

# Chapter 2

## About the bill

### Introduction

2.1 The efficient and effective administration of Australia's tax system relies on the disclosure of a significant amount of information by Australian taxpayers each year.<sup>1</sup> To protect taxpayer privacy and maintain confidence in the tax system, privacy and secrecy provisions have been drafted into the law over many years; the first protections enacted in 1936.<sup>2</sup> Over time prolific amendment has resulted in unclear and inconsistent provisions which increase the risk of unauthorised disclosures.<sup>3</sup>

2.2 In 2006 the Government released a discussion paper 'Review of Taxation Secrecy and Disclosure Provisions' commencing the process of reforming the numerous provisions which were causing inconsistency and uncertainty. The discussion paper identified four principles on which consolidation and standardisation would be based:

- (a) maintaining the principle of tightly protecting taxpayer information;
- (b) clearly describing what information is to be protected and by whom;
- (c) identifying to whom protected information can be disclosed, the circumstances in which disclosure is allowed, and the purposes for which disclosed information can be used; and
- (d) a uniform system of penalties for all tax secrecy offences.<sup>4</sup>

2.3 It is these principles which have framed the drafting of the current bill.

2.4 The protections afforded to taxpayers through the privacy and secrecy provisions of the various taxation acts have operated, and following the amendments of this bill will continue to operate, within the overarching framework of the *Privacy Act 1988*.<sup>5</sup> This act governs how the public sector, and to some extent the private sector, collect, use and store information.

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1 The Department of the Treasury, *Review of Taxation Secrecy and Disclosure Provisions*, August 2006, p. 1.

2 The Department of the Treasury, *Review of Taxation Secrecy and Disclosure Provisions*, August 2006, p. 1. These protections were provided through the introduction of section 16 of the *Income Tax Assessment Act 1936* (ITAA 1936).

3 Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009, Explanatory Memorandum, p. 3.

4 The Department of the Treasury, *Review of Taxation Secrecy and Disclosure Provisions*, August 2006, p. 7.

5 Explanatory Memorandum, p. 11.

2.5 In addition to providing protection from unauthorised disclosure of taxpayer information, the standardised clauses introduced by the bill will adopt the existing provisions relating to oaths, affirmations and injunctions which provide additional safeguards against unauthorised disclosure.<sup>6</sup>

### **Exceptions to the bill**

2.6 Given the need to maintain the independence of both the Australian Business Register and the Tax Practitioners Board the provisions of the *A New Tax System (Australian Business Number) Act 1999* or the *Tax Agent Services Act 2009* are excluded from the bill and therefore are in no way affected by the standardised provisions.<sup>7</sup>

2.7 The existing provisions which govern the disclosure of tax file numbers (TFNs) will also remain separate on the basis that the proposed framework would provide inadequate protection for TFNs. Offences for the wrongful disclosure of TFNs will therefore continue to be covered by Division 2 of Part III of the TAA 1953 as well as the legally binding guidelines issued by the Privacy Commissioner.<sup>8</sup>

### **Objectives of the bill**

2.8 In his second reading speech in the House of Representatives, the Hon. Dr Craig Emerson MP, detailed that this bill would:

...consolidate taxation secrecy and disclosure provisions...continue to prohibit, through criminal offence provisions, the unauthorised disclosure of taxpayer information obtained or generated in the course of administering a taxation law...standardise key definitions to overcome existing ambiguities...introduce clear rules to govern the on-disclosure of information provided to non-taxation officers...introduce a number of new disclosure provisions where the public benefit of disclosure outweighs taxpayer privacy...[and]...enhance taxpayer privacy.<sup>9</sup>

2.9 The Minister also stated that it was not the intention of the bill to 'broaden the circumstances in which information [could] be disclosed'.<sup>10</sup>

2.10 The bill consolidates the existing privacy and disclosure provisions by replacing those provisions with a single framework. That framework introduces a new Division, Division 355 into Schedule 1 to the TAA 1953.

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6 Explanatory Memorandum, pp 79 - 80.

7 Explanatory Memorandum, pp 9 – 10.

8 Explanatory Memorandum, p. 10.

9 The Hon. Dr Craig Emerson MP, Second reading speech, *House of Representatives Hansard*, Thursday 19 November 2009, p. 5.

10 The Hon. Dr Craig Emerson MP, Second reading speech, *House of Representatives Hansard*, Thursday 19 November 2009, p. 5.

2.11 Division 355 will introduce five subdivisions to protect taxpayer privacy. Similar to the existing provisions that Division 355 will replace, confidentiality of taxpayer information will be protected by a general prohibition of disclosure of taxpayer information and offence provisions that will operate in circumstances where unauthorised disclosure occurs.

2.12 Division 355 will also introduce standard definitions for the terms 'taxation officers' and 'protected information' and proposes a minor amendment to the definition of 'taxation law'.<sup>11</sup> These definitions will ensure consistent application of the provisions thereby increasing certainty for taxpayers.

### **The general prohibition of disclosure**

2.13 Under the framework, taxpayer information will be safeguarded by generally prohibiting the disclosure of all protected information through the introduction of three specific offence provisions. The provisions, which will be located in subdivisions 355-B, 355-C and 355-D of Schedule 1 to the TAA, will operate by providing that the disclosure of any protected information is an offence.<sup>12</sup> Each subdivision will then provide for exceptions to that general rule, identifying specific authorised disclosures by:

- current and former taxation officers who obtain information in that capacity;
- non-taxation officers who obtain information under one of the new framework's exceptions; and
- non-taxation officers who acquire information as a result of a breach of a provision of the new framework.<sup>13</sup>

2.14 The right of a taxpayer to access their own information will continue to be protected through provisions ensuring that it is not an offence for their information to be provided to them or to an entity that is authorised to represent or act on their behalf.<sup>14</sup> Proposed subsection 355-25(2) will specifically identify those entities authorised to represent or act on the behalf of a taxpayer and who can therefore receive information relating to an entity.<sup>15</sup>

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11 The term, 'taxation law' is currently defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).

