

# Senate Standing Committee on Economics

## ANSWERS TO QUESTIONS ON NOTICE

### Treasury Portfolio

#### Additional Estimates

23 – 24 February 2011

**Question No:** AET 96

**Topic:** Section 264 Powers

**Hansard Page:** Written

**Senator Bushby asked:**

In your answers to questions on notice arising from the October 2010 round of Estimates you said:

‘We cannot provide statistics on how often our section 264 powers have been used over the past five years. This is because our use of the subsection 264 (1) power, requiring the furnishing of information, is mostly used routinely. Furthermore, our case management and reporting systems are not structured to extract and report this information.

The ATO continues to document the use of these powers within the taxpayer case records in our centralised case management system.’

1. How would you describe the ‘routine’ use of these powers, typically how are they exercised and what advice is given to taxpayers e.g. the need to obtain expert advice or legal assistance, health warnings etc.
2. Is it correct that a computer algorithm is the decision maker for section 264 powers? If so can we be advised of the criteria which trigger such a decision?
3. Do you have an SES person who is in charge of the overall discharge of section 264 powers, and if so could you advise the name of the person and his/her position?
4. Could this officer provide the Senate with a discursive summary of how the power is operating and give an indication of its effectiveness in terms of tax collections and also with respect to any feedback from taxpayers and tax professionals?
5. Can you confirm what the penalties are for failure to provide such information? On how many occasions have you issued penalty notices for such failure?
6. What has been the revenue collection impact of serving such notices, additional taxes levied/harvested and fines?

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7. How difficult would it be to do a representative sample of your case records and estimate the number of section 264 notices that have been issued?
8. What therefore is your 'seat of the pants assessment' of how well the section 264 system is running and what are its strengths and weaknesses? For example, if a taxpayer receives a section 264 notice what is the probability of ATO receiving a satisfactory response?
9. If ATO had ten million taxpayers on its books would the number of section 264 notices be 2 million, one million, 200,000 or 300,000 or some lesser number?
10. Which new tax initiatives over the past decade have meant a boost in the rate of use of section 264 notices?
11. Do some ATO branch offices in the capital cities use this power more than others, or is it more likely to be used by some business lines more than others?
12. When the Commissioner has his annual or regular meetings with his senior SES, have there been any discussions on the use of these powers, and if so what conclusions were reached?
13. What additional funding would you need to be allocated so that a comprehensive system could be built so as to inform the Parliament of the extent to which ATO is exercising its coercive powers?
14. Are you aware that ABCC, ACCC, ACC are all reporting the use of their routine coercive information gathering powers?
15. If you do not know how often you use these powers and what are the trends over say three or five years, how do you judge the effectiveness of the self assessment system, surely, the extent to which taxpayers need to provide you additional data for returns under the self assessment system is a key indicator of how well the system is going – indeed it could be an indicator of poorly worded questions on tax return forms and questionnaires?
16. In your answer to Question on Notice SBT 75, you say;  
We cannot provide statistics on how often our section 264 powers have been used over the past five years. This is because our use of the subsection 264 (1) power, requiring the furnishing of information, is mostly used routinely. Furthermore, our case management and reporting systems are not structured to extract and report this information.

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The ATO continues to document the use of these powers within the taxpayer case records in our centralised case management system.

a) Who made the decision for system changes?

b) When will the first data be on the ATO website?

c) Have there ever been any issues re the use of this power – previous Senate questions, Tax Ombudsman's reports or AAT cases?

If so please provide details.

17. What are the procedures to ensure that these powers are not abused, and also to ensure that post March 2011 accurate and reliable data on the use of these powers is provided to the Parliament?

18. Does the ATO have procedures on the use of these powers and where are they published – how do these procedures ensure integrity?

19. Does the ATO receive complaints on the use of this power, and if so how does it handle such matters?

20. Can the ATO recall an Ombudsman's report of December 1996 entitled: 'Complaint by Mr B concerning the use of ATO's information gathering powers to identify the whereabouts of the debtor? Did this case prompt the ATO to institute any procedural changes?

