 77; Taxation Administration Act 1996 (NSW) *(NSW TAA)* section 75 and 77; Taxation Administration Act 2001 (Qld) *(Qld TAA)* section 90, 92 and 94; Taxation Administration Act 1996 (SA) *(SA TAA)* section 71 and 72; Taxation Administration Act 1997 (Tas) *(Tas TAA)* section 70 and 72; Taxation (Administration) Act 1978 (NT) *(NT TAA)* section 127; Taxation Administration Act 1999 (ACT) *(ACT TAA)* section 83 and 84.

\(^2\) See for, example, Pay-roll Tax Act 1971 (Qld) *(Qld PRT Act)* section 45; Stamp Act 1921 (WA) section 7(1) *(WA Stamp Act)*; Pay-roll Tax Assessment Act 1971 (WA) section 45 *(WA PRT Act)*; Pay-roll Tax Act (NT) *(NT PRT Act)*.

\(^3\) Although broader access powers are conferred if a search warrant is obtained; eg, see Vic TAA section 77; NSW TAA section 77; Qld TAA section 92-93; SA TAA section 72; Tas TAA section 72; ACT TAA section 84.

\(^4\) Vic TAA section 76(6); see also, for example, NSW TAA section 75(5), ACT TAA section 83(3), Tas TAA section 70(4).

\(^5\) Referred to as the 1936 Act.
access power is being exercised for the purposes of the 1936 Act and not for an extraneous purpose. 6 That position would also apply under most (if not all) Taxation Administration Acts, particularly those which expressly provide that the access power can only be exercised if the officer ‘believes on reasonable grounds’ that there are documents or other things, relevant to the administration or execution of a tax law. 7

Having said this, the authorities in relation to section 263 also support the view that it is not necessary that the reasonable belief relate to the tax affairs of the person from which access is being sought.

In Clyne v DFC of T & Anor8 the High Court upheld the Commissioner’s right to access an applicant’s files under section 263, for the dual purpose of investigating the tax liability of the applicant’s clients and those of the applicant himself.

In Southwestern Indemnities Ltd v Bank of New South Wales and FC of T Barwick CJ said:9

Sec 263 is not limited in its application to the affairs of a person who in fact is in receipt of assessable income. It suffices that the exercise of the power given by the section is for the purposes of the Act, which of course include an investigation into whether or not a person is or has been in receipt of assessable income. Such an investigation cannot be limited to buildings, books, etc of a person who is liable to taxation but must extend to any person.

One area, however, in which the access powers of the Revenue may be broader than those conferred on the Federal Commissioner, is in relation to the power of seizure. Section 263 gives the Federal Commissioner the right to examine, but not to seize, documentary records. The Revenue’s access powers, to varying degrees, do confer on it the power of seizure. 10

Importantly, persons against whom an access power is sought to be exercised are under certain obligations which aim to ensure that the Revenue can exercise its powers efficiently. A common obligation is not to hinder or obstruct the Revenue in the exercise of its access power. 11 Another, is

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6 See, for example, Kerrison v FCT 86 ATC 4103.
7 See, for example, Vic TAA section 76(1); Tas TAA section 179(1).
8 85 ATC 4597.
9 73 ATC 4171 at 4174-4175.
10 See, for example, Vic TAA section 76(2)(d); NSW TAA section 76(1)(d); Tas TAA section 71(1)(d).
11 See, for example, Vic TAA section 88(1)(b); Qld TAA section 126; WA Stamp Act section 114; ACT TAA section 88; Tas TAA section 73(1)(b); NT TAA section 127(3).
the obligation to provide reasonable facilities and assistance to the Revenue in relation to the exercise of its access powers. 12 This obligation is material for two reasons; first, without it, the Revenue’s access powers can be significantly curtailed and second, the obligation extends to things which may not be as obvious and which may be considered extravagant. The first reason is best exemplified by the case of *O’Reilly v Commrs of State Bank of Victoria.* 13

In that case, the ATO sought access to documents held by the State Bank of Victoria. The bank agreed to give the ATO access to its premises but declined to provide the ATO with assistance in relation to its investigation. The ATO found the room where the documents were held which was locked, and sought access to the room. The bank refused to unlock the door. The ATO did not ask for the key to the room nor did the bank volunteer any information as to its whereabouts.