12 Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009, p. 5.

13 Explanatory Memorandum, p. 22.

14 Explanatory Memorandum, p. 26.

15 Explanatory Memorandum, p. 26.

## **Authorised disclosures by tax officers**

2.15 Pursuant to subdivision 355-B, taxation officers will be authorised to disclose protected information<sup>16</sup> to certain entities in specific circumstances.

2.16 The new framework largely retains the existing permitted disclosures and seeks to clarify those that fall within the meaning of the phrase 'in the performance of their duties as a tax officer' by providing a non-exhaustive list of disclosures that would be covered by that particular exemption.<sup>17</sup>

2.17 Although it is not possible to identify all disclosures that may be made in the performance of duties, proposed subsection 355-50 will include a table identifying nine circumstances where disclosure will be permitted.

2.18 The bill will also introduce some new disclosures that reflect situations where the public benefit associated with the disclosure would outweigh any impact on the taxpayer's privacy, including protection for tax officers and former tax officers to provide information requested by parliamentary committees provided that information is given to the committee *in camera*.<sup>18</sup>

2.19 The proposed changes have been designed consistently with the existing permitted disclosures with the exception of that concerning disclosure to parliamentary committees.

## ***Disclosure for other government purposes***

2.20 In recognition of the fact that taxpayer information can assist the efficient and effective administration of other government agencies, the various tax laws have, over time, been amended to enable tax officers to disclose protected information for a specific purpose where it is considered that the public benefit to be gained as a result of the disclosure exceeds any loss to a taxpayer's privacy.<sup>19</sup>

2.21 To consolidate the privacy and disclosure provisions that are currently spread across the tax laws, those particular provisions that have been added over time to assist government agencies with their administration will be combined into seven broad categories under a single provision, section 355-65, within Division 355.<sup>20</sup>

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16 Protected information will be defined in new section 355-30 as meaning 'information that: was disclosed or obtained under or for the purposes of a law that was a taxation law (other than the *Tax Agent Service Act 2009*) when the information was disclosed or obtained; and relates to the affairs of an entity; and identifies, or is reasonably capable of being used to identify, the entity.

17 Explanatory Memorandum, paragraph 5.8, p. 42.

18 Explanatory Memorandum, p. 54.

19 Explanatory Memorandum, p. 55.

20 Explanatory Memorandum, p. 56.

2.22 The categories identify situations where taxation officers can record or disclose protected information for 'other government purposes' without the commission of an offence.

- (a) social welfare, health or safety;
- (b) superannuation or finance;
- (c) corporate regulations, business, research or policy;
- (d) other taxation matters;
- (e) rehabilitation or compensation;
- (f) the environment; and
- (g) miscellaneous matters, including law enforcement purposes.

2.23 Although the majority of the disclosures permitted in these categories replicate existing provisions, there are a number of new disclosures also proposed. The Explanatory Memorandum to the bill explains that new disclosures have only been introduced to reflect cases where:

- the taxation secrecy provisions have yet to be updated to take into account changes in administrative arrangements;
- to facilitate the disclosure of taxpayer information which will be invaluable in the administration of new law enforcement regimes;
- existing disclosure provisions need to be amended to give effect to the original policy intent of the provision; and
- the public benefit of disclosure outweighs taxpayer privacy.<sup>21</sup>

2.24 Disclosure for other government purposes will enable disclosures to Treasury for estimation and analysis. In these situations the Tax Office will be permitted to provide information to Treasury for the purpose of analysing and predicting revenue flows and costing proposals even in instances where the provision of such information may enable the identity of a taxpayer to be deduced.<sup>22</sup> By expressly prohibiting the disclosure of the taxpayers' names, Australian business numbers and contact details such as addresses, telephone numbers and email, some protection will be given to reduce the chances of this occurring.<sup>23</sup>

2.25 To address the issue of non-compliance with workers' compensation laws, Division 355 proposes the introduction of a provision to authorise the disclosure of information concerning an employer's income tax withholding history.<sup>24</sup> This new

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21 Explanatory Memorandum, p. 58.

22 Explanatory Memorandum, p. 61.

23 Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009, Item 8, Table 3, s355-65.

24 Explanatory Memorandum, p. 62.

disclosure is identified in the explanatory memorandum as an example of a situation where the public benefit of disclosure exceeds taxpayer privacy, the potential future benefits of such disclosure being improved compliance by employers with their workers' compensation obligations.<sup>25</sup>

2.26 The bill also incorporates the current provisions that permit disclosure of information to law enforcement agencies with some minor modifications.<sup>26</sup>

### **Authorised on-disclosures of taxpayer information**

2.27 The new framework recognises the need to protect information in situations where that information is disclosed to non-taxation officers. It does this through limiting on-disclosure of protected information to situations where the disclosure is for the original, or is connected to the original, purpose for which the information was given.<sup>27</sup>

2.28 In recognition of the fact that there will be limited situations where information may be on-disclosed for a number of purposes, particularly in relation to law enforcement, the new framework will enable agencies to on-disclose information received for one purpose for another purpose (other than that for which the information was acquired). An example of permitted on-disclosure for multiple purposes is provided in the explanatory memorandum as being:

A taxation officer lawfully discloses taxