

**SENATE STANDING COMMITTEE ON ECONOMICS QUESTION**  
**(Supplementary Budget Estimates 20 October – 21 October)**

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**Question: SBT 75****Topic: Coercive Powers**

Senator Bushby asked:

1. What are the ATO's coercive powers? How often has each power been used in the past five years?
2. How many departure prohibition notice orders does the ATO currently have in force?
  - a. Is it the case that if a court declares a departure prohibition order invalid the ATO can immediately issue a further DPO effectively over-riding the Court?
  - b. Has this ever occurred?
  - c. What are the procedures?
3. Third, when exercising these powers what is the ATO position re suggesting that those under coercion seek the advice of an appropriate adviser so that their rights are respected?
4. Does the ATO ever try to discourage a taxpayer in its dealings with the ATO from using lawyers?
  - a. If you had heard of such an instance would that concern you and what would you do?
5. In the UK the HM Revenue and Customs HMRC has a policy on its web site as follows:

**This Code of Practice explains how the Fraud and Avoidance section of the Specialist Investigations directorate of HM Revenue & Customs (HMRC) carry out investigations. It applies to all investigations where the Civil Investigation of Fraud procedures (Code of Practice 9) are not used. Other sections of Specialist Investigations may also act under this Code from time to time. The Code promises that we will treat you fairly and courteously in accordance with the law and includes 'Our service commitment to you' (inside back cover).**

**Professional representation**

We recommend that you approach a professional adviser to represent you during our investigation although, again, this is a matter for you.

Does the ATO have an equivalent statement on its web site or does it send written advice with these messages to taxpayers under scrutiny?

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**Answer:**

1. The Commissioner may compel a taxpayer to undertake specified actions. These powers are under provisions of taxation legislation such as:
  - Division 353 in Schedule 1 of the *Taxation Administration Act 1953* (upon notice being given in writing, require information or evidence to be provided, in some cases in person and on oath or affirmation; also require authorised ATO officers to be given access to buildings, places and documentation)
  - Section 263 of the *Income Tax Assessment Act 1936* states that 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 the *Income Tax Assessment Act 1936*, and for that purpose may make extracts from or copies of any such books, documents or papers. Taxpayers frequently provide information to the ATO on an informal basis, without formal notice or upon an informal request from the ATO. The use of the Section 263 power without notice is only authorised in exceptional circumstances, on a small number of occasions in any one year. This is recognised in the Commonwealth Ombudsman's February 2010 Report on the ATO's use of "access without notice" powers.
  - ATO officers must be properly authorised to exercise access powers. Authorised officers should carry their authorisation document titled "Authorisation for Access". The authority (sometimes referred to as a wallet) may be used where informal access is being sought. If proceeding on an informal basis an officer should only show the bottom half of their authority (that is, photograph identity only) to the enquirer.
  - If an officer does not have a current, valid authority they may not enter premises without the informed consent of the occupier. Generally, the ATO's access provisions stipulate that an officer is not entitled to enter or remain on land or premises if, on being requested by the occupier of the land or premises for proof of authority, they do not produce an authority in writing signed by the Commissioner or his delegate stating that they are authorised to exercise the access powers. If an officer does not have a valid authority and do not leave the premises when requested, the officer would be open to an action for trespass.
  - Section 264 of the *Income Tax Assessment Act 1936* (upon notice being given in writing, require information to be provided, in some cases in person and on oath or affirmation).
  - The ATO used its access without notice powers under section 263 on ten occasions, four in 2008-09, eleven in 2007-08, twenty one in 2006-07, and sixty eight times in 2005-06.
  - Subsection 264 (1) is the Commissioner's power to, 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 to furnish him with such information as he may require. This power is more routine or frequently used than other section 264 powers. Subsection 264 (2), where the Commissioner may require the information or evidence to be given on oath or affirmation and either verbally or in writing is used but used infrequently but is still necessary in some complex tax matters.