The High Court was asked to decide whether the ATO had full and free access to the books, documents and other papers held at the bank and whether the bank was obliged under section 263 of the 1936 Act to tell the ATO precisely where the documents were located, to physically deliver to the officers the documents requested and to take any steps necessary to facilitate inspection by the ATO of the documents requested.

The High Court answered ‘no’ to each question. In relation to the latter question, it said that section 263 did not oblige the bank to actively assist the ATO in obtaining access. In other words, the section did not create a positive duty to assist the ATO. Section 263 has since been amended to avoid the consequences of this case. 14

If one draws from the income tax context, the obligation to provide the Revenue with reasonable facilities and assistance would extend to the reasonable use of photocopying, and the provision of telephone, light, power and work space.

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12 See, for example, Vic TAA section 86; NSW TAA section 76(1)(c); Qld TAA section 96(1)(g); SA TAA section 71(1)(d); ACT TAA section 83(1)(g); Tas TAA section 71(1)(c).

13 83 ATC 4156.

14 1936 Act section 263(3).
3. **Revenue’s information gathering powers**

3.1 **Overview**

Like the Revenue’s access powers, its information gathering powers are in some cases, found in Taxation Administration Acts and in other cases found in specific taxing Acts. Whilst the information gathering powers differ among the jurisdictions again like the access powers, they are fairly broad powers.

For example, section 72 of the NSW TAA provides:

1. The Chief Commissioner may require a person, by written notice, to do any one or more of the following:
   
   a. to provide to the Chief Commissioner (either orally or in writing) information that is described in the notice,
   b. to attend and give evidence before the Chief Commissioner or an authorised officer,
   c. to produce to the Chief Commissioner an instrument or record in the person’s custody or control that is described in the notice.

The information gathering provisions of most jurisdictions bear some similarity to the information gathering provisions under section 264 of the 1936 Act, which provides:

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.

It is appropriate, given the similarity between the New South Wales and Commonwealth provisions, to draw from the cases which have considered the operation of section 264 of the 1936 Act.

The scope of section 264 is well summarised by the Full Federal Court in *May v DFC of T*:

It is clear enough that “the powers contained in s 264(1) must be exercised for the purposes of the [ITA Act]” : Industrial Equity Ltd & Anor v DFC of T & Ors 90 ATC 5008 at 5013; (1990) 170 CLR 649 at 659. But subject to that, they “should be circumscribed only by reference to the limitations which

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15 Vic TAA section 73; NSW TAA section 72; Qld TAA section 87 – 89; Qld PRT Act; SA TAA section 70; Tas TAA section 65; WA Stamp Act section 7A; WA PRT section 16; NT TAA section 86; ACT TAA section 82.

16 99 ATC 4587 4593-4594.
are expressed in that section” : FC of T & Ors v The ANZ Banking Group Ltd 79 ATC 4039 at 4052; (1977-1979) 143 CLR 499 at 535. They may, without any issue or dispute of fact having arisen with a taxpayer, be used to conduct a “fishing expedition” in the sense of “a wide-ranging inquiry to ascertain a taxpayer's taxable income” : Industrial Equity Ltd v DFC of T, above, ATC 5015; CLR 662.

The information, etc sought need not be from the taxpayer. It may be from a third person. A s 264(1) notice will override any duty of confidence owed by a third person recipient to the taxpayer in respect of confidential information of or about the taxpayer possessed by the third person, to the extent that such information is sought in the notice: Smorgon v FC of T & Ors 76 ATC 4364 at 4370-4372; (1976) 134 CLR 475 at 486-490. It will not, though, displace any properly available claim of legal professional privilege, as the letter of 14 May 1998 to Mr May itself acknowledged: FC of T v Citibank Ltd 89 ATC 4268; (1989) 20 FCR 403.

