

ATO ACCESS POWERS — ANOTHER LOST OPPORTUNITY

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I INTRODUCTION

Section 263 of the *Income Tax Assessment Act 1936* (Cth) (ITAA) and its predecessors¹ operated for almost a century as a key element in the ATO's investigative armoury, providing the ATO with full and free access at all times to all buildings, places, books, documents and other papers for any of the purposes of the ITAA 1936.

Historically, s 263 was the most frequently used ATO investigative tool before the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) consigned it to the dustbin of history, and replaced it with s 353-15 in Schedule 1 of the *Taxation Administration Act 1953* (Cth) (TAA),² which now provides a central access power for virtually all federal taxation legislation.

The Explanatory Memorandum to the *Repeal Day Act* stated:

The amendments ... do not alter the intended operation of the provisions as they apply to the administration and operation of the taxation law. The amended TAA 1953 provisions are merely a rewrite and consolidation of the provisions being repealed.

However, while s 353-15 is in similar terms to former s 263, there are differences which may go beyond a mere rewrite. This issue is discussed below.

Significantly, the installation of a (minimally) amended s 353-15 in place of s 263 represents yet another lost opportunity to improve the clarity and effective operation of a crucial weapon in the ATO's arsenal. Such an improvement would have been beneficial, because while s 263 operated effectively in most situations, analysis in 2005³ suggested that it was a second-best provision, with a number of improvements that could easily be made in order to deal with potential problems and provide greater clarity and certainty for taxpayers and ATO alike.

As was said in 2005:

given the key role of sec 263 in the Commissioner of Taxation's investigative arsenal, we should try to minimise uncertainty, delay and expense where this is feasible — i.e., we should not leave important issues unresolved if they can be clarified by simple amendments. Indeed, given that various other jurisdictions both inside and beyond Australia have introduced provisions to deal with these issues, it is more than a little puzzling that [the ATO] seems so reluctant to consider introducing similar provisions [in s 263].⁴

However, until the recent introduction of s 353-15, the only action that had been taken in many decades to improve s 263 were amendments introduced in 1987 to overcome the High Court decision in *O'Reilly v State Bank of Victoria*.⁵ Ironically, while solving one set of problems, these amendments introduced fresh difficulties, in the form of the central but fuzzy concept of an 'occupier' (discussed below).

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¹ The history of s263 was traced by French J (as he then was) in *Citibank Ltd v FC of T* 89 ATC 4268, 4286–7.

² Sec 353-15 has been in the *TAA* for some time, in a slightly different form.

³ R Woellner, 'Section 263 powers of access — why settle for second-best?' (2005) 20 *Australian Tax Forum*, 365, 366.

⁴ *Ibid.*

It is important, therefore, to analyse s 353-15 to evaluate the extent to which it is an improvement on s 263, and whether any additional elements could be introduced which would significantly enhance its effectiveness.

In approaching this issue, ATO officials are inclined to suggest that Parliamentary time is scarce and needs to be reserved for 'more important' areas, and that in any event there is no need to amend the access provisions because problems rarely arise in practice.

However, access powers are a crucial part of the ATO's armoury, because unless the ATO can obtain timely and accurate information about a person's tax position, it will not be able to accurately assess them. Moreover, while disputes about access may be infrequent, when they do occur, they can occupy enormous amounts of ATO time and expertise, and incur substantial expenses in government and private sector legal costs as cases wend their way over a period of years through the Federal Court and perhaps to the High Court, with uncertainty reigning in the interim. The experience in relation to legal professional privilege is an example of this.

Accordingly, as Eisenstein has noted, 'legislation by litigation' is to be avoided where possible, because it is serendipitous (it depends on a suitable case arising for decision), expensive (particularly in the Federal and High Courts), slow (there may sometimes be years between the initial hearing and the final appeal),⁶ and risky (judges sometimes 'get it wrong', from the ATO or government perspective).

