

Australian Taxation Office

USE OF 'ACCESS WITHOUT NOTICE' POWERS

February 2010

Findings of an own motion investigation conducted by the Commonwealth Ombudsman,
Professor John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **02|2010**

Reports by the Ombudsman

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PART 1—INTRODUCTION

Background

1.1 The Australian Taxation Office (ATO) exercises a range of coercive powers to administer the Australian taxation system. Where such powers are used, it is necessary that appropriate oversight and robust procedures govern their use. This includes adequate record keeping and appropriate review and quality assurance mechanisms.

1.2 The 2000 report of the Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, expressed concerns about the wide ranging powers available to Government agencies. It recommended that the Ombudsman conduct a regular random audit of the ATO’s use of access without notice powers. This is the Ombudsman’s second investigation into the ATO’s use of its access without notice powers.

1.3 The observations and findings in this report draw on the principles outlined in the Ombudsman report *Lessons for public administration*¹ and the Administrative Review Council’s report *The Coercive Information-gathering Powers of Government Agencies* (the ARC report), which puts forward best-practice principles as a guide to government agencies, ‘to ensure fair, efficient and effective use of coercive information-gathering powers’.²

Methodology and scope

1.4 The objective of the investigation was to:

- assess the procedures for preparing for an access without notice visit, the conduct of visits and quality assurance measures
- compare the ATO’s practices to its *Access and Information Gathering Manual* and other guidance documents
- assess the record-keeping procedures.

1.5 The methodology for this investigation involved:

- observing an access without notice visit, including attending the briefing and debriefing associated with that visit
- reviewing the supporting documents of a random selection of 16 access without notice visits conducted by the ATO in the period 2005–06 to 2007–08, inclusive. The sample included visits conducted by the ATO’s Goods and Services Tax (GST), Excise, Serious Non-compliance and Aggressive Tax Planning business lines
- discussions with ATO staff involved in the exercise of these powers
- reviewing the ATO supporting documentation that guides its staff in the use of its access without notice powers.

¹ Commonwealth Ombudsman, *Lessons for public administration—Ombudsman investigation of referred immigration cases*, Report No. 11/2007.

² Administrative Review Council, *The Coercive Information-gathering Powers of Government Agencies*, Report No. 48, 2008.

PART 2—OVERVIEW OF THE ATO’S ACCESS POWERS

2.1 The ATO compliance model and its associated enforcement strategies provide the context for the use of its powers to obtain information, including the use of access without notice.

2.2 The ATO’s compliance model advocates education as the most appropriate strategy to help compliant taxpayers meet their tax obligations. The model suggests a more coercive strategy to deal with less compliant taxpayers, such as those the ATO suspects have elected to opt out of the tax system or evade tax obligations. This might include the ATO using its access without notice powers.

The legislation

2.3 Legislation administered by the ATO gives the Commissioner and his delegated officers the right to access premises without notice for the purpose of gathering information. The ATO’s *Access and Information Gathering Manual* (the Manual) lists those Acts that contain powers to enter and remain on premises and access documents.³ The legislation that provides for access without notice deals with income tax, indirect tax, pay as you go tax, fringe benefits tax, energy-related taxes and superannuation.

2.4 The wording of each of the access provisions varies slightly, but all provisions include the power to have ‘full and free’ access to all places and buildings to examine and copy documents, and require the occupier to provide reasonable assistance to the ATO. ATO officers must be appropriately authorised by the Commissioner to conduct an access without notice visit.

2.5 An additional power contained in some legislation administered by the ATO is the power to take samples during an access without notice visit (for example the power contained in s 353–15 of the *Taxation Administration Act 1953* (TAA)).

2.6 One of the more commonly used powers to access premises without notice is at s 263 of the *Income Tax Assessment Act 1936* (ITAA).

263 Access to books etc.

(1) The Commissioner, or any officer authorised 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.

(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 authorised to exercise powers under this section.

(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.

Penalty: 30 penalty units.