It is at least arguable that the Courts will adopt a similar approach to the information gathering powers of jurisdictions like New South Wales.

3.2 Scope of the power

The scope of section 264 of the 1936 has been challenged over the years in a number of cases, mainly on the basis that the relevant notice was beyond scope, was issued for an improper purpose or was uncertain.

In Australia & New Zealand Banking Group Ltd & Ors v DFC of T\(^\text{17}\), for example, the ATO issued amended income tax assessments to the applicants against which objections had been lodged. Prior to an objection decision, the ATO issued a section 264 notice to a solicitor who advised the applicant at the time, requiring him to attend and give evidence concerning the income or assessment of the applicants for the period 1 October 1989 to 30 September 1993. The notice was accompanied by a letter informing the solicitor that he could bring a person to advise him of his legal rights and obligations.

Relevantly, the notice was challenged on the ground that it did not notify either the relevant income or the relevant assessment and that it was issued for an improper purpose in that the period of investigation differed to the tax period the subject of the amended assessment.

The Court declined to accept the first ground for the reason that a section 264 notice was required to do no more than make it clear that the evidence to be given concerned the income or

\(^{17}\) 2001 ATC 4140.
assessment of a person or persons. It was not necessary that the notice specify particular topics.\textsuperscript{18}

As to the second ground, however, the Court decided that on the evidence, the only presently relevant matters before the ATO related to tax periods which differed from those the subject of the investigation. It held, therefore, that there was a serious question to be tried in relation to whether the notice was issued for an improper purpose.\textsuperscript{19} Accordingly, interlocutory relief sought was granted.

In contrast, in \textit{McLaren & Ors v DFC of T}\textsuperscript{20}, the facts were, for presently purposes, materially similar to those in \textit{Australia & New Zealand Banking Group Ltd}. The notice issued by the ATO to an employee of one of the taxpayers was challenged on the basis that it was a breach of the ATO’s duty to act fairly, too wide in its terms (ie that the period to which it related travelled beyond the tax period the subject of the tax dispute) and that the notices were incorrectly drafted. It was decided that there was no evidence to suggest that the ATO issued the notice for an improper purpose. It was also decided that whilst there was a serious question to be tried as to whether the notice was phrased too widely, any breach would be a technical one and the breadth of the notice would not cause the applicant any practical difficulty. This was because it was reasonable to assume that he would be accompanied by a legal adviser who could advise him to refuse to answer any questions that travelled outside the proper purpose of the notice.

In the context of the information gathering powers of the Revenue, \textit{McLaren’s case} could support a jurisdiction’s attempt to ‘fish’ for documents outside the ordinary period referable to an amended assessment or objection, if no practical difficulty would be occasioned to the recipient of the notice.

Perhaps one area where the exercise of a power to issue a notice is considered ‘excessive’ and thereby beyond power, is where the notice is likely to be understood as demanding, under threat of sanctions for non-compliance, more than the Revenue’s entitlement. An example is where the Revenue fails to give sufficient consideration to the need to ensure that the recipient of a notice has had adequate opportunity to claim legal professional privilege.\textsuperscript{21}

\textsuperscript{18} At 4143.
\textsuperscript{19} At 4143.
\textsuperscript{20} 2001 ATC 4136.
\textsuperscript{21} See, for example, \textit{FC of T & Ors v Citibank Limited}\textsuperscript{89} ATC 4268.
3.3 **Notices relating to client lists**

An issue arises as to whether the information gathering powers of the Revenue are sufficiently broad to allow the Revenue to obtain client lists (and related documents) from professional firms. The Revenue may seek that information out of a concern about the existence or prevalence of particular arrangements which have implications in relation to their tax laws rather than the participation of particular taxpayers in such arrangements.

