Submission No 210

Inquiry into potential reforms of National Security Legislation

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Parliamentary Joint Committee on Intelligence and Security
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Inquiry into potential reforms of National Security Legislation, 2012
Response to submission #120 by the Australian Taxation Office

Dear Committee,

I realise that the window for submissions has closed. However, I would seek your indulgence in responding to the submission of the Australian Taxation Office to your inquiry.

The ATO's submission (submission #120) argues that the ATO should have access to telecommunications intercept ('TI') material.

Their request should be treated with the utmost caution, for the following reasons:

1. Their example exhibits other administrative failings; TI material was not necessary.
2. Any legitimate need for which the ATO seeks TI material can be met under existing legislation.
3. The ATO is not a law enforcement body, which means they should not be tapping phones.
4. Use of TI material, in the context of civil tax assessments, is dangerous and unfairly prejudicial to taxpayers.
5. The idea of giving TI material to the ATO to use "tax responses" to attack people who have not committed any offence is not acceptable, let alone an acceptable basis for giving them additional powers.

Having said that, I would submit that ATO access to summaries of TI material – on an intelligence-only basis akin to Austrac Suspicious Matter Reports – would enable the ATO to play its part in combating organised crime without unduly infringing the rights of taxpayers.

1. TI material was not necessary in their example

The ATO's submission contains an example where a suspect travelled to and from Australia and was, in the end, deported by the Department of Immigration and Citizenship ('DIAC'). The ATO argues that, if it could intercept the suspect's telecommunications, they could have obtained enough evidence to arrest and convict the suspect before he left Australia for good.

The investigation could have progressed, under existing legislation, in one of the following ways:

(a) If the non-content or stored communications information which the ATO was using was provided faster than three days, then the ATO could have responded more quickly. This is a matter of the telecommunications provider being

technically able to provide information more quickly. This has nothing to do with legislation, except, arguably, to the extent that you need legislation that compels more prompt service in urgent cases.

(b) Better cooperation and exchange of information between the ATO and DIAC would have enabled the ATO to monitor the suspect's movements more contemporaneously. The ATO could also have pursued information held by airlines or banks to try to identify the suspect's contact details, bank accounts or regular associates.

(c) Better cooperation with DIAC would have prevented a situation where the ATO was trying to execute an arrest warrant and DIAC was trying to deport the same person. The ATO should have identified, from the suspect's international movements, the risk of flight. The ATO should have arranged a PACE alert to monitor him. One agency should not have deported a person that another agency was trying to arrest.

Even if TI material was available, it is not clear that the result would be any different. Tapping someone's phone is not a magic bullet that results in taped confessions. The example indicates that the ATO had enough evidence for a prosecution; unless it is the ATO's practice to arrest people without evidence. Clearly DIAC was able to find and apprehend the suspect, so the availability of TI material was irrelevant to the issue of locating him.

You should discount the ATO's proffered example unless the ATO can show you that the avenues above were truly unavailable or were pursued with all possible diligence and co-operation. If not, then the ATO is just using the lack of TI material as an excuse for the outcome of this case, while simultaneously using the outcome of the case as an excuse to demand access to TI material. You need to question whether there really is a logical link between the two.

If there is a need for a limited legislative amendment to, for example, give the ATO real-time access to mobile phone locations, then that could be considered. But the ATO has not made a case for intercepting communications themselves.

If there is a legislative impediment to the ATO and DIAC sharing information, then that should be addressed. It is not necessary to give intrusive interception powers to a civil regulatory agency like the ATO; that measure is ill-suited to the underlying legitimate need.

2. Any legitimate reasons for the ATO to receive TI material are already met under existing legislation.

TI material is already available to law enforcement agencies for investigating tax evasion. Tax evasion is criminalised under the Criminal Code as 'obtaining a financial benefit by deception'; it carries a 10-year maximum sentence, which makes TI warrants and material available.

The ATO points out that it is unable to access this material, even for tax evasion prosecutions, because it is not a prescribed law enforcement agency.

The answer to that is that the ATO should not be investigating the most serious tax evasion. The enforcement of Commonwealth criminal law is the domain of the

Australian Federal Police. The AFP is a police force staffed with sworn police officers. The ATO, in contrast, is a civil regulatory body staffed with regular public servants.

