

ATO PROSECUTION POLICY

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1 INTRODUCTION

1.1 OVERVIEW

1.1.1 This document contains the prosecution policy of the Australian Taxation Office (ATO). The policy is designed to ensure that taxpayers, their advisers and ATO staff have a common understanding of the ATO's approach to prosecutions. The policy is based on legislation enacted as at 15 December 2001 and the interpretation that will be applied to offence provisions by the Criminal Code to acts and omissions that happen on or after 15 December 2001. It has application to all offence provisions in:

- (i) Legislation administered by the Commissioner of Taxation; and
- (ii) The *Crimes Act 1914*, the *Crimes (Taxation Offences) Act 1980*, the *Financial Transactions Reports Act 1988*, the *Criminal Code Act 1995* (Schedule 1 of which contains the Criminal Code) and other Commonwealth legislation administered by other agencies.

However, the decision whether or not to prosecute under the Acts referred to in this paragraph is one for the DPP in accordance with the "Prosecution Policy of the Commonwealth". The ATO Prosecution Policy only relates to Division 136 or 137 of the Criminal Code in relation to a taxation law.

1.1.2 This policy document is part of a set of documents guiding prosecution activity within the ATO. Other relevant documents include:

- Prosecution Policy of the Commonwealth;
- ATO Compliance Model;
- Taxpayers' Charter;
- Commonwealth Director of Public Prosecutions (DPP) Tax Manual;
- Fraud Control Policy of the Commonwealth;
- Liaison Guidelines between the Director of Public Prosecutions and the ATO;
- Commonwealth Fraud Investigations Standards; and
- Working Guidelines between the Australian Federal Police (AFP) and the ATO.

1.1.3 This document replaces the Prosecution Policy issued in July 2000. It is consistent with that version, though it updates ATO policy in response to various legislative amendments enacted since the commencement date of that version (July 2000) and incorporates current policy considerations in light of changes made to core taxation offences to ensure consistency with the Criminal Code.

1.1.4 This document, together with the other documents, will guide all prosecution activities and will be updated as required. The policies are to be applied to prosecution activities from the release date of this document and of any subsequent amendments. For the purposes of this policy, "prosecution" includes the investigation of suspected offences for the purposes of prosecution.

- 1.1.5 In this document, where appropriate, reference to taxpayers in respect of tax legislation includes reference to payers, payees and employers in respect of superannuation legislation.
- 1.1.6 It should be noted that the penalties stated within the guidelines do not reflect the penalties set out in the published *Taxation Administration Act 1953* (TAA 1953) and in other legislation. These guidelines state penalties in penalty units, however, some legislation still expresses penalties in dollar amounts. Section 4AB of the *Crimes Act 1914* provides that penalties in published legislation can be converted to penalty units by dividing the published financial penalty by 100 (i.e. \$2000 equal 20 penalty units), then multiply that by the value of section 4AA of the *Crimes Act 1914* (currently \$110).
- 1.1.7 This document does not specifically deal with every offence under taxation and other laws. Rather it concentrates on those offences which impact on the mainstream of taxation administration. Nevertheless, the general policy concepts enunciated in this document, and the Prosecution Policy of the Commonwealth, will have application when circumstances arise which require an officer of the ATO to make a decision as to whether or not to commence prosecution action for an offence not specifically mentioned.
- 1.1.8 The words used in the document are intended to have their ordinary meaning unless otherwise stated. Single sentences should not be read in isolation. In this document the word taxpayer can be read to include reference to tax agent, adviser and company official.
- 1.1.9 This policy document does not have the force of law. Each prosecution decision taken by the Commissioner is made on the merits of the individual case, having regard to the legislation, this policy document and other documents referred to at paragraph 1.1.2, and any relevant ruling.
- 1.1.10 This document is copyright to the Commonwealth of Australia. Copies are available under the *Freedom of Information Act 1982*.

2 PRINCIPLES UNDERLYING THE PROSECUTION POLICY OF THE ATO

2.1 OVERVIEW

2.1.1 This chapter sets out the principles underlying the ATO's prosecution policy which applies to all legislation administered by the Commissioner of Taxation. It is also relevant to other offences a taxpayer may commit in failing to fulfil all or part of their taxation obligations.

2.2 INTRODUCTION

2.2.1 The Australian taxation system is based on the premise of taxpayers acting honestly and voluntarily complying with their taxation obligations. Within that environment, the Commissioner has a responsibility to assist taxpayers to understand their rights and obligations and to respond to taxpayers that do not meet their obligations under the law.

2.2.2 Prosecution activity is an important response for both taxpayers and the Parliament in the administration of the taxation law. Parliament expects all taxpayers to meet their taxation obligations as prescribed by legislation. Where taxpayers fail to do so, Parliament has given the Commissioner of Taxation powers to address that failure to comply in an appropriate manner, using any of a number of different compliance improvement approaches (including prosecution).

2.2.3 The Commissioner will have regard to the following principles when deciding whether prosecution action is the most appropriate manner in which to deal with non-compliance. Some principles are supplemented by explanatory narrative.

2.3 PRINCIPLES

A Taxpayers are expected to organise their taxation affairs to ensure they meet their taxation obligations.

2.3.1 The responsibility for maintaining complete and accurate records lies solely on taxpayers. If they maintain appropriate records, taxpayers ought to be able to meet their important obligations under the law, which are:

- to be truthful in their dealings with the ATO;
- to take reasonable care in preparing activity statements, taxation returns and other documents;
- to notify liabilities, and lodge activity statements, taxation returns and other documents or information by the due date; and
- to pay taxes and other amounts by the due date.

2.3.2 A taxpayer's attitude to compliance can, in part, be gauged from whether the taxpayer has satisfied, or has attempted to satisfy, this principle.

B When deciding the most appropriate manner in which to deal with outstanding taxation obligations the Commissioner will give considerable weight to the taxpayer's compliance history.

2.3.3 Where taxpayers fail to meet their obligations under the law, the ATO has a number of strategies available to promote improvement in compliance. These range from help and education, to audits and/or prosecution.

2.3.4 The choice of option or options will vary with each case or type of case, and will be dependent on factors such as:

- the taxpayer's compliance history and attitude to compliance, and the overall compliance risk as demonstrated by the taxpayer's actions or inaction;
- the likelihood that the respective compliance improvement strategy will influence the taxpayer to change his or her attitude to compliance within a reasonable period of time;
- whether any of the various strategies are an appropriate response to the taxpayer's actions or compliance attitude; and
- the seriousness of the taxpayer's conduct.

(For further discussion on this matter, refer to the chapter entitled: "Case Selection and Compliance Improvement")

C Prosecution is not seen as an end in itself. It is a means of encouraging or securing compliance, not only by a specific taxpayer but also by the wider taxpaying community generally.

2.3.5 If prosecution action is considered the most appropriate option to achieve compliance, then its appropriateness will be gauged by the effect that the prosecution has, and not merely by the fact that the prosecution produced a fine or other sanction. The outcome sought from a prosecution is the correction of the mischief for which the taxpayer was prosecuted, and more importantly, to influence that taxpayer and the wider community to meet their obligations in future.

D A matter will not proceed to prosecution where an administrative penalty by itself, or some other administrative response, is appropriate.

E A prosecution should not be instituted or continued unless there is sufficient admissible evidence likely to prove that an offence has been committed by the taxpayer. There must be a reasonable prospect of a conviction on that evidence.

2.3.6 It is the responsibility of the In-House prosecutors or the investigation units e.g. Serious Non-Compliance Capability-Fraud Investigations, to evaluate if there is sufficient evidence for a prosecution, or for the matter to be referred to DPP.

F A prosecution should not be instituted or continued unless it is consistent with the Prosecutions Policy of the Commonwealth and in the public interest.

2.3.7 The term "public interest" is not restricted to the need for deterrence or the seriousness of the offence. The Prosecution Policy of the Commonwealth (at pages 5-6) lists relevant factors in determining whether the public interest requires a prosecution as including:

- the seriousness, or conversely the triviality of the alleged offence or whether it is of a 'technical' nature only;

- any mitigating or aggravating factors;
- the youth, age, intelligence, physical health, mental health or special infirmity of the taxpayer;
- the staleness of the alleged offence;
- the degree of culpability of the taxpayer in connection with the offence;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the offence and the need for deterrence, both personal and general; and
- the necessity to maintain public confidence in such basic institutions as the Parliament, the Courts and the tax system.

(Real or potential publicity is not a relevant consideration in identifying cases suitable for prosecution).

G The ATO will maintain appropriate professional standards in prosecution work.

2.3.8 The ATO will maintain appropriate professional standards through:

- adhering to the intent of the Taxpayers' Charter;
- selecting the correct type of case for investigation;
- working closely with the DPP, the AFP and other agencies;
- applying the Prosecution Policy of the Commonwealth and the Commonwealth standards for all investigation cases;
- ATO investigators meeting the requirements of the Commonwealth Fraud Investigation Standards,
- giving the accused taxpayer reasonable opportunity to present their case;
- laying charges as soon as practicable after the offence is committed;
- working closely with other agencies; and
- maintaining internal quality standards, through quality assurance and probity checks e.g., security checks where appropriate.

H The ATO will not include terms in settlement agreements that prosecution action will not be taken against any particular taxpayer. Only the DPP has statutory authority to give immunity from prosecution.

2.3.9 In all cases ATO officers will make it clear to the taxpayer that settlements and prosecutions are separate and distinct matters and that the decision whether to prosecute or not is the responsibility of the DPP.

2.3.10 ATO officers do not have authority to make it a condition of a settlement that a taxpayer or another person will not be prosecuted, or that the ATO or another agency will not take other proceedings associated with a prosecution.

- 2.3.11 In those cases where the matter is referred to the DPP, and the DPP decides not to prosecute, or where Serious Non-Compliance Capability-Fraud Investigations has considered a matter and concluded that the matter should not be referred to the DPP, ATO officers may inform the taxpayer of that decision during settlement discussions.
- 2.3.12 Where a taxpayer is advised that there is no intention to commence criminal proceedings it will be emphasised that this advice does not preclude a reconsideration of the matter by the DPP (for example, where new information warrants a review).

3 THE CRIMINAL CODE AND TAXPAYER COMPLIANCE

3.1 OVERVIEW

3.1.1 This chapter discusses prosecution activity in the context of ATO compliance improvement activities. Linkages are drawn between:

- Prosecutions and Serious Non-Compliance Capability-Fraud Investigations, and the ATO Compliance Model and the Taxpayers' Charter; and
- the Prosecution Policy of the Commonwealth and ATO prosecution activity.

3.2 LEGISLATION

3.2.1 Various statutes enable the Commissioner to commence prosecution action against taxpayers whose actions, or omissions, satisfy the requirements of the offence provisions. This prosecution action may be undertaken by the DPP or the ATO In-House prosecutors in accordance with the DPP/ATO Investigation and Prosecution Liaison Guidelines.

3.2.2 The offence provisions are contained in an array of legislation, including:

- Criminal Code (e.g. sections 134.1, 134.2, 135.1, 135.2, 135.4, 136.1, 137.1, 137.2, 149.1)
- *Taxation Administration Act 1953* (e.g. Part III.)
- *Income Tax Assessment Act 1936* (e.g. section 221V, 221YL)
- *Sales Tax Assessment Act 1992*
- *Fringe Benefits Tax Assessment Act 1986* (e.g. section 99)
- *A New Tax System (Good and Services Tax) Act 1999*
- *A New Tax System (Australian Business Number) Act 1999*
- *Superannuation Guarantee (Administration) Act 1992*
- *Diesel and Alternative Fuels Grants Scheme Act 1999*
- *Product Grants and Benefits Administration Act 2000*

3.2.3 These provisions provide for a range of offences relating to taxation matters, including:

- fraud against the Commonwealth;
- making false and misleading statements;
- obstruction of taxation officers;
- failure to correctly keep accounting records;
- failure to answer questions when attending before the Commissioner pursuant to a taxation law;
- failure of payers/group employers to remit deductions; and
- failure to provide activity statements, approved forms, returns or information.

- 3.2.4 Prosecution action is not limited to offences under the taxation laws administered by the Commissioner. Taxpayers can be charged with offences under the Criminal Code (e.g., Divisions 134-36 concerning offences involving fraudulent conduct and Divisions 147-49 if a person obstructs or hinders a Commonwealth public officer by violence, threats or intimidation). Further, reparation orders can be sought under section 21B of the *Crimes Act 1914* if certain taxation offences are proven.
- 3.2.5 Taxpayers who fail to meet their taxation obligations may be liable to penalties for their action or inaction. If a prosecution is subsequently instituted against a taxpayer for a taxation offence, other than a Criminal Code offence, based on the same act or omission, the taxpayer is no longer liable to pay the penalty originally imposed (section 8ZE, TAA 1953).
- 3.2.6 In prosecutions for tax offences under the Criminal Code, section 8ZE of the TAA 1953 may apply, however, the Court may take any tax and penalties imposed by the ATO into account when sentencing the offender.

3.3 THE CRIMINAL CODE

- 3.3.1 The *Criminal Code Act 1995* (Schedule 1 of which contains the Criminal Code) is a Commonwealth Act which has codified the way in which criminal offences are interpreted. The following paragraphs explain key concepts in relation to the Criminal Code, and amendments being made to taxation offences to ensure that they continue to operate in the same manner following the application of the Criminal Code. These amendments apply to offences that happen on or after 15 December 2001, which is the date on which the Criminal Code applies to all existing offence provisions.
- 3.3.2 The amendments arise from the requirement to:
- recognise the application of the Criminal Code;
 - specifically identify offences of strict or absolute liability;
 - clarify the fault elements of an offence (especially where these fault elements vary from the default elements provided by the Criminal Code);
 - separate defences from offences and identify the burden of proof a defendant bears in relation to a defence; and
 - replace references to provisions of the *Crimes Act 1914* which have been repealed, with references to corresponding provisions in the Criminal Code.
- 3.3.3 The Criminal Code provides that an offence consists of physical elements and fault elements (section 3.1(1) of the Criminal Code), and to establish guilt for an offence both physical and fault elements relating to the offence must be proved (section 3.2(1) of the Criminal Code). In certain cases the laws creating the offences may provide that the offences are either strict liability or absolute liability in which case there are no fault elements for any of the physical elements of the offence, although the defence of mistake of fact is available for strict liability offences (sections 6.1 and 6.2 of the Criminal Code). Examples of such offences are sections 8C(1) and 8D(1) of the TAA 1953.