2.7 A decision to access premises without notice can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977*.

³ *Access and Information Gathering Manual*, paragraph 1.1.7, ATO website, accessed on 8 October 2009.

The ATO’s Access and Information Gathering Manual

2.8 The Manual contains the ATO’s policies and procedures for the use of coercive powers, including the access without notice powers, and is publicly available on the ATO website. The Manual is supported by other material, such as guidelines for senior ATO officers who approve access without notice visits.

2.9 The Manual states that access without notice should be used only if there are exceptional circumstances. Exceptional circumstances are limited to three categories:

- a genuine belief that documents may be destroyed if notice is given about the access
- a well-founded concern that fraud or evasion is taking place
- there is inappropriate secrecy by the taxpayer.⁴

2.10 When the ATO’s formal powers are used to access premises, the taxpayer has an obligation to answer any questions regarding the location of records. They are not, however, obliged to respond to any other questions. The ATO can issue a notice to compel a taxpayer to answer questions beyond those relating to access and can require a person to furnish such information as may be required. This power requires notice to be given to the taxpayer, so the ATO does not use it as part of the access without notice process.

2.11 The right of ‘full and free’ access allows ATO officers to take the steps they consider necessary to remove physical obstructions to a premises, but not beyond a reasonable use of force. The Manual advises that ‘forced’ access to premises is warranted only in exceptional circumstances and that every opportunity must be provided to the occupier to open a locked storage facility. Forced entry—which involves engagement by the ATO of a locksmith—may proceed only with the clearance of an approving officer. Force may be used at unoccupied premises or in a situation where a building occupier refuses to cooperate with the ATO. Using access without notice at unoccupied premises limits the practical ability of the occupier to claim Legal Professional Privilege (LPP) on documents.

2.12 The Manual further advises that the ATO, when seeking access without notice, must allow the occupier of a building reasonable time to seek legal advice.

Legal Professional Privilege and Accountants Concession

2.13 ATO access powers do not override LPP. The effect of this is that if a communication is subject to LPP, the ATO is not entitled to use its statutory powers to obtain it.⁵ The ATO also restricts its access to documents that may be protected by the ‘Accountants Concession’ (AC). The Manual states that at the commencement of an access without notice visit, officers should make it clear to the occupier of the premises that they may claim LPP or AC over the documents they hold.

2.14 Legal Professional Privilege is a fundamental principle that protects certain communications between a lawyer and client. In accordance with Principle 17 of the ARC report, the ATO has in place extensive procedures and guidelines on the application of LPP in the context of access without notice.

⁴ ATO document supplied as part of this investigation, *Ombudsman Review of s 263*, page 9 of 86.

⁵ *Access and Information Gathering Manual* paragraph 6.1.5.

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2.15 The issue of LPP is complex, particularly when access is at a lawyer’s or accountant’s premises. To assist in such access visits, the ATO has prepared guidelines that deal with relevant issues. During access without notice visits, field officers are also supported by ATO experts on the use of LPP via a command centre. At the commencement of a visit, the ATO policy is for officers to make it clear to the occupier of the premises that they may claim LPP. The occupier of the premises must also be given the opportunity to seek legal advice in relation to documents that may attract LPP.

2.16 If an occupier claims LPP on documents, ATO officers should seek to identify the grounds on which the claim is made—the custodian should be asked to complete a pro forma for each document in respect of which LPP is claimed. Each completed pro forma must be returned to the ATO, at which time the ATO will determine if it wishes to challenge the claim of LPP.

2.17 The ATO has advised the Ombudsman’s office that its preference is to avoid drawn-out claims for LPP and, if possible, to negotiate and settle claims during the visit. To this end it has a number of strategies to resolve claims, such as both parties agreeing on an independent person to inspect the documents and decide whether the documents attract LPP.

2.18 The Accountants Concession is a creation of the ATO that acknowledges a class of documents which should, in all but exceptional circumstances, remain confidential between taxpayers and their professional accounting advisers. As an administrative measure created by the ATO, there are circumstances in which the ATO will not apply the concession. If the AC is claimed by the taxpayer, the claim is managed in a similar manner to a claim for LPP. Claiming the AC places an onus on the custodian of the documents to reveal enough information about the documents for the ATO to determine if it will accept or challenge the AC claim.