21. What action does the ATO take to ensure that mistakes observed by large numbers of taxpayers in a particular industry or under a particular tax measure, are addressed through further educations, training etc?

For example, if an incorrect approach to paying superannuation on commission payments was observed or brought to your attention, how would you approach this?

#### **Answer:**

1. The routine use of these section 264 powers refers to these notices being a necessary element of taxation administration to formally gain information, on taxation related matters, from taxpayers and other third parties.

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For example, section 264 notices are routinely furnished to financial institutions, at their request, so they can formally provide the ATO with information necessary to check that taxpayers are complying with their obligations.

Most of the ATO's section 264 notices are issued to financial institutions. They are very accustomed to a large volume of valid notices being issued and are very co-operative in complying. In fact, the Australian Bankers' Association has in the past requested that the ATO use formal powers so as to meet concerns about client confidentiality.

Attachment 1 shows an example of a templated ATO covering letter sent to taxpayers with a section 264 notice attached.

With this letter, the ATO also sends a Taxpayers Charter booklet *Fair use of our access and information gathering powers* which provides expanded advice to taxpayers and their advisers on access and information gathering powers including their rights. This can be found at Attachment 2.

**2.** No, this is not the case.

The triggers for the formal notices include requests to the ATO by third parties such as financial institutions to have these notices issued so the supply of tax-related information can be made pursuant to a valid legal requirement.

**3.** The Commissioner of Taxation is ultimately in charge of the overall discharge of section 264 powers. The Commissioner has delegated those powers to very senior officers holding particular positions, in particular Deputy Commissioners. In addition, other officers holding particular senior positions are authorised to exercise those powers, so they can be appropriately used in accordance with the ATO's published practice and guidance in the *Access and Information Gathering Manual*.

The SES Assistant Commissioner with responsibility for the guidelines in this manual is the ATO General Counsel.

**4.** Most ATO information gathering activities are conducted co-operatively, without the use of formal powers and formal notices. Most taxpayers respond co-operatively with the ATO's informal requests for information. The actual number of taxpayers issued with section 264 notices is very low as a percentage of all taxpayers the ATO interacts with in any one year.

The ATO uses many information sources to assess tax compliance and many channels of activity and processes occur to ensure that Compliance Program

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activities are carried out legally, effectively and appropriately. The use of section 264 notices is only one of many activities to understand and verify taxpayer compliance.

The section 264 power is effective because it provides the ATO with timely information to:

- provide some voluntary compliance services to taxpayers, e.g. emerging pre-filling service to taxpayers with completed property transactions
- aid the clarification of taxpayer-related facts and evidence to resolve potential disputes at the earliest possible time
- provide a level playing field so those who do not want to willingly comply with their obligations under the law, do comply, and
- deliver on Compliance Program activities through being effective and undertaking activities more efficiently, particularly when taxpayers do not want to willingly comply.

The use of the power has been, and is the subject of, ongoing consultation arrangements with tax professionals and industry representatives because of its requirements.

For a small number of taxpayers and advisers in the community, the use of this power does understandably create tension, complaint and dispute because at times, this power is used to overcome circumstances where the ATO sees a lack of timely co-operation.

The ATO continues to be open to feedback from the community on the use of this power.

5. A person who, when and as required pursuant or under a taxation law, refuses or fails to:

- furnish information
- produce a book, paper, record or other document
- attend (and answer questions), or
- take an oath or make an affirmation when attending

...to the extent that the person is capable of doing so, that person will be guilty of an offence or offences under sections 8C and/or 8D of the *Taxation Administration Act 1953*.

That person will be liable, under sections 8E or 8ZF of the *Taxation Administration Act 1953* to:

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- a fine not exceeding \$2,200 for a first offence
- a fine not exceeding \$4,400 for a second offence, or
- a fine not exceeding \$5,500, and/or imprisonment not exceeding 12 months, or \$27,500 for a company, for a third or subsequent offence.