3.4 THE ATO COMPLIANCE MODEL AND THE TAXPAYERS' CHARTER

- 3.4.1 The Australian taxation system operates within a self-assessment environment which, to function properly, relies to a high degree on taxpayers understanding their rights and obligations under taxation laws and voluntarily complying with those laws.
- 3.4.2 The system is based on taxpayers co-operating with the ATO and voluntarily complying with their legal obligations. To help achieve this, the ATO has assumed certain responsibilities as outlined in the Taxpayers' Charter, and has adopted the ATO Compliance Model. Taxpayers, their advisors and ATO staff should refer to the relevant published material.
- 3.4.3 A taxpayer that has a good compliance history (i.e. lodgment and payments made by the due date, and no evidence of incorrect statements, approved forms or returns) will not usually be referred for prosecution action.
- 3.4.4 Referral for prosecution is also likely if a taxpayer participates in activities which are seen to have a high compliance risk (e.g. aggressive tax planning), or refuses to comply despite repeated contact (or attempted contact) by the ATO. Individual circumstances will be considered in each case, and due regard will be given to any steps taken by the taxpayer to mitigate the risk.
- 3.4.5 Further, there will always be cases where a firm response involving prosecution action is the only appropriate response e.g.:
- cases involving persistent offenders i.e. taxpayers who have not changed their attitude to compliance after reasonable opportunity to do so and the overall compliance risk is high;
 - cases involving serious or blatant breaches of the law (e.g. maintaining more than one set of records);
 - cases which are representative of significant/prevalent noncompliance practices and which, if prosecuted on a timely basis, may have a wider compliance impact;
 - cases where other responses e.g. administrative penalties, are either inappropriate or no longer appropriate i.e. will not obtain current and future compliance;
 - cases where the charge adequately reflects the nature and extent of the noncompliant conduct disclosed by the evidence;
 - cases involving significant or serious taxation fraud; and
 - cases for which there are no other effective responses or sanctions (e.g. refusal to answer questions where required by law).
- Any prosecution action should have a deterrent effect on both the offender and the wider community.
- 3.4.6 Other factors to be considered when deciding whether to commence prosecution action include:
- the degree of culpability of the person;
 - the degree of cooperation of the person; and

- other public interest factors (Refer to the chapter: “Principles underlying the Prosecution Policy of the ATO”).
- 3.4.7 Even when an appropriate case has been identified i.e. the overall compliance risk posed is sufficiently high, the decision to proceed with a prosecution will depend on:
- the sufficiency of available evidence:
 - for a prima facie case;
 - for the prospect of a successful conviction; and
 - for an appropriate penalty.
 - credibility and availability of witnesses;
 - ATO priorities and risks; and
 - resources (staff, financial etc).
- 3.4.8 The decision to commence prosecution action should also reflect the reality that the resources available for prosecution action (including court time) are limited. They should not be wasted on doubtful or trivial cases but should be focused on the vigorous pursuit of cases deserving prosecution employing the principles outlined in this policy and a proper assessment of the overall compliance risk.
- 3.4.9 There may also be cases in which prosecution is warranted notwithstanding the possible cost and the fact that other remedies may be available. A decision may be made to take action that could involve costs exceeding revenue collected (e.g. action designed to ensure outstanding obligations do not escalate or action to support the integrity of the tax system).
- 3.5 THE IMPACT OF THE REVISED TAX REGULATIONS ON PROSECUTION ACTIVITY**
- 3.5.1 The service of summonses on time is a central issue in the overall effectiveness of prosecution activity. The new ITR 1936 introduces a regime that allows the Commissioner of Taxation to be more flexible in requiring certain information from different classes of taxpayers. For example Regulation 36 would make it possible for a person to nominate an electronic address, in addition to physical addresses also given to the Commissioner as may be required by a particular ‘approved form’, as their ‘preferred address for service’.
- 3.5.2 The new Regulations 38 and 39 will have the most bearing on ATO Prosecution activity. Regulation 38 makes it clear that the Commissioner may use another address he or she is aware of, to serve a notice on the taxpayer . The Commissioner may do so even though it may not be the taxpayer’s nominated preferred address for service. Situations where the Commissioner may do so include:
- a person may not have specified a preferred address for service;
 - the specified preferred address for service is found to be ineffective; or
 - the Commissioner may wish to serve a notice to a postal address rather than a preferred address that happens to be an electronic address.

- In practice, the Commissioner asks for a number of different contact addresses from a taxpayer in approved forms the taxpayer is required to lodge.

4. THE ATO PROSECUTION POLICY AND COMMONWEALTH AGENCIES

4.1 OVERVIEW

4.1.1 This chapter discusses the close working relationship between the ATO Fraud, the ATO In-House prosecutors, the Director of Public Prosecutions (DPP) and the Australian Federal Police (AFP).

4.2 INTRODUCTION

4.2.1 The investigation and prosecution functions in the Commonwealth criminal justice system are performed by different Commonwealth agencies.

4.2.2 The **role of the DPP** is to ensure that the Commonwealth prosecution system operates fairly and openly, and to provide advice to other agencies. DPP ensures that cases have been adequately and properly prepared, and that only appropriate cases are prosecuted. Under the *Director of Public Prosecutions Act 1983*, the decision to prosecute is made by the DPP independently of the ATO. In cases involving more serious offences, the ATO will consult with the DPP during the course of the investigation.

4.2.3 In addition to having responsibility for criminal prosecutions, the DPP can also undertake civil recoveries. They play a role in collecting fines, costs and reparation orders, especially in *Crimes Act 1914* prosecutions.

4.2.4 The **role of the ATO**, and particularly the Serious Non-Compliance Capability-Fraud Investigations in relation to prosecutions is to:

- identify potential cases for prosecutions;
- investigate those potential cases to identify cases that are appropriate to proceed to prosecution; determine if there is sufficient evidence; collect additional admissible evidence, and prepare a brief of evidence;
- refer matters to DPP or the ATO In-House Prosecutions with a recommendation as to the charge to be laid, for DPP or the ATO In-House Prosecutions to decide whether or not the person should be prosecuted;
- assist DPP when asked;
- refer to the AFP potential serious fraud, and either assist in the investigation or conduct investigations where the AFP are unable to deal with a referral;
- monitor former prosecutions cases to confirm the taxpayers are now complying with the law; and
- where relevant, follow up the decision of the Court (e.g. recovering reparation orders etc).

4.2.5 The role of the AFP is to :

- take responsibility for investigating serious fraud cases and other serious criminal activity;

- support government agencies that investigate their own offences by:
 - executing search warrants;
 - providing surveillance support when possible and appropriate; and
 - providing computer crime support when possible.
- provide forensic service support when possible and appropriate.

4.3 POLICY

- 4.3.1 In administering the taxation laws, the ATO becomes aware of many cases where an offence may have been committed. Care needs to be taken in identifying and pursuing cases suitable for prosecution. The identification of suitable cases will be in accordance with the principles outlined in this policy and will normally fall to Business Lines within the ATO in consultation with Serious Non-Compliance Capability-Fraud Investigations units.
- 4.3.2 Prosecution activity is not restricted to the prosecution of the offence before the Court. It commences with the identification of potential cases suitable for prosecution and ends when post prosecution follow up action has been taken to reintegrate the taxpayer into the complying taxpayer community.
- 4.3.3 The procedures adopted by the ATO in advising taxpayers that they are being considered for prosecution are based on the nature of the charge and the laws of natural justice.
- 4.3.4 Where the prosecution will be based on an **inaction** by the taxpayer, the taxpayer should be advised that prosecution action would commence without further notice if the taxpayer fails to fulfil his/her obligations.
- 4.3.5 Where the prosecution will be based on **actions** of the taxpayer, the ATO will not normally advise the taxpayer in advance that it is or will be investigating the taxpayer to see if there is sufficient evidence to support a prosecution or that it is contemplating prosecution action. The ATO investigation units would notify the taxpayer that they are under investigation once they consider that the disclosure would not jeopardise the investigation. In matters where the ATO would conduct its own prosecution, the ATO will advise the taxpayer in writing when the decision is taken to institute prosecution action against him/her.
- 4.3.6 Where the taxpayer has been advised or is aware that an investigation is being conducted and the ATO decides not to continue the investigation or prosecution action is not warranted, the ATO will advise the taxpayer accordingly.
- 4.3.7 In rare cases, new evidence or information may become available which makes it no longer appropriate for the prosecution to proceed. Where this occurs, the ATO will consult with the DPP with the view to having the prosecution discontinued in accordance with the Prosecution Policy of the Commonwealth. If the offence is a summary matter being prosecuted by the ATO, the matter will be withdrawn having regard to the Prosecutions Policy of the Commonwealth and the ATO Withdrawal Guidelines.
- 4.3.8 Where a decision has been taken by the DPP not to proceed, the ATO will not approach the DPP and seek to reverse that decision unless:
- significant fresh evidence is located that was not previously available for consideration; or

- the original decision was based on a mistake of fact; and
- on balance, it is in the public interest that the decision be reversed.

4.4 REFERRAL TO THE DPP

4.4.1 The DPP has agreed that ATO officers may conduct summary prosecutions for offences under the TAA 1953 and other taxation laws provided cases which fall into the following categories are referred to the DPP:

- all prosecutions for offences against the *Crimes Act 1914* or the *Crimes (Taxation Offences) Act 1980*;
- all offences where the maximum penalty available includes a term of imprisonment exceeding 12 months;
- any case where, in the ATO's view, there is a realistic possibility of the court sentencing the defendant to a term of imprisonment in the event of a conviction;
- all prosecutions where the Commissioner elects to treat an offence otherwise than as a prescribed taxation offence;
- all cases which involve novel or difficult questions of law or previously untested sections (once a precedent has been established, referral may not be necessary in future matters);
- all appeals against a decision of a court, either by the person convicted or by the Commissioner;
- all applications under the *Administrative Decisions (Judicial Review) Act 1977* which seek to challenge a ruling made in the course of the criminal process;
- any cases which involve prominent or high profile figures or which, for any reason, are likely to attract public attention;
- any matter involving, directly or indirectly, a case that is being investigated by the AFP or prosecuted by the DPP or in which civil recovery action is being brought or coordinated by the DPP (even if the later prosecution does not involve a matter of great substance);
- all cases in which the defendant's previous history indicates that the matter should be handled by the DPP (e.g. the person has behaved in a violent manner in the past or has a history of defending cases);
- defended cases in which the person will be represented by legal counsel or it is apparent that the issues raised by the defence are of substance; and
- any other matter where, in the opinion of the ATO officer, the prosecution should be handled by the DPP.

4.4.2 ATO officers may only prosecute cases that fall into the above mentioned categories by agreement with the appropriate regional office of the DPP, which may be reached on a case by case basis or in relation to specific types of matters.

4.5 REFERRAL TO THE AFP

4.5.1 Where the ATO suspects a serious fraud has been committed, the case will be referred to the AFP for investigation, in accordance with working guidelines between the AFP and the ATO. If the AFP rejects the case because of resource constraints or other reasons, the ATO may consider commencing an investigation and preparing a brief of evidence for referral to the DPP.

4.5.2 Serious fraud is commonly seen as a deliberate or organised course of conduct undertaken to evade a substantial amount of tax. This could be by preparing and presenting false information or by deliberately withholding relevant information. Conduct of this nature may be prosecuted under the *Crimes Act 1914* or the *Crimes (Taxation Offences) Act 1980*.

4.5.3 It may not always be possible to tell at an early stage of an audit or investigation whether a person has committed serious fraud against the revenue. However, there are a number of indicators that should alert ATO officers to the possibility that a person may have done so, for example:

- the maintenance of more than one set of records;
- the use of false names or false documents;
- the inclusion of an overseas entity in a domestic transaction;
- the use of transactions that have no apparent commercial reality;
- large unexplained gaps in documents;
- the evasion of a large amount of tax;
- the repeated commission of offences over a number of years;
- actions by company directors which cause a significant loss of revenue to the Commonwealth.
- failure to remit a significant amount of revenue;
- the involvement of more than one person in a suspect transaction e.g. conspiracy cases;
- a significant understatement of assets or income;
- the concealment of assets or income;
- significantly overclaimed deductions; or
- bribery or attempted bribery of ATO officers.

4.5.4 The amount of tax involved in an alleged offence is not always a true indication of the seriousness of the matter. For example a serious offence may be detected at an early stage before it has achieved its potential impact. Further reference should be made to the chapter "The Criminal Code and Taxpayer Compliance".

5 FAILURE TO COMPLY WITH A REQUIREMENT

5.1 OVERVIEW

5.1.1 The taxation laws provide for taxpayers to meet certain obligations in complying with those laws. These include:

- to lodge taxation returns;
- to provide information or additional information (including books) if required; and
- to attend and answer questions when required.

Taxpayers who fail to comply with these obligations may commit an offence.

5.1.2 If a person has complied with the requirement after the stipulated time but before the issue of a summons, it will generally be more appropriate to rely on administrative penalties.

5.2 LEGISLATION

5.2.1 Key Sections

- Section 8C *Taxation Administration Act 1953* (TAA 1953)
- Division 286, Schedule 1, TAA 1953
- Section 388-50, Schedule 1, TAA 1953
- Sections 161 and 162 *Income Tax Assessment Act 1936* (ITAA 1936)
- Sections 16-150, 16-153, and 45-20 Schedule 1 TAA 1953
- Section 61 *Sales Tax Assessment Act 1992* (STAA 1992)
- Sections 28, 29, 30, 31, 32 and 33 *Wool Tax Assessment Act 1964* (WTAA 1964)
- Sections 69 and 104 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986)
- Section 160ARF ITAA 1936.
- Section 34 *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992)
- Section 31-5 *A New Tax System (Goods and Services Tax) Act 1999*, the GST Act 1999

5.2.2 The various Acts administered by the Commissioner contain provisions which require taxpayers to furnish approved forms. The principles referred to in this chapter should be read as having general application to all relevant legislation.

5.2.3 The most common prosecution action instituted by the Commissioner under paragraph 8C(1)(a) of the TAA 1953 is for failure to lodge an income tax return in the approved form in compliance with a notice issued under section 162 of the ITAA 1936, a GST return in the approved form in compliance with section 31-5 of the GST Act 1999 or an approved form

under Section 388-50, Schedule 1, TAA 1953. The elements of the offence are:

- A valid requirement exists or is created under or pursuant to a taxation law. This is referred to as the physical element of circumstance.
- The person has refused or failed to comply with the requirement. This is referred to as the physical element of conduct.

5.2.4 Subsection 8C(1A) provides that paragraphs 8C(1)(a)-(g) are offences of absolute liability. No fault elements must be proved, and the defence of mistake of fact under section 9.2 of the Criminal Code is unavailable. However subsection 8C(1B), when read with section 13.3 of the Criminal Code, has the effect of placing the evidential burden on the defendant to establish he or she was not capable of complying with the relevant paragraph of subsection 8C(1). This is a specific defence that has been made available to the defendant by subsection 8C(1B).

5.3 POLICY

5.3.1 Prosecution may be the most appropriate means of obtaining lodgment where:

- despite the issue of a final notice a person has not furnished a return, for example, a person fails to lodge a return in compliance with a notice issued under section 162 of the ITAA 1936; or
- despite the issue of a Business Activity Statement form (BAS) a person has not furnished an approved form (being the BAS) ;
- office records reveal that a person who is required to lodge a return has not complied with the requirement to lodge, for example, a person who is required to lodge a sales tax return under subsection 61(1) or 61(2) of the STAA 1992.

5.3.2 In determining priorities for selection of cases for prosecution, all relevant factors will be taken into account (in addition to those factors set out in the chapter 'Case Selection and Compliance Improvement'). In particular, priority should be given to cases:

- according to the amount of revenue involved;
- that involve repeat offenders; or
- where prosecution may be the only strategy left to obtain lodgment of a return from a person who fails to respond to correspondence, phone calls and notices relating to the non-lodgment of a return.

5.3.3 Where there is evidence to suggest that a person has no tax liability or is due for a refund, it is desirable that other efforts to obtain lodgment are made before prosecution action is instituted. In cases of known hardship, serious illness or infirmity which makes compliance difficult, additional steps should be taken to obtain lodgment. Prosecution action in these circumstances is generally not appropriate.

5.3.4 Any approved forms for periods subject to bankruptcy will still be required to be lodged and bankrupts may be subject to prosecution action if they fail to lodge approved forms when and as required. Particular emphasis will be given to taxpayers who have a history of bankruptcy and other bankrupt taxpayers where the approved forms are required for audit

purposes. However, the ATO may choose not to proceed with a prosecution against a bankrupt, for failing to lodge an approved form, if the insolvency trustee indicates that there would be no dividend payable for the relevant period.

- 5.3.5 As a general rule, prosecution action should be instituted where, at the time of issuing the summons, ATO records reveal that a person has not complied with the requirement to lodge. Where a person has been convicted of an offence under section 8C or section 8D of the TAA 1953, the ATO will seek a court order under section 8G of the TAA 1953 to compel compliance with the original requirement if the taxpayer has not yet complied.
- 5.3.6 Where a person has complied with the requirement to lodge, after the stipulated time in the notice, but before the issue of a summons, it will generally be more appropriate to rely on administrative penalties rather than prosecution proceedings. However, the presence of the factors outlined in paragraphs 3.4.5. et seq. would usually mean that a prosecution would proceed. Where a person has complied with the requirement to lodge after the issue of a summons, the ATO will generally proceed with the prosecution unless there are strong mitigating circumstances (such as ill health or natural disaster) that would have made compliance virtually impossible. Where such mitigating factors were known at the time when prosecution action was commenced, and all public interest factors had been considered at the time, it would normally be inappropriate to withdraw the prosecution. In accordance with section 8ZE of the TAA 1953, where administrative penalty has been imposed and a subsequent prosecution is instituted, then whether or not the prosecution is withdrawn, the administrative penalty is not payable and consequently must be remitted.
- 5.3.7 On some occasions, a taxpayer may supply the ATO with mitigating information after a summons has been issued (e.g. public interest factors – see paragraph 2.3.6). If the same information would have resulted in the summons not being issued, had it been known at the time of the issuing of the summons, any subsequent prosecution should be withdrawn.

