DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference: HA09102133

17 December 2009

The Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009

I refer to the Committee's Inquiry into the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*.

Please find enclosed the submission of the Commonwealth Director of Public Prosecutions regarding the inquiry. I am the author of the submission and my contact details are:

Ms Jaala Corinne Hinchcliffe
Senior Assistant Director
PO Box 3104
CANBERRA ACT 2601

Telephone: 02 6206 5625

Thank you for the opportunity to comment on the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*

Yours sincerely

Jaala Hinchcliffe
Senior Assistant Director

DPP

Commonwealth Director of Public Prosecutions

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009

Submission by the Commonwealth Director of Public Prosecutions

Role of the Office of the Commonwealth Director of Public Prosecutions

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of offences against the Commonwealth and for the confiscation of the proceeds of Commonwealth crime. The main cases prosecuted by the CDPP involve drug importation and money laundering, offences against corporate law, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), people smuggling, sexual servitude and terrorism.

The CDPP has no investigative function. It can only prosecute or take confiscation action where there has been an investigation by the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Australian Taxation Office (ATO) or some other investigative agency. However, the CDPP regularly provides advice and assistance to investigators at the investigation stage and works closely with the investigators.

The CDPP has considered the secrecy provisions in various pieces of taxation law, particularly section 16 of the *Income Tax Assessment Act 1936* (ITAA) and section 3E of the *Taxation Administration Act 1953* (TAA), and has provided advice to the ATO in relation to the operation of these provisions.

The CDPP made a submission to Treasury dated 20 April 2009 in relation to the Exposure Draft of this Bill. Please find a copy of this submission attached. In September 2006 the CDPP made a detailed submission to the *Review of Taxation Secrecy and Disclosure Provisions* discussion paper. I have also attached a copy of this submission for your information.

In our submission dated 20 April 2009 the CDPP, while indicating its support for the consolidation of the taxation secrecy provisions into a single framework, made a number of comments about possible amendments to the Exposure Draft which in our view would improve the operation of the Act. A number of those comments remain relevant to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (the Bill).

Authorised law enforcement agency officer

Subclause 355-70(1) provides that it is not an offence for the Commissioner or an authorised taxation officer to make a record for or disclosure to an authorised law enforcement officer where the record or disclosure is for the purpose of:

- investigating a serious offence or
- enforcing a law, the contravention of which is a serious offence or
- the making, or proposed or possible making, of a proceeds of crime order.

Authorised law enforcement agency officer is defined in subclause 355-70(3) as the head of a law enforcement agency or a person authorised in writing by the head of the law enforcement agency. We previously raised that the requirement for the head of a law enforcement agency to

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authorise in writing those persons who can receive taxation information creates an additional administrative task for agencies in attempting to receive taxation information, which adds to the complexity of the provision. Consideration could be given to removing the requirement that an officer of the law enforcement agency be authorised.

Law enforcement agency

The definition of "law enforcement agency" is limited, in the Commonwealth sphere, to the AFP, ACC, ACLEI, ASIC and the CDPP. In our submission to the *Review of Taxation Secrecy and Disclosure Provisions*, we noted the difficulties and inflexible nature of the current definition of "law enforcement agency" in section 2 of the *Tax Administration Act 1953*, which contains specifically listed agencies. We recommended that the definition of "law enforcement agencies" be expanded to include general categories such as are included in the definition of "enforcement body" in the *Privacy Act 1988,* such as "another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law" and "another prescribed authority or body that is established under a law of a State or Territory to conduct criminal investigations or inquiries".

Consideration could be given to broadening the definition of "law enforcement agency" to include the general categories included in the definition of "enforcement body" in the *Privacy Act 1988.* Alternatively, the definition could specifically include other Commonwealth agencies which may need taxation information for law enforcement purposes, such as Centrelink, Australian Customs and Border Protection Service, Department of Immigration and Citizenship, Insolvency and Trustee Service Australia and Child Support Agency.

In our submission to the *Review of Taxation Secrecy and Disclosure Provisions* we noted the importance of tax information to certain Centrelink investigations, which is also acknowledged in paragraph 5.89 of the Bill's Explanatory Memorandum.

Serious offence

We note that information can only be disclosed if it for the purposes of enforcing a law the contravention of which is a serious offence. "Serious offence" is defined as an offence against an Australian law which is punishable by imprisonment for a period exceeding 12 months.

The proposed definition of "serious offence" would mean that taxation information could not be disclosed in relation to the investigation of serious non-indictable offences, like some social security or immigration frauds which have a maximum penalty of 12 months. This could be overcome if the definition of "serious offence" included offences punishable by imprisonment for a period of 12 months or more.