Note: These are not imposed by the ATO. They are generally imposed by the Courts.

The answer for the period from 1 July 2008 is as follows:

#### 1 July 2008 to 30 June 2009

5 cases resulted in convictions in the 2008-09 financial year for \$11,700 in fines.

Another 25 cases were not proceeded with for a variety of reasons. There are a number of reasons why action did not proceed, including:

- provision of the documentation and information before the court date fell due
- the ATO has obtained information from other sources
- deficiencies in the notices, or
- inability to locate the taxpayer or third party.

#### 1 July 2009 to 30 June 2010

22 cases resulted in convictions in the 2009-10 financial year for \$22,675 in fines.

Another 43 cases were not proceeded with for a variety of reasons including the production of information required before the court date fell due.

#### Current year to date - 1 July 2010 to 21 March 2011

20 cases so far this year have resulted in convictions for \$19,400 in fines.

Another 32 cases were not proceeded with for a variety of reasons including the production of information required before the court date fell due.

6. These notices do contribute to the revenue the ATO collects on behalf of the community.

The total revenue collection impact attributable to section 264 notices cannot be isolated and quantified because it is only one element of a suite of compliance strategies operating to support taxation and superannuation system compliance.

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A positive impact is reflected in audit and dispute resolution outcomes where the ATO uses a range of risk assessment, information gathering and dispute resolution processes, not just section 264 notices.

Without these notices, taxpayers and their advisers may be more inclined to adopt a less open and transparent approach in relation to their tax affairs. This behavioural response should not be underestimated.

**7.** The ATO has developed manual reporting arrangements to deliver the best approximation of 2010-11 year to date, section 264 notice numbers and know past year numbers for particular compliance projects.

The ATO has been keeping manual records this year as they put in place system changes to automate reporting, to the best extent possible.

For the eight months to 28 February, 2011, the best approximation is that the ATO issued 1,797 formal section 264 notices [including section 264A notices, which apply to information held offshore, and section 353-10 notices, the latter being the indirect tax provision that is equivalent to section 264 for income tax].

The sampling would be a difficult process given the numerous interactions the ATO has with taxpayers.

**8.** The ATO's assessment is as follows which adds to the response commentary to Question 4 above.

Where it is used, it more likely than not, aids tax compliance and aids to re-enforce behaviours which support our already high levels of voluntary compliance.

Its strength is in providing a legal obligation on taxpayers and third parties to supply timely relevant information to support a broad range of compliance-supporting actions and services. The power supports the provision of timely and relevant information, both formally and informally.

In some cases, where there is a lack of cooperation and the ATO uses the section 264 power, they see there is a significant reduction in the time taken to obtain relevant information or evidence compared to those cases where continued informal approaches were maintained.

Furthermore, it is a power which is responsible for the ATO making appropriate, supportable decisions, based on the best possible identification and analysis of the relevant, available, facts and evidence.

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In addition, multiple notices are sometimes required before the relevant information is provided. For example, the ATO may need to issue a notice to identify the material available and who holds that material before they can issue a notice requiring the provision of the information or documents.

In most cases, the ATO receives relevant information and high levels of compliance with these notices. It should be noted that when issued to financial institutions, 99% of these notices are complied with which is a positive outcome for the community. It is an essential tax compliance tool to support willing-to-comply taxpayers and assists us in dealing with taxpayers unwilling to comply.

Tensions will continue when this power is used and the ATO fully intends to work with all stakeholders in the tax and superannuation systems to ensure our use of this power is appropriate and that taxpayers are fully aware of their rights and responsibilities.

**9.** It is a much smaller number and only a very small taxpayer number compared to the number of individuals and business entities in the tax and superannuation systems (There are approximately 16.5 million returns filed each year).