There are at least two options open to the ATO, under existing legislation, for its specialist investigators to participate in investigations involving the use of TI material:

(a) A joint agency agreement where the AFP conducted the components requiring access to TI material, with the ATO providing the necessary access to tax return information and tax processing information (such as, for example, the IP addresses being used to lodge suspicious electronic returns).

(b) Seconding ATO officers with specialist skills to the AFP to work on the AFP's investigation. If necessary, these officers could be sworn in as special constables to enable them to participate fully in the investigation.

If the ATO can justify a need to intercept communications relating directly to its own systems, such as the electronic lodgement of tax returns, then a legislative response should be targeted directly at that specific issue. For example, the Parliament could enact a special power for the ATO to intercept communications directed at or emanating from ATO facilities. The complaint of "attacks" on the ATO's system should not be used as an excuse to open up the wider community to intrusive electronic surveillance by regulatory agencies.

Even with the existing law, if the ATO was concerned about "attacks on [its] system", then the investigation of those attacks would be domain of the AFP. To the extent that the ambiguous word "attack" refers to cybercrime, it would be more appropriate for the AFP to conduct the necessary surveillance and investigation to prevent attacks on Commonwealth IT infrastructure.

To the extent that the ATO uses the word "attack" to mean refund fraud, again, serious and complex fraud against the Commonwealth is the domain of the AFP. Refund fraud is not complex from a tax law perspective; therefore there is no impediment to generalist fraud investigators in the AFP conducting those investigations, with access to TI material and tax information accessed under the recently-revamped Tax Administration Act secrecy/disclosure provisions.

3. The ATO is not a law enforcement body and should not be able to tap phones

The ATO, unlike some other revenue bodies around the world, is not a law enforcement agency. The ATO only investigates tax fraud at all under an outsourcing-type arrangement under the Commonwealth Fraud Control Guidelines. This arrangement alleviates the need for the generalist AFP to get bogged down with routine or minor offences in specialist domains. The Guidelines specify that serious or complex fraud should be investigated by the AFP, not the ATO.

Intercepting telecommunications is clearly a law enforcement function, not a regulatory function.

TI powers should be considered in their context alongside other police powers. ATO investigators cannot arrest suspects. Nor can they apply for search warrants. They are simply not police.

If the ATO is going to become a law enforcement agency, then that is a different matter. ATO officers can be sworn in as police officers, execute search warrants, and enforce the tax laws. But unless the policy really is to go down this path of turning the ATO into a law enforcement agency, then there is no grounds to give it telecommunication interception powers.

4. Use of TI material for civil tax assessments unfairly prejudicial to taxpayers.

When TI material is used for criminal prosecutions, there are important safeguards against the content of communications being misinterpreted and used unfairly against the accused. These include:

(a) Evidence is excluded from the trial if it is prejudicial.

(b) A conviction can only result from evidence of an offence beyond a reasonable doubt.

In contrast, the ATO in making tax assessments can:

(a) use any information source whatsoever; and

(b) impose a liability, including administrative penalties, on the basis of the 'balance of probabilities'.

Once a tax assessment is raised, the ATO can garnishee the taxpayer's bank accounts, sue for the debt and seize their assets, garnishee their wages, and put them into bankruptcy. These consequences flow regardless of whether the taxpayer's success in objecting to the assessment. If you ask the ATO about its policy, it will tell you that, on a number of occasions, it has proceeded to seek bankruptcy for a taxpayer who is in the process of contesting the underlying tax assessment.

A taxpayer objecting to an assessment bears the burden of proof. They must prove, on the balance of probabilities, that their true income is something less than the ATO's assessment. In normal circumstances, with books of account and bank statements, this makes sense. The ATO makes a judgment on objective evidence and it is up to the taxpayer to dislodge that judgment. Even when the ATO makes a judgment of tax avoidance (Part IVA) or 'sham', it must be backed by objective documentary evidence.

However, with TI material, the ATO would be making assumptions about the meaning of phone calls and electronic messages, without being in possession of the full context.

Making such inferences is sensible for a criminal investigator seeking out leads to investigate a crime. The TI material provides invaluable intelligence. Moreover, the right TI material, combined with sufficient corroborating or circumstantial evidence, will secure a conviction. This means that an innocent person can raise a defence including an attack on the inferences drawn out of the TI material if those inferences are not beyond doubt.