Additional comment

In addition to the comments previously made in our submission dated 20 April 2009 we would like to raise another issue which has come to our attention after further considering the Bill.

We are uncertain whether a taxation officer is able to make a record for or disclose to a Court for the purpose of proceedings relating to a serious offence or proceeds of crime where these proceedings are unrelated to a taxation law. It appears the Bill allows law enforcement officers to make a record for or disclose to a Court in these proceedings where that information was originally disclosed by an authorised taxation officer for a law enforcement purpose under clause 355-70 and the record or disclosure is made for that purpose or in connection with that purpose (see clause 355-175).

However, in many cases, it will be a tax officer rather than a law enforcement officer who will need to give evidence in relation to the tax information provided in order for the material to be admissible in Court. In many cases in order to make sense of the tax information and/or establish that the evidence is business records and/or establish other matters relating to admissibility a tax officer will be required to give evidence about the information.

In considering this issue we have considered the following clauses:

- Clause 355-25 makes it an offence for a taxation officer to disclose protected information to an entity or to a court or tribunal.

- Clause 355-50 creates an exception to clause 355-25 where the taxation officer is performing their duties. Subclause 355-50(2) provides that records or disclosures made in performing duties as a taxation officer include those mentioned in the table, which does not appear to include making a record for or disclosing to a court for the purpose of criminal proceedings that relate to a serious offence or proceeds of crime proceedings where the proceedings are unrelated to a taxation law.

- Clause 355-70 provides an exception to clause 355-25 for law enforcement and related purposes where an item listed in the table in clause 355-70 covers the making of the record or the disclosure. The table is exhaustive of the circumstances in which a record can be made or disclosure can occur. The table includes making a record for or disclosure to an authorised law enforcement agency where the record or disclosure is for the purpose of:

  - investigating a serious offence or
  -enforcing a law, the contravention of which is a serious offence or
  - the making, or proposed or possible making of a proceeds of crime order.

  It does not include disclosure to a Court for the purpose of enforcing a law, the contravention of which is a serious offence or for proceeds of crime proceedings (other than in relation to Project Wickenby or a taskforce)

- None of the other exceptions which apply to clause 355-25 appear to provide for making a record or disclosure in these circumstances.

- Clause 355-75 limits disclosure to courts and tribunals. This provision provides:

  "Any entity who is or was a taxation officer is not to be required to disclose to a court or tribunal protected information that was acquired by the entity as a taxation officer except where it is necessary to do so for the purpose of carrying into effect the provisions of a taxation law".

  The Explanatory Memorandum in relation to this provision states:

  "*Under the new framework and consistent with the current law, a taxation officer or another recipient of taxpayer information cannot be compelled to provide information to a court or tribunal. This recognises the significant loss of privacy that would result in the release of taxpayer information in an open court.*

  As an exception, however, a taxation officer or another recipient of taxpayer information can be compelled to disclose taxpayer information to a court or tribunal where it is necessary for the purpose of carrying into effect a provision of a taxation law. Such a disclosure is closely aligned with the purpose for which the information is given and recognises that in some circumstances a courts power to compel the production of

> *information should be invoked to give effect to a provision of* ***a taxation law*** *[my emphasis]"*

Example 4.2 in the Explanatory Memorandum to the Bill appears to indicate that a taxation officer may be able to disclose protected information to a Court for proceedings relating to a serious offence or proceeds of crime where those proceedings are unrelated to taxation law. Example 4.2 provides:

> *"A taxation officer lawfully discloses taxpayer information to a law enforcement agency officer to establish whether a serious offence prescribed by the taxation law has been committed. Both the law enforcement agency officer and the taxation officer can be compelled to disclose that taxpayer information to the court for the prosecution of the serious offence."*

As discussed above, we are uncertain how the provisions of the Bill operate to enable a taxation officer to be compelled to disclose taxpayer information to a court for the prosecution of a serious offence which is unrelated to a taxation offence and this may be an issue which could be assisted by some further clarification.

DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference: HA09102133

20 April 2009

General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Madam/Sir

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 – Exposure Draft

Submission by the Commonwealth Director of Public Prosecutions

Role of the Office of the Commonwealth Director of Public Prosecutions

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of offences against the Commonwealth and for the confiscation of the proceeds of Commonwealth crime. The main cases prosecuted by the CDPP involve drug importation and money laundering, offences against corporate law, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), people smuggling, sexual servitude and terrorism.

The CDPP has no investigative function. It can only prosecute or take confiscation action where there has been an investigation by the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Australian Taxation Office (ATO) or some other investigative agency. However, the CDPP regularly provides advice and assistance to investigators at the investigation stage and works closely with the investigators.