2.19 The limitation of access to accounting documents under the AC has the potential to hamper the ATO’s administration of taxation law. In view of this, the AC can only be claimed in relation to ‘restricted source’ documents and ‘non source’ documents. These are documents that are prepared by an external accounting professional to provide to a client advice about a tax liability or transactions that the taxpayer did not put into practice.

2.20 The AC cannot be claimed for source documents, including records of transactions, profit and loss documents, or ledgers or records that cast light on the purpose of a transaction. Limiting access to these documents would prevent the ATO from being able to assess a taxpayer’s liability.

2.21 The Manual states that submissions seeking approval to use the access without notice power, in circumstances where it is proposed to not allow for the AC to be claimed, must identify an exceptional circumstance that supports this approach. The exceptional circumstances that meet the requirement to have the AC lifted include where:

- source documents do not provide the ATO with sufficient information for the ATO to administer the tax law
- there is a suspicion of fraud
- the client’s source documents have been lost or destroyed.

PART 3—OBSERVING AN ACCESS WITHOUT NOTICE VISIT

3.1 Ombudsman staff accompanied ATO officers on an access without notice visit to observe the ATO’s practical application of their powers in comparison to the guidelines. The access visit observed was conducted by staff from the ATO’s GST business line. The powers relied upon by the ATO to obtain access were s 263 of the ITAA and s 353–15 of the TAA.

3.2 This was a coordinated multi-site access without notice visit across four states. Ombudsman staff were present in the main command centre and at two other sites, one in Queensland and one in Victoria. Ombudsman staff also attended the pre-access briefing session and the debriefing session.

3.3 The preparation and the execution of the access involved more than 100 ATO staff. In line with ATO procedure, staff in a command centre provided a central point of contact and coordination for all the sites accessed. Command centres are staffed by senior access experts with the capacity to address any problems or issues that might arise during an access visit. Due to the geographical spread in this case, an additional two smaller command centres were established in other states. All the command centres were connected via video link for the duration of the access. The access without notice visit at the Queensland site took around nine hours, and the Victorian site visit took around six hours.

3.4 The sites were accessed simultaneously at the beginning of business hours. Access teams at each site comprised about six ATO officers. The sites were a mix of business and private residences. At the Queensland site, two Queensland Police officers were present to ensure the safety of the ATO officers. The police officers did not participate in the search. The ATO, in conjunction with Victoria Police, decided that the Victorian site did not pose a risk to ATO officers.

3.5 At both sites attended by Ombudsman staff, ATO officers who entered the business premises identified themselves to the occupiers using their wallet authorities.⁶ The ATO officers provided the building occupiers with copies of the signed approval to access the premises, the *Taxpayers’ charter, Fair Use of Our Access and Information Gathering Powers* booklet and the relevant sections of the legislation the ATO believed allowed them to access the site without notice. This approach is consistent with Principle 14 of the ARC report.

3.6 Only the ATO access team leaders negotiated with the occupiers and responded to questions. They informed the building occupiers of the legislation under which the premises were being accessed and advised that the ATO was acting in accordance with the legislation. The ATO officers also advised the occupiers of their right to obtain legal or professional advice and allowed them sufficient time to seek that advice before the access took place.

3.7 The owner of the business at the Queensland site was not available on the day of the visit, so access was negotiated with the manager. The manager was not confident about claiming or waiving LPP on any of the documents on the premises. The parties agreed that access would continue but that any documents identified by ATO officers as possibly attracting LPP would be provided to the manager for consideration without having been copied. The matter was eventually resolved when

⁶ A wallet authority is a photo identification listing the powers available to the ATO officer. This is in accordance with Principle 13 of the *Coercive Information-gathering Powers of Government Agencies*.

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the manager contacted the business owner, who decided not to claim LPP on any documents.