If the approach adopted by the Courts on this question in relation to section 264 of the 1936 Act is a reliable guide, then there is some basis for suggesting that the Revenue’s information gathering powers may extend this far.

In *Deloitte Touche Tohmatsu & Ors v DFC of T* 22, notices under section 264(1)(a) of the 1936 Act were issued to the applicant seeking information (among others) on whether the applicant provided any services in relation to New Zealand non-complying employer-sponsored superannuation funds, the full name and address of each client of the applicant, the full name and address of the New Zealand fund or trust, the name of the trustees of funds and trusts, the basis of fees and disbursements charged to clients, the clients' contributions, and whether clients were referred to the applicant together with their names and addresses.

The applicant sought judicial review of the ATO's decision to issue the notices, contending that the decision to issue the notices were not authorised by the 1936 Act as they were made for an improper purpose. The applicant contended that the ATO should have first formed a view on the merits of the arrangement under the 1936 Act before the notices were issued and that the ATO was gathering information at large.

The Court upheld the ATO’s power to issue the notices. The Court held that the fact that the ATO was making a very general inquiry did not mean that the ATO was not making it for the purposes of the 1936 Act or to enable the ATO to perform its functions under the 1936 Act. Essentially, the ATO was concerned about an aggressive tax scheme with alarming potential tax consequences. The ATO considered it imperative that it immediately get a handle on the scope of the scheme and the number of taxpayers involved to consider future action. A notice issued for that purpose would

22 98 ATC 5192.
not be struck out, even if at the time of issue, the ATO had not formed a conclusive view on the merits of the scheme under the 1936 Act.\footnote{23 At 5208.}

In \textit{May v DFC of T}\footnote{99 ATC 4587.}, the ATO issued a notice under sec 264(1)(a) of the 1936 Act which required the applicant, as a member of a firm of solicitors, to furnish specific information relating to employee share acquisition plans, employee benefit trusts or similar plans which had been established or prepared by the firm. The information sought included explanatory details of the manner in which an arrangement was intended to operate and its perceived benefits and the names and addresses of participating employers.

Relevantly, the applicant argued that clients of the firm had a right to procedural fairness in the exercise of the section 264(1)(a) power such as would give them an adequate opportunity to challenge the validity of its exercise. This was because the provision of information relating to the affairs of a client so affected that client’s interests as to give the client a right to be accorded procedural fairness, particularly as the client was not the recipient of the notice itself. A failure by the Commissioner properly to have regard to that right constituted a failure to take a relevant consideration into account.

In upholding the validity of the notices, the Full Federal Court concluded that the obligation of procedural fairness did not apply to a decision to issue a notice under section 264(1) or equivalent statutory provisions.

Finally, in \textit{McCormack & Ors v DFC of T}\footnote{2001 ATC 4740.}, the ATO issued notices under sec 264(1)(a) of the 1936 Act which required the applicants, as members of Ernst & Young, to simply:

\begin{quote}
Identify by name and address, clients of the firm known as Ernst & Young for whom you provided services during the period 1 June 2000 to 31 May 2001.
\end{quote}

The applicants challenged the ATO’s decisions to issue the notices on the basis that they were not authorised by section 264(1)(a), that the ATO’s decisions constituted an improper exercise of the power under section 264(1)(a) in that the power was exercised for an improper purpose, that the making of the decisions was an improper exercise of the power in that it involved an exercise of
power so unreasonable that no reasonable person could have exercised the power and that the making of the decisions was an improper exercise of the power in that the terms of the notice were uncertain.

The applicant failed on all accounts. The gist of the Court’s reasoning was this:26

The point is that, on the basis of those findings, it could hardly be disputed that lists of clients for whom the three partners provided services might well assist the Commissioner to take steps designed to ensure that those clients, and other taxpayers who might have used similar tax planning products or entered into similar tax planning arrangements, paid the appropriate amount of tax in respect of their assessable income calculated in accordance with the ITAA. Similarly, the lists might well assist the Commissioner in understanding and responding to tax planning arrangements used or recommended by the firm and the partners.