The estimated number of formal section 264 notices to be issued this year is likely to be around 3,000, given the best available data to the end of February this year.

- 10.** The use of these notices is mainly driven by factors such as:
- a sharper focus on tax and superannuation system risks of non-compliance
  - the need to deal with risks of non-compliance early, efficiently and effectively, particularly given the *Review of Self Assessment* period of review changes, other changes in the laws administered by the ATO and the internationalisation of how people conduct their affairs, and
  - the need to complete long-running complex tax audits, ensuring that the ATO is making supportable decisions, based on the best available relevant facts and evidence.

The reduction in the Period of Review - under the *Review of Self Assessment* changes - and the previous Simplified Tax System, resulted in an increased use of section 264 notices due to the reduced time available to the ATO to undertake and complete audit activity - unless fraud or evasion is evident. Consequently, increased use of formal powers at an early point in an audit has occurred, in some cases.



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Furthermore, with the growing internationalisation of business, the ATO has increased enquiries relating to information held overseas. Section 264A notices, introduced in relatively recent times for income tax matters, enable the ATO to seek details of relevant information held overseas.

The introduction of promoter penalty laws in 2006, which can impose penalties on the promotion of tax exploitation schemes, has led to an increase in the use of section 264 notices. Promoters and key tax system intermediaries routinely request that a formal notice be issued by the ATO in the first instance because confidentiality and contractual obligations exist.

Finally, given the transactional nature of the GST, there is a requirement to verify high numbers of transactional documentation, such as tax invoices, in each tax period. Therefore, there has been some increase in the numbers of formal notices seeking these documents from the other parties to transactions.

**11.** Generally speaking, some business lines with particular risk-based compliance activities in certain locations will use this power more than others.

In the large market for example, more notices issue from the Sydney and Melbourne regions because the 'higher risk and higher consequence' taxpayers are generally located in Sydney and Melbourne.

In the micro enterprises and individuals markets, some risk-based activities focusing on key Compliance Program risks are located in particular sites and those focused activities may be more likely to use formal powers than others due to the nature of their work.

For indirect tax matters, especially GST, there is no geographical variation to the use of formal powers. Any increased activity again reflects the nature of the work to manage tax risks undertaken around Australia.

**12.** The Commissioner has ongoing discussions with his senior executives. Usually the focus of these discussions is not the use of section 264. However, there would be instances where these discussions touch on whether our information gathering practices and procedures are appropriate or adequate in dealing with taxpayers and the risks the ATO sees.

The conclusion has been that there needs to be appropriate information gathering both informal and formal to manage the risks we see. Much voluntary compliance and community acceptance has been and is being achieved through the use of informal approaches to information gathering.

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**13.** The overall cost of designing and delivering such a comprehensive reporting framework and assuring the output for integrity would be around \$1 million over the next 12 months, which represents a roll out to all potentially-impacted tax officers.

Most of the cost would be salary costs to enable accurate and comprehensive reporting to Parliament.

**14.** The ATO is aware of those disclosures.

**15.** The ATO does have a reasonable level of confidence in the estimation of the number of times the section 264 power is used and they know where their use is increasing in response to identified risks.

Aspects of the self-assessment system were reviewed in 2004 but that review did not cover the section 264 power.

The review was asked to examine aspects of Australia's self assessment system for income tax to determine whether the right balance had been struck between protecting the rights of individual taxpayers and protecting the revenue for the benefit of the whole Australian community.

The review made a number of recommendations, which have been implemented. As a result, the self assessment system would now be more effective.

In addition, the ATO tests the useability of its various returns and information products on a regular basis with the community. This testing is carried out in a number of ways:

- The ATO Tracking the Individuals Segment survey includes a range of questions on taxpayer awareness, understanding and satisfaction with ATO products and services.
- The ATO uses the principles of co-design when designing products to support new legislative and policy measures. This can include 'stand alone' products such as information bulletins as well as content for existing forms and instructions such as Tax Pack and e-tax.
- E-tax and Tax Pack major enhancements are specifically user tested. The ATO also has an online survey with around 15 questions that taxpayers can elect to complete when lodging their return via e-tax.
- The ATO co-designs and user tests with members of the individual taxpayer community all new online tools and calculators.

Some of the ATO's observations around effectiveness were published in the ATO's *2009-10 Annual Report* at page 90 and also noted in the Commissioner's speech to

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the *Committee for Economic Development of Australia* dated 25 February 2011:

<http://www.ato.gov.au/corporate/content.aspx?doc=/content/00277345.htm>

**16(a).** Assistant Commissioner Active Compliance Improvement Leader, who has oversight of the compliance enterprise reporting framework.

**16(b).** The manually-gathered data referred to in Question 7 will be available when the ATO publishes the 2010-11 Annual Report in October this year.

The first data routinely extracted as a result of systems changes will be contained in the 2011-12 Annual Report, published in October 2012.

**16(c).** The December 1996 Ombudsman report: *The ATO's use of information gathering powers*, concerning Mr B. was specifically about the section 264 power.

The May 2008 Report No. 48 by the Administrative Review Council: *The coercive information-gathering powers of Government agencies* also made reference to this power.

In developing its report the Council took into account other bodies' work to the extent that it pertains to coercive information-gathering powers. Such work includes the 2000 and 2006 reports of the Senate Standing Committee for the Scrutiny of Bills, the government's response to the earlier of those reports, the 2003 report *Review of the Competition Provisions of the Trade Practices Act*, and work done by law reform bodies such as the Australian Law Reform Commission in the areas of the privilege against self-incrimination or self-exposure to penalty and client legal privilege. The Council also took into account the ALRC's work on client legal privilege and privacy.

The more significant court and AAT cases on section 264 matters are referred to and referenced in the ATO's comprehensive published *Access and Information Gathering Manual*. The link to review that manual is:

<http://www.ato.gov.au/corporate/content.asp?doc=/content/51035.htm>

**17.** The set of section 264 and other information-gathering guidelines, including the stated procedures to ensure against abuse of these powers is contained in the ATO's published *Access and Information Gathering Manual*. The link to this manual's detailed procedures is at this link:

<http://www.ato.gov.au/corporate/content.asp?doc=/content/51035.htm>

The ATO also undertakes ongoing quality checks on what ATO officers do in their audits as part of the ATO's Integrated Quality Framework activities. Quality as a

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definition, includes checking to ensure that tax officers comply with published practices, procedures and guidelines

Procedures and processes exist through the ATO's Active Compliance Capability to report and assure the accuracy of the data to be disclosed to Parliament on the use of this power. A key aspect to ensure accuracy will be to design a counting rule to govern how the ATO quantifies section 264 notice activities. The ATO then needs to check compliance with that rule to ensure that disclosures to the Parliament have the highest levels of integrity.

**18.** Yes. These procedures are published as noted in the answer to Question 17 above.

Integrity is assured to the best possible extent by having notices issue which have had input and oversight by experienced senior officers in the ATO with notices only issuing from senior officers who are delegated or authorised to do so. The ATO also has training programs in the use of these powers.

**19.** The ATO does receive complaints on audit processes and does not separately identify where the use of section 264 is a feature of the complaint. All complaints are handled through the ATO's formal complaints handling procedures. These are intended to inform the ATO if a particular matter is the subject of frequent complaints. The use of section 264 has not been identified as such through these processes.

The ATO also hears of other complaints through external consultation forums and from other stakeholders. The ATO considers this feedback to determine whether processes can be further improved and also offers the opportunity to raise specific cases as case studies either for resolution or for continuous improvement. The ATO addresses those matters formally and directly with those stakeholders.