3.8 The ATO officers advised the building occupiers that they were under no obligation to answer any questions other than those regarding the location of the documents. The building occupiers elected to answer all questions freely.

3.9 At the Queensland site, the ATO access team leader asked the manager if documents were stored at other locations. The manager identified another site used to store documents. In accordance with the Manual, the ATO officers searched the additional site only after obtaining permission to do so by a senior ATO officer at the command centre. ATO officers also searched the manager’s car, which was parked at the premises.

3.10 As part of the pre-access briefing, all ATO officers were provided with an access kit containing relevant information to enable them to perform their roles in the access visit. On the day of the access, they were provided with a list of names of individuals or entities, phone numbers and phrases that would help them to identify documents relevant to the search.

3.11 Access to electronic records was managed by the ‘special access’ members of the ATO access teams. This included looking at all employees’ personal and work mobile phones to search for the phone numbers of individuals or entities the ATO had identified. The ATO did not record any personal information from the phones. A record of all the documents copied during the access was provided on disk to the building occupiers at the completion of the access visit (consistent with Principle 20 of the ARC report).

3.12 The escalation and decision-making processes followed by staff in the command centre demonstrated good administrative practice. The access team leaders and their deputies were in regular phone contact with staff in the command centre to update them on progress at the sites and requests for information and assistance. Command centre staff considered all the facts before deciding whether or not to expand the access, and logged all conversations and decisions.

3.13 A lack of coordination between the ATO’s GST and Serious Non-compliance (SNC) lines was apparent at the Queensland site. The SNC business line had obtained a warrant to enter and search the same premises as the GST business line. The warrant allowed the SNC access team to seize records or goods within a strict time limit.

3.14 The GST access team took longer to conduct its search than the SNC business line had anticipated. As a result, some members of the SNC access team applied pressure to the GST access team to complete its visit before all the relevant materials had been copied. The risk of an overlap in timing for each visit could have been anticipated, and contingency plans put in place, during the planning stages of the two visits.

3.15 The ATO has advised Ombudsman staff that it considered this matter as part of the post-visit debrief and determined it was a ‘one-off’ incident. The ATO stated also that a subsequent access without notice visit involving the two business lines was well coordinated.

3.16 Apart from the incident described at paragraphs 3.13 to 3.15, the access was well planned, supported and executed.

PART 4—ANALYSIS OF RECORDS

4.1 The ATO provided a list of all access without notice visits undertaken during the period 2005–06 to 2007–08. From this list,⁷ we selected 16 and examined the records relating to the planning, execution and evaluation of these visits. Our review of the records indicated that access was generally well prepared and executed in accordance with the Manual and other guidelines. Some areas for improvement were identified.

Record keeping

4.2 The Ombudsman report *Lessons for public administration* articulates the importance of agencies maintaining accurate and comprehensive records that are easily accessible.⁸ This is of particular importance when an agency is making decisions about the exercise of coercive powers.

4.3 The ATO advised that it keeps no central register of records in relation to the use of access powers. It noted that records of access visits are kept with individual case files. A case file may comprise both electronic and paper documents; access without notice documents are often one component of a larger audit process.⁹ Records of the use of access powers are dispersed across ATO business lines.

4.4 We noted that the ATO had difficulties providing to Ombudsman staff documents dating back to 2005.¹⁰ In particular, the SNC business line stated in its supporting material that due to the age of some cases and the nature of the information requested, it had been difficult for it to locate the documents. The ATO advised that the information requested was stored in several different electronic systems and that identification of, and access to, the information was further complicated because it related to a period when a new compliance case management system was introduced.

4.5 The ATO has advised that records relating to access visits are now maintained on its new, centralised compliance case management system. While this represents an improvement to the ATO’s record-keeping practices, identifying cases where the ATO has made an access without notice visit remains difficult.¹¹ The ATO has agreed to develop procedures that will allow officers to identify, using the new case management system, when access powers have been used.

4.6 Accessible information is important to ensure transparency in the exercise of coercive powers. Principle 4 of the ARC report states that:

To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers ...