3.4 Limitation on subsequent discovery?

As the information gathering powers of the Revenue are broad and in some respects unrestricted by time, one might expect some limitation on further claims for information when the statutory power has been exercised and on the faith of the information provided, the Revenue has commenced proceedings for the recovery of unpaid tax. Drawing from the income tax context, this may not necessarily be so.

In Eastern Nitrogen Ltd v FC of T, for example,27 the Federal Commissioner sought an order for discovery in relation to documents which had either already been examined by him in the course of his audit or they were documents to which he had been given full and free access during the audit. The Federal Court granted the order of discovery essentially deciding that the litigation process may be compromised if relevant information was not provided. The salient point was as follows:28

The fact that the Commissioner would have had opportunity to inspect and take copies of any such document during the course of the audit does not seem to me to conclude the matter.

I am conscious that if I were to deny the limited discovery as sought, one possible consequence is that out of an abundance of caution every single scrap and skerrick of documentary material that is available during an audit inquiry would be photocopied so as to avoid having to bring applications such as this in future matters.

Speaking basically, the purpose of discovery is to ensure, as far as possible, that litigation is decided on its merits without ambush and surprise and to provide the parties with the relevant documents they need to prepare their cases for trial. What might have been thought to be relevant during an

26 At 4757.
27 96 ATC 4531.
28 At 4534.
audit is not necessarily what might be thought to be relevant to a party who is now a litigant to proceedings in the Court.

4. Defences to access and information gathering powers

4.1 Privilege against self incrimination

The common law privilege against self incrimination is that no person could be compelled to answer questions the answer to which might tend to incriminate him or her. Some jurisdictions have by an express legislative stipulation abrogated the privilege. In the case of other jurisdictions, it is certainly arguable that the breadth of the information gathering powers supports the view that the legislation has impliedly abrogated the privilege against self-incrimination.

This outcome would be consistent with that under the 1936 Act. On at least three occasions, the Federal Court has decided that having regard to the purpose for which the information gathering powers are conferred, the context in which the section applies and the penalties for non-compliance, it reasonable to conclude that the 1936 Act in relation to those powers, has impliedly abrogated the privilege against self-incrimination.

4.2 Public interest immunity

Public interest immunity exempts from production documents or communications to protect the interests of the public and cannot be waived or surrendered.

In recent examples, the Courts have agreed that public interest immunity should apply in relation to the production of documents in the tax arena.

In KC Park Safe Pty Ltd & Ors v Commr of State Revenue (Vic), the Victorian Revenue investigated the pay-roll tax liability of the taxpayer and related companies, based on information

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30 See, for example, Vic TAA section 87; Qld TAA section 124; SA TAA section 74; ACT TAA section 87.
31 Stergiis & Ors v FC of T & Anor 88 ATC 4442. Donovan v DFC of T 92 ATC 4114. DFC of T v De Vonk 95 ATC 4820.
33 98 ATC 4655.
that the taxpayer made cash payments to employees and did not declare those payments for tax purposes. The Revenue in particular obtained information from a former employee which supported a conclusion of tax evasion.

The Revenue issued assessments to the taxpayer and subsequently served notices effectively freezing the taxpayer's bank accounts. The taxpayer challenged the validity of the notices and sought production of the information provided by the former employee. The Revenue (among others) contended that the information was protected from production by reason of public interest immunity on the basis that the employees had been told that the information they provided would be confidential and that their identity would not be disclosed. The employees had been extremely reluctant to speak and expressed extreme concern that the information would be passed on to the taxpayer.