The CDPP has considered the secrecy provisions in various pieces of taxation law, particularly section 16 of the *Income Tax Assessment Act 1936* (ITAA) and section 3E of the *Taxation Administration Act 1953* (TAA), and has provided advice to the ATO in relation to the operation of these provisions.

The CDPP provided a detailed submission to the *Review of Taxation Secrecy and Disclosure Provisions* discussion paper in 2006, which we have attached for your information. In summary, our submission indicated that we strongly support the expansion of disclosure of tax information to law enforcement agencies. We also raised two fundamental and interrelated difficulties with the current disclosure to law enforcement agencies under section 3E of the TAA. The first is that disclosure to law enforcement agencies is currently limited to the investigation of a serious offence, which is limited in its definition to indictable offences. The second is that information disclosed to law enforcement agencies for the investigation of a serious offence cannot be used as evidence in the prosecution of an offence unless that offence is a tax related offence. In the

context of the issues raise in our previous submission, we provided the following comments in relation to the exposure draft.

Comments on the exposure draft

Consolidation of taxation secrecy provisions into a single framework

The CDPP supports the consolidation of taxation secrecy provisions into a single framework and we note that the exposure bill contains provisions repealing the current taxation secrecy provisions, including section 3E of the TAA and section 16 of the ITAA. As we noted in our submission to the *Review of Taxation Secrecy and Disclosure Provision*, clear and specific secrecy and disclosure rules will benefit the ATO, law enforcement agencies and the courts when dealing with taxation information.

We are concerned, however, at the complexity of the proposed framework. Given that it is a criminal offence for taxation officers to disclose protected information (see clause 355-20), it is essential that taxation officers are left without a doubt about when they can disclose information and when they cannot. As currently drafted, the number and complexity of the exceptions where disclosure can occur and the provisions concerning on-disclosure may leave taxation officers without the certainty that they need. It may be that consideration can be given as to whether the provisions can be simplified any further.

Exception – disclosure to law enforcement agencies and intelligence agencies

Clause 355-70(1) sets out an exception for disclosure to law enforcement agencies and intelligence agencies. The provision provides that it is not an offence for the Commissioner or a taxation officer authorised by the Commissioner to make a disclosure to an authorised law enforcement agency officer for the purpose of enforcing a serious offence or making or possibly making a proceeds of crime order.

The CDPP supports a provision that allows the disclosure of tax information for law enforcement purposes. However, we have the following comments in relation to this provision.

- Authorised law enforcement agency officer

The disclosure can only be made to an authorised law enforcement agency officer. An "authorised law enforcement agency officer" is the head of a law enforcement agency or a person authorised in writing by the head of the law enforcement agency. The requirement for the head of a law enforcement agency to authorise in writing those persons who can receive taxation information creates an additional administrative task for agencies in attempting receive taxation information, which adds to the complexity of the provision. We would recommend that consideration be given to removing the requirement that an officer of the law enforcement agency be authorised.

- Law enforcement agency

The definition of "law enforcement agency" is limited, in the Commonwealth sphere, to the AFP, ACC, ACLEI, ASIC and the CDPP. In our submission to the *Review of Taxation Secrecy and Disclosure Provisions*, we noted the difficulties and inflexible nature of the current definition of "law enforcement agency" in section 2 of the TAA, which contains specifically listed agencies. We recommended that the definition of "law enforcement agencies" be expanded to include general categories such as are included in the definition of "enforcement body" in the *Privacy Act 1988*, such as "another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law" and

"another prescribed authority or body that is established under a law of a State or Territory to conduct criminal investigations or inquiries".

We recommend that consideration be given to broadening the definition of "law enforcement agency" to include the general categories included in the definition of "enforcement body" in the *Privacy Act 1988.* Alternatively, we recommend that the definition specifically include other Commonwealth agencies which may need taxation information for law enforcement purposes, such as Centrelink, Australian Customs and Border Protection Service, Department of Immigration and Citizenship, Insolvency and Trustee Service Australia and Child Support Agency.

- Serious offence

The information can only be disclosed if it for the purposes of enforcing a law the contravention of which is a serious offence. "Serious offence" is defined as an offence against Australian law which is punishable by imprisonment for a period exceeding 12 months. For Commonwealth offences, this is in effect an indictable offence[1] (see 4G of the *Crimes Act 1914*).

In our submission to the *Review of Taxation Secrecy and Disclosure Provisions* we noted:

> "non-indictable offences can be, and often are, serious offences. As the current disclosure regime limits disclosure to law enforcement agencies for the investigation of indictable offences, the information cannot be disclosed in relation to the investigation of serious non-indictable offences such as non-indictable frauds, including social security fraud and immigration fraud. I note that a vast majority of the offences prosecuted by my office on referral from Centrelink are summary, with a maximum penalty of 12 months imprisonment. These matters are serious social security fraud but they are precluded from the current definition of "serious offence" in section 3E of the TAA because they are not indictable offences."

The proposed definition of "serious offence" would mean that taxation information could not be disclosed in relation to the investigation of serious non-indictable frauds, such as some social security or immigration frauds. Most of these fraud offences have a maximum penalty of 12 months. Therefore, we recommend that consideration be given to amending the definition of "serious offence" to include all Commonwealth offences, or alternatively to include offences punishable by imprisonment for a period of 12 months or more.

On-disclosure

Clause 355-155 provides a general offence for an entity who has been provided information under an exception if they disclose that information to another entity. There are exceptions to that offence, including on-disclosure for original purpose in clause 355-175. Clause 355-175 provides, in effect, that an entity does not commit an offence if the information was obtained under an exception in Subdivision 355-B for a purpose specified under the exception (the original purpose) and the on-disclosure is made for the original purpose or in connection with the original purpose. Clause (1)(b) provides similarly for the on-disclosure of information that has been provided to another entity as a result of an on-disclosure for the original purpose.

This office has an interest in the on-disclosure provisions because the CDPP may be provided with taxation information by a law enforcement agency in the referral of a brief for a serious offence or proceeds of crime action and the CDPP may then need to provide that taxation

[1] We note that it would also include offences which are specified to be summary in nature which have a penalty in excess of 12 months imprisonment.

information to the defence and the court in prosecuting an offence or taking proceeds of crime action.

The on-disclosure provisions are complex. However, it appears that if a law enforcement agency has had taxation information disclosed to them for the purpose of "enforcing a law the contravention of which is a serious offence" under clause 355-70, the law enforcement agency could disclose that information to the CDPP under clause 355-175, as long as the disclosure was still for the original purpose of enforcing a law the contravention of which is a serious offence. The CDPP could then disclose that information to the defence and the court in the prosecution of the serious offence under clause 355-175, again so long as the disclosure was for the original purpose or connected to the original purpose. Each of these on-disclosures would need to be covered in order for that taxation information to be used in a prosecution of an offence. Similar on-disclosures would need to be covered by clause 355-175 in order for taxation information to be used in relation to proceeds of crime action. We seek clarification that our interpretation of the on-disclosure exception provision in clause 355-175 is correct.

We also recommend that it be clarified that the disclosure of the taxation information by a law enforcement agency to the CDPP or by the CDPP to the court and defence for the prosecution of a serious offence which is different to the original serious offence contemplated by the law enforcement agency when they received the taxation information under clause 355-10 is covered by the on-disclosure provision in clause 355-175. There can be changes in relation to the offences investigated as an investigation progresses. Similarly, after the evidence has been consider by the CDPP different offences may be prosecuted then were originally contemplated by the investigator. Regardless of these changes, it is our view that the taxation information should still be available for the prosecution of the offence so long as the offence still meets the definition of a serious offence. To avoid unnecessary argument on this issue, we recommend that this be covered in the Bill.

Thank you for the opportunity to consider the exposure draft of the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009.* Please feel free to contact myself on 6206 5625 or Mark de Crespigny on 6206 5646 if you wish to discuss this letter.

Yours sincerely

Jaala Hinchcliffe
Senior Assistant Director
Policy

DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference: HA05199531

28 September 2006

Mr Paul McCullough
General Manager
Tax System Review Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir

The Review of Taxation Secrecy and Disclosure Provisions

Submission by the Commonwealth Director of Public Prosecutions

Introduction

Role of the Office of the Commonwealth Director of Public Prosecutions

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for the prosecution of offences against the Commonwealth and for the confiscation of the proceeds of Commonwealth crime. The main cases prosecuted by the CDPP involve drug importation and money laundering, offences against corporate law, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), people smuggling, sexual servitude and terrorism.

The CDPP has no investigative function. It can only prosecute or take confiscation action where there has been an investigation by the Australian Federal Police (AFP), the Australian Crime Commission (ACC) or some other investigative agency. However, the CDPP regularly provides advice and assistance to investigators at the investigation stage and works closely with the investigators.

The CDPP has considered the secrecy provisions in various pieces of taxation law, particularly section 16 of the *Income Tax Assessment Act 1936* (ITAA) and section 3E of the *Taxation Administration Act 1953* (TAA), and has provided advice to the Australian Taxation Office (ATO) in relation to the operation of these provisions. The CDPP is aware of matters where investigation agencies or the CDPP have requested information from the ATO as part of an investigation or a prosecution of a serious Commonwealth offence, where the ATO has been unable to provide that information because it considered that that disclosure was prevented by the taxation secrecy provisions.

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Interaction between secrecy provisions and the criminal process

It has been my view and the view of my office for a substantial period of time that the interaction between the secrecy provisions in taxation law and the criminal process is problematic. The secrecy provisions, and the interpretation that they have been afforded by the ATO, have created a very narrow basis for disclosure of tax information. This, in turn, has impacted on the investigation of serious criminal offences. This issue was discussed by Tom Sherman AO in the Report on Review of ATO Capability to Combat Serious Non-Compliance (13 November 2003), where he stated:

> "From my discussions with staff on this issue it is clear that section 16 [of the ITAA] is, or is at least perceived to be, a substantial impediment to the sharing of information between the ATO and other agencies and with other organisations such as banks. It follows that it is (as currently interpreted) a serious barrier to effective investigations." (p47)

The most recent example of the difficulties that this has the potential to create are the problems of information sharing experienced in the current Wickenby investigations, where there have been difficulties sharing tax information with some of the law enforcement agencies involved in the operation, for example ASIC. To be in a situation where several law enforcement agencies are investigating criminal offences collaboratively, but where some of the agencies can have access to information to which other agencies cannot, is a serious impediment to the proper investigation of these offences and is of particular concern.

The current secrecy provisions have presented further difficulties because they have been subject to interpretation which has narrowed the basis for the disclosure of tax information and clouded the issues rather than clarified them. In the Report on Review of ATO Capability to Combat Serious Non-Compliance (13 November 2003), Tom Sherman AO stated:

> "In the course of the review I read a number of legal opinions by eminent lawyers on the interpretation of section 16 including opinions written by present and former Solicitors General and other eminent QCs. It is some time since I have practised law and would not presume to question the views of eminent lawyers. That said, I was left, after having read those opinions, with no clear guidance on the proper parameters of the section." (p47)

The changing nature of criminal law enforcement and the growth of the role of ATO

The changing nature of criminal law enforcement and the increasing role of the ATO in Australian society with the implementation of the GST and other tax reforms, means that the interaction between the secrecy provisions in taxation law and the criminal process is continuing to be of great policy import. The Commissioner of the Australian Federal Police (the AFP) recently identified the interaction that criminal activity has with the Australian tax system. During hearings before the Parliamentary Joint Committee on the Australian Crime Commission on 7 October 2005, Commissioner Keelty stated:

> "There are not many organised crime entities that do not in some way or another affect our taxation system either through defrauding the taxation system or using the taxation system in a variety of ways to benefit themselves."

The position of the Commissioner was reflected in the unanimous support noted in the Parliamentary Joint Committee's report and its recommendation that the Commissioner of Taxation be included on the Board of the Australian Crime Commission.

As criminal enterprises continue to grow in their interaction with the tax system, either through defrauding the tax system or using the tax system to their advantage, tax information becomes an increasingly valuable source of intelligence and evidence for the investigation and prosecution of serious criminal activity. The analysis of tax information can provide a vital part of law enforcement's armoury in detecting and prosecuting criminal activity.

Further, serious criminal activity is often no longer confined to one identifiable area. Those involved in narcotics trafficking will also commonly be involved in money laundering and tax evasion. Similarly, terrorist activity may not only involve acts of or in direct preparation of terrorism. While our experience is limited, terrorist activity may be accompanied with other forms of illegal activity such as offences against immigration / passport laws, customs offences, money laundering, fraud, firearm offences, taxation fraud, identity fraud and social security fraud. Such offences will involve both Commonwealth and State law and these offences may be associated with preparation for or funding of terrorist activity. As you will appreciate in some cases the detection of potential terrorist activity or the funding of such activity may depend on drawing together threads of evidence and information from a variety of sources and we would see tax information as part of the potential information that would be of importance in this exercise. Active co-operation between a range of Government agencies is important to identify, investigate and prosecute such serious criminal activity.

The appropriate model for secrecy provisions

The secrecy provisions in tax law have, to date, been primarily concerned with privacy considerations. This is reflected in the Discussion Paper in paragraph 3.7 which provides that a framework based on a test of "remoteness of use from reason originally collected" should guide to whom and in what circumstances protected taxpayer information may be disclosed. In the application of the framework, the Discussion Paper states "[t]he further the use of the information is from the reason for which it was originally collected, the greater the level of justification required for the information to be disclosed and the more precisely the circumstances of the disclosure would be described." In effect, this framework is based on an understanding that the further the use of the information is from the reason it was collected, the more tightly the privacy of the information needs to be protected.

