



2 March 2010

The Secretary
Senate Economics Committee
Parliament House
CANBERRA ACT 2600

Dear Sir

INQUIRY INTO THE TAX LAWS AMENDMENT (CONFIDENTIALITY OF TAXPAYER INFORMATION) BILL 2009

I respond to the invitation to provide a submission to the Inquiry into the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* (**the Bill**) on behalf of the Rule of Law Association of Australia (**RoLAA**).

About RoLAA

RoLAA is an independent not-for-profit body formed to uphold the rule of law in Australia. The Association aims to promote discussion on the importance of the principles which underpin the rule of law. RoLAA's broad objectives are:

- to foster the rule of law in Australia;
- to promote good governance in Australia by the rule of law;
- to encourage truth and transparency in Australian Federal and State governments and government departments and agencies;
- to reduce complexity, arbitrariness and uncertainty of Australian laws; and
- to reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Confidentiality of Taxpayer Information?

RoLAA believes that whilst the Bill makes reference to the ‘Confidentiality of Taxpayer Information’, it has little to do with keeping taxpayers’ information confidential and a lot to do with disclosing the information to other government departments and agencies and enabling them to use the information in investigations and prosecutions. The rule of law requires Bills presented to Parliament to be true to their title and any Explanatory Memorandum, frank, honest and transparent. This cannot be said in relation to the Bill under consideration by the committee.

Expansion of information to be disclosed

Whilst we applaud the consolidation of the various secrecy and disclosure provisions into the one subdivision, the new regime extends the disclosure powers of the Australian Taxation Office (ATO) in a number of instances where “the public benefit of disclosure outweighs taxpayer privacy”. A fundamental concern with the Bill is who at the ATO makes the determination of when the public benefit of the disclosure outweighs taxpayer privacy and whether a senior ATO officer needs to approve the disclosure. The Bill provisions are silent as to who is such a decision maker within the ATO, how such a decision is made and authorised, and what must be taken into account when making such a decision.

Expansion of permitted uses of disclosed information

In addition to extending the disclosure powers of the ATO, the Bill also extends the use that the receiving entity can make of the information received. Previously, recipients could use information to investigate whether a serious offence had been committed but that information could not be used in the prosecution of that offence (unless it was a taxation offence). Under the new regime, a recipient law enforcement agency is permitted to use the information for both investigation and prosecution of a serious offence.

As noted in paragraph 5.82 of the Explanatory Memorandum:

“For an individual, the consequences of these disclosures could potentially be quite significant. In recognition of this, the existing law has additional integrity provisions with respect to these disclosures. The first is the requirement that the Commissioner, under section 3B of the TAA 1953, identify in his annual report the number of times that he was requested by these agencies/bodies to provide information and the number of times the information was actually provided.”

Whilst the new framework retains this integrity provision, the effect of the increase in permitted uses of the disclosed information is that law enforcement agencies unconnected with the ATO are now able to not only investigate a non-tax related matter arising from disclosures made to the ATO but may bring a prosecution based on the materials received from the ATO.

Taxpayers need to be aware that disclosures made to the ATO may have far more serious implications than just taxation. From a compliance perspective taxpayers will need to ensure that disclosures to be made to the ATO are not only appropriate from a taxation perspective but in relation to all laws upon which that disclosure may have an impact. Accordingly, given the gravity of the data sharing the ATO should be obliged to establish procedures which alert taxpayers under examination that data might be referred to other agencies, state and federal, and that that data may be used in prosecutions by these agencies.

It is our submission that the extended scope of disclosures permitted to be made by the ATO together with the extension of the uses to which that information may be put by the recipient agencies or organisations warrant the implementation of the following minimum safeguards:

1. When requesting or requiring the production of documents and information, the ATO should notify the person in writing that the documents or information produced to the ATO may be disclosed to other agencies and may be used by those other agencies to investigate or prosecute a Commonwealth or State offence. Such notification should also be required to be given orally by the ATO before conducting a formal examination.
2. A senior ATO officer (at the level of Assistant Commissioner or above) should be required to determine whether the public benefit of a proposed disclosure outweighs taxpayer privacy concerns and authorise the disclosure. In addition the designated Assistant Commissioner should be working in a business line outside of the business line in which the data is being gathered. This would assist in ensuring that there is a degree of impartiality in the decision to transfer data, and is currently a process used by the ATO for the issuance of 'access without notice' authorities.
3. The ATO should be required to produce a practice statement which clearly sets out the ATO disclosure procedures and alerts taxpayers and others to the fact that the information they provide to the ATO may be passed on to other agencies and used by the recipient for law enforcement purposes.
4. The Privacy Commissioner should report to Parliament biennially on the use of these extended disclosure provisions by the ATO and the recipient organisations.

If you have any questions in relation to our submissions please contact me to discuss.

Yours faithfully,



Malcolm Stewart

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