A particular problem with legislation by litigation is that, at the end of years of extended and expensive litigation, the government may be forced to intervene anyway to amend legislation in order to overcome court decisions which it sees as adverse, or which expose flaws in existing legislation. This occurred for example in 1987 in *O'Reilly*,⁷ where the High Court held, in relation to an earlier version of s 263, that while a person could not *obstruct* an ATO auditor (investigator) in the performance of their duties, there was no obligation to positively assist the auditor. This forced the legislature to intervene and introduce sub-secs 263(2) and (3) in 1987, some 4 years after the High Court decision.

II BALANCING THE POLICY FACTORS

In approaching the question of whether or not the legislature should adopt suggested changes to s 353-15, it is important to bear in mind that such provisions need to balance two competing policy factors:

1. Investigative provisions such as s 353-15 involve significant interference with the personal liberty and privacy of those affected, since they empower the ATO to obtain forced access to confidential information about taxpayers, with a penalty imposed on those who do not cooperate.
2. On the other hand, income tax is the Commonwealth Government's main source of revenue and is vital to the effectuation of its policies and programmes. Accordingly, it is crucial that the ATO be able to obtain adequate and timely information on tax issues in order to ensure that the correct amount of tax is paid, in a context where it is 'notorious that many and varied devices are employed to avoid ... [paying] tax, so that the ATO requires 'power to make wide ranging enquiries to investigate whether tax is due'.⁸

Balancing these competing policies can be difficult, particularly in a sensitive area such as access to confidential taxpayer information.

5 83 ATC 4156.

6 I Eisenstein, 'Some Iconoclastic Reflections on Tax Administration' (1945) 58 *Harvard Law Review* LVIII (4) 4, 477.

7 Above n 2.

8 *Grant & Ors v DFC of T* 2000 ATC 4649, 4652 (Black CJ, Merkel and Finkelstein JJ).

III A COMPARISON OF TERMINOLOGY: S 263 AND S 353-15

The former s 263 provided that:

(1) **[Commissioner or authorised officer to have full and free access]** The Commissioner, or any officer authorised by the Commissioner 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) **[Officer must produce written authority upon request]** 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) **[Occupier to provide assistance]** 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.

The amended s 353-15⁹ provides that:

(1) For the purposes of a taxation law, the Commissioner, or an individual authorised by the Commissioner for the purpose of this section:

- a. May at all reasonable times enter and remain on any land, premises or place, and
- b. is entitled to full and free access at all reasonable times to any documents, goods or other property; and
- c. may inspect, examine, make copies of or take extracts from, any documents; and
- d. may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.

(2) An individual authorised by the Commissioner for the purpose of this section is not entitled to enter or remain on any land, premises or place if, after having been requested by the occupier to produce proof of his or her authority, the individual does not produce an authority signed by the Commissioner stating that the individual is authorised to exercise powers under this section.

(3) You commit an offence if:

- a. you are the occupier of land, premises or place; and
- b. an individual enters, or proposes to enter, the land, premises or place under this section; and
- c. the individual is the Commissioner or authorised by the Commissioner for the purposes of this section; and
- d. you do not provide the individual with all reasonable facilities and assistance for the effective exercise of powers under this section.

[Subsection (4) observes that strict liability applies to paragraphs (3) (a) and (c), and the note to that subsection points out that strict liability is dealt with in section 6.1 of the *Criminal Code*].

Penalty: 30 penalty units

Note 1: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

⁹ The former s 353-15(1) provided: 'For the purposes of an indirect tax law, the MRRT law or the Division 293 tax law, the Commissioner ...'.

A Preliminary Observations on s 353-15

There are a number of differences between the wording of s 263 and s 353-15, and an issue may arise under the Acts Interpretation Act 1901 (Cth) as to whether s 15AB of that Act can apply to enable reference to be made to extrinsic materials such as the Explanatory Memorandum to the amending Act¹⁰ to clarify the intended meaning of the terms in s 353-15. Significantly, such extrinsic materials cannot be used to contradict the clear meaning of the text,¹¹ and s 15AB does not guarantee that a court will adopt a 'favourable' or purposive interpretation.¹²

Against that background, the main differences between the two provisions are as follows.