Most general (not-taxpayer-specific) commentary over the last decade on the use of the section 264 power has come from industry to the ATO through channels such as:

- The 2005 Report by Kevin Burges: *Report on the concerns of a number of the largest companies in the Large Business Segment, with ATO audit, investigation, and advice procedures.*
  - no specific complaint numbers noted in this report.
- The Large Business Advisory Group and large market representatives providing input to our *Large business and tax compliance* booklets.
  - no specific complaint numbers shared with the ATO.

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Much of that commentary from industry is aimed at our practices and procedures around section 264 matters, including the quality of communications between the ATO, taxpayers and tax professionals.

**20.** Yes.

The ATO agreed to and implemented all recommendations in the Ombudsman's December 1996 report entitled *Complaint by Mr B. concerning the use of the ATO's information gathering powers to identify the whereabouts of a debtor*.

Implementation included the following procedural amendment to the ATO's *Receivables Policy* which is available on the ATO's website at [www.ato.gov.au](http://www.ato.gov.au)

Chapter 111 - *Introduction to information gathering* - paragraph 41:

*A formal notice may also be served on a relative of the taxpayer, if enquiries of other persons and entities have been unsuccessful and the relatives decline to supply the information informally. Care should be taken in issuing notices on family members - other avenues should be tried first, where appropriate, to minimise the tension between complying with the law and supporting the family.*

**21.** First, the ATO has to identify the mistake and to that end, they encourage taxpayers, advisers and professional bodies to bring such matters to their attention.

The ATO's first response is often to work with taxpayers, industry groups and tax professionals to understand what is driving the mistake and agree on a range of strategies so taxpayers can correct the mistake efficiently and voluntarily.

Tailored marketing and education strategies provide assistance with the application of the law including the development of fact sheets and web-based material.

The Joint Committee of Public Accounts and Audit's (JCPAA) comprehensive three year review of the ATO culminated in its *Report 410 on Tax Administration* in June 2008. While the Committee was concerned about the complexity of the tax laws (a matter outside the control of the ATO), the Committee endorsed the ATO's Compliance Model that counsels taking action that best addresses the compliance risks.

Where it is identified that a particular error is occurring with either the calculation of superannuation guarantee or other aspects of the legislation, the ATO's initial strategy is to raise the level of education and awareness for that issue. This is typically done by adopting one or more of the following communication strategies:

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- issuing tailored letters to targeted industries (if the error is found to be prevalent in particular industries)
- issuing media alerts
- communicating the correct approach when undertaking audit activities
- targeted media campaign which could include:
  - information input onto the ATO website
  - mailouts
  - information provided through forums to ATO industry partnership secretariats
  - revise tax speaker and seminar presentations including:
    - Tax Basic seminars
    - Record keeping seminars
    - General seminars with super information
  - articles included in various publications including:
    - industry associations and employer association newsletters and publications
    - Large Business bulletin (2,000 issued per month to large businesses)
    - Tax Agent Newsletter (distributed to 27,000 registered tax agents)
    - Super Update (electronic newsletter sent to 14,000 superannuation funds and intermediaries)
    - Activity Statement Update (issues each quarter to three million quarterly lodgers and 376,000 people with monthly obligations)
    - BAS Newsletter (monthly email subscription newsletter which aims to engage and educate bookkeepers who operate a business providing business activity statement (BAS) services for a fee)
    - E-link (Bulletin to inform tax practitioners of the most recent updates to *ato.gov.au*), and
    - Not for profit news service (keeps employers up-to-date on key tax issues affecting the non-profit sector).

When the legislation was changed in 2009, the ATO undertook an extensive media campaign incorporating most of the above approaches as well as working very closely with industry representatives.

The ATO makes a significant investment to support Australian citizens generally whether they be taxpayers, tax professionals, superannuation funds, financial advisers and other stakeholders in the taxation and superannuation systems.

This support is aimed at giving people the right information so they can comply with their obligations.

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See also the ATO's *Strategic Statement 2010-15* which highlights as themes, encouraging, supporting and championing taxpayers and enhancing ATO capabilities.