5.4 FAILURE TO FURNISH INFORMATION

5.4.1 Key sections

- Section 8C TAA 1953
- Section 353-10 Schedule 1 TAA 1953
- Section 65 TAA 1953
- Section 264 ITAA 1936
- Section 108 STAA 1992
- Paragraph 77(1)(a) SGAA 1992
- Section 128 FBTA 1986
- Section 34 WTA 1964

- 5.4.2 A person who refuses or fails to comply with a notice issued under any of the above provisions, to the extent the person is capable of doing so, may be guilty of an offence under section 8C of the TAA 1953, and an

order can be sought under section 8G of the TAA 1953 to compel compliance with the notice.

5.5 POLICY

5.5.1 Broadly, the policy for this area is the same as that for furnishing returns. Prosecution action will generally be instituted where a person fails to comply with such a notice or to provide information in the required manner. As a general rule, prosecution action should be instituted where, at the time of issuing a summons, ATO records reveal that the person has not complied with the notice. Furthermore, the ATO will seek a court order under section 8G of the TAA 1953 to compel compliance with the original notice.

5.5.2 Where a person has complied with such a notice after the stipulated time in the notice, but before the issue of a summons, it may be inappropriate to prosecute.

5.5.3 Where a person complies with such a notice after the summons has issued, the ATO will generally proceed with the prosecution unless it is not in the public interest to proceed.

5.6 FAILURE TO ANSWER QUESTIONS AND/OR PRODUCE BOOKS ETC WHEN ATTENDING BEFORE THE COMMISSIONER OF TAXATION

5.6.1 Key sections

- Section 8D TAA 1953
- Paragraph 264(1)(b) ITAA 1936
- Subsection 353-10(1), Schedule 1, TAA 1953
- Subsection 65(1) TAA 1953
- Paragraphs 108(1)(b) & (c) STAA 1992
- Paragraphs 77(1)(b) & (c) SGAA 1992
- Paragraphs 128(1)(b) & (c) FBTAA 1986
- Paragraphs 34(1)(b) & (c) WTAA 1964

5.6.2 The Commissioner's policy concerning his information gathering powers is outlined in the Access Manual. A person who attends before the Commissioner pursuant to a notice issued under any of the above provisions, but refuses or fails to answer a question and/or produce books, documents etc., may be guilty of an offence under section 8D of the TAA 1953. Subsection 8D(1) is an offence of strict liability, so no fault elements are required to be proved. However, the defence of mistake of fact in section 9.2 of the Criminal Code is available to the defendant. In addition, Subsection 8D(1B) provides a specific defence, and when read with Section 13.3 of the Criminal Code, has the effect of placing an evidential burden on the defendant to establish he or she was not capable of complying with the relevant paragraph of Subsection 8D(1).

5.6.3 An order can be sought under section 8G of the TAA 1953 to compel compliance with the notice. A failure to attend in response to such a notice may be a breach of section 8H of the TAA 1953.

5.7 POLICY

5.7.1 Prosecution action will generally be taken on the basis that it is the only practical way of obtaining information. Where the information is provided after the summons has issued, the ATO will generally proceed with the prosecution unless there are strong mitigating circumstances (such as ill health or natural disaster) that would have made compliance virtually impossible. Where such mitigating factors were known at the time when prosecution action was being considered, and all public interest factors had been considered, it would be inappropriate to withdraw the prosecution.

5.7.2 Generally, where a person refuses or fails to take an oath or affirmation, where required, prosecution action may be taken. Where a person, despite refusing to take an oath or affirmation, gives evidence which in the opinion of the interviewing officer is honest and complete, prosecution action would not be appropriate.

5.8 PENALTIES FOR OFFENCES AGAINST SECTIONS 8C AND 8D

5.8.1 Section 8E of the TAA 1953 provides for penalties for a conviction for an offence against section 8C or subsections 8D(1) or (2).

5.8.2 The penalties prescribed in section 8E of the TAA 1953 are:

Offence	Maximum Penalty
Sections 8C and 8D TAA 1953 : Failure to comply with a requirement Failure to answer questions or produce documents	Penalty under Section 8E 1st Offence: 20 Penalty Units; 2nd Offence: 40 Penalty Units 3rd and subsequent offences where the Commissioner elects under section 8F: 50 Penalty Units and/or 12 months imprisonment

5.8.3 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

5.9 ELECTION UNDER SECTION 8F OF THE TAA 1953 TO TREAT OFFENCE OTHERWISE THAN AS A PRESCRIBED TAXATION OFFENCE

5.9.1 Where a person who has two or more prior convictions against sections 8C, 8D or 8H of the TAA 1953 (relevant offences), section 8F enables the Commissioner to elect to treat the offence against sections 8C or 8D otherwise than as a prescribed taxation offence. The effect of this election enables a court to treat the offence as a more serious offence (criminal offence) and impose a penalty of 50 penalty units and/or 12 months imprisonment under subsection 8E(3).

5.9.2 It is not intended that this election would be made for every third or subsequent prosecution against sections 8C or 8D of the TAA 1953. Generally speaking the election power should be restricted to the more serious cases where the circumstances of the offences warrant a higher penalty than if the election had not been made. It is anticipated that in most cases an election will only be made when the defendant was

convicted of the offences on a previous occasion e.g. at least two prior prosecutions for the same required tax return or information. Unless there are substantial aggravating factors, it would be inappropriate to make an election on the basis that there are other offences which are being prosecuted on the same day.

5.10 FAILURE TO COMPLY WITH A COURT ORDER

5.10.1 Where a person is convicted of an offence against section 8C or section 8D of the TAA 1953 (including when an order is made under section 19B of the *Crimes Act 1914*), the court may be requested to order that person to comply with the original requirement pursuant to section 8G. This order can be made in addition to the penalty imposed pursuant to section 8E.

5.11 POLICY

5.11.1 Where a person has not complied with the requirements of the order made by the court, prosecution action should be instituted under section 8H of the TAA 1953.

5.11.2 An offence under Section 8H is an offence of strict liability, so no fault elements need to be proved. The defence of mistake of fact under section 9.2 of the Criminal Code is available to the defendant. In addition subsection 8H(3) provides a specific defence, and, when read with Section 13.3 of the Criminal Code, has the effect of placing an evidential burden on the defendant to establish that he or she was not capable of complying with subsection 8H(1).

5.11.3 If ATO records reveal that the person has complied with the requirement after the time specified by the court but before the summons issues, the following factors, in addition to those factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" may need to be taken into account in determining whether prosecution action should be taken:

- Whether further ATO action was necessary to prompt compliance with the court order;
- the extent of the time delay in complying with the court order and the financial advantage obtained by the person;
- the record of the person in respect of complying with taxation laws; and
- any mitigating circumstances provided by the taxpayer.

6 FALSE OR MISLEADING STATEMENTS

6.1 OVERVIEW

6.1.1 It is an offence to make a false or misleading statement to a taxation officer either orally, in writing or in electronic medium, e.g. an income tax return or Activity Statement. Where a person makes a false or misleading statement it usually results in the omission of income or over claiming of deductions. In these instances the person may be liable for administrative penalty. In accordance with section 8ZE of the *Taxation Administration Act 1953* (TAA 1953), where an administrative penalty has been imposed and a subsequent prosecution is instituted, then, whether or not the prosecution is withdrawn, the administrative penalty is not payable and consequently must be remitted. Section 8W of the TAA 1953 may also be relevant in many cases.

6.2 LEGISLATION

6.2.1 Key sections

- Section 8K TAA 1953
- Section 8N TAA 1953
- Divisions 136 and 137 of the Criminal Code
- Division 284 TAA 1953

6.2.2 The TAA 1953 contains two tiers for false or misleading statements that are differentiated according to the degree of culpability. The provisions are contained in sections 8K and 8N of the TAA 1953.

6.2.3 Interpretative provisions in the TAA 1953 which are relevant to sections 8K and 8N include:

- subsection 8J(1) which defines a 'taxation officer'.
- subsection 8J(2) which defines 'a statement made to a taxation officer'.
- subsection 8J(2A) provides for statements made in documents given on a data processing device or by way of an electronic transmission forwarded by a registered tax agent on behalf of a taxpayer.
- subsection 8J(9) extends the definition of 'a statement made to a taxation officer' to, include a statement made to a person other than a taxation officer for a purpose in connection with the operation of a taxation law.
- subsection 8J(10) sets out, for the purpose of subsection 8J(9), an extended definition of the term 'statement made to a person other than a taxation officer' in connection with the operation of taxation law. This would include a false statement made to a tax agent in the preparation of a taxation return.

6.3 POLICY

6.3.1 In addition to those considerations mentioned in the chapter "Principles Underlying the Prosecution Policy of the ATO", the following factors are

relevant when deciding whether to prosecute for a false or misleading statement:

- the amount of revenue involved;
- the degree of negligence, recklessness, or knowledge;
- the degree of dishonesty;
- the degree of untruthfulness;
- personal circumstances;
- compliance history with taxation laws;
- the degree of cooperation; and
- the professional or educational background of the person.

6.3.2 The maker of a false or misleading statement is guilty of an offence under section 8K of the TAA 1953 unless the maker is able to show, pursuant to section 8K(2), that he or she did not know, and could not reasonably be expected to have known, that the statement was false or misleading. The effect of this requirement is that the person must show that he or she was not careless and had taken all reasonable steps to ensure that the statement was accurate and complete. The legal burden of proof is on the defendant pursuant to Section 13.4 of the Criminal Code.

6.3.3 In potential section 8K cases, the Commissioner will normally respond with administrative penalties instead of an isolated charge under section 8K. The Commissioner will be more inclined to lay charges under section 8K against a person where administrative penalties are not available or when the person is also being charged with other offences.

6.3.4 Section 8N of the TAA 1953 prescribes as an offence the reckless making of false and misleading statements. The common law definition of 'recklessness' contained in R v McKinnon [1959] has been replaced by the Criminal Code definition. Under subsection 5.4(1) of the Criminal Code a person is reckless with respect to a circumstance (i.e. for present purposes that a statement is false or misleading) if:

- (i) he or she is aware of a substantial risk that the statement is false or misleading; and
- (ii) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

6.3.5 In proving a case of recklessness, a subjective fault based test of criminal responsibility is applied. It must therefore be proved that the maker of the statement must have had a state of mind which was reckless at the time the statement was made. Subsection 5.4(4) of the Criminal Code provides that if recklessness is a fault element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element. If it is proved that the defendant was aware that the representation might be false or misleading, but, indifferent to the risk, decided to make it in any event, then the fault element of recklessness would be satisfied. Or if the person made a statement knowing it is false or misleading the fault element of recklessness would also be satisfied.

6.3.6 Cases that satisfy section 8N of the TAA 1953 are clearly suitable for prosecution. It is possible however that the number of potential section 8N cases may be greater than the number that can be capably handled

by the ATO. Prosecution action may be limited to the more serious cases and cases that reflect the ATO's compliance initiatives.

- 6.3.7 The Commissioner will only exercise his discretion in bringing an action pursuant to Division 136 or Division 137 of the Criminal Code to offences so serious in nature that they warrant imprisonment as a first hand judgement. Prosecutions made pursuant to Divisions 136 or 137 of the Criminal Code are to be treated in the same manner as prosecutions made under section 8N.
- 6.3.8 A person should be charged under subsection 136.1(1) of the Criminal Code where the evidence establishes that the person has made statements in applications with full knowledge that the disclosure is false or misleading. Obviously the nature of the statements should be severe enough to warrant the imposition of a maximum of 12 months imprisonment. However, pursuant to subsection 136.1(4), a maximum imprisonment of 6 months may still be imposed for making a statement, reckless as to whether it is false or misleading. A high degree of recklessness is required here before bringing an action under subsection 136.1(4). A distinction has been made between knowledge under subsection 136.1(1) and recklessness under subsection 136.1(4). The intention of the legislature is to impose a higher threshold of punishment for knowledge than for recklessness.
- 6.3.9 A person should be charged under section 137.1 where the evidence establishes that the person has passed on information knowing that it is false or misleading. Section 137.2 is used when the person produces a document knowing it is false or misleading. Both offences are punishable by a maximum of twelve months imprisonment. Serious considerations need to be assessed before bringing an action under Division 137 of the Criminal Code. Factors such as the character of the defendant, their position of responsibility in the community, deterrence value of the case, total tax avoided or deductions over-claimed will give weight in assessing the overall appropriateness of prosecution.
- 6.3.10 Where prosecution under divisions 136 or 137 is not warranted, consideration should be given to initiating charges pursuant to the false statement provisions contained within the TAA 1953 (e.g. 8K, 8L, 8N, 8Q, 8T, 8U, etc.).

6.4 MULTIPLE OFFENCES IN ONE STATEMENT

- 6.4.1 An income tax return, GST return or approved form e.g. Business Activity Statement (BAS), may be false or misleading in a number of material particulars that represent separate false or misleading statements in their own right. For example, a taxpayer may omit specific items of income and overstate claims for specific deductions or rebates.
- 6.4.2 If the statements were made with the same degree of culpability, one charge can be brought which covers the total reduction in liability for tax. Each of the individual false or misleading statements form part of the charge of making a false or misleading statement.
- 6.4.3 However, if some false statements have been made knowingly and some recklessly, it may be appropriate to lay separate charges for each false statement.

6.5 ELECTION UNDER SECTION 8S OF THE TAA 1953 TO TREAT AN OFFENCE OTHERWISE THAN AS A PRESCRIBED TAXATION OFFENCE

6.5.1 Where a person who has one or more prior convictions against sections 8K, 8L 8N, 8Q, 8T or 8U of the TAA 1953 or Divisions 136 or 137 of the Criminal Code, section 8S, read in conjunction with the definition of 'relevant offence' in subsection 8J(3), enables the Commissioner to elect to treat an offence against 8N, 8Q or Divisions 136 or 137 of the Criminal Code otherwise than a prescribed taxation offence. The effect of this election enables a court to treat the offence as a more serious offence (criminal offence) and impose a penalty of 50 penalty units and/or 12 months imprisonment under subsection 8R(2).

6.5.2 It is not intended that an election would be made for every second or subsequent prosecution against sections 8N, or 8Q of the TAA 1953 or Divisions 136 or 137 of the Criminal Code. Generally speaking, the election power should be restricted to the more serious cases where the circumstances of the offences warrant a higher penalty than if the election had not been made. It is anticipated that in most cases an election will only be made when the defendant was convicted of the offence on a previous occasion. Unless there are substantial aggravating factors it would be inappropriate to make an election on the basis that there is another offence which is being prosecuted on the same day.

6.6 SECTION 8W – COURT MAY ORDER PAYMENT OF AN AMOUNT IN ADDITION TO PENALTY

6.6.1 Section 8W of the TAA 1953 provides that the court may order a person convicted under sections 8K or 8N to pay an amount not exceeding double the tax avoided in addition to any fine imposed for the offence. In a case where a person is convicted under Divisions 136 or 137 of the Criminal Code, the court may order an amount up to three times the tax avoided. Upon conviction for a second offence against sections 8N or 8P, the court may order an amount up to three times the tax avoided.

6.7 EXAMPLES

6.7.1 Section 8K of the TAA 1953 - Person making a false or misleading statement

A taxpayer earns a significant amount of interest income but has not kept his bank records. He estimates the amount of interest and includes this estimate in his tax return. The actual amount of the interest was substantially more than the estimate. In completing and signing his tax return, he has made a false statement by omitting assessable income. A false statement has been made and prosecution under section 8K may be appropriate. The offence under subsection 8K(1) is an absolute liability offence, therefore it is not necessary to prove an fault elements. It is unlikely in this example that the defendant would be able to prove the specific defence in subsection 8K(2), that they did not know or could not reasonably be expected to have known that the statement was false or misleading, as it is reasonable to expect a person to have made the necessary inquiries to find out the amount of their interest.