First, s 353-15 (1) extends the operation of the section to 'the purposes of a taxation law', whereas s 263 was limited to 'any of the purposes of this Act' (the ITAA36). This means that s 353-15 will apply to any 'taxation law' as defined in s 995-1 of the ITAA97 — which covers '(a) an Act of which the Commissioner has the general administration; or (b) legislative instruments made under such an Act ...; or (c) the *Tax Agent Services Act 2009* or regulations made under that Act'. This is a sensible amendment which positions s 353-15 as the central provision applying the same access powers to virtually all federal taxation laws (including income tax and CGT, FBT and GST), thus ensuring a consistent application of the powers across different legislation.

Second, s 353-15(1)(a) and (b) specifically limit the time for exercise of the power of access to 'all reasonable times'. This is again a sensible amendment which makes it clear that the power is limited to (all) 'reasonable times' — though this was the preferable interpretation of s 263 in any event.¹³

Issues will remain as to what are 'reasonable hours' in a particular instance, given that this will depend on the context in which an auditor seeks to use the access power. For example, times which are reasonable when seeking access to a nightclub may not be reasonable when seeking access to a doctor's surgery.

Third, s 353-15(1)(a) grants access to 'any land, premises or place', whereas s 263 referred to 'all buildings, places ...'. Once again, the use of different terminology raises the question of whether the two phrases actually cover the same area. It seems likely that these terms will cover much the same ground, though the issue will no doubt be determined in due course.

Fourth, s 353-15(1)(b) grants access to 'documents, goods or other property', whereas s 263 referred to 'books, documents or other papers'. Again, the use of different terminology raises the question of whether the two phrases cover the same area. While s 353-15 is broader, in that it covers also powers primarily relating to indirect and other non-income tax legislation — such as weighing of goods, taking of samples, and the like — the balance of the section seems likely to be interpreted to cover similar ground to s 263.

One interesting issue is whether the use of the phrase 'or other property' in para 353-15(1)(b) and again in (1)(d) raises a potential argument that the other items in those phrases are limited to types of 'property' — this might raise some interesting questions in the future.

Fifth, s 353-15(2) states that an authorised officer is 'not entitled to enter or remain on any land premises or place if' they do not produce an authority when required. By contrast, s 263 stated that the officer was not entitled to enter or remain 'under this section' if they failed to comply with a proper request for proof of authority (emphasis added). The difference in wording in s 353-15(2) raises the question of whether the (presumably intentional) omission from s 353-15 of the words 'under this section' in s 263 could found an argument that the

10 See for example *Stergis v FC of T* 89 ATC 4442, 4456 (Hill J). Issues may also arise under s 15AC of the *Acts Interpretation Act* (discussed below) as to whether different terms used in the respective Acts are expressing the same idea and are to be given, in effect, the same meaning.

11 *Muc v DFC of T (No 2)* 2008 ATC ¶20-032, 8410 (Giles JA).

12 See *Gray v FC of T* 89 ATC 4640, 4643-4645 (Sheppard J).

13 However, not all judges have agreed on this: Murphy J suggested (obiter) in *FCT & Ors v The ANZ Banking Group Ltd; Smorgon and Ors v FCT & Ors ('Smorgon III')* 79 ATC 4039, 4057-58 that the wording of s 263 was to be taken literally and was not limited to 'reasonable times', in part because in other contexts, when Parliament intended to limit such powers to 'reasonable times', it had done so expressly.

statutory right under s 353-15 is the sole source of the right for an auditor to remain on property (so that the officer is required to leave if they do not produce an authority when required), or whether – as with s 263 — they can subsequently remain on the property pursuant to common-law rights (for as long as those rights subsist).¹⁴

Sixth, under s 353-15 (4) and the Note to that subsection, a breach of s 353-15 (3) is specifically made a criminal offence of strict liability, so that under s 6.1(a)-(d) of the *Criminal Code* it is not necessary to prove any ‘fault’ elements of the offence, and the defence of mistake of fact under s 9.2 is available.¹⁵ By contrast, s 263 simply provided that the penalty for a breach of its provisions was a maximum fine of 30 penalty units.

The wording of s 353-15(4) provides useful clarification on the application of the section. There does not seem to be a well-developed specific jurisprudence on the meaning of terms in s 353-15, which can be used to guide interpretation of these provisions. As a result, in the short term at least, determination of their meaning will depend to a large extent on whether the courts apply the interpretations developed in relation to terms in s 263 to their analogues in s 353-15.

Given the difference in terminology between the two provisions, there may be a question in this context as to whether, in terms of s 15AC of the *Acts Interpretation Act 1901* (Cth),¹⁶ various terms in s 353-15 are merely expressing the ‘same idea’ as their equivalents in s 263 in a different form of words ‘for the purpose of using a clearer style’, so that the terms are therefore to be taken under s 15AC to have the same meaning. This will be important, because if s 15AC is held to apply to some or all of the terms in s 353-15, the existing jurisprudence on the former s 263 will apply seamlessly to s 353-15. If not, the transition will be more difficult.

Early indications suggest that the courts will take the sensible approach of applying the existing s 263 jurisprudence to s 353-15.¹⁷

B *An Evaluation of s 353-15 Against some of the 2005 Suggestions for Improvement*

As noted at the outset, a number of potential areas for improvement to s 263 had been identified.

The introduction of an amended s 353-15 has rectified or clarified some of these problems (e.g. the express limitation that the powers may only be exercised at ‘reasonable’ times and extension of the access power to all ‘taxation laws’ as defined).

However, a number of identified problems have not been addressed, and in evaluating s 353-15 it is therefore useful to measure it against the suggestions for improvement of s 263 which have been put forward, but which the ATO and the legislature decided not to incorporate into s 353-15.

IV SUGGESTED IMPROVEMENTS NOT ADDRESSED BY S 353-15

The potentially useful improvements to s 353-15 which have not been adopted include the following.

A *Clarifying the Fuzzy Concept of ‘occupier’*

This is perhaps the most important of the unresolved issues. As noted, the term ‘occupier’ was introduced into the Act in 1987 as part of the remedial legislation designed to overcome

¹⁴ In relation to s 263, French J in *FCT & Ors v Citibank Ltd* 89 ATC 4268, 4287 stated that the ‘failure to produce [an authority under s 263(2)] extinguishes a statutory entitlement and if there be otherwise no licence or authority to enter and remain, the common laws relating to criminal trespass will supply their own prohibition’.

¹⁵ The *Criminal Code* provides that the existence of strict liability does not remove any other defence (s 6.1(3)).

¹⁶ *Sec 15AC(a),(b)* states that: ‘Where: ... an Act has expressed an idea in a particular form of words; and ... a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style, the ideas shall not be taken to be different merely because different forms of words were used’.

¹⁷ See *FC of T v Warner* 2015 ATC ¶20-514, [27] (Perry J).

the decision in O'Reilly (above). Interestingly, the term is now used in a number of Federal Acts.¹⁸

The meaning of the term is crucial, because under s 353-15(2) and 3(a), an 'occupier' (or occupiers) is the only person who is permitted to require an ATO auditor to show an authority under s 353-15(2) and, on the other hand, is the only person required to provide an auditor with 'all reasonable facilities and assistance' under s 353-15(3)(d).

The problem is that the term 'occupier' is not defined in the TAA,¹⁹ and at common law, the term has been said to be:

inherently a term of no fixed denotation, with its precise meaning varying depending upon the context ... [and having] a range of widely varying meanings, at times requiring legal possession but at other times requiring nothing more than ephemeral physical presence as when we speak of a person 'occupying' a church pew or a park bench.²⁰

Given the inherent tensions in s 353-15(2) and (3)(a) and their implications, taxpayers will be inclined to argue for a broad interpretation of the term 'occupier' in s 353-15(2), in order to expand the range of people who can require auditors to show their authority, but conversely to argue for a narrow interpretation of the term in s 353-15(3), in order to narrow the range of people required to provide 'all reasonable facilities and assistance', while the ATO will no doubt argue the reverse. This promises to make for entertaining debates; and while it would seem logical to assume that the term 'occupier' will be given the same meaning in s 353-15(2) as in 353-15(3), the diverse meanings attached by the High Court to the term 'disposal' for CGT purposes in the original s 160M(6) ITAA 1936²¹ might indicate that this cannot be assumed automatically.

