



Australian Government

Office of the Privacy Commissioner

**Inquiry into the Tax Laws
Amendment (Confidentiality of
Taxpayer Information) Bill 2009**

**Submission to the Senate Standing
Committee on Economics**

December 2009

Key Recommendations

The Office of the Privacy Commissioner (the Office) has the following recommendations and comments in relation to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (the Bill):

- i. The Office welcomes the Bill stating that exceptions to disclosure will not apply to taxpayer information that is made publicly available as a result of a security breach or in breach of another law.
- ii. The Bill states that regulations 'may' specify the purposes of a prescribed taskforce (to which information may be disclosed), and the agencies involved. Specifying those purposes will assist in ensuring appropriate and accountable disclosures. If the purposes of a prescribed taskforce are not identified by regulation, it may be difficult to interpret paragraph 355-175(3) of the Bill which refers to 'a purpose of a prescribed taskforce'.
- iii. In order to provide guidance and ensure disclosures relating to serious threats are made appropriately, a further consideration as to whether such disclosures should be made could be the 'proximity in time' of the threat (complementing the 'gravity' and 'likelihood' of the threat in question – Explanatory Memorandum refers).
- iv. The Office welcomes the broad range of factors outlined in the Explanatory Memorandum that need to be considered when assessing whether the public benefit of disclosure clearly outweighs taxpayer privacy.

Background

1. The Office of the Privacy Commissioner is an independent statutory body whose purpose is to promote and protect privacy in Australia. The Office, established under the *Privacy Act 1988* (Cth) (Privacy Act), has responsibilities for the protection of individuals' personal information handled by Australian and ACT Government agencies, large private sector organisations, all private health service providers and some small businesses.
2. The Office welcomes the opportunity to make a submission to the Senate's inquiry into the Bill. This follows the Office's submission to the Commonwealth Treasury in April of this year on the Exposure Draft of the Bill (Treasury submission).¹

¹ The Office's submission to Treasury is available at www.privacy.gov.au/materials/types/download/9357/6901
OPC Submission on the Superannuation System Review – Phase Two Issues Paper

Purpose of the Bill

3. It is understood that the broad purpose of this Bill is to amend the secrecy and disclosure provisions applying to taxation information that are currently spread over many taxation Acts. The Bill consolidates those provisions into a single new framework in Schedule 1 to the *Taxation Administration Act 1953* (Cth), and outlines some additional disclosure provisions.
4. The new framework is designed to provide clarity and certainty to taxpayers, the Australian Taxation Office (ATO) and users of taxpayer information. It will also provide guiding principles to assist in framing any additional disclosure provisions in future.

Specific Comments

5. The Office's comments on the Bill are mainly directed at the exceptions to the prohibition of disclosure of taxpayer information. Those exceptions are intended to balance the public benefit derived from the permitted disclosure of information with the public interest in maintaining individual privacy.²

Publicly Available Information

6. Under the Bill it is not an offence for an entity to make a record of, or disclose any taxpayer information that is publicly available³. The Explanatory Memorandum (EM) to the Bill states that taxpayer privacy is paramount, though it is less significant when that information is already available to the public.⁴
7. In its Treasury submission, the Office recommended that the legislation should not override the protections currently afforded to publicly available personal information under the *Privacy Act 1988* (Privacy Act).⁵
8. However, the Office welcomes that the Bill incorporates the Office's alternative suggestion made in our Treasury submission that exceptions to disclosure will not apply to taxpayer information made publicly available as a result of a security breach or in breach of another law.⁶

Project Wickenby and Prescribed Taskforces

9. Under the Bill, the Commissioner of Taxation (or an authorised officer) may make a record for or disclose taxpayer information to a Project Wickenby Officer, for or in connection with any purpose of the Project

² *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (the Bill), paragraph 355-1

³ paragraphs 355-45, 355-170, 355-270

⁴ Explanatory Memorandum (EM) to the Bill, paragraph 4.32

⁵ Information Privacy Principles ('IPPs') 10 and 11; and National Privacy Principle (NPP) 2

⁶ Note 1, paragraph 38

Wickenby taskforce.⁷

10. The Office welcomes that the Bill specifically defines the purposes of the Project Wickenby taskforce.⁸ The Bill also contains similar provisions applying to prescribed taskforces.⁹
11. In its Treasury submission, the Office suggested that any regulations made under the Bill to establish other taskforces identify the purposes of the taskforce and the agencies to be involved.¹⁰ The Office understands the Bill now provides that, when a taskforce is prescribed by regulation, the regulations 'may' deal with the purposes of that taskforce and the agencies in the taskforce.¹¹
12. The Office's suggestion to require that the regulations specify a taskforce's purposes, and the agencies involved, was to provide a point of reference for determining appropriate disclosures, and to assist accountability. If the purposes of a prescribed taskforce are not identified by regulation, it may be difficult to interpret paragraph 355-175(3) of the Bill which refers to 'a purpose of a prescribed taskforce'.

Explanatory Memorandum

Serious threat to health or safety

13. The Office notes that the Bill provides an exception to secrecy offence provisions where a taxation officer makes a record, or discloses taxpayer information to an Australian Government agency, for the purpose of preventing or lessening a 'serious' threat to an individual's life, health or safety; or to public health or safety.¹²
14. In its Treasury submission, the Office suggested that the EM provide additional guidance on what is meant by a 'serious' threat.¹³ The Office welcomes the inclusion of a reference in the EM that the gravity of the outcome, and the likelihood of its occurrence, be considered when determining whether there is a serious threat.¹⁴
15. The Office notes that there is no requirement that the serious threat be 'imminent'. According to the EM, this is on the basis that in the Bill (unlike the Privacy Act), individual consent could not be sought to disclose the information if a threat were serious, but not imminent. To provide guidance and ensure such disclosures are made appropriately, a further consideration for whether particular disclosures should be made (complementing 'gravity' and 'likelihood') could be 'proximity in time'.

Future policy considerations

7 Paragraph 355-70(1), Table 1, Item 3; the Bill also permits a Project Wickenby Officer to make a record of, or disclose taxpayer information for any purpose of the Project Wickenby taskforce (a whole-of-government taskforce set up in 2006 to investigate tax avoidance, tax evasion and large-scale money laundering).

8 Paragraph 355-70(9)

9 Paragraph 355-70(1), Table 1, Item 4

10 Note 1, paragraphs 26-27

11 Paragraph 355-70(13)

12 Paragraph 355-65, Table 1, Item 9

13 See note 1, paragraph 19

14 EM, paragraph 5.67

16. The EM provides that as a guide for future policy consideration, taxpayer information should only be disclosed where the public benefit of such disclosure clearly outweighs taxpayer privacy.¹⁵ The Office recommended in its Treasury submission that when evaluating whether the public benefit of a proposed disclosure clearly outweighs taxpayer privacy, several factors should be considered.¹⁶
17. The Office welcomes the broad range of factors outlined in the EM that need to be considered when assessing whether the public benefit of disclosure clearly outweighs taxpayer privacy. Several of the listed factors draw on the Office's previous recommendation.

¹⁵ EM, paragraph 1.16

¹⁶ Note 1, paragraph 43. The Office's suggested factors included whether the disclosure: will be exempt from the privacy principles (and if so, how far the proposed disclosure would diverge from the IPP or NPP protections that would otherwise apply); is consistent with community expectations; and is necessary to achieve policy objectives.