⁷ Information provided by the ATO indicated it undertook 68 visits in 2005–06, 21 visits in 2006–07 and 11 in 2007–08.

⁸ Commonwealth Ombudsman, *Lessons for public administration—Ombudsman investigation of referred immigration cases*, Report No. 11/2007.

⁹ Advice provided by ATO at a meeting on 22 September 2009.

¹⁰ There were difficulties in both advising of the number of times the powers were used in this period as well as providing the associated documentation.

¹¹ Advice provided by ATO at a meeting on 22 September 2009.

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4.7 The ATO has not regularly published information about its use of coercive powers. However, to improve the transparency and accountability of the exercise of these powers, the ATO has agreed to include in its annual report some information, such as how frequently they are used.

Approval of submissions to undertake access without notice visits

4.8 As part of the ATO’s quality assurance processes, a line proposing to undertake an access without notice visit must prepare a submission to have the visit approved.

4.9 The Manual provides guidance on what to include in the submission. For example, a submission must explain why the access is being proposed, identify material to support the proposal, and demonstrate how the material supports the exceptional circumstances that necessitate access without notice. This is consistent with Principles 1, 2 and 3 of the ARC report.

4.10 A submission must be approved by an ATO officer who holds the appropriate delegation—an Executive Level 2 (EL 2) or Senior Executive Service (SES) officer can approve a submission for access without notice. However, only an ‘independent’ SES officer can approve a request to lift AC.

4.11 The level of officer required to approve a proposed access without notice visit is influenced by factors such as the scale of the operation, the amount of revenue, and the profile of the subject (individual/s or entity) of the access visit.¹²

Independent approval

4.12 It is important to the integrity of the ATO’s exercise of its access without notice powers that it can articulate a robust and defensible reason when it uses them. The independent approval of a proposal is one way the ATO can demonstrate its integrity in exercising its coercive powers.

4.13 The ATO defines an independent SES officer as an SES officer who has not been involved in identifying the subject of an access without notice visit or preparing the relevant documentation. The independent SES officer can work in the business line proposing the access.

4.14 The ATO has advised Ombudsman staff that it prefers to keep the approval process within a business line. The ATO argues that senior officers with thorough knowledge of specific tax laws dealt with in a business line are in the best position to assess a submission for access without notice.

4.15 The ATO has agreed to amend its submission template for approving the use of access without notice powers. The revised template will clearly identify the approving officer as a staff member of the respective business line who has not taken part in identifying the subject of, or planning, the access visit. In addition, the ATO has advised that it will remove from its manuals and guidelines the term ‘independent SES officer’ and replace it with a more accurate description. This would better accord with Principle 7 of the ARC report.

¹² Information provided by the ATO at a meeting on 21 August 2008.

Internal oversight

4.16 The ATO followed good administrative practice by conducting a post-access debriefing session with officers from the GST and SNC business lines and writing up the lessons learnt to help improve the processes followed in the future.

4.17 The Ombudsman report *Lessons for public administration* advocates the periodic review of coercive powers to assess whether or not decisions have been made properly and consistently. Similarly, Principle 10 of the ARC report states that ‘senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency ...’ It would be appropriate, therefore, for the ATO to adopt a practice of regular review of the exercise of its coercive powers across the organisation.

4.18 The ATO has advised the Ombudsman’s office that it has implemented an Integrated Quality Framework (IQF) process to review and modify aspects of projects while they are still ‘active’. The IQF is applied across the ATO and is not specifically used in relation to the exercise of coercive powers. However, the planning and preparation for an access without notice visit has a 30% chance of being quality assured as part of the IQF process.¹³ We did not review this process in this investigation.

4.19 Consistent with Principle 11 of the ARC report, the ATO has in place a network of experts in the use of access powers. This network is available, if required, at various stages of the access process. The ATO could take more advantage of the support network, for example, when preparing submissions for access approval, to ensure consistency and compliance with ATO guidelines.