I am concerned that this framework will require Parliament to find a greater justification for the disclosure of information for some purposes than others, which will in turn restrict the discretion of Parliament to determine when information, having been obtained by a Commonwealth agency, may be disclosed.

The information disclosure framework provides that greater justification is required to allow for the disclosure of tax information for the prosecution of a general offence rather than a tax related offence. In my view, this framework creates an artificial distinction. Instead, I consider that the test for the 'framework' to guide thinking about the drafting of legislation allowing disclosure of tax information should be 'the public benefit in the purpose' rather than a test which is heavily weighted towards privacy. In determining where the public interest lies, the remoteness of use would be simply one of the issues that needs to be considered. In many cases the public interest (or public good) may be best served by the disclosure of information for purposes far removed from the reason the information was obtained. Law enforcement and proceeds of crime are two such areas.

It is against this background that any amendment to the tax law secrecy provisions and the disclosure to law enforcement agencies should be considered and it is with these issues in mind that I provide the following comments.

Disclosure to law enforcement agencies and intelligence agencies

Paragraph 5.2 of the Discussion Paper considers the expansion of the current range of disclosure of tax information to law enforcement agencies. I strongly support this proposal.

An appropriate model on which to base the expansion of the current range of disclosure of tax information to law enforcement agencies is National Privacy Principles 2.1(h)[1] (NPP 2.1(h)), which states:

> An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless the organisation reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by or on behalf of an enforcement body:
> (i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction or breaches of a prescribed law;
> (ii) the enforcement of laws relating to the confiscation of the proceeds of crime;
> (iii) the protection of the public revenue;
> (iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;
> (v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal

I am of the view that an expansion of disclosure to law enforcement based on NPP 2.1(h) meets each of the issues raised in the introduction to this submission, namely that it resolves the current problematic interaction between the secrecy provisions in taxation law and the criminal process, it will be able to accommodate the changing nature of criminal law enforcement and it is based on considerations of the public interest, which is an appropriate model for secrecy provisions.

This proposal will overcome two fundamental and interrelated difficulties with the current disclosure to law enforcement agencies under section 3E of the TAA. The first is that disclosure to law enforcement agencies is currently limited to the investigation of a serious offence, which is limited in its definition to indictable offences only. The second is that information disclosed to law enforcement agencies for the investigation of a serious offence cannot be used as evidence in the prosecution of an offence unless that offence is a tax related offence.

I agree with the comments in the Discussion Paper that non-indictable offences can be, and often are, serious offences. As the current disclosure regime limits disclosure to law enforcement agencies for the investigation of indictable offences, the information cannot be disclosed in relation to the investigation of serious non-indictable offences such as non-indictable frauds, including social security fraud and immigration fraud. I note that a vast majority of the offences prosecuted by my office on referral from Centrelink are summary, with a maximum penalty of 12 months imprisonment. These matters are serious social security fraud but they are precluded from the current definition of "serious offence" in section 3E of the TAA because they are not indictable offences.

Further, having detected criminal activity, tax information should be available not only for intelligence purposes but for use in all prosecutions, not simply tax related prosecutions. To allow persons to gain 'protection' in relation to prosecution for non-tax offences by the secrecy

[1] The Discussion Paper refers to Privacy Principle 11.1(e) as an appropriate model for law enforcement disclosure. However, it is not clear whether the formula "reasonable necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue" in Privacy Principle 11.1(e) permits a disclosure which is solely or predominantly for the purpose of proceeds of crime proceedings. In contrast, NPP 2.1(h) clearly provides for disclosure for the purposes of the confiscation of proceeds of crime.

provisions in relation to tax information is against the public interest. The following examples of criminal activity in support of this.

Identity theft cases

The burgeoning crime of identity theft provides an example of criminal investigation which relies on cross-agency co-operation. Criminal syndicates are involved in the large-scale manufacture of documents to support false identities. Such documents are used for a wide range of illegal purposes including defrauding Centrelink, Medicare and the ATO, obtaining false passports, obtaining credit, and opening false name bank accounts to launder proceeds of crime. Active co-operation between agencies including AFP, the ATO, Centrelink, DIMA and state and territory police is essential to getting law enforcement results in this area.

Falsified taxation documents feature in these enterprises, in the form of notices of assessment and ATO correspondence addressed to the false identity. In such cases the co-operation of the ATO is required even though there may not have been financial prejudice to the ATO itself. In this environment a restrictive approach to disclosure of tax information harms the ability of law enforcers to detect and prosecute such crimes, and gives protection to those who perpetrate them.

Money Laundering Offences

Tax information can be required for the effective prosecution of certain money laundering offences. For example, section 400.9 of the *Criminal Code* provides an offence of possessing money reasonably suspected of being proceeds of crime. In cases where large unexplained sums of money are found in the possession of the defendant the prosecution is able to rely upon s 400.9(2)(c), which allows a court to find the reasonable suspicion where the value of the money is grossly out of proportion to the defendant's income and expenditure.

ATO-sourced evidence of the declared income of the defendant is of obvious relevance in this regard, both in support of the prosecution case and in rebuttal of a defence that the money has a legitimate source. However these offences have often not been considered to be tax related offences and the tax information required has not been available to the prosecution.

The activity of money laundering is of serious concern to the Australian Government, with one estimate indicating that the amount of money laundered in Australia ranges between AUD 2 – 3 billion per year[2] . The current prohibition on use of tax information in money laundering cases is inconsistent with the co-operative approach that is needed to get prosecution results in this area.

Structuring offences

Section 31 of the *Financial Transactions Reports Act 1988* provides an offence of engaging in two or more non-reportable transactions in a manner or form that it is reasonable to conclude that the person conducted the transactions in that way for the sole or dominate purpose that the transaction would not give rise to a transaction that was reportable. This offence is commonly known as "structuring".

Taxation information is potentially relevant in structuring cases as it may provide proof of the defendant's intention. Evidence through tax information that the total amount of money structured by the defendant greatly exceeds the amount declared by the defendant in a tax return during the relevant period may go to proving that the defendant intentionally structured their transactions to reduce the amount of money they would declare as income without having reports created concerning the other money they have moved.

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[2] see FATF Third Mutual Evaluation Report Australia 14 October 2005 p3

Taxation information may also of assistance to the sentencing judge in sentence proceedings for structuring offences. In fixing an appropriate penalty a sentencing judge is assisted by evidence as to an offender's motivation in conducting the relevant offence. Where the motivation is the avoidance of tax obligations there is a strong public interest in ATO disclosure of the relevant information.

Bribery cases

Another example relates to Australia's responsibilities as a member of the international community. Division 70 of the *Criminal Code* provides for offences relating to the bribery of foreign public officials. Where a person was suspected of having committed an offence against s.70.2 of the *Criminal Code*, tax information might be very relevant not just for investigative purposes but for establishing the offence. However unless the bribery offence could be classed as a *'tax related offence'* the tax information could not be used in the prosecution of the person which may in turn result either in a prosecution not being brought or failing.

The importance of Australia's responsibilities in relation to this area was highlighted by the recent OECD report concerning Australia's implementation of the Convention[3]. The OECD Report also noted the use that could be made of the money laundering offences against cases of bribery[4]. However once again, the restrictions contained in the current secrecy and disclosure provisions would not allow tax information to be used in a money laundering case unless the offence could be classed as tax related.

Welfare fraud cases

Data-matching arrangements between the ATO and Centrelink allow the latter agency to compare details of beneficiaries' declared income with details provided in support of Centrelink payments. However tax information is not available for use in prosecution of false claims for Centrelink payments.

The main impact of this prohibition is in situations where employment records are not available to the prosecution, typically where the defendant is self-employed or the employer is unable or unwilling to provide this evidence. In these cases ATO records are usually the only other source of such evidence but are not available, with the result that such cases cannot be prosecuted. An evident inequity arises from the fact that such persons are likely to be able to escape prosecution where others will not.

For these reasons, I am of the view that an expansion of the current range of disclosure of tax information to law enforcement agencies to disclosure that is based on NPP 2.1(h) would be of significant benefit to the continued enforcement of the criminal law in Australia. Accordingly, I strongly support this proposal.

Definition of law enforcement agency

NPP 2.1(h) is based on disclosure to an 'enforcement body". "Enforcement body" is defined in section 6 of the *Privacy Act 1988* and the definition includes general categories such as "another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law" and "another prescribed authority or body that is established under a law of a State or Territory to conduct criminal investigations or inquiries".

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[3] OECD; Australia: Phase 2 Report on the Application of the Convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendations on combating bribery in international business transactions.

[4] See pages 37-38 of the OECD Report.

The current definition of "law enforcement agency" in section 2 of the TAA contains only specifically listed agencies, including the AFP, the police force of a State or the Northern Territory, the DPP, the ACC and the NSW ICAC. This definition of "law enforcement agency" has created difficulties because it is inflexible and does not include several Commonwealth agencies which have an investigation function, for example ASIC, DIMA, Customs and Centrelink. In drafting disclosure provisions relating to law enforcement it needs to be borne in mind that investigations into suspected criminal conduct may lead to other criminal conduct which needs to be investigated by the original agency or by another Commonwealth or State agency. This of course is consistent with a whole of government approach to the fight against crime, which the Federal Government has adopted in relation to a number of initiatives.[5] I am of the view that an expansion of the definition of "law enforcement agencies" to include general categories such as are included in the definition of "enforcement body" in the *Privacy Act 1988* would be facilitative to this approach to law enforcement.