The Court held that there was a public interest in protecting the sources of information which could assist government agencies in enforcing the law, and that applied as much to revenue authorities as to criminal authorities. The documents were prepared on the basis that their content remained confidential and they had little relevance to the taxpayer's claim.34

In the income tax context, the question of public interest immunity arose in Middendorp Electric Co v Law Institute of Victoria.35 Middendorp lodged a complaint under the Legal Profession Practice Act 1958 with the Institute alleging a defalcation of its funds by its then solicitor. The Institute initiated an investigation and obtained documents from Middendorp (among others). During the investigation the ATO sought access from the Institute to all relevant documents arising out of the investigation under section 263 of the 1936 Act.

Middendorp argued that the documents were immune from production on the ground of protecting the public’s interest. Both Middendorp and the Institute essentially argued that the object of the Practice Act would be subverted if production of the documents was ordered, as people would become unwilling to supply documents and other information to investigators acting under the Practice Act.

34 At 4659.
35 93 ATC 5041.
The Court agreed, saying that:

There is a recognizable public interest in giving whistle blowers protection from disclosure, both as to whom they may be, and more particularly what they may say.

4.3 Legal professional privilege

The general rule in relation to legal professional privilege is stated in the High Court case of *Esso Australia Resources Limited v FCT*. In *Esso*, the Full High Court held that, broadly speaking, confidential communications or documents which are brought into existence for the dominant purpose of obtaining or providing legal advice or in respect of anticipated litigation may be subject to legal professional privilege.

It is clear that a document may be partially privileged. In *Grofam Pty Ltd & Ors v ANZ Banking Group & Ors* Heerey J decided that parts of a document that were made to record legal advice were protected from disclosure by legal professional privilege, notwithstanding that the document as a whole was not privileged.

Until recent times it appeared established in the income tax arena that access claims and claims for information under section 263 and 264 of the 1936 Act could be defeated by valid claims of legal professional privilege. There is no reasonable basis to challenge the application of those authorities to the equivalent provisions in the relevant jurisdictions. In fact, some jurisdictions, for example Queensland, expressly recognise legal professional privilege as a defence to a notice to produce information.

At issue, is whether the decision of the Full Federal Court in *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* causes a shift in thinking. That case decided that legal professional privilege does not apply to a notice issued under section 155 of the

36 At 5051.
38 The dominant purpose test, as opposed to the former sole purpose test, is reflected in the Evidence Acts of some jurisdictions; eg, Evidence Act 1925 (NSW) section 120.
39 93 ATC 4672
40 *Baker v Campbell* 83 ATC 4606; *FC of T v Citibank* 89 ATC 4268.
41 (2001) 182 ALR 114, on appeal to the High Court.
Trade Practices Act 1974 (Cth), which is a substantially similar provision to section 264 of the 1936 Act.

In the context of a notice under section 264 of the 1936 Act, the Federal Court in *Australia & New Zealand Banking Group Ltd & Ors v DFC of T* concluded that the reasoning in *Daniels* leads to the conclusion that privilege does not apply to a notice issued under section 264.

These cases raise the issue of whether the defence of legal professional privilege is available to information requests from the Revenue under their information gathering powers. The extension of *Daniels* to the information gathering powers of particular jurisdictions will depend on the similarity of the provisions. *Daniels* appeared to be decided on the basis that under section 155(5)(a) of the Trade Practices Act 1974 (Cth), a person must not "refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it". In their natural meaning, this refers to what a person is able to do and is not limited by reference to what a person is entitled not to do; a person may be capable of doing something, although entitled not to do it. Accordingly, it was held that a person who is called upon to disclose information that is subject to legal professional privilege is able to comply with the demand, and may choose to do so, notwithstanding that he or she is entitled not to do so.

Arguably, the provisions of some jurisdictions are not as broad. For example, whilst under the Vic TAA, a person ‘must comply’ with a notice requesting information, it may be implied from related enforcement provisions that sanctions for non-compliance will not apply if there is a ‘reasonable excuse’ for the failure to comply with the notice. Legal professional privilege would constitute a reasonable excuse.