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- 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.
2. At 31 October 2010 the ATO had 53 departure prohibition orders (DPOs) in place.
- a. The ATO has the power to issue a DPO immediately following the setting aside of a previous DPO by a court.
  - b. On one occasion where the court set aside a DPO on technical grounds, the ATO issued a new DPO shortly afterwards based upon newly acquired information.
  - c. The procedure for issuing a new DPO after a court has declared the previous DPO invalid is the same as that followed for all DPOs. The decision to issue a DPO is made in accordance with chapter 13 of the *ATO Receivables Policy* (available on the ATO website) and can only be made by a senior officer within the ATO.
3. Our position on this matter is embedded in publicly available ATO guidelines which require officers to take steps to ensure that taxpayer rights are respected in the course of exercising these powers. In particular, the ATO advises taxpayers that they will be given reasonable opportunity at any time to consult with their advisers.

Paragraph 6.6.4 of the ATO's *Access and information gathering manual* is relevant and requires officers to do the following:

*When you are exercising the power to access premises you are required to give the custodian of documents an adequate opportunity to claim privilege, unless there is no possibility of privilege being applicable – see [Chapter 1](#). Either at the time of giving a person a notice, or at the very latest at the time of entering the premises, you should hand out and explain booklet 9 which supports the taxpayers' charter and is called *Fair use of our access and information-gathering powers*.*

The *Taxpayers' charter* booklet referred to above is at Attachment A.

At page 5, the ATO makes it clear to taxpayers that they have legal rights which will be respected as follows:

**RESPECTING YOUR LEGAL RIGHTS**

*If you are required to attend a formal interview, you may choose to have your representative or advisers present. However, your representative or adviser will not be able to answer questions put to you. They may advise you about what a question means but they cannot tell you the answer you should give.*

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*In some limited circumstances, you may not be able to have your choice of representative or adviser at the meeting. This may be because they were involved in the transaction under review. In this case, we will give you reasonable time to find an alternative representative or adviser.*

*You will be given reasonable opportunity at any time to consult with your advisers.*

*We will respect your right to claim legal professional privilege for certain communications between you and your barrister or solicitor. In some circumstances, we will allow some advice given to you by a professional accounting adviser to remain in confidence between you and that adviser. You will need to provide sufficient information about each communication where you are claiming legal professional privilege or for each advice that you want to remain in confidence between you and a professional accounting adviser.*

4. The ATO fully respects taxpayers' rights to legal and other professional representation (e.g. to be represented by registered tax agents). That said, there will be many instances where both the ATO and taxpayer agree that discussions on a particular issue are best conducted informally and without either party being professionally represented. As noted above, publicly available ATO information clearly recommends that taxpayers seek professional advice where necessary in relation to their tax affairs.
  - a. The ATO acknowledges that taxpayers may choose legal representation at their own discretion. Taxpayers who consider they may have been wrongfully discouraged from seeking legal counsel would be within their rights to raise this concern with the ATO for investigation. Taxpayers concerned with the behaviours of ATO officers can make a complaint. Information on how taxpayers can make a complaint in person, by phone, fax or by lodging a form with the ATO is available through *ato.gov.au*. The link for taxpayers to the relevant page is as follows:  
  
<http://ato.gov.au/corporate/content.asp?doc=/content/67192.htm>
5. The ATO has a *Taxpayers' charter*, which is publicly available on the ATO website and in printed format. The *Taxpayers' charter* includes clear statements that the ATO will treat taxpayers 'with courtesy and respect' and use its powers 'fairly and professionally'. The ATO's use of its access and information gathering powers is explained in the *Taxpayers' charter* booklet 'Fair use of our access and information gathering powers'. This booklet includes a specific paragraph entitled 'Respecting Your Legal Rights' which advises that 'you may choose to have your representative or advisers present'.

In addition, the ATO has published our *Access and Information Gathering Manual* on *ato.gov.au*. This manual sets out guidelines which tax officers should follow when they are using the powers of investigation contained in the various Acts administered by the Commissioner of Taxation. The manual sets out the law on which those guidelines are based. It also provides taxpayers and our staff with practical examples of how the guidelines work.

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These examples are intended to illustrate particular key points of practice. This manual can be found on the ATO website using the following link:

<http://www.ato.gov.au/corporate/content.asp?doc=/content/9101.htm>