In contrast, consider the kind of information which the ATO envisions it would receive from TI material, and how it would apply that to the making of tax assessments. A person on a phone might say "That's my horse" or "My shares are up", or "I have lots of money." The ATO would then come along and say "Aha, you are the true beneficial owner of this asset, we cannot see how you funded that

acquisition from declared taxable income, therefore we will raise a tax assessment on the value of your assets."

It would not be necessary for the ATO's inferences from the TI material to be the only inferences available, or accompanied by corroborating evidence. Whatever interpretation the ATO puts on the content of intercepted communications, it can use to raise a tax assessment.

The taxpayer would then be in the unenviable position of having to explain – to the satisfaction of an ATO objections officer, a Tribunal member or a Court – what all their little turns of phrase mean, what they meant when they made that call, etc. Tax assessments would not necessary arise soon after the intercepted communication. The taxpayer would have to think back months or years and try to explain why they said what they said, or what it really meant, to displace the ATO's inference that it means they own an asset or derived income.

If you listen to recorded phone calls, you will quickly realise that what is said means more, and something different, to the actual participants to the conversation than appears to an outsider listening after the fact.

The law on objections and appeals against tax assessments states that it is not sufficient for a taxpayer to merely show that the ATO's assessment is wrong or ill-founded. The taxpayer must prove what their true income is, and explain away all of the ATO's inferences. This is a heavy burden.

There is nothing in the ATO's submission that would restrict the use of TI material to cases where fraud or evasion was proven by other evidence. The ATO would like to have TI material available for all and sundry tax cases, with all the consequences described above.

The Committee should consider carefully whether this is a desirable policy for the law of the Commonwealth.

5. Use of "tax responses" to attack people who have not committed any offence

The ATO's submission speaks of the Commonwealth's organised crime strategy including the use of "tax responses" "where the ACC or AFP does not have the requisite evidence to refer the matter for criminal prosecution".

Think about that sentence, from the final of the ATO's submission.

The targets are innocent members of the public.

There is no evidence that they have committed an offence.

Why is the government harassing them? Why doesn't the government go after people who are guilty of offences?

I understand that the police need to investigate suspects, even when there is no or little evidence of their wrongdoing. The police start with a suspicion, and they collect

evidence. I understand that innocent people's privacy will necessarily be impacted by police surveillance on them as suspects or associates of suspects. I accept that.

But if there is insufficient evidence that the person has committed an offence, why is the government still trying to hurt them?

Sometimes there is a clear offence, such as a murder, but it is not clear who did it. Other times there is someone with nothing more than a reputation for involvement in crime, but it is not clear exactly what offences they have committed.

A diligent police officer would go after every bit of evidence available, but, once it ran out, would put the file to one side, in case more evidence became available later, and move on to new cases. Unfortunately, many a police officer would resent the "crook" who got away, after already being judged guilty by that police officer's gut instinct, and they would seek to "get" them any way they could.

Ideally, the Parliament would prescribe criminal laws. The police would investigate offences, bring evidence to the courts, and criminals would be convicted and punished.

Instead, aspects of the "organised crime strategy" seem to have become an executive crusade against people who senior police officers simply don't like.

If we were talking about people who were guilty of offences, but not of adequate weight to bring in the use of TI material, and the government wants to confiscate the profits from those offences, then the logical course would be to go for proceeds of crime orders. TI material is available for investigating the proceeds of crime where the predicate offence has a maximum sentence of 3 years or more.

If serious and organised crime is constituted of more minor offences, then perhaps the provision for the use of TI material in proceeds of crime investigations should be amended. The legislative response must focus on the legitimate target – crime – and not become a discretionary instrument the ATO can use against any taxpayer.

Now there are a number of instances where the ATO's participation is vital in combating organised crime. These, I note, do not require the ATO to receive TI material.

(a) Where criminals commit tax evasion. Famous examples include Abe Saffron in Australia and Al Capone in the United States. These were cases where law enforcement agencies, such as the National Crime Authority or the Internal Revenue Service, doggedly pursued evidence of the suspect's income and spending. By combining evidence of specific sources of income with evidence of spending by the accused, these cases culminated in convictions for tax evasion. In such a case, it will be important for tax specialists to be seconded from the ATO to the AFP or ACC to assist in the investigation, and it goes without saying that the ATO's information disclosure powers will need to be used to let the police obtain the suspect's tax returns.