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42 2001 ATC 4140.
43 Vic TAA section 73(8).
44 Vic TAA section 73A.
45 See also related provisions in NSW TAA section 30(2)(b); SA TAA section 31(3)(e)(i); Qld TAA section 88(4) and (5); Tas TAA section 42(2)(b); ACT TAA section 88(2). See, however, clause 94 of the *Taxation Administration Bill 2001 (WA)* which seeks to abrogate legal professional privilege.
4.4 Legal professional privilege in the context of avoidance schemes

A recent development in the income tax arena raises the issue of whether legal professional privilege can apply to protect from disclosure information relating to tax avoidance schemes to which anti-avoidance rules can apply.

The question before the Federal Court in *Clements, Dunne & Bell v Commr of Australian Federal Police*\(^{46}\) was whether the applicant firm of accountants was entitled to maintain its claim to client legal privilege against the respondent. The issue arose out of the execution by the respondent of search warrants.

The applicant engaged a firm of solicitors to advise on behalf of clients of the applicant who had established productivity incentive plans. Each of the clients instructed the applicant to obtain the advice in order to modify the structure of the plans to meet deficiencies identified by the ATO. The plans involved the establishment of a separate entity by employers in such a way that contributions by the employers for the benefit of employees would be tax effective.

Pursuant to a warrant, the respondent seized the communications between the applicant and their solicitors. The applicant claimed that the documents were subject to legal client privilege.

It was held that the documents were not privileged because they were created in furtherance of a criminal, illegal or improper purpose. One of the most controversial parts of the decision, is the statement of the Court that the fact that the provisions of Part IVA of the 1936 Act are applicable to a scheme, renders a client’s actions improper in the sense required for the application of the doctrine which limits the reach of client legal privilege.

It would seem that this decision would have some relevance to those jurisdictions which have general anti-avoidance provisions.\(^{47}\)

4.5 Common interest privilege

Common interest privilege has been described as a privilege in aid of anticipated litigation in which several persons have a common interest.\(^{48}\) An example, is ‘if two parties with a common interest

\(^{46}\) 2002 ATC 4072.

\(^{47}\) See, for example, *Duties Act 2001 (Qld) Part 4 Chapter 11.*
and a common solicitor exchange information for the dominant purpose of informing each of them of the facts, issue and advice and of both, or either, obtaining legal advice or further legal advice in respect of contemplated or pending litigation, the documents or copy documents containing that information are privileged from production in the hands of either’. 49

The privilege was successfully applied in Re Perpetual Trustee Co (Canberra) Ltd and Commr for ACT Revenue 50 in respect of non-litigious documents shared between a transferor and transferee. It was decided that the parties had a sufficient common interest whether the transaction would attract stamp duty to establish the claim that privilege in documents was not lost because the documents were made available to both parties.

5. Logistical issues in managing the audit process

5.1 The Revenue’s perspective

As discussed, most jurisdictions have been proactive in alerting taxpayers of their rights and obligations in the context of an audit. In particular, they have provided taxpayers with pointers as to how best to prepare for the audit and as to what may be expected from the Revenue.

The compliance manual, for example, published by the New South Wales Office of State Revenue alerts taxpayers of their right to:

- expect the investigator to be professional and courteous.
- see the investigator’s identification.
- involve their professional advisors in the audit.
- get a hold on the timing of the audit.
- have their affairs treated in strict confidence.
- obtain a receipt for all information provided.
- be given the opportunity to explain irregularities and discrepancies.


50 94 ATC 2131.
This ‘openness’ of approach is welcomed.

5.2 What can taxpayers expect and how should they proceed

(a) Managing expectations

It is important for taxpayers to manage expectations of their own organisation in relation to an audit. This necessarily involves getting a handle on the timing, cost and resources which are likely to be involved. It is not uncommon for audits to be broken up into stages, which at times will involve Revenue officers physically spending some time at the taxpayer’s premises, interviewing people and requesting that documents be provided. Managing expectations such as these, should alleviate some of the frustration which is often associated with audits.