The issue is significant. For example, if 'occupier' is interpreted broadly in s 353-15 to include employees and other non-owners, this will tend to make the requirement to provide all reasonable facilities and assistance more effective. However, if 'occupier' were to be interpreted narrowly by the courts and limited for example to the owner or those in ultimate control of the premises,²² this could severely reduce the effectiveness of the provision, as the number of people obliged to co-operate with the ATO would be greatly reduced, and the flow of information to the ATO in contentious situations²³ reduced accordingly.

The uncertainty as to the meaning of the key term 'occupier' could be removed by the simple device of incorporating into s 353-15 a provision along the lines of s 231.1(1)(d) of the Canadian *Income Tax Act*, 1985, which provides that an authorised person:

may ... require the owner or manager of the property or business and any other person on the premises or place to give all reasonable assistance and answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, [may] require the owner or manager to attend at the premises or place with the authorised person.

Comparable provisions are found in s 16 of the New Zealand *Tax Administration Act* (1994) and s 70 (1) of the Botswana *Income Tax Act*, which provide that similar obligations attach to the owner, manager or person having effective control of the land, premises or place, documents

18 See e.g. among others, *Customs Act 1901* (Cth), ss 122N, 122G; *Crimes Act 1914* (Cth) ss 3H, 3LB; *Superannuation Guarantee (Administration) Act 1992* (Cth) s 76; and *Termination Payments Tax (Assessment and Collection) Act 1997* s 26.

19 While there are definitions in some other Acts, often they are not particularly helpful. For example the *Customs Act 1901* (Cth) s 122G states that 'occupier of premises includes a person who is apparently in charge of the premises'; cf in different contexts, the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), Sched 2 (Dictionary), and *Occupiers Liability Act 1985* (WA) ss 2, 4(2).

20 Viscount Cave in *Madrasa Anjuman Islamia of Kholwad v Johannesburg Municipal Council*, [1922] 1 AC 500, 504, quoted with approval by Brennan J in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 267. See also *Bethune v Heffernan*; *Heelan v Hayward* [1986] VR 417, 420-2 (Nathan J).

21 *Hepples v FC of T* 92 ATC 4013.

22 For example, while the definition of 'occupier' in s 122G of the *Customs Act 1901* (Cth) is inclusive, the sole reference to a 'person who is apparently in charge of the premises' does not suggest that a broad meaning was contemplated.

23 In most (non-contentious) circumstances, information is freely provided to ATO auditors without the need to call upon the statutory access/information powers.

goods or other property, and any other person physically present on the building or place at the time (or from time to time).²⁴

A provision along these lines seems eminently sensible, and indeed more consistent with the policy underlying access powers. It seems obvious that from time to time employees, for example, may be the only persons who will know the password for their individual computers, as well as being the ones most easily able to locate relevant day-to-day records and documents. It seems illogical to risk excluding such persons from the scope of the access power, provided they are given adequate protection in relation to information or materials of which they are unaware.

Such appropriate protection for employees²⁵ could be provided through a defence along the lines of s 8C(1B) of the TAA 1953 (Cth), which limits a person's liability to the extent of their knowledge or ability to comply with an auditor's requirement. Alternatively, a defence of 'reasonable compliance' could be applied, as under the New South Wales TAA (1996) s 80, which provides a general defence where a person 'could not, by the exercise of reasonable diligence, have complied with the [relevant] requirement or... [had] complied with a requirement to the extent of his or her or her ability to do so'.

B *Effectuating the Power of Access*

(1) *Access to Technology*

While s 25 of the Act Interpretation Act (Cth)²⁶ authorises auditors to access electronic equipment such as computers,²⁷ the extent of this power and its implications could be clarified by adopting provisions along the lines of those in s 81(1)(a)-(c) of the Victorian TAA (1997), which provides that where the auditor believes on reasonable grounds inter alia that a storage device contains information relevant to the administration of a taxation law, they can operate the device themselves (or require the occupier to operate it) in order to access the information; use the device to produce the information in a documentary form and then seize that document; or where it is not practicable to create a document, they can seize the storage device and any related equipment that enables the information to be accessed.

Alternatively, provisions such as s 99(1)(f)(iv),(v) of the Western Australian TAA (2003) could be utilised. These provisions require any person on the premises accessed to operate (or allow the investigator to operate) equipment or facilities, and to give the investigator any translation, code password or other information necessary to gain access to or interpret and understand any relevant information.²⁸

If it is not practicable to create a document from that information, the Act authorises the auditor to seize the storage device and any equipment that enables information to be accessed.

Any of these provisions could easily be adapted to s 353-15.

(2) *Power to Seize and Remove Materials*

By analogy from case-law on s 263, there is no statutory power under s 353-15 for an ATO auditor to seize or remove materials from a person's premises (beyond the taking of samples and the like).²⁹

²⁴ Compare the definition in s 1 of the *Trespass Act 1996* (RSBC).

²⁵ Protection could also be provided for other persons who might be on premises from time to time, but know little or nothing about the issue being examined — for example, transient customers.

²⁶ See Woellner, above n 3, 370–7.

²⁷ Sec 25 provides, in essence, that a 'document' includes 'any article or material from which ... writings are capable of being reproduced with or without the aid of any other article or device'. See also s 25A and TR 2005/9, paras [14]–[16]. In addition, s 25A requires persons holding electronic records to provide the ATO with a hard copy of relevant documents: TR 2005/9, para 28.

²⁸ Compare *Crimes Act 1914* (Cth) ss 3C and following.

²⁹ See for example *JMA Accounting Pty Ltd & Anor v Carmody & Ors* 2004 ATC 49216, 4919 — beyond the taking of samples.

In practice, ATO auditors will usually seek permission to take materials back to the ATO office if they feel this is needed, and taxpayers and others will ordinarily cooperate.³⁰ However, auditors have indicated that there are times — albeit infrequent — when they believe it is necessary to seize material immediately, for example to prevent materials or documents being destroyed or altered.

Once again, while such situations may be infrequent, the consequences of not being able to take possession of documents immediately³¹ can be serious. Once records have been destroyed, it may be difficult to re-create them.

To avoid such problems, legislators could incorporate into s 353-15 a provision like s 80(2)(a)-(c) of the *Income Tax Act 1967* (Malaysia), which provides that an auditor may take possession of relevant records where they are of the opinion that the materials cannot reasonably be inspected on site, or may be interfered with or destroyed unless possession is taken, or they may be needed as evidence.

The interests of taxpayers and third parties could be protected by requiring the auditor to give a receipt for items seized, to return the records as soon as practicable, and granting the ‘owner’ reasonable access to the materials in the meantime.³²

C Power to Require Answers to Relevant Questions

While s 353-15 requires an ‘occupier’ to provide all reasonable facilities and assistance for the effective exercise of s 353-15 powers, it imposes no obligation on other persons. Logic suggests that there may be a number of people (other than the ‘occupier/s’) found on particular premises or places from time to time who would have useful information relevant to an ATO investigation. At present, they are under no obligation to provide any assistance to an ATO auditor, which seems anomalous.

A number of other jurisdictions take a more pragmatic approach, and require for example that:

the owner or manager of the property or business and any other person on the premises or place ... answer proper questions relating to the administration or enforcement of [the] Act ...³³

Adoption of a provision along these lines would not only enable an auditor to question any person found on the premises, but would also expand the auditors’ powers by enabling them to ask relevant questions in relation to the administration or enforcement of a taxation act, rather than being limited to questions enabling the effective operation of the access powers — as was the case with s 263, and, given the same wording, would seem also to be the case with s 353-15.

Again, to provide appropriate protection for taxpayers and third parties, a defence along the lines of s 8C(1B) *TAA* 1953 (Cth) could be inserted, providing that a person is only liable to a penalty to the extent they were ‘capable’ of complying with the requirement in question (or, e.g. only liable to the extent of their knowledge and ability).

D Clarifying the Defences to s 353-15

Rather than leaving issues such as self-incrimination and legal professional privilege to the common law, increased clarity and certainty could be provided by specifically dealing with these and other potential exceptions in s 353. There are specific provisions in the Australian Securities and Investments Commission Act dealing with these privileges (ss 68 and 69 respectively), and it seems surprising that similar provisions have not been included in the comparable tax legislation.

³⁰ R Woellner et al, *Australian Taxation Law*, 25th edn, CCH Aust Ltd, 1661.

³¹ Where the auditors cannot make other arrangements.

³² See e.g. *Tax Administration Act 1994* (NZ), paras 16B(4)(a),(b) and compare *Australian Securities and Investments Commission Act 2001* (Cth) s 37(5),(7).

³³ *Income Tax Act* 1985 (Can); compare *TAA* 2003 (WA) paras 99(1)(f)(i),(ii); *TAA* 1997 (Tas), s 71(1)(b) – see also the suggestion made in relation to the definition of ‘occupier’ under heading A above.

(3) *Self-incrimination*

Case-law on s 263 — presumably applicable to s 353-15 — confirms that self-incrimination cannot be used as a defence to an exercise of access powers.³⁴

The position appears to be clear under the common law. However, if it were thought appropriate for certainty, completeness, or more abundant caution, the position could be dealt with expressly by inserting a provision into s 353-15 dealing directly with the issue.

For example, s 87(1) and (2) of the ACT TAA (1999)³⁵ provides that a person cannot raise self-incrimination or potential exposure to a penalty as a reason for not answering a question, providing information or producing a document. However, where the person objects to complying on the basis of self-incrimination, their answer, information or document cannot be used against them in a criminal proceeding (other than in relation to certain prescribed offences).³⁶

Some or all of the elements of this or similar provisions (e.g. s 68 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) could be adapted for incorporation into s 353-15.

(4) *Legal Professional Privilege*

The ATO has for some time accepted that communications protected by legal professional privilege could not be accessed under s 263, a view confirmed by case law.³⁷

The position might therefore be thought to have been settled — yet when it faced a difficult situation in *Donoghue*³⁸ in 2015, the ATO apparently argued that the former s 263 overrode legal professional privilege!

When such ‘well-settled’ matters can be challenged suddenly after years of apparent agreement, it might well be thought wise to put the position beyond dispute by incorporating relevant principles into s 353-15. This would also offer the opportunity to clarify issues left uncertain by common law decisions, such as the test for protection of communications by in-house counsel³⁹ and for implied waiver of privilege.⁴⁰

One provision which could be easily adapted for this purpose is s 69 of the ASIC Act, which permits a lawyer to refuse to comply with a demand for access to privileged information unless the person to whom, or by whom, the communication was made (or the liquidator of a body corporate being wound up) consents to the lawyer disclosing the information (s 69(2)). However, if the lawyer refuses to disclose the privileged information, he or she must, as soon as practicable, give to the person who made the requirement a written notice providing (if the lawyer knows them) the name and address of that person and sufficient particulars to identify the document or book containing the communication (s 69(3)).

A provision along the lines of s 69 could be adapted (and expanded for example to apply to relevant persons other than a lawyer) to deal with issues which might arise under s 353-15.

34 See e.g. *Stergis v FCT*, 89 ATC 4442, 4457 (Hill J); *DFCT v De Vonk* 95 ATC 4820; cf *Binetter v DFCT (No 2)* 2012 ATC ¶20-345, [30] (Edmonds, Perram and Jagot JJ).