(b) Where tax returns are used to assess the sources of a suspect's wealth, and whether that wealth may have come from criminal activity. This information may lead to leads in a conventional criminal investigation, or may lead to proceeds of crime investigations. Under the ATO's existing information

disclosure powers, tax returns can be released to any police officer investigating an indictable offence, or any member of a prescribed taskforce. Police are not limited to the tax returns of the suspect; they just need a purpose of investigating an indictable offence. The only real limit is that they cannot get tax returns for investigations into very minor offences; however, that would have nothing to do with organised crime.

But using tax assessments on the basis of scant evidence from intercepted phone calls, to attack people not guilty of any offence, is just not right.

6. It would be fair to provide summarised TI material, strictly as intelligence only

Having made the above arguments, I can acknowledge that intelligence gleaned from TI material could lead the ATO to leads, in its civil tax audits, which it would never get from any other source.

This intelligence could link a person to a bank account held through a nominee, or a property held in someone else's name. If the ATO was in possession of this intelligence, it could use its information-gathering powers to obtain corroborating evidence of such a link, for example by obtaining bank statements or interviewing suspected nominees or 'straw directors'.

Such intelligence would enable the ATO to attack tax evasion schemes which rely on hiding the facts from the ATO, but which may not constitute a criminal offence or, more likely, where there is insufficient evidence to convict for a criminal offence.

While the participants in such schemes are entitled to innocence before the law, there may be other evidence that their income is not what they say it is. Since there is insufficient evidence of criminality, they do not deserve to be punished as such. But they should pay tax on their income. Otherwise they have an unfair advantage over law-abiding taxpayers who do pay tax.

How can we balance this legitimate need to assess tax fairly, against the risk that TI material could lead to incorrect inferences and unjust tax assessments?

I suggest that, if law enforcement bodies were empowered to disclose a summary of TI material to the ATO, the ATO could use that intelligence to seek objective evidence which could be used to ground a tax assessment.

To avoid the inferences from the TI material itself being used to ground a tax assessment, the TI summaries should be on a secret or 'confidential intelligence' basis akin to Austrac Suspicious Matter Reports ('SMR').

SMRs are generated by financial institutions who witness suspicious behaviour by their customers. SMRs are used to inform ATO risk assessment and case selection, and as intelligence to lead to formal enquiries to obtain corroborating evidence. The SMRs themselves are inadmissible as evidence – indeed, even a Freedom of Information or discovery request cannot lawfully reach them – and the ATO cannot make a decision on the sole basis of one.

A similar regime should be enacted where a law enforcement officer, who receives TI material which could relate to the tax affairs of any taxpayer, is empowered to disclose a summary of that information to the ATO.

You may choose to include limits such as:

(i) the information must relate directly to tax evasion;
(ii) the information must relate to the tax affairs of a suspect; or
(iii) the law enforcement officer and the receiving ATO officer must both be part of a prescribed taskforce such as Project Wickenby or the Criminal Assets Confiscation Taskforce.

However, I would argue that a prohibition on using such material itself as evidence by the ATO would be sufficient to address fairness concerns.

Furthermore, law enforcement agencies should not be allowed to obtain TI warrants for the purpose of providing intelligence to the ATO. Each TI warrant must have a legitimate basis in a police investigation.

Conclusion

In conclusion, it is important not to let the convenience of agencies like the ATO outweigh important privacy and fairness considerations. If the ATO is to be given additional powers, this should only be after it has truly done its best and exhausted its efforts with the powers it already has.

By way of example, consider the unexplained wealth laws. Ask the law enforcement community what they have done with the most recent laws providing for unexplained wealth orders. And ask the ATO what it has done since it was prescribed as a law enforcement body for proceeds of crime purposes. Or, on a related note, ask the ATO what it has done since it was prescribed as an enforcement agency with the power to obtain stored communications.

If executive agencies are not working smarter to investigate wrongdoing, cooperate with each other and share information under existing laws, then why should they be rewarded with ever more invasive powers to spy on Australians?

The ATO should be given the powers it legitimately needs, but no more.

Submitted respectfully,

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