6.7.2 Section 8N of the TAA 1953 - Person recklessly making a false or misleading statement. The following are two examples:

Example 1: A self-employed financial broker is the subject of an income tax audit which reveals a significant understatement of taxable income over several years. She admits to guessing the amount of income she declared that she is often paid in "drips and drabs", and that she is a poor record-keeper and has no records to support her estimate. She says she has a large client base and relies primarily on her client list and memory to estimate her income.

In signing the returns she has declared that the information therein is true and correct. She has made the statement fully aware of the substantial risk that it might not be correct. Having regard to the circumstances known to her, it is unjustifiable for her to take that risk.

- 6.7.3 The false statement in this case has been made recklessly and prosecution under section 8N may be appropriate.

Example 2: A taxpayer earns small amounts of interest over several years from several bank accounts. These amounts of interest are included in her assessable income each year. During the same period she also has a cash management account where she has invested a large sum of money, with the intention of earning a higher rate of interest. She does not include this income in her assessable income. She keeps all her banking records together including the cash management account records. She advises she omitted the interest from the cash management account from her tax return because she did not want to pay too much tax.

In this scenario she has made the statement fully aware that the statement was not correct.

The false statement in this case has been made deliberately and prosecution under section 8N may be appropriate.

- 6.7.4 **Divisions 136 and 137 of the Criminal Code**

As a result of an internal audit investigation by GST compliance field officers, a major seller company, with a registered ABN, was found to have false tax receipts and invoices resulting in a substantial under-declaration and an unfounded refund claim. The falsified documents have been compiled deliberately and, having regard to the seriousness of the matter and the importance of its deterrence value, prosecution under section 137.2 may be appropriate.

- 6.7.5 **Subsection 8J(10) of the TAA 1953 – definition of statements other than to a taxation officer**

A person who makes a false statement for a purpose in connection with a taxation law to a person other than a taxation officer, may have committed an offence. This would include a false statement to a tax agent in the preparation of a taxation return.

- 6.7.6 **Multiple offences that may result in one charge**

A person has deliberately excluded interest of \$2,000, dividends of \$5,000 and commission of \$1,000 from their income tax return in an attempt to reduce their taxation liability. In this example, one charge under section 8N of the TAA 1953 may be appropriate.

- 6.7.7 **Multiple offences that may result in more than one charge**

A person has deliberately overclaimed rental expenses of \$15,000 in an attempt to reduce their taxation liability and provided false documents

declaring false business expenditure amounts on plant and office equipment. In this example separate charges under section 8N of the TAA 1953 section 137.2 of the Criminal Code may be appropriate.

In deciding the number of charges, taxation officers may choose not to charge for every offence, but rather select a representative sample that still shows the gravity of the conduct.

6.8 CORPORATIONS

6.8.1 In the case of corporations, the requisite knowledge is to be found in natural persons who are to be treated in law as being the heart and mind of the corporation. In a taxation context, this test includes the officers of the corporation who were concerned in or who took part in the management of the corporation.

6.9 PENALTIES

Offence	Maximum Penalty
Section 8K TAA 1953 False and misleading statements	Penalty under section 8M 1 st offence: 20 Penalty Units 2 nd and subsequent offences: 40 Penalty units
Sections 8N TAA 1953 Recklessly making false or misleading statements	Penalty under section 8R 1 st offence: 30 Penalty Units 2 nd and subsequent offences where the Commissioner elects under section 8S:
Subsection 136.1(1) Criminal Code False and misleading statements in applications (knowledge)	50 Penalty units and/or 12 months imprisonment
Subsection 136.1(4) Criminal Code False and misleading statements in applications (recklessness)	Penalty: Imprisonment for 12 months
Section 137.1 Criminal Code False and misleading information	Penalty Imprisonment for 6 months
Section 137.2 Criminal Code False and misleading documents	Penalty Imprisonment for 12 months
	Penalty Imprisonment for 12 months

6.9.1 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

7 RECORD KEEPING OFFENCES

7.1 OVERVIEW

- 7.1.1 The record keeping initiative is an important part of the ATO's compliance improvement strategy. This initiative includes advice to business on appropriate record keeping standards. The rationale behind the record keeping program is to improve business records so that the correct liability to the Commissioner of Taxation can be determined.
- 7.1.2 The record keeping provisions of the Acts administered by the Commissioner require that records be kept by all persons who operate a business, that they maintain a proper system for recording financial transactions, and that all relevant transactions be recorded and adequately explained on that system. For example, if the nature of the business is such that it would be appropriate to maintain a record of cash receipts, then it would be a breach of the relevant tax law not to keep such a record.
- 7.1.3 Further, transactions should be recorded in such a manner that allows a person's liability under the relevant Acts to be readily ascertained. It is the ATO's view (Taxation Ruling TR96/7) that a person's liability is readily ascertainable if ATO staff with accounting skills can determine the person's liability quickly and easily with minimal assistance from that person. The ATO also considers that a person required to make a record would normally be required to do so contemporaneously, ie to record transactions as they occur or as soon as practical after the transactions have occurred.
- 7.1.4 If a person maintained a required record such as a cash book or journal but failed to record all relevant transactions in those records, an offence may have been committed for each omission. However, if a person failed to maintain a particular type of record, or failed to have a recording system at all, then one charge may be more appropriate.

7.2 INADEQUATE OR NO RECORDS

7.2.1 Key Sections

- Sections 12-55, 288-25 and 288-30 Schedule 1 *Taxation Administration Act 1953* (TAA 1953)
- Section 262A *Income Tax Assessment Act 1936* (ITAA 1936)
- Section 102AAZG ITAA 1936
- Paragraph 160ZZU(1)(c) ITAA 1936
- Section 465 ITAA 1936
- Section 621 ITAA 1936
- Section 221YHDC ITAA 1936
- Subsection 221YHQ(12) ITAA 1936
- Subsection 221YHR(8) ITAA 1936
- Section 132 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986)

- Section 127 *Sales Tax Assessment Act 1992* (STAA 1992)
- Section 79 *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992)

7.3 POLICY

7.3.1 In deciding whether to prosecute a person for a record keeping offence the following factors may be relevant in addition to those mentioned in the chapter "Principles underlying the Prosecution Policy of the ATO":

- the extent to which the records are incomplete or inadequate;
- the potential for financial gain created by the inadequate records;
- the degree of carelessness, negligence, recklessness or wilfulness;
- prior advice or warning that the standard of record keeping is unsatisfactory;
- ATO Rulings on record keeping issues; and
- any other circumstances that may have caused the inadequate record keeping.

7.3.2 If a person is prosecuted for failing to keep records, a reasonable time should be given after the prosecution to allow the person to get his/her records in order before further prosecution proceedings are considered.

7.3.3 A prosecution for inadequate or poor records can be instituted at any time in view of the ongoing obligation to keep records.

7.3.4 Where a prosecution is instituted under section 262A of the ITAA 1936 for inadequate records and assessments have been raised that include penalty for those inadequate records, subsection 8ZE(1) of the TAA 1953 provides that part of the penalty attributable to inadequate records is no longer payable. The penalty must be remitted to prevent any 'doubling up' between the administrative penalty and any court-imposed penalty relating to the record keeping offence.

7.3.5 The penalties for inadequate records are:

Offence	Maximum Penalty
Section 262A ITAA 1936	30 Penalty Units
Section 102AAZG ITAA 1936	30 Penalty Units
Section 465 ITAA 1936: Controlled Foreign Coy	30 Penalty Units
Section 621 ITAA 1936: Foreign Investment Funds	30 Penalty Units
Paragraph 160ZZU(1)(c) ITAA 1936: Capital Gains	30 Penalty Units
Section 221YHDC ITAA 1936: PPS	20 Penalty Units
Subsection 221YHQ(12) ITAA 1936: PPS	10 Penalty Units
Subsection 221YHR(7) ITAA 1936: PPS	10 Penalty Units
Section 132: FBTAA 1986	30 Penalty Units
Section 127: STAA 1992	30 Penalty Units
Section 79: SGAA 1992	30 Penalty Units

7.4 INCORRECTLY KEEPING RECORDS

7.4.1 Key Sections

- Sections 8L, 8Q & 8T TAA 1953

7.4.2 These sections create offences for incorrectly keeping records. Incorrectly keeping records in this section includes:

- keeping records that do not correctly record or explain their subject;
- keeping records that are illegible or indecipherable;
- engaging in conduct that results in altering, defacing, damaging, removing, concealing or destroying records; or
- keeping records that omit relevant information.

The different offences in the TAA 1953 allow for varying degrees of culpability.

7.4.3 Subsections 8L(1) and 8L(1A) (regarding employers) create absolute liability offences for incorrectly keeping records. There is no fault elements required for the offence to have been committed. Subsection 8L(2) provides a statutory defence where the person did not know and could not reasonably be expected to have known that the records were incorrect. The defendant bears the legal burden of proof.

7.4.4 Section 8Q of the TAA 1953 creates the offence of recklessly incorrectly keeping records. In establishing the physical elements of the offence, the appropriate corresponding fault elements need to be proved. Paragraph 8Q(1)(a) contains the physical element of circumstance - that the person is required to keep accounts or records pursuant to a taxation law. This element is a strict liability element (as stated in subsection 8Q(3)). Paragraph 8Q(1)(b) contains the physical element of conduct - that the person keeps the records. The Criminal Code will require 'intention' as the relevant fault element in relation to conduct. Paragraph 8Q(1)(ba) requires that the records are actually incorrect, which is the physical element of result. Paragraph 8Q(1)(c) contains the fault element for the circumstance – that the person was reckless as to whether the records were correct. The effect and meaning of the term 'reckless' is discussed in subsection 5.4(4) of the Criminal Code. See also the discussion in Chapter 6 "False and Misleading Statements".

7.4.5 Section 8T is the more serious offence of incorrectly keeping records with the intention of deceiving, misleading, hindering or obstructing the Commissioner or a particular taxation officer, or the investigation of a taxation offence, or the administration, execution or enforcement of a taxation law, or defeating the purpose of a taxation law.

7.4.6 Incorrectly keeping records in section 8T includes the following physical elements: keeping records that do not correctly record or explain their subject; keeping records that are illegible or indecipherable; engaging in conduct that results in altering, defacing, damaging, removing, concealing or destroying records; and keeping records that omit relevant information. Where a taxpayer has incorrectly kept records as part of a scheme to understate taxable income, it may be appropriate to prosecute for the false record (pursuant to sections 8L, 8Q or 8T of the TAA 1953), and the false statement (pursuant to sections 8K, 8N or 8P of the TAA 1953) or fraud (pursuant to divisions 134-36 of the Criminal Code) as appropriate.

7.5 SECTION 8W – COURT MAY ORDER PAYMENT OF AN AMOUNT IN ADDITION TO PENALTY

- 7.5.1 Section 8W of the TAA 1953 provides that the court may order a person convicted under sections 8L or 8Q of the TAA 1953 to pay an amount not exceeding double the tax avoided in addition to any fine imposed for the offence. Upon conviction for a second offence against section 8Q the court may order an amount up to three times the tax avoided.
- 7.5.2 Under subsection 8ZA(5) of the TAA 1953 where 2 or more convictions under section 8T of the TAA 1953 are recorded by the same court at the same sitting, all of the offences are punishable summarily.

7.6 EXAMPLES

Inadequate records

- 7.6.1 A record keeping officer detects unsatisfactory record keeping at an initial visit. The officer provides advice on the correct practices to the person responsible for keeping the records. A second visit establishes that the deficiencies have not been corrected. The officer concludes that the client has made no attempt to implement the improvements recommended. The area of deficiency is a significant and common problem in record keeping. This case may be appropriate for prosecution pursuant to section 8L of the TAA 1953.

Incorrectly kept records

- 7.6.2 An employer pays employees overtime by untaxed cash payments from cash receipts and conceals the payments by not recording the cash receipts, the overtime worked nor the cash payments made. This may be an offence under section 8T of the TAA 1953.
- 7.6.3 An auditor discovers that a taxpayer has maintained two sets of records and has used the incorrect set to support his income tax returns. It may be appropriate to prosecute the taxpayer for the false records under sections 8Q or 8T of the TAA 1953 (depending on the facts of the case) and also to prosecute for the false or misleading statements contained in the returns under sections 8K or 8N of the TAA 1953 or Divisions 136 or 137 of the Criminal Code as appropriate.
- 7.6.4 A manufacturer of office furniture sells \$15,000 worth of new goods to a customer. In the manufacturer's sales journal and on the duplicate of the sales invoice the goods are described as second hand and no amount for sales tax is shown. The manufacturer does not include the sale in that month's sales tax return. Offences may have been committed against sections 8Q or 8T of the TAA 1953 (depending on the facts of the case) for the false records and against sections 8K or 8N of the TAA 1953 for the false or misleading statements contained in the return.
- 7.6.5 Prosecution should also be considered against a person who maintains incorrect records for the purpose of avoiding statutory obligations, eg. the obligation to make deductions or remittances under the Pay As You Go, Goods and Service Tax or Reportable Payments Systems, or the person's liability to pay superannuation under Superannuation Guarantee and Contributions Surcharge. For example, an employer who incorrectly records wages as purchases to conceal his failure to make deductions

from the wages and/or to meet his superannuation obligations under the SGAA 1992.

7.6.6 The penalties for incorrectly keeping records are:

Offence	Maximum Penalty
Section 8L TAA 1953: incorrectly keeping records	1 st offence: 20 Penalty Units 2 nd and subsequent offences: 40 Penalty Units
Section 8Q TAA 1953: Recklessly or knowingly keeping incorrect records	1 st offence: 30 Penalty Units 2 nd and subsequent offences where the Commissioner elects under section 8S: 50 Penalty Units and/or 12 months imprisonment
Section 8T TAA 1953: Incorrectly keeping records with the intention to deceive or mislead	1 st offence: 50 Penalty Units and/or 12 months imprisonment 2 nd and subsequent offences: 100 Penalty Units and/or 24 months imprisonment

7.6.7 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

8 FALSIFYING OR CONCEALING IDENTITY

8.1 OVERVIEW

8.1.1 This chapter deals with the offence of either:

- using false names and/or addresses; or
- concealing the true identity or the address (or location) of a place of residence or business.

8.2 LEGISLATION

8.2.1 Key Section

- Section 8U Taxation Administration Act (TAA) 1953

8.2.2 Section 8U of the TAA 1953 creates the offence of falsifying or concealing identity with the intention of deceiving or misleading the Commissioner or a particular taxation officer. The elements of the offence include:

- engaging in conduct which results in falsifying or concealing, or
- doing, or omitting to do something, which facilitates falsifying or concealing:

the identity, address, place of residence or business of the person or another person.

8.2.3 Section 8U also requires that the identity was falsified or concealed with the intention of deceiving, misleading, hindering or obstructing the Commissioner or a particular taxation officer, or to defeat the purpose of a taxation law. A person cannot be charged under section 8U if there is no evidence of these specific intentions.

8.2.4 The essential fault element of charges under section 8U is intention. While taxpayers may have what they consider valid reasons for falsifying or concealing their identity etc., or the location of their residence or place of business, the Commissioner does not accept that these reasons extend to the specific intentions mentioned in paragraphs 8U(c) to 8U(g) inclusive. Taxpayers are expected to fully meet their taxation obligations. The secrecy provisions of taxation law apply to the taxpayer's reasons for concealing their identity or location, and to their new identity or location.

8.3 POLICY

8.3.1 Offences under section 8U of the TAA 1953 will normally be actively prosecuted. The level of penalties under section 8V and 8W indicate that Parliament viewed these offences as being of a more serious nature. If the evidence indicates that the taxpayer has acted with any of the intentions specified in section 8U (irrespective of whether the taxpayer had any other intention(s)), charges should be laid.

8.3.2 A taxpayer who has falsified or concealed their identity or the identity of another usually does so as part of some strategy. Where the taxpayer has implemented their strategy, consideration should be given to prosecuting the taxpayer:

- for charges under section 8U; and

- any other charges that flow from that strategy (e.g. section 8K re false and misleading statements).

8.4 EXAMPLE

8.4.1 A taxpayer maintains a bank account in a false name and omits the interest from his income tax returns. Offences may have been committed for the false account under section 8U and for the omitted income under section 8P.