Excise business line operating as regulator

4.20 The sample of records reviewed as part of this investigation included one access visit conducted by the Excise business line under ss 50 and 86 of the *Excise Act 1901*. The ATO’s provisions for access without notice powers in relation to its general regulatory powers for excisable goods do not require the ATO to satisfy the ‘exceptional circumstances’ criterion specified for other access without notice visits. This operational difference is not reflected in the Manual.

4.21 The ATO’s Excise business line has a regulatory role in relation to excisable goods such as alcohol and tobacco. As regulator, the ATO issues licences to individuals or entities that wish to deal with excisable goods, and monitors licence conditions such as the amount of tobacco that can be purchased and where a licence holder can store that tobacco. As part of the licensing process and as per the relevant legislation, applicants agree that the ATO will have access to the licensed premises at any time. In its capacity as a regulator, the ATO may only access licensed areas such as shops and storage areas. The ATO cannot access premises that are not part of the licence, such as private residences.¹⁴

4.22 In its regulatory role, ATO access visits are undertaken to review sales records, conduct stock takes and ensure licence conditions are being met. Although not entirely clear from the documentation provided to Ombudsman staff, the record reviewed as part of this investigation seemed to fall into this category.

¹³ Advice provided by the ATO at a meeting on 22 September 2009.

¹⁴ Advice provided by the ATO at a meeting on 4 September 2009.

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4.23 The ATO advised that if the Excise business line identified any issues that could require access beyond its regulatory function, it would refer the matter to the GST or SNC business lines to lead any access without notice visits.

4.24 The chapter in the Manual about the Excise business line does not explain its regulatory function. Nor does it explain that the Excise business line may conduct unannounced field work as a regulator that need not meet the exceptional circumstances outlined in the Manual.

4.25 As a result of this investigation, the ATO advised that it would update the Manual to more accurately describe the Excise line’s role. The ATO also agreed to make changes to processes to ensure that submissions supporting access for regulatory purposes—like stocktaking or assessing compliance with licence conditions—are clear.

PART 5—CONCLUSION

5.1 Based on observations by Ombudsman staff of the ATO’s use of its access without notice powers and a review of the associated documentation, I consider the ATO has established appropriate guidelines and manuals to assist its staff in the application of the powers. The practices observed generally accord with the principles set out in the ARC report.

5.2 There is scope for the ATO to improve in the areas of transparency and public accountability. During the course of the investigation, the ATO agreed to implement processes to ensure that information about access without notice visits can be easily obtained from the new compliance case management system, and to report on its use of access without notice powers in its annual report.

APPENDIX 1—ATO'S RESPONSE



Australian Government
Australian Taxation Office

COMMISSIONER OF TAXATION

5 February 2010

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Professor John McMillan
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A handwritten signature in black ink, appearing to read 'John'.

Dear Professor McMillan,

Use of Access Without Notice Powers

Thank you for your letter dated 21 December 2009 accompanying your draft report on the above own motion investigation.

We welcome your finding that the Tax Office has well established guidelines and manuals to assist staff in the use of these powers and that our practices generally accord with the principles set out in the ARC report.

Furthermore, we agree to implement the enhancements noted within your report.

We consider the draft report reflects the discussions between our agencies throughout the investigation.

We also thank your officers who conducted this investigation for their professionalism.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bruce'.

Bruce Quigley
Acting Commissioner of Taxation

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ABBREVIATIONS AND ACRONYMS

| | |
|------------|--|
| AC | Accountants Concession |
| ARC report | Administrative Review Council’s report <i>The Coercive Information-gathering Powers of Government Agencies</i> |
| ATO | Australian Taxation Office |
| EL2 | Executive Level 2 |
| GST | Goods and Services Tax |
| IQF | Integrated Quality Framework |
| ITAA | <i>Income Tax Assessment Act 1936</i> |
| LPP | Legal professional privilege |
| s | section |
| SES | Senior Executive Service |
| SNC | Serious Non-compliance line |
| TAA | <i>Taxation Administration Act 1953</i> |
| The Manual | The ATO’s <i>Access and Information Gathering Manual</i> |