35 Contrast s 68 of the ASIC Act.

36 That is, offences involving false or misleading statements, or perjury — compare ASIC Act s 68.

37 *FCT & Ors v Citibank Ltd* 89 ATC 4268, 4274–7 (Bowen CJ and Fisher J) and other cases and materials cited in Woellner et al, above n 30, 1,664, n 28.

38 *Donoghue v FCT* [2015] FCA 235 (Logan J): the challenge to legal professional privilege was unsuccessful at first instance, and the ATO has appealed to the Full Federal Court.

39 Woellner et al above n 30, 1,677.

40 Woellner et al above n 30, 1,678–9.

(5) *Further Potential Developments*

In addition to legal professional privilege, the ATO also currently provides an administrative concession for certain confidential tax advice given by accountants⁴¹ and corporate board documents relating to tax compliance risk.⁴²

A statutory version of tax accountants advice privilege could be adapted from the ALRC proposal⁴³ or various overseas models⁴⁴ and included in s 353-15. This would overcome one of the major current objections to the accountant's concession, namely the fact that it is not enforceable against the ATO. Similar provisions could also be adapted to cover corporate board tax compliance risk materials.

V CONCLUSION

Replacement of the former s 263 ITAA A36 access power by s 353-15 of the TAA 1953 (Cth) provided (another) important opportunity to improve the ATO access power by incorporating into s 353-15 a number of simple but effective provisions which could increase clarity, reduce uncertainty and deal with predictable potential problems in advance, rather than waiting until problems arise and then reactively trying to plug the gaps.⁴⁵

Regrettably, while the substitution of s 353-15 has introduced some improvements, no change has been made in a number of areas where the section could be significantly improved by the simple incorporation or adaptation of provisions found in other access powers in Australian and overseas jurisdictions.

The failure to adopt useful and proactive improvements to s 353-15 represents the loss of an important opportunity to improve one of the vital sources of information on which the ATO depends for its effective operation.

It has been suggested from time to time that there is no need to improve s 353-15 or its predecessors, as problems arise only infrequently. This may be so, but when problems do arise they tend to cost significant amounts of ATO tax and advisers' time, as well as the time and expertise of hard-pressed courts and judges, in addition to potentially significant legal and related costs. More generally, publicity in relation to known inadequacies in access powers may damage perceptions of the integrity of the taxation system.

It is also said that parliamentary time is too valuable to spend on amending provisions such as s 353-15, and that there are more pressing issues. However, unless the Commissioner is able to obtain accurate and timely information about a taxpayer's affairs, the effectiveness of substantive taxation provisions will be seriously compromised.

The failure to improve s 353-15 in 2014 was particularly unfortunate, as the government had actually made time and expertise available to amend aspects of the section. It is regrettable, but perhaps not surprising, that the government did not take the opportunity to clarify other issues, remove ambiguities, and extend the section to avoid future potential problems.

Incorporating the various suggestions into s 353-15 would no doubt produce a lengthier version of the section.⁴⁶ However, the various provisions could be worded more economically, if that were thought important. In any event, in a context where a 'simplified' rewrite of the Managed Investment Trust provisions⁴⁷ runs to 102 pages, with an even longer 129 page Explanatory Memorandum to explain these 'simplified' provisions, a few pages devoted to ensuring that a crucial weapon underpinning ATO activities operates efficiently and effectively seems a very reasonable (almost frugal) investment.

41 'Guidelines to accessing professional accounting advisors' papers', ATO website; Woellner et al, above n 30, 1680-81.

42 Practice Statement PS LA 2004/14 (Access to corporate board documents on tax compliance risk). See Woellner et al, above n 30, 1,680.

43 ALRC, 'A Review of Legal Professional Privilege and Federal Investigatory Bodies' AGPS 2008, [6.203]-[6.288].

44 Woellner et al, above n 30, 1,681 n 50.

45 Other possible improvements discussed in the 2005 analysis (Woellner, above n 3) have not been considered in this article.

46 See for example the suggested redraft of the former s 263 set out in Woellner, above n 3, 398-406.

47 The Tax Laws Amendment (New Tax System for Managed Investment) Bill 2015.