8.4.2 Penalties:

Offence	Maximum Penalty
<p>Falsifying or concealing the identity of, the address of, or location of a place of residence or business of, a person.</p> <p>Facilitating the falsifying or concealing the identity of, the address of, or location of a place of residence or business of, a person</p>	<p>1st offence:</p> <ul style="list-style-type: none"> • 50 Penalty Units and/or 12 months imprisonment (section 8V TAA 1953); and • subject to subsection 8W(2) TAA 1953, double the amount of tax avoided by the convicted person or another person. <p>2nd and each subsequent offence:</p> <ul style="list-style-type: none"> • 100 Penalty units and/or 2 years imprisonment (section 8V TAA 1953); and • subject to subsection 8W(2) TAA 1953, triple the amount of tax avoided by the convicted person or another person.

8.4.3 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

9 OFFENCES RELATING TO TAX FILE NUMBERS

9.1 OVERVIEW

9.1.1 Tax File Numbers (TFNs) are designed to enhance the administration of taxation laws. They cannot be used as part of a general identification system. In addition, individuals have rights to:

- choose not to quote a TFN; and
- have the security of their TFN respected.

A person commits an offence if they seek, or record, a person's TFN in circumstances not authorised by taxation law.

9.1.2 Key Sections

- Section 8WA, 8WB and 8WC *Taxation Administration Act 1953* (TAA 1953)
- Section 17 Privacy Act 1988

9.1.3 Section 8WA of the TAA 1953 creates an offence for a person to require another person to quote that other person's TFN to establish their identity unless quoting is:

- required to comply with a taxation law: paragraph 8WA (1AA)(a);
- pursuant to powers or functions under a taxation law (or one of the other listed Commonwealth laws): paragraph 8WA (1AA)(b);
- required by a person who is acting on behalf of another person in the conduct of that other person's affairs: paragraph 8WA (1AA)(c); or
- required in application for the registration of an entity under the *A New Tax System (Australian Business Number) Act 1999*: subsection 8WA (1A).

The defendant bears the evidential burden in relation to the matters in subsections (1A) and (1AA).

9.1.4 Section 8WB of the TAA 1953 creates an offence for a person to:

- record or maintain a record of the TFN of another person: paragraph 8WB(1)(a);
- use another person's TFN in connection with that other person's identity: paragraph 8WB(1)(b); or
- divulge or communicate another person's TFN to a third person: paragraph 8WB(1)(c), unless it is:
- required or permitted by a taxation law (or one of the other listed Commonwealth laws): paragraph 8WB(1A)(a);
- pursuant to powers and functions under a taxation law (or one of the other listed Commonwealth laws): paragraph 8WB(1A)(b); or
- required by a person who is acting on behalf of another person in the conduct of that other person's affairs: paragraph 8WB(1A)(c).

The defendant bears the evidential burden in relation to the matters in subsection 8WB(1A).

9.1.5 Under taxation law, the failure by an investor to quote a TFN in connection with an investment requires the investment body to withhold an amount from any income it becomes liable to pay in connection with that investment. Section 8WC of the TAA 1953 creates an offence for a person who is an investor in two or more similar investments, to structure those investments for the sole or dominant purpose of avoiding amounts being deducted, withheld or remitted to the Commissioner from their investments. In considering the sole or dominant purpose of the investor, section 8WC requires that the Commissioner consider:

- the manner in which a person became an investor in relation to the investments; and
- any explanation made by the person as to becoming an investor in that manner.

9.1.6 Under subsection 8WA(4) of the TAA 1953, a person cannot require another person to quote a TFN even within the accepted circumstances listed in section 8WA. Further, the failure to quote a TFN does not amount to a false or misleading statement under section 8K (subsection 8K(3)).

9.2 POLICY

9.2.1 Part VA of the ITAA 1936 contains provisions regulating the issuing of TFNs and their quotation by taxpayers to their employers, financial institutions and superannuation funds. These provisions also restrict the recording of TFNs to specific purposes. The Privacy Commissioner has also issued guidelines, pursuant to section 17 of the *Privacy Act 1988*, concerning the collection, storage, use and security of TFN information.

9.2.2 Neither the *Privacy Act 1988* nor the ITAA 1936 contain administrative penalties to respond to situations where a person seeks a TFN, records TFNs, communicates or uses another person's TFN in circumstances or for purposes not authorised by taxation law. Where these circumstances or purposes are found to exist, the Commissioner of Taxation can respond in one of two ways:

- administrative response(s); or
- initiating prosecution action under either 8WA, 8WB or 8WC of the TAA 1953.

9.2.3 In the more serious cases (e.g. where the person deliberately uses TFNs to facilitate inappropriate actions by either themselves or others), the Commissioner will prosecute.

9.2.4 In other cases, the person's actions may be due to inadvertence, an error or an omission. Here, the Commissioner will adopt an administrative response advising relevant parties of their responsibilities and obligations under taxation law regarding TFNs. Where a person ignores this administrative response and it is apparent from the facts, circumstances or plausibility that the taxpayer is likely to continue to ignore their responsibilities and obligations, the case will be considered for prosecution. The factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" should be taken into account in determining whether prosecution action should be taken.

9.3 EXAMPLE

9.3.1 An employer was charged when he handed out TFNs to casual employees who did not have one. Mainly itinerant workers were being employed (e.g. backpackers) due to the nature of the work. It was also alleged that backpackers could purchase TFNs and identities of people so they did not have to use their correct names. This action constitutes an offence under section 8WB of the TAA 1953.

9.3.2 Penalties:

Offence	Maximum Penalty
TFN – Subsection 8WA(1) TAA 1953	100 Penalty Units and/or 24 months imprisonment
TFN – Subsection 8WB(1) TAA 1953	100 Penalty Units and/or 24 months imprisonment
TFN – Subsection 8WC(1) TAA 1953	100 Penalty Units and/or 24 months imprisonment

9.3.3 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

10 OBSTRUCTION

10.1 OVERVIEW

- 10.1.1 Many of the taxation laws administered by the Commissioner give him, or any officer he authorises, the right to enter and remain on premises and to have full and free access to documents for any purposes of the applicable Act. The access provisions in most Acts also confer on authorised officers the right of reasonable facilities and assistance. The wording of each access provision is not identical.
- 10.1.2 Prior to 24 May 2001, it was an offence under section 8X of the *Taxation Administration Act 1953* (TAA 1953) to obstruct or hinder taxation officers. Section 8X TAA 1953 was repealed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. On and from 24 May 2001 obstruction, hindrance, intimidation and resistance of “taxation officers” comes within the scope of section 149.1 of the Criminal Code.

10.2 LEGISLATION - SECTION 149.1 OF THE CRIMINAL CODE

- 10.2.1 Section 149.1 of the Criminal Code is an indictable offence with a 2 year maximum penalty. It now applies to the conduct formerly covered by section 8X (a summary offence, with a 6 month maximum penalty). It is considered that case-law relating to section 8X will be relevant to the Code offence.
- 10.2.2 Section 149.1 provides that:
- (i) A person is guilty of an offence if:
 - (a) the person knows that another person is a public official; and
 - (b) the first-mentioned person obstructs, hinders, intimidates or resists the official in the performance of the official’s functions; and
 - (c) the official is a Commonwealth public official; and
 - (d) the functions are functions as a Commonwealth public official.

Penalty: Imprisonment for 2 years.
 - (ii) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:
 - (a) that the official was a Commonwealth public official; or
 - (b) that the functions were functions as a Commonwealth public official.
 - (iii) For the purposes of this section, it is immaterial whether the defendant was aware that the public official was performing the official’s functions.
 - (iv) Section 15.3 (extended geographical jurisdiction—category C) applies to an offence against subsection (1).
 - (v) the definition of *duty* in section 130.1 does not apply to this section. Instead, *duty* means:

- (a) in relation to a person who is a public official - any authority, duty, function or power that is conferred on the person as a public official; or
- (b) in relation to a person who is a Commonwealth public official - any authority, duty, function or power that is conferred on the person as a Commonwealth public official.

10.3 AUTHORITY, DUTY, FUNCTION OR POWER

- 10.3.1 In order for section 149.1 of the Criminal Code to apply to a situation, the person concerned must be performing a function as a Taxation Officer. In this context “function” means “any authority, duty, function, or power that is conferred on the person as a Commonwealth public official” (subsection 149.1(6)).
- 10.3.2 Taxation officers must have the appropriate delegations and/or authorisations to carry out the function. Reference should be made to the relevant legislative provisions (e.g. section 263 ITAA 1936) the decided case law in the area, and the relevant delegations and authorisations.

10.4 TAXATION OFFICER

- 10.4.1 Subsection 8J(1) TAA 1953 states that a person exercising powers etc. under, pursuant to, or in relation to a taxation law is deemed to be a taxation officer. Another person e.g. a police officer, could fall into this extended definition. It must however be shown that this person was properly authorised to perform the functions etc.

10.5 THE MEANING OF “OBSTRUCT”, “HINDER”, “INTIMIDATE” AND “RESIST”

Obstruct

- 10.5.1 As a prosecution for obstruction is conducted under the Criminal Code, case law relating to police or other law enforcement agencies is relevant to considerations of whether a taxation officer has been obstructed. The meaning of the word “obstruct” should be its common meaning:

"The verb 'obstructs' of course can, in various contexts, have different shades of meaning, but a common and natural meaning of the verb 'to obstruct' is to 'impede or hinder, to retard or to oppose the activities' of or to oppose the course of conduct of a person who is seeking to achieve a particular purpose": *Auburn and Municipal Council v Ivanoff (1964)* 10 LGRA 258.
- 10.5.2 Similarly it has been held that ‘simply making it more difficult . . . to carry out their duties’ will amount to obstruction: *Hinchcliffe v Sheldon* [1955] 11 WLR at p1210. Since *Leonard v Morris* (1975) 10 SASR 528 it may be the case that a defendant will only obstruct if his or her actions make it substantially more difficult for the police to carry out their duties: i.e. trivial interferences are not offences. It is considered that the meaning of obstruct as discussed above would have the same meaning in the context of an offence against subsection 149.1(1).
- 10.5.3 It is not necessary to show that there was any physical interference in order to prove obstruction: *Auburn and Municipal Council v Ivanoff* (1964) 10 LGRA 258, 259; *Betts v Stevens* [1910] 11 KB 1; *Rice v Connolly* [1966] 2 All ER 649.

Hinder

10.5.4 The meaning of 'hindrance' is similar to 'obstruction' and includes to impede, obstruct or prevent a person exercising powers etc.. Hindrance simply means rendering an action more difficult to carry out: *Hoaben [1940]* VLR 285; *Young (1972)* 19 FLR 70; *Terbutt (1935)* 52 WN (NSW) 223; *Mainpay (1919)* 11 WAR 70. In *Leonard v Morris (1975)* 10 SASR 528 a more exacting onus was placed on the prosecution: an officer's duty must be made substantially more difficult; furthermore hindrance will not result from trivial or ineffective impediments. See also *Schmidt v South Australia (1985)* 37 SASR 570, 574-575.

Examples of obstruct and hinder

10.5.5 Examples of hindrance or obstruction would be:

- physically restraining a taxation officer: *O'Reilly* 83 ATC 4156;
- disposing of an item to prevent or frustrate access to it: *Carmichael v McGowen [1967]* WAR 11, 15; *Peach v McCarthy [1919]* VLR 342; *Erlick v Teriesen [1948]* VLR 184; *Dibble v Ingleton [1972]* 1 QB 480;
- issuing warnings or directions or prevent the detection of an offence: *Betts v Stevens [1910]* 1 KB 1; *Green v Moore [1982]* 1 All ER 428;
- supplying wilfully misleading information: *Rice v Connolly [1962]* 2 All ER 649, 652;
- spurious or unreasonable assertion of common law right: *Scanlon v Swann* 82 ATO 4402; and
- negative conduct (see below).

Negative conduct as obstruction etc

10.5.6 Whether negative conduct will amount to obstruction will largely depend on the empowering provision under which the taxation officer is operating. In the case of *O'Reilly v Commissioners of the State Bank of Victoria* 83 ATC 4156 the High Court considered section 263 of the ITAA 1936 (which confers on the Commissioner or any authorised officer full and free access to buildings, places, books, documents and other papers) and held it does not expressly or impliedly create a positive duty to assist the Commissioner (p4159). At the same time it was acknowledged that negative conduct could amount to an obstruction or hindrance in some circumstances.

10.5.7 Whether the particular conduct amounts to obstructing or hindering an officer acting in the discharge of his duty is a question of fact in the particular case. Conduct which is essentially negative in character may in some circumstances constitute an obstruction or hindrance. For example, the retention of documents to which it was known that the Commissioner sought access under section 263 in a locked room, accompanied by secretion of the key, could well constitute such obstruction or hindrance for the reason that the maintenance of such a state of affairs may amount to active obstruction or hindrance' (p4163).

10.5.8 Prior to the insertion of subsection 263(3) ITAA 1936, it was considered that a deliberate non-compliance with a reasonable direction to allow

execution of an officer's duty may cause obstruction. (refer *Towse v Bradley* (1985) 73 FLR). Such a requirement, if made by a tax officer, would not necessarily be inconsistent with *O'Reilly, supra*, because Mason, Murphy, Brennan and Deane JJ regarded a power to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction to that access as implicit in the grant of a right of access.

- 10.5.9 Since the *O'Reilly* and *Towse v Bradley* decisions, section 263 has been amended (*Taxation Laws Amendment (No 2) Act 1987*) by the addition of subsection 263(3) to create the positive duty to assist the Commissioner which was found to be lacking or limited in those cases. Accordingly, passive non-co-operation is now more likely to constitute obstruction or hindrance.

Intimidate/Intimidation

- 10.5.10 The word 'intimidate', and its derivatives, is not a technical term, or a term of art, but a word in common use employed in its popular sense: *R v Mathews* [1993] 2 Qd R 316. It should be interpreted as "an ordinary English word, readily understood, with no technical or complex or concealed meaning": *Meller v Low* (2000) 48 NSWLR 517.
- 10.5.11 Ordinarily, intimidation would involve some threatening words or conduct tending to coerce the other person. The word "intimidate" has been interpreted to mean: to render timid, to inspire with fear, to overawe, to cow, or to force to or deter from some action by threats or violence or by inducing fear.
- 10.5.12 One thing common to the ordinary notion of intimidation, and to all the dictionary definitions given, is that the act that constitutes the intimidation has an effect on another person. While particular behaviour may be intimidatory in its nature without causing actual fear or apprehension, there is no intimidation unless it has induced fear or affected conduct, i.e., it does not intimidate until it has worked its effect in the person to whom it is directed.

Resist/Resistance

- 10.5.13 Most consideration of 'resist' or 'resisting' is in the context of resisting arrest or other lawful force. In *R v Hansford* [1974] VR 251 it was held that "resist" means nothing more than "to oppose" or "strive against" or "put a stop to".

10.6 DEFENCES

- 10.6.1 As section 149.1 of the Criminal Code is a Code offence, the only defences available are those set out in the Code (see Part 2.3 of the Code).