(b) Agreeing the terms of reference

Getting a handle on the scope of the audit is critical to audit management. Taxpayers should at the very first meeting with the Revenue seek written confirmation of the terms of the audit. For example:

- If the Revenue is investigating a particular transaction, then the transaction should be identified.
- If the Revenue is investigating arrangements generally, then they should also be identified.
- The Revenue should indicate the years under review and the expected duration of the audit.

(c) Setting guidelines for the Revenue and staff in relation to information

A clear objective should be to ensure that all communications are in writing and that they are made through the same appointed member of staff; ie, a liaison officer. This will help to ensure that all communications with the Revenue are tracked and monitored.

Taxpayers should also make it clear to Revenue staff that all communications must be initiated through the liaison officer.

(d) Minimise disruption to other parts of the organisation
It is often worthwhile allocating a room to the Revenue from which they can undertake their investigation. This not only gives the Revenue some privacy, but also aims to limit any potential disruption to other members of the organisation.

(e) Monitor all requests for information

Whilst the Revenue has extensive access and information gathering powers, as we have seen, there may be no obligation to provide some information sought; eg, information the subject of legal professional privilege. Taxpayers should be alert to their rights of non-disclosure.

(f) Co-operate in a reasonable manner

As discussed above, taxpayers are generally required to provide reasonable assistance and facilities to the Revenue in the context of their investigations. They are also prohibited from hindering or obstructing the audit process. As serious sanctions apply for non-compliance in these areas, taxpayers should fully understand their obligations.

5.3 The negotiation process

The audit process may reveal irregularities, which the Revenue may seek to challenge. In some cases, the merits of the issue may be clear cut, and in other cases, they may be unclear.

Depending on the merits of the case, taxpayers may in appropriate cases, seek to settle the issue instead of challenging the issue through the Courts. This is particularly so if the cost of litigation and disruption to the taxpayer’s business are considered significant in the context of the amount at issue and the taxpayer’s prospects of success.

In any negotiation process taxpayers should ensure that discussions with the Revenue are on a ‘without prejudice’ basis so as to avoid any risk of unhelpful statements being admitted by the Revenue into evidence in litigation proceedings.

If the negotiation process is successful, and a settlement is agreed, then the settlement should be articulated in a legally binding agreement. Careful drafting will be necessary to ensure that the matter is completely closed.
5.4 Minimising penalties

Penalties for underpayment of tax can be minimised if voluntary disclosure is made, with greater reductions available if the disclosure is made before the commencement of an investigation.\textsuperscript{51}

6. Related observations – Rights of challenge

It seems likely that the objection and review procedures set out in the tax laws of most jurisdictions are intended to operate as a code for challenging assessments of tax. This may either be as a result of the existence of conclusive evidence provisions\textsuperscript{52} or of the existence of express provisions ousting the jurisdiction of a Court or Tribunal to consider the merits of any assessment outside the objection and appeal rules.\textsuperscript{53}

Notwithstanding these strict rules, it may still be possible to challenge an assessment by way of judicial review if the assessment has been initiated by bad faith on the part of the Revenue.\textsuperscript{54} Alternatively, there may be some prospect for taxpayers to initiate proceedings by seeking a declaration before an assessment is issued.\textsuperscript{55}

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\textsuperscript{51} See, for example, NSW TAA section 30(2); SA TAA section 31(2).

\textsuperscript{52} See, for example, Vic TAA section 127, NSW TAA section 119, Qld TAA section 132, ACT TAA section 134 and Tas TAA section 101.

\textsuperscript{53} See, for example, Vic TAA section 96(2) and NSW TAA section 103A.

\textsuperscript{54} Cf. DFC of T v Richard Walter 95 ATC 4067.

\textsuperscript{55} Cf. Oil Basins Ltd v Commonwealth of Australia & Ors 93 ATC 4947.