Other provisions of the Discussion Paper

An amendment to the secrecy provisions in tax law which allows disclosure of tax information to law enforcement agencies as specified above is essential. Such an amendment would rectify the current problems which law enforcement agencies experience with the secrecy provisions in tax law, which have been identified.

I provide the following comments on the other provisions of the Discussion Paper for completeness. I am of the view, however, that the law enforcement issues identified in the following discussion would be resolved by an amendment to secrecy provisions of the kind referred to above.

Standardisation of tax law secrecy and disclosure provisions

The discussion paper proposes that the secrecy and disclosure provisions in the tax law should be standardised into a single piece of legislation. The discussion paper provides 4 aims in relation to the standardisation of the secrecy and disclosure provisions. These are to:

- Maintain the principle of tightly protecting taxpayer information;
- Clearly describe what information is to be protected and by whom;
- Identify to whom protected information can be disclosed, the circumstances in which disclosure is allowed and the purposes for which disclosed information can be used; and
- Provide a uniform system of penalties for all tax secrecy offences.

I support the standardisation of tax law secrecy and disclosure provisions into a single piece of legislation. Clear and specific secrecy and disclosure rules will benefit the ATO, law enforcement agencies and the courts when dealing with taxation information. I note that this "single provision" approach has been taken in relation to the disclosure of Customs information through section 16 of the *Customs Administration Act 1985*.

Information that need not be protected – publicly available information

Paragraph 3.2.1 of the Discussion Paper expresses the view that the tax secrecy and disclosure provisions do not need to protect information that is already publicly available. One example given by the Discussion Paper is that the ATO should be able to publicise details of a tax conviction as that information is available through the court.

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[5] See for example issues such as the National drug strategy; identity fraud; firearms regulation; transnational organised crime; cash economy.

The ATO has previously taken the view that the secrecy provisions in section 16 of the ITAA prohibit it from reporting tax convictions. By arrangement with my office, the bulk of ATO compliance offences (failure to lodge taxation returns, failure to attend audit examinations and failure to produce documents to the ATO) are prosecuted by the ATO's In-House Prosecutors. However, as the ATO has in the past taken the view that section 16 of the ITAA prohibits it from disclosing the convictions from such prosecutions, these convictions have not been recorded on a person's criminal record.

On the same basis, the ATO has refused to disclose to the NSW Bar Association the names of barristers convicted of such offences. The NSW Bar Association seeks such information in order to assess whether its members are complying with their obligation to notify the Association of convictions for tax offences.

I support the view expressed in the discussion paper and would submit that in the process of standardising the secrecy and disclosure provisions in the tax law it should be made clear that the provisions do not protect information that is already publicly available.

Disclosure in the course of an officer's duties

Paragraph 4.1.1 of the Discussion Paper considers the current provision for disclosure in the "course of duties of an officer" under tax law, indicating that the term is uncertain and should be clarified.

The term "course of duties of an officer" in relation to section 16 of the ITAA has been the subject of various legal advices. In the Report on Review of ATO Capability to Combat Serious Non-Compliance (13 November 2003), Tom Sherman AO stated:

> "In the course of the review I read a number of legal opinions by eminent lawyers on the interpretation of section 16 including opinions written by present and former Solicitors General and other eminent QCs. It is some time since I have practised law and would not presume to question the views of eminent lawyers. That said, I was left, after having read those opinions, with no clear guidance on the proper parameters of the section.
>
> I noted in some of the opinions that there were quite subjective assessments whether the action proposed was within the "performance of the person's duties as an officer". This is a question of fact not law, and the answer to that question will generally depend on what is said in the instructions to advise." (pp 47-8)

In clarifying the term "course of duties of an officer" regard should be had to the interpretation of this term in the relevant case law. The suggestion in the Discussion Paper is that the scope of the term "course of duties of an officer" could be clarified to include, amongst other things, "disclosure to the Commonwealth Director of Public Prosecutions to enable the prosecution of tax-related offences". I support this suggestion and also recommend that "tax-related offences" be defined so as to make it clear that they do not merely include tax offences but also include general offences where the conduct is related to taxation offences, as per the decision in *R v Yates* (1991) 102 ALR 673.

Please feel free to contact Mark de Crespigny on 6206 5646 or Jaala Hinchcliffe on 6206 5625 if you wish to discuss this letter.

Yours sincerely

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Director of Public Prosecutions