10.7 POLICY

- 10.7.1 The Commissioner has issued comprehensive guidelines on his access and information gathering powers under taxation legislation. The Access Manual:
- sets out guidelines that all ATO officers should follow when using investigative powers contained in various taxation legislation;

- provides suggestions for alternative courses of action where officers perceive there is obstruction; and
 - provides guidance about what is considered to be reasonable facilities and assistance when access is sought.
- 10.7.2 The Access Manual and the Taxpayers' Charter emphasise that taxation officers need to exercise the access powers in as professional and open a manner as the circumstances allow. Consistent with the obligation to exercise these powers with care (*Murphy J, FCT v ANZ Banking Group Ltd; Smorgan v FCT* 79 ATC 4039), the custodian or person concerned should be:
- encouraged to comply in an informal and cooperative manner in accordance with procedures set out in the Access Manual, without resorting to the formal use of powers under taxation law (prosecution cannot be initiated where a person declines to comply with an informal request - a formal request must be made);
 - advised of their rights and obligations under the law;
 - given reasonable opportunity to consult with their advisers; and
 - given reasonable time to comply with the request for access.
- 10.7.3 The ATO will also have regard to cost, time and privacy considerations, and (in some cases) to the risk that information may be removed or destroyed, when making access requests.
- 10.7.4 It is expected that custodians and other persons will cooperate with requests for access. If they are not inclined to do so, the approaches outlined in the Access Manual will be followed. Where it is apparent from the facts and surrounding circumstances that the custodian or another person will continue to ignore their responsibilities and obligations, the case will be considered for prosecution.
- 10.7.5 The severity of the incident will determine whether it should be prosecuted.
- 10.7.6 The factors to consider include the factors in the chapter 'Principles Underlying the Prosecution Policy of the ATO' and:
- the seriousness of the obstruction, hindrance or resistance;
 - the duration of the obstruction, hindrance or resistance;
 - the importance of obtaining access;
 - the feasibility of obtaining the information from another source;
 - the history of the offender;
 - the extent to which the person attempts to mitigate the effects of his action after the incident; and
 - the result of the obstruction, hindrance or resistance.
- 10.7.7 It is highly probable that cases of intimidation will be referred for prosecution.
- 10.7.8 Access provisions also require persons to provide "reasonable facilities and assistance". The phrase "reasonable facilities and assistance" is also discussed in the Access Manual, including the limitations of the phrase.

Prosecution should be considered when a failure to provide reasonable facilities or assistance renders an officer unable to perform their duties.

10.8 TERMS USED

- 10.8.1 “Commonwealth public official” is defined in the Dictionary of the Criminal Code to mean various classes of persons including “an APS employee”, “an individual who holds or performs the duties of an office established by or under a law of the Commonwealth” (the exceptions are not relevant for present purposes), and “an officer or employee of a Commonwealth authority”. “Commonwealth authority” is defined in the Dictionary in the Code to mean “a body established by or under a law of the Commonwealth” (again the exceptions are not relevant for present purposes).
- 10.8.2 “Public official” is defined in the Dictionary of the Code to include, amongst other classes of persons, “a Commonwealth public official”, “an officer or employee of the Commonwealth”, “an individual who performs work for the Commonwealth”, “an individual who holds or performs the duties of an office established by a law of the Commonwealth”, “an individual who is otherwise in the service of the Commonwealth”, and “an officer or employee of . . . an authority of the Commonwealth”. It is hard to envisage a situation when a “taxation officer” carrying out his or her duties for the ATO would not be a Commonwealth public official for the purposes of section 149.1 of the Code.

11 PROSECUTION OF OFFICERS OF CORPORATIONS

11.1 OVERVIEW

- 11.1.1 Section 8Y of the *Taxation Administration Act 1953* (TAA 1953) deals with the criminal liability of persons concerned in, or who take part in, the management of companies that breach taxation laws. Under this provision, a person can be held liable for the penalty the law prescribes for the offence of the company as if they had committed the offence themselves. Also, the court may order that the person is liable to compensate the Commonwealth for any loss incurred as a result of the offence being committed.
- 11.1.2 This liability arises irrespective of the position held by the person in the corporation so long as they fall within the terms of section 8Y. Accordingly, section 8Y could apply to directors, secretaries, receivers, managers, official managers or any other person directly concerned in, or taking part in, the management of the company.
- 11.1.3 Subsection 8Y(2) provides a defence for a person concerned in or taking part in the management of a corporation. It is a defence if the person can prove that he did not aid, abet, counsel or procure the relevant act or omission or that he was not in any way directly or indirectly knowingly concerned in the relevant act or omission. The defendant bears the legal burden of proof.

11.2 POLICY

- 11.2.1 The use of section 8Y TAA 1953 would be appropriate where:
- the debt is significant;
 - the corporation does not have sufficient assets to meet any penalty imposed;
 - there are indications the company's assets have been misappropriated by associated natural persons and/or the company's insolvency has been or is being engineered for the purpose of defeating creditors, in particular the ATO;
 - there is deliberate use of corporations to defeat the operation of taxation laws;
 - assets of the company have been removed from the defaulting company to an associated entity;
 - the company is a repeat offender of PAYE / PPS provisions;
 - the defaulting company has obstructed or hindered an audit or has incorrectly kept records;
 - an officer of the company has a history of associating with defaulting companies;
 - monies available for tax debts have been paid to directors or used to meet other company debts;
 - deliberate actions by an officer of the corporation that appear to be designed to avoid the payment of tax; or

- it appears that previous prosecutions of the corporation (or associated entities) did not have a deterrent effect and the corporation has continued to offend against taxation laws.

11.2.2 If a decision is made to use section 8Y, all detected offences should be prosecuted. Appropriate orders from the court should be sought, e.g. section 21B of the *Crimes Act 1914*, (reparation) subsection 221C(1B) or subsection 221YHD(4) of the *Income Tax Assessment Act 1936* (ITAA 1936) (as the case may be).

11.2.3 Where a decision is made to seek a sanction against a natural person who is associated with a defaulting corporation, section 8Y will generally be more appropriate than the 'public officer' provisions such as section 252 of the ITAA 1936.

12 FAILURE BY A THIRD PARTY TO COMPLY WITH A GARNISHEE NOTICE.

12.1 OVERVIEW

12.1.1 Tax which is due by a taxpayer may be recovered from any person by whom money is or may become due to the taxpayer, or who holds or may later hold money for or on account of the taxpayer (or some other person for payment to the taxpayer). Under taxation law, the Commissioner may by written notice require any such person to pay him out of such monies an amount sufficient to pay the tax due, up to the total of such monies. A person who refuses or fails to comply with the notice is potentially guilty of an offence.

12.1.2 Key Sections

- Section 260-5 Schedule 1 *Taxation Administration Act 1953* (TAA 1953)
- Section 218 *Income Tax Assessment Act 1936* (ITAA 1936)
- Section 34 TAA 1953
- Section 74 *Sales Tax Assessment Act 1992* (STAA 1992)
- Section 99 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986)

12.1.3 Reference in this chapter to section 260-5 TAA 1953 or 218 of the ITAA 1936 has equal application to the equivalent sections in other Acts listed above which are administered by the Commissioner.

12.2 POLICY

12.2.1 The Commissioner will be inclined to prosecute where there is little chance the taxpayer will pay the debt, or the debt will only be paid after considerable expense by the ATO.

12.2.2 In determining whether prosecution action should be taken against the person who failed to comply with the notice, regard should be had to:

- the factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO";
- the amount that ought to have been paid to the Commissioner;
- the probability that the debt will be paid by the taxpayer without undue demand on ATO resources, or that other moneys can be identified for garnishee purposes (This would include consideration whether the ATO has instituted, or is proposing to commence, proceedings to recover the debt in a court);
- the previous history of the person towards compliance with sections 260-5 Schedule 1 TAA 1953 or 218 ITAA 1936 or equivalent notices; and
- any other mitigating factors.

12.2.3 The timing of any prosecution may be important. A reparation order under section 260-5 Schedule 1 TAA 1953 or subsection 218(3) of the ITAA 1936 is unlikely to be made if it is likely the debt will be paid.

12.2.4 In cases where prosecution is not considered appropriate, the offender should be given a written warning that a repetition of the conduct could result in prosecution action being commenced.

12.3 EXAMPLE

12.3.1 An employer receives a section 260-5 Schedule 1 TAA 1953 or section 218 ITAA 1936 notice requiring him to deduct an amount from an employee's wages each week and to remit those deductions to the ATO. If the employer fails to deduct the amount, or to remit the amount deducted, he is guilty of an offence against section 260-5 Schedule 1 TAA 1953 or 218 ITAA 1936.

12.3.2 A land agent/conveyancer oversees the sale of mortgage free land for a taxpayer who has a tax liability. The ATO issues a section 260-5 Schedule 1 TAA 1953 or section 218 ITAA 1936 notice to the land agent that requires him to deduct an amount from the settlement due to the taxpayer and remit that amount to the ATO. If he does not deduct the amount or does not remit the amount to the ATO, he is guilty of an offence against section 260-5 Schedule 1 TAA 1953 or 218 ITAA 1936.

12.3.3 Penalties:

Offence	Maximum Penalty
Section 260-20 Schedule 1 TAA 1953	20 Penalty Units
Subsection 34(4) TAA 1953	20 Penalty Units
Subsection 218(2) ITAA 1936	10 Penalty Units
Subsection 74(4) STAA 1992	20 Penalty Units
Subsection 99(4) FBTAA 1986	10 Penalty Units
Subsection 56(4) SGAA 1992	10 Penalty Units

12.3.4 In addition, court orders can be obtained under section 260-5 of Schedule 1 to the TAA 1953 or subsection 218(3) of the ITAA 1936 for a convicted person to recompense the Commissioner for any loss suffered as a result of not complying with the notice.

13 SALES TAX

13.1 OVERVIEW

13.1.1 This chapter deals with offences that relate specifically to sales tax.

13.1.2 There are a number of sales tax offences that are similar in nature to offences arising in other taxation laws. These other offences (listed below) are discussed in separate chapters:

- failure to lodge sales tax returns is dealt with in the chapter "Failure to comply with a requirement";
- false or misleading statements made in sales tax returns, exemption declarations or applications for credits or registration are dealt with in the chapter "False or misleading statements";
- failure to keep or retain records or incorrectly kept records are dealt with in the chapter "Record keeping offences";
- obstruction is dealt with in the chapter "Obstruction"; and
- fraud against the Commonwealth is dealt with in the chapters "Principles Underlying the Prosecution Policy of the ATO" and "The ATO Prosecution Policy and the Commonwealth".

13.2 LEGISLATION

13.2.1 Key Sections

- Section 91 *Sales Tax Assessment Act 1992* (STAA 1992)
- Section 125 STAA 1992
- Section 126 STAA 1992

These provisions are discussed further under the relevant heading in this chapter.

13.3 IMPROPER QUOTING OF A SALES TAX REGISTRATION NUMBER OR AN EXEMPTION DECLARATION

13.3.1 Section 91 of the STAA 1992 creates an offence when a person dealing in goods:

- (i) falsely represents that they are a registered person; or
- (ii) quotes a registration number or exemption declaration:
 - in circumstances in which the person is not entitled to quote; or
 - in the form or manner not approved by the Commissioner: or
- (iii) in any other way falsely quotes a registration number or exemption declaration.

13.3.2 The sales tax regime relies on quotations of registration numbers and exemption declarations to allow persons to purchase goods free of sales tax in appropriate circumstances and to prevent double taxation. As sales tax is self-assessed, it is essential that the integrity of the quotation system is maintained. Consequently, all offences against this section should be considered for prosecution.

- 13.3.3 In deciding whether to prosecute a person for improper quotation the following factors may be relevant in addition to those mentioned in the chapter 'Principles Underlying the Prosecution Policy of the ATO':
- the potential revenue risk;
 - the degree of carelessness, negligence, recklessness or wilfulness; and
 - the previous history of the quoter.
- 13.3.4 Where a person contravenes section 91 of the STAA 1992, an offence may also have been committed under section 8K (false or misleading statements), 8N (recklessly making false or misleading statements) or 8P (knowingly making false or misleading statements) of the TAA 1953. Prosecution can be instituted using the most appropriate provision. Sections 8K, 8N and 8P provide a greater range of penalties, relevant in the case of serious or repeated offences.
- 13.3.5 In cases where prosecution is not considered appropriate, the offender should be given a written warning that a repetition of the conduct could result in prosecution action being commenced.

13.4 FAILURE TO SPECIFY SALES TAX ON AN INVOICE

- 13.4.1 Section 125 of the STAA 1992 requires that a person who sells assessable goods by wholesale at a price that includes tax, must specify the amount of the sales tax on any invoice given to the purchaser.
- 13.4.2 Generally, breaches of section 125 of the STAA 1992 will be considered for prosecution. Priority will be given to cases where:
- there has been a failure to comply with other obligations under the sales tax legislation;
 - there are indications that the offences have been committed as part of an attempt to defeat the operation of sales tax law; or
 - a previous ATO warning has been given and ignored.
- 13.4.3 Prosecution action should not be taken where there are indications the offence was committed due to inadvertence and the tax involved has been recovered.

13.5 FALSE PRETENCE AS TO SALES TAX

- 13.5.1 Section 126 of the STAA 1992 creates an offence for a person who obtains any payment or other benefit by means of a false pretence concerning the amount of tax borne by the person on goods. The two examples mentioned below concern offences under section 126.
- Obtaining a payment or benefit by means of a false pretence is a threat to the proper functioning of the sales tax system. All detected offences should be prosecuted unless:
- the offence was committed due to inadvertence and the taxpayer has agreed to change their conduct; and
 - the person has not benefited from the false pretence.
- In cases where prosecution is not considered appropriate, the offender should be given a written warning that a repetition of the conduct could result in prosecution action being commenced.

13.6 EXAMPLES

13.6.1 A wholesaler of goods, taxable at the rate of 12%, charges his customers sales tax at the rate of 22%. The wholesaler only returns an amount equivalent to the 12% rate that should have been charged.

13.6.2 A wholesaler of goods charges a retailer an amount of \$150 for sales tax on the purchase of a new television. This amount is shown on the sales invoice as 'sales tax \$150'. The wholesaler only paid \$100 sales tax on the television to the ATO.

13.6.3 Penalties

Offence	Maximum Penalty
Section 91 STAA 1992	50 Penalty Units
Section 125 STAA 1992	20 Penalty Units
Section 126 STAA 1992	50 Penalty Units

12 FAILURE BY A THIRD PARTY TO COMPLY WITH A GARNISHEE NOTICE.

12.1 OVERVIEW

12.1.1 Tax which is due by a taxpayer may be recovered from any person by whom money is or may become due to the taxpayer, or who holds or may later hold money for or on account of the taxpayer (or some other person for payment to the taxpayer). Under taxation law, the Commissioner may by written notice require any such person to pay him out of such monies an amount sufficient to pay the tax due, up to the total of such monies. A person who refuses or fails to comply with the notice is potentially guilty of an offence.

12.1.2 Key Sections

- Section 260-5 Schedule 1 *Taxation Administration Act 1953* (TAA 1953)
- Section 218 *Income Tax Assessment Act 1936* (ITAA 1936)
- Section 34 TAA 1953
- Section 74 *Sales Tax Assessment Act 1992* (STAA 1992)
- Section 99 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986)

12.1.3 Reference in this chapter to section 260-5 TAA 1953 or 218 of the ITAA 1936 has equal application to the equivalent sections in other Acts listed above which are administered by the Commissioner.

12.2 POLICY

12.2.1 The Commissioner will be inclined to prosecute where there is little chance the taxpayer will pay the debt, or the debt will only be paid after considerable expense by the ATO.

12.2.2 In determining whether prosecution action should be taken against the person who failed to comply with the notice, regard should be had to:

- the factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO";
- the amount that ought to have been paid to the Commissioner;
- the probability that the debt will be paid by the taxpayer without undue demand on ATO resources, or that other moneys can be identified for garnishee purposes (This would include consideration whether the ATO has instituted, or is proposing to commence, proceedings to recover the debt in a court);
- the previous history of the person towards compliance with sections 260-5 Schedule 1 TAA 1953 or 218 ITAA 1936 or equivalent notices; and
- any other mitigating factors.

12.2.3 The timing of any prosecution may be important. A reparation order under section 260-5 Schedule 1 TAA 1953 or subsection 218(3) of the ITAA 1936 is unlikely to be made if it is likely the debt will be paid.

12.2.4 In cases where prosecution is not considered appropriate, the offender should be given a written warning that a repetition of the conduct could result in prosecution action being commenced.

12.3 EXAMPLE

12.3.1 An employer receives a section 260-5 Schedule 1 TAA 1953 or section 218 ITAA 1936 notice requiring him to deduct an amount from an employee's wages each week and to remit those deductions to the ATO. If the employer fails to deduct the amount, or to remit the amount deducted, he is guilty of an offence against section 260-5 Schedule 1 TAA 1953 or 218 ITAA 1936.

12.3.2 A land agent/conveyancer oversees the sale of mortgage free land for a taxpayer who has a tax liability. The ATO issues a section 260-5 Schedule 1 TAA 1953 or section 218 ITAA 1936 notice to the land agent that requires him to deduct an amount from the settlement due to the taxpayer and remit that amount to the ATO. If he does not deduct the amount or does not remit the amount to the ATO, he is guilty of an offence against section 260-5 Schedule 1 TAA 1953 or 218 ITAA 1936.

12.3.3 Penalties:

Offence	Maximum Penalty
Section 260-20 Schedule 1 TAA 1953	20 Penalty Units
Subsection 34(4) TAA 1953	20 Penalty Units
Subsection 218(2) ITAA 1936	10 Penalty Units
Subsection 74(4) STAA 1992	20 Penalty Units
Subsection 99(4) FBTAA 1986	10 Penalty Units
Subsection 56(4) SGAA 1992	10 Penalty Units

12.3.4 In addition, court orders can be obtained under section 260-5 of Schedule 1 to the TAA 1953 or subsection 218(3) of the ITAA 1936 for a convicted person to recompense the Commissioner for any loss suffered as a result of not complying with the notice.

13 SALES TAX

13.1 OVERVIEW

13.1.1 This chapter deals with offences that relate specifically to sales tax.

13.1.2 There are a number of sales tax offences that are similar in nature to offences arising in other taxation laws. These other offences (listed below) are discussed in separate chapters:

- failure to lodge sales tax returns is dealt with in the chapter "Failure to comply with a requirement";
- false or misleading statements made in sales tax returns, exemption declarations or applications for credits or registration are dealt with in the chapter "False or misleading statements";
- failure to keep or retain records or incorrectly kept records are dealt with in the chapter "Record keeping offences";
- obstruction is dealt with in the chapter "Obstruction"; and
- fraud against the Commonwealth is dealt with in the chapters "Principles Underlying the Prosecution Policy of the ATO" and "The ATO Prosecution Policy and the Commonwealth".

13.2 LEGISLATION

13.2.1 Key Sections

- Section 91 *Sales Tax Assessment Act 1992* (STAA 1992)
- Section 125 STAA 1992
- Section 126 STAA 1992

These provisions are discussed further under the relevant heading in this chapter.

13.3 IMPROPER QUOTING OF A SALES TAX REGISTRATION NUMBER OR AN EXEMPTION DECLARATION

13.3.1 Section 91 of the STAA 1992 creates an offence when a person dealing in goods:

- (i) falsely represents that they are a registered person; or
- (ii) quotes a registration number or exemption declaration:
 - in circumstances in which the person is not entitled to quote; or
 - in the form or manner not approved by the Commissioner: or
- (iii) in any other way falsely quotes a registration number or exemption declaration.

13.3.2 The sales tax regime relies on quotations of registration numbers and exemption declarations to allow persons to purchase goods free of sales tax in appropriate circumstances and to prevent double taxation. As sales tax is self-assessed, it is essential that the integrity of the quotation system is maintained. Consequently, all offences against this section should be considered for prosecution.

- 13.3.3 In deciding whether to prosecute a person for improper quotation the following factors may be relevant in addition to those mentioned in the chapter 'Principles Underlying the Prosecution Policy of the ATO':
- the potential revenue risk;
 - the degree of carelessness, negligence, recklessness or wilfulness; and
 - the previous history of the quoter.
- 13.3.4 Where a person contravenes section 91 of the STAA 1992, an offence may also have been committed under section 8K (false or misleading statements), 8N (recklessly making false or misleading statements) or 8P (knowingly making false or misleading statements) of the TAA 1953. Prosecution can be instituted using the most appropriate provision. Sections 8K, 8N and 8P provide a greater range of penalties, relevant in the case of serious or repeated offences.
- 13.3.5 In cases where prosecution is not considered appropriate, the offender should be given a written warning that a repetition of the conduct could result in prosecution action being commenced.

13.4 FAILURE TO SPECIFY SALES TAX ON AN INVOICE

- 13.4.1 Section 125 of the STAA 1992 requires that a person who sells assessable goods by wholesale at a price that includes tax, must specify the amount of the sales tax on any invoice given to the purchaser.
- 13.4.2 Generally, breaches of section 125 of the STAA 1992 will be considered for prosecution. Priority will be given to cases where:
- there has been a failure to comply with other obligations under the sales tax legislation;
 - there are indications that the offences have been committed as part of an attempt to defeat the operation of sales tax law; or
 - a previous ATO warning has been given and ignored.
- 13.4.3 Prosecution action should not be taken where there are indications the offence was committed due to inadvertence and the tax involved has been recovered.

13.5 FALSE PRETENCE AS TO SALES TAX

- 13.5.1 Section 126 of the STAA 1992 creates an offence for a person who obtains any payment or other benefit by means of a false pretence concerning the amount of tax borne by the person on goods. The two examples mentioned below concern offences under section 126.
- Obtaining a payment or benefit by means of a false pretence is a threat to the proper functioning of the sales tax system. All detected offences should be prosecuted unless:
- the offence was committed due to inadvertence and the taxpayer has agreed to change their conduct; and
 - the person has not benefited from the false pretence.
- In cases where prosecution is not considered appropriate, the offender should be given a written warning that a repetition of the conduct could result in prosecution action being commenced.

13.6 EXAMPLES

13.6.1 A wholesaler of goods, taxable at the rate of 12%, charges his customers sales tax at the rate of 22%. The wholesaler only returns an amount equivalent to the 12% rate that should have been charged.

13.6.2 A wholesaler of goods charges a retailer an amount of \$150 for sales tax on the purchase of a new television. This amount is shown on the sales invoice as 'sales tax \$150'. The wholesaler only paid \$100 sales tax on the television to the ATO.

13.6.3 Penalties

Offence	Maximum Penalty
Section 91 STAA 1992	50 Penalty Units
Section 125 STAA 1992	20 Penalty Units
Section 126 STAA 1992	50 Penalty Units

14 EMPLOYER, PPS AND RPS OFFENCES

14.1 OVERVIEW

- 14.1.1 Despite the changes to legislation which came into effect on 1 July 1998 which impact on the way employers fulfil their obligations there could be possible prosecution action being necessary for some employers who did not comply with their requirements prior to that date. The first part of this section applies to those non compliant employers.
- 14.1.2 The withholding tax systems have been developed to facilitate collection and reporting of income tax as and when income is earned. The various systems collect the majority of the Commonwealth's revenue. Some systems have been specifically designed to reduce the incidence of tax avoidance in industries which have a high risk of non-compliance with taxation legislation or have traditional involvement in the cash economy.
- 14.1.3 The withholding tax systems which are the subject of this chapter are the Pay-As-You-Earn (PAYE) system, the Prescribed Payments System (PPS) and the Reportable Payments System (RPS). They impose obligations on payers of income, recipients of income and external parties. In this chapter group employers under PAYE will be referred to as 'employers', and eligible paying authorities under PPS and payers under RPS will collectively be referred to as 'payers'. Employees and payees will collectively be referred to as 'income recipients'.
- 14.1.4 Prosecution action should be considered where the information available indicates that a person has deliberately ignored an obligation or that the offence has been committed as part of an attempt to defeat the operation of the taxation laws.
- 14.1.5 There are numerous offences under PAYE, PPS and RPS which are not specifically dealt with below. All offences should be considered for prosecution. The fact an offence has not been specifically mentioned does not indicate that it is not considered as serious as the more common offences detailed below.

14.2 FAILURE TO REGISTER OR LODGE

14.2.1 Key sections

- Section 221F Income Tax Assessment Act (ITAA) 1936
- Section 221YHDB ITAA 1936

14.2.2 These offences involve persons who fail to:

- register as an employer when required to do so; or
- send to the Commissioner a paying authority notification form for PPS when required to do so.

All offences should be considered for prosecution, however those employers or payers who also fail to comply with other obligations will take priority. The factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" should be taken into account in determining whether prosecution action should be taken.

14.2.3 Penalties:

Offence	Maximum Penalty
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Subsection 221F (13) ITAA 1936	1 Penalty Unit Per Day
Subsection 221YHDB (2) ITAA 1936	1 Penalty Unit

14.3 FAILURE TO FORWARD DECLARATIONS

14.3.1 Key Sections

- Section 220AQ ITAA 1936
- Section 202CD ITAA 1936
- Section 221YHC ITAA 1936

14.3.2 These offences involve employers or payers who, having received a declaration from an income recipient, fail to complete and send it to the Commissioner within the required time or who fail to retain a copy of the declaration for the prescribed time. Dealing with a declaration in the required manner is important as it is integral to the process which identifies the payer and the income recipient. The factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" should be taken into account in determining whether prosecution action should be taken.

14.3.3 Penalties:

Offence	Maximum Penalty
Section 220AQ ITAA 1936	10 Penalty Units
Section 202CD ITAA 1936	10 Penalty Units
Section 221YHC ITAA 1936	10 Penalty Units

14.4 FALSE OR MISLEADING DECLARATIONS

14.4.1 The employee/payee declaration is the basis on which the employer/payer must determine the rate of tax that is applicable to an income recipient at a particular time. Where an income recipient furnishes a declaration they are required to provide certain information and to furnish a new declaration if any of that information changes.

14.4.2 Where false or misleading information is provided in a declaration, or a new declaration is not provided after circumstances change, incorrect tax deductions can be made. Prosecution action should be considered using the guidelines in the chapter "Case Selection and Compliance Improvement" of this policy.

14.5 FAILURE TO DEDUCT

14.5.1 Key Sections

- Section 221C ITAA 1936
- Section 221YHD ITAA 1936

- Section 221YHDA ITAA 1936
- Section 220AF ITAA 1936

14.5.2 Offences under the ITAA 1936 involve an employer or payer failing to make deductions of tax at the appropriate rate from salary and wages, prescribed payments or reportable payments. The factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" should be taken into account in determining whether prosecution action should be taken.

14.5.3 Penalties:

Offence	Maximum Penalty
PAYE – Failure to deduct from salary and wages Subsection 221C(1A) ITAA 1936	10 Penalty Units
PPS – Failure to deduct from prescribed payments Subsection 221YHD(6) and subsection 221YHDA(3) ITAA 1936	10 Penalty Units
RPS – Failure to deduct from reportable payments Subsection 220AF(3) ITAA 1936	10 Penalty Units

14.6 FAILURE TO REMIT

14.6.1 Key Sections

- Subsection 221F(5) ITAA 1936
- Subsection 221YHDC(2) ITAA 1936
- Subsection 220AG(1) ITAA 1936
- Subsection 220AAE(1) ITAA 1936
- Subsection 220AAM(1) ITAA 1936
- Subsection 220AAR(1) ITAA 1936

14.6.2 These offences involve employers or payers who, having made deductions of tax from salary and wages, prescribed payments and reportable payments, fail to send the amounts deducted to the Commissioner by the required date. The factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" should be taken into account in determining whether prosecution action should be taken. Where the amount deducted is significant, and it is apparent that the person concerned never had any intention of remitting the amount to the ATO, it may be appropriate to charge under section 29D of the *Crimes Act 1914*.

14.6.3 Penalties:

Offence	Maximum Penalty
PAYE – Failure to remit deductions from salary and wages (up to 30	

June 1998) - Subsection 221F (14) ITAA 1936	50 Penalty Units and/or 12 months imprisonment
PPS – Failure to remit deductions from prescribed payments (up to 30 June 1998) - Subsection 221YHDC (3) ITAA 1936	12 months imprisonment plus penalty of 100% of amount not remitted
RPS – Failure to remit deductions from reportable payments (up to 30 June 1998) - Subsection 220AG (2) ITAA 1936	12 months imprisonment plus penalty of 100% of amount not remitted
PAYE/PPS/RPS - Failure by large remitter to remit deductions (from 1 July 1998) - Subsection 220AAE(3) ITAA 1936	12 months imprisonment (1/7/98-30/6/99) GIC (1/7/99 onwards)
PAYE/PPS/RPS - Failure by medium remitter to remit deductions (from 1 July 1998) - Subsection 220AAM(3) ITAA 1936	12 months imprisonment (1/7/98-30/6/99) GIC (1/7/99 onwards)
PAYE/PPS/RPS - Failure by small remitter to remit deductions (from 1 July 1998) - Subsection 220AAR(3) ITAA 1936	12 months imprisonment (1/7/98-30/6/99) GIC (1/7/99 onwards)

14.6.4 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

14.7 FAILURE TO REPORT

14.7.1 Key Sections

- Subsections 221F(5A)-(5D), (5H)-(5J) ITAA 1936
- Subsections 221YHDC(4), (5), (6), (8), (9) ITAA 1936
- Subsection 220AAG(1) ITAA 1936
- Subsection 220AAO(1) ITAA 1936
- Subsection 220AAT(1) ITAA 1936

- Section 220AJ ITAA 1936
- Section 220AAZ ITAA 1936

14.7.2 These offences involve employers or payers who fail to comply with obligations to furnish the Commissioner and the income recipient with various reports and reconciliation statements on income and tax deducted at the end of the financial year or end of building project. Failure to comply with these obligations to report and keep records is an indicator that the payer may not be complying with other obligations, e.g. has failed to remit. The factors set out in the chapter "Principles Underlying the Prosecution Policy of the ATO" should be taken into account in determining whether prosecution action should be taken.

14.7.3 Penalties:

Offence	Maximum Penalty
PAYE – Failure to comply with end of year or termination of employment obligations - Subsection 221F (15) ITAA 1936	20 Penalty Units
PPS – Failure to comply with reporting obligations - Subsection 221YHDC (10) ITAA 1936	20 Penalty Units
RPS – Failure to comply with end of year obligations - Subsection 220AJ ITAA 1936	20 Penalty Units
PAYE/PPS/RPS - Failure to send statement about payments made (for deductions from 1 July 1998) - Section 220AAZ ITAA 1936	20 Penalty Units
"Withholding" Reconciliation statements and annual reporting. (1/7/99-30/6/2001)	Late reconciliation statement penalty - \$10.00 per week up to max. \$200.00

14.8 FRAUDULENT ACTIONS

14.8.1 Key Sections

- Section 221V ITAA 1936
- Section 221YHU ITAA 1936

14.8.2 These offences relate to:

- fraudulently claiming credit for payment of tax deducted from another person's wages or prescribed payments;

- pretending to be another person for the purposes of obtaining credit; and
- presenting, for the purpose of obtaining a credit, a group certificate not duly given to, or tax voucher not duly purchased by, the person presenting it.

These offences are serious and all instances should be considered for prosecution. The factors set out in Chapter 2 should be taken into account in determining whether prosecution action should be taken.

14.8.3 Penalties:

Offence	Maximum Penalty
PAYE – Attempting to obtain credit by wrongful actions - Section 221V ITAA 1936	50 Penalty Units and/or 12 months imprisonment
PPS – Attempting to obtain credit by wrongful actions - Section 221YHU ITAA 1936	12 months imprisonment

14.8.4 Under section 8ZF of the TAA 1953, when corporations are convicted of an offence punishable by imprisonment, the Court may impose a fine not exceeding five times the maximum fine.

14.9 FAILURE TO RETURN CERTIFICATES

14.9.1 Key Sections

- Subsection 221E(3) ITAA 1936
- Subsection 221YHS(2) ITAA 1936

14.9.2 These provisions require the return of various certificates. After reasonable attempts have been made to obtain the certificate by other means all cases should be considered for prosecution

14.9.3 Penalties:

Offence	Maximum Penalty
PAYE – Failure to return cancelled PAYE exemption certificates - Subsection 221E (3) ITAA 1936	5 Penalty Units
PPS – Failure to return revoked PPS deduction variation or deduction exemption certificate - Subsection 221YHS (2) ITAA 1936	5 Penalty Units

14.10 FAILURE TO NOTIFY REVOCATION OF CERTIFICATE

14.10.1 Key Sections

- Subsection 221YHS(3) ITAA 1936
- Subsection 221YHSA(3) ITAA 1936

14.10.2 These provisions require that when a PPS deduction variation certificate, deduction exemption certificate or approval to quote a reporting exemption number is revoked, the holder is required to notify relevant payers. An offence is committed where the holder fails to notify relevant parties. The factors in Chapter 2 should be taken into account in determining whether prosecution action should be taken.

14.10.3 Penalties:

Offence	Maximum Penalty
PPS – Failure to notify relevant payer that deduction exemption or deduction variation certificate has been revoked - Subsection 221YHS(3) ITAA 1936	20 Penalty Units
PPS – Failure to notify relevant payer that approval to quote reporting exemption number has been revoked - Subsection 221YHSA (3) ITAA 1936	20 Penalty Units

15 PAY-AS-YOU-GO (PAYG)

15.1 OVERVIEW

- 15.1.1 Under the new tax system there is a requirement for entities to pay amounts to the Commissioner by a date specified in the law. Entities also have a duty at law to notify the Commissioner of these amounts on or before the due date for payment. The amounts are required to be notified in an approved form.
- 15.1.2 Section 16-150 of Schedule 1 to the Taxation Administration Act (TAA) 1953 is the notification provision that applies to all withholders of amounts withheld from withholding payments. It requires an entity to notify the Commissioner of the amount it must pay on or before the due day for payment. It also requires the amount to be notified by that day regardless whether it is paid. The notification must be in the approved form. An electronic funds transfer does not satisfy this notification requirement.

15.2 FAILURE TO KEEP RECORDS

- 15.2.1 Subsection 12-55(2), Schedule 1, TAA 1953
- 15.2.2 Each party to a voluntary agreement that states that the agreement covers payments under the arrangement, is required to keep the agreement from the time that it is made until 5 years after the making of the last payment covered by the agreement.
- 15.2.3 An offence under subsection 12-55(2) is an offence of strict liability – subsection 12-55(2A).
- 15.2.4 Penalties:

Offence	Maximum Penalty
Failure to keep a copy of the voluntary agreement - Subsection 12-55(2), Schedule 1, TAA 1953	30 Penalty Units

15.3 HOW MUCH TO WITHHOLD

- 15.3.1 Key Section
- Subsection 12-330(1) of Schedule 1 to the TAA 1953
- 15.3.2 An entity must not intentionally make a payment from a natural resource payment which section 12-325, Schedule 1, TAA 1853, requires it to withhold unless:
- the entity notified the Commissioner of the amount proposed to be paid; and
 - the Commissioner notified the entity of the amount to withhold.
- 15.3.3 The fault element for the physical element of conduct, in this case 'making the payment', is intention. Therefore it must be proven that the taxpayer means to engage in that conduct.
- 15.3.4 Penalties:

Offence	Maximum Penalty
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Payer must ask the Commissioner how much to withhold Subsection 12-330(1), Schedule 1, TAA 1953	20 Penalty Units
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15.4 FAILURE TO WITHHOLD OR REMIT AN AMOUNT

15.4.1 Key Sections

- Subsection 16-25(1), Schedule 1, TAA 1953
- Subsection 16-25(2), Schedule 1, TAA 1953

15.4.2 These offences involve an entity failing to:

- withhold an amount as required by Division 12 of the TAA 1953; or
- pay to the Commissioner an amount as required by Division 14.

These offences are strict liability offences - subsection 16-25(3), Schedule 1, TAA 1953.

15.4.3 Penalties:

Offence	Maximum Penalty
Failure to withhold - Subsection 16-25(1), Schedule 1, TAA 1953	10 Penalty Units
Failure to pay an amount to the Commissioner - Subsection 16-25(2), Schedule 1, TAA 1953	10 Penalty Units

15.5 OBLIGATION TO KEEP PAYMENT SUMMARY

15.5.1 Key Section

- Subsection 18-100(1), Schedule 1, TAA 1953

15.5.2 An entity that is given a payment summary in a financial year must keep a copy of it for a certain amount of time.

15.5.3 Subsection 18-100(2) provides for three possible defences. The defendant bears the evidential burden of proof in relation to these matters.

15.5.4 The offence under subsection 18-100(1) is an offence of strict liability (subsection 18-100(1A) TAA 1953).

15.5.5 Penalties:

Offence	Maximum Penalty
Obligation to keep payment summary for either 5 years or 2 years. Section 18-100, Schedule 1, TAA 1953	30 Penalty Units

15.6 OFFENCES

15.6.1 Key Section

- Section 20-35, Schedule 1, TAA 1953

15.6.2 Under this section a person must not:

- falsely pretend to be a person in a specified document for obtaining a credit;
- attempt to obtain for the person a credit;
- present a copy of a payment summary or a document purporting to be a copy of a payment summary, which is not a copy duly given to the person.

15.6.3 Penalties:

Offence	Maximum Penalty
Offences - Subsection 20-35(1), Schedule 1, TAA 1953	60 Penalty Units and/or 12 months imprisonment

16 GOODS AND SERVICES TAX

16.1 OVERVIEW

- 16.1.1 The goods and services tax (GST) is a broad based consumption tax which aims to tax “private final consumption expenditure”. GST is a tax which is charged on the supply of goods and services in Australia and on goods imported into Australia. The tax is imposed on “taxable supplies”, which embraces virtually all activities involving the supply of goods and services.
- 16.1.2 Because entities will be collecting GST, there have to be registration requirements. Those entities whose annual turnover exceeds a threshold will be required to be registered, whilst for those entities under the threshold, registration will be optional. Registered entities will need to maintain supporting documentation and have to submit GST returns (Business Activity Statements) to the ATO with their payments or refund claims.
- 16.1.3 There are a number of Acts of the Commonwealth Parliament governing the imposition and rate of the GST. All the Acts must be regarded as a whole to comprehend the system.
- 16.1.4 GST offences are covered by special GST legislation and by general taxation laws. The more serious fraud offences will also be covered by the Criminal Code .

16.2 LEGISLATION

A New Tax System (Goods and Services Tax) Act 1999 (GST Act)

A New Tax System (Goods and Services Tax Transition) Act 1999

A New Tax System (Wine Equalisation Tax and Luxury Car Tax Transition) Act 1999

A New Tax System (Australian Business Number Tax) Act 1999 (ABN Act)

Taxation Administration Act 1953 (TAA 1953)

Criminal Code

16.3 FAILURE TO REGISTER OR LODGE

16.3.1 Key Sections

- Paragraph 8C(1)(g) TAA 1953
- Paragraph 8C(1)(a) TAA 1953

16.3.2 These offences of absolute liability involve entities who fail to:

- apply for registration, or apply for cancellation as required by the GST Act; or
- give the Commissioner a GST return on time, advising him of all Business Activity obligations for a period in the same manner

Subsection 8C(1A) provides a specific defence, that the offences do not apply to the extent that the entity is not capable of complying.

16.3.3 Penalties:

Offences	Maximum Penalty
Failure to Register, Paragraph 8C(1)(g)	20 Penalty Units
Failure to furnish GST return or other information, Paragraph 8C(1)(a)	1 st Offence: 20 Penalty Units 2 nd Offence: 40 Penalty Units 3 rd and subsequent offences where the Commissioner elects under section 8F: 50 Penalty Units and/or 12 months imprisonment

16.4 OTHER OFFENCES

16.4.1 Key Sections

- Sections 8K, 8L, 8N, 8Q, 8T of the TAA 1953 and Divisions 136 or 137 of the Criminal Code

16.4.2 As the ATO's expectations of taxpayer behaviour rise in regards to their GST obligations, it maybe more appropriate in some cases to invoke sections 8K, 8N or Divisions 136 or 137 of the Criminal Code when prosecuting taxpayers that make false and misleading statements. For a discussion on these sections please see Chapter 6 "False and Misleading Statements". It may also be relevant to invoke sections 8L, 8Q or 8T for incorrectly keeping records. For a discussion on these sections please see Chapter 7 "Incorrectly Keeping Records".

17 WINE EQUALISATION TAX

17.1 OVERVIEW

17.1.1 The wine tax is a single stage tax applying (in most cases) to dealing in wine at the wholesale level. In almost all dealings to which it applies, the GST will also apply.

17.1.2 If a taxpayer sells wine by wholesale, at a price that includes wine tax that he or she has or will become liable to pay on wine, they must specify the amount of the tax on any invoice given to the purchaser.

17.1.3 If a taxpayer contravenes section 27-5 of A New Tax System (Wine Equalisation Tax) Act (ANTS(WET)A) 1999, he or she is guilty of an offence.

17.1.4 Penalty

Offence	Maximum Penalty
Section 27-5 ANTS(WET)A 1999	20 Penalty Units

18 LUXURY CAR TAX

18.1 OVERVIEW

18.1.1 In certain circumstances, a taxpayer can quote for a supply or importation of a luxury car and not pay the luxury car tax. This is designed to avoid the luxury car tax becoming payable unless the car is sold or imported at retail level.

18.1.2 If a taxpayer is not entitled to quote for a particular supply from the supplier during the period, he or she must notify the supplier of that fact, at or before the time of supply. The notification must be in the approved form.

18.1.3 If a taxpayer contravenes section 9-20 of *A New Tax System (Luxury Car Tax) Act 1999* (ANTS(LCT)A), he or she is guilty of an offence.

18.1.4 Penalty

Offence	Maximum Penalty
Section 9-10 ANTS(LCT)A 1999	20 Penalty Units

19 AUSTRALIAN BUSINESS NUMBER

19.1 OVERVIEW

19.1.1 The main object of an Australian Business Number (ABN) is to make it easier for entities to conduct their dealings with the Australian Government. This is done by establishing a system for registering businesses and issuing them with unique identifying numbers so they can identify themselves reliably.

- A taxpayer is entitled to have an ABN if he or she is carrying on any enterprise in Australia or, in the course of their business, they make supplies that are connected with Australia; and
- To get an ABN, a taxpayer must be registered in the Australian Business Register.

19.1.2 Section 23 of the *ANTS (Australian Business Number) Act 1999* (the ABN Act) creates an offence whereby a taxpayer must not claim to identify themselves by using:

- a number that is not an ABN as if it were an ABN; or
- an ABN that is not their own.

19.1.3 A taxpayer must not claim to be an entity that is an associate of that person by using:

- a number that is not an ABN as if it were an ABN; or
- an ABN that is not an entity's own ABN.

19.1.4 Penalty

Offence	Penalty
Division 9, Section 23 of the ABN Act	2 Years Imprisonment

19.1.5 Section 30 restricts what a person may do with protected information obtained from the Australian Business Register, in the course of their official employment, and states that they:

- must not make a record of protected information, and
- must not to disclose it to anyone else;

If the recording or disclosure is not done in accordance with subsection 30(3).

19.1.6

Offence	Penalty
Division 10, Section 30 of the ABN Act	2 Years Imprisonment

20 INTERMEDIARIES

20.1 OVERVIEW

20.1.1 Intermediaries have a significant impact on the Australian taxation system as they lodge a large number of returns, objections and ruling requests. They also have a large impact due to the frequency with which information must be obtained from them by taxation officers. Their role as taxpayers' representatives is recognised in taxation law and by the professional bodies which set the highest standards of conduct for their members to meet. Similarly, the ATO recognises that tax agents and advisers have a greater duty of care than the ordinary taxpayer. It is clearly in the public interest that tax agents and advisers exercise reasonable care in the performance of tax agent services.

20.1.2 From 1 July 2000, the concept of a "BAS service" was introduced. A BAS service is any of these:

- (i) preparing or lodging an approved form about a taxpayer's liabilities, obligations or entitlements under a BAS provision;
- (ii) giving legal advice about a BAS provision; or
- (iii) dealing with the Commissioner or a person who is exercising powers or performing functions under a taxation law in relation to a BAS provision.

20.1.3 Section 251L of the *Income Tax Assessment Act 1936* (ITAA 1936) previously restricted a person from demanding or receiving a fee for the preparation of an income tax return or objection, or the transaction of any business in income tax matters, on behalf of a taxpayer, unless the person was a registered tax agent. Parallel restrictions applied to fringe benefits tax work under section 119 of the *Fringe Benefits Tax Assessment Act 1986*. As the BAS contains information about income tax and fringe benefit tax matters, those restrictions meant that only registered tax agents would be allowed to prepare and lodge a BAS on behalf of taxpayers.

20.1.4 The amended provisions allow either members of a recognised professional association, or bookkeepers working under the supervision of registered tax agents, to provide BAS services on behalf of taxpayers. Entities that provide payroll bureau services to employers are also able to provide BAS services in relation to PAYG withholding matters.

20.1.5 Except as stated in this chapter, taxation legislation does not provide separate offences for offences committed by tax agents, BAS service providers and advisers. They can be charged with the same offences as taxpayers for their actions. These charges should be selected by reference to the matters discussed in earlier chapters.

20.2 POLICY

20.2.1 Where a tax agent, BAS service provider, or adviser, at their own initiative, has omitted income or has invented or inflated claims, prosecution of the tax agent, BAS service provider or adviser as the principal offender should be preferred.

20.2.2 When the evidence discloses that a tax agent, BAS service provider or adviser aided or abetted a taxpayer to furnish false returns, Activity

Statements, or information, the tax agent, BAS service provider or adviser should be charged with the same offence as the taxpayer - refer to section 5 of the *Crimes Act 1914*.

- 20.2.3 It is also an offence for registered tax agents to allow persons, other than employees of the tax agent, to prepare tax returns on their behalf. There is a further requirement, where there are partnerships or companies, that the nominee provide adequate supervision and control (section 251N, ITAA 1936). Breaches of this provision would normally be handled administratively. Occasionally, the Tax Agents Board refer cases back to the ATO for further action. Where this occurs, consideration should be given to whether the facts indicate the presence of offences discussed in earlier chapters.

20.3 UNREGISTERED TAX AGENTS

20.3.1 Key Sections

- Section 251L ITAA 1936
- Section 251O ITAA 1936

Division 7 of the ITAA 1936 deals with the privileges and duties of registered tax agents. It contains offences for unregistered tax agents charging fees (section 251L), and advertising as a tax agent by persons other than a registered tax agent (section 251O).

- 20.3.2 Where it is ascertained that an unregistered tax agent or BAS service provider is charging a fee for the preparation of returns or other services contrary to section 251L of the ITAA 1936, action should be taken to prosecute that person under section 251L where:

- the person has charged fees for return preparation etc. for a period of time;
- the returns prepared by the person contain false or misleading information; or
- prosecution will have leveraged compliance effects.

- 20.3.3 Where there is sufficient evidence to sustain charges in addition to charges under section 251L, the other charges should also be laid. These charges should be selected by reference to the matters discussed in earlier chapters.

20.4 CRITERIA FOR PROSECUTION

- 20.4.1 Prosecution should be considered whenever these offences are detected. Priority will be given to cases where:

- returns prepared by the person contain false or misleading information. In these circumstances, consideration should also be given to applicable offences discussed in earlier chapters;
- due to the number of offences, there is a significant risk to the revenue and to the interests of taxpayers; and
- for registered agents, the case is indicative of the compliance directions of the ATO. For unregistered agents, the facts of the case indicate the person is conducting a 'business' of return

preparation, engaging clients on a large scale, and usually advertising the 'service' to parts of the community at large.

20.5 EXAMPLES

20.5.1 Examples of situations where tax agents or advisers commit offences:

- a tax agent obtains a signed blank return from a taxpayer, completes the return without obtaining appropriate instructions from the taxpayer and the return contains false or misleading information;
- a tax agent completes a certificate relating to sources of information which is false or misleading in a material particular;
- during an interview with a taxation officer a tax agent orally supplies false or misleading information to the taxation officer in circumstances where it is clear to the tax agent that the statement is false and is being relied upon by the taxation officer as a specific statement of fact, and not merely as an expression of opinion;
- a GST return adviser furnishes false or misleading information in order to obtain a GST advantage for a client; and
- a taxpayer supplies false information to a tax agent for inclusion in his return and the tax agent includes the information even though he knows or ought reasonably to have known that the information is false. It would be appropriate in this instance to jointly charge the tax agent and the taxpayer.

20.5.2 In the situations referred to above, the appropriate charge should be selected by reference to the matters discussed in earlier chapters.

20.5.3 Unregistered tax agent example: A person who is not a registered tax agent leases premises in a suburban business centre and advertises a range of financial services including the preparation of income tax returns. In addition to providing financial advice, he prepares income tax returns and charges an identifiable fee for their preparation. The adviser has committed an offence against section 251L of the ITAA 1936.

20.5.4 Penalties:

Offence	Maximum Penalty
Subsection 251L(1) ITAA 1936	200 Penalty Units
Subsection 251O(1) ITAA 1936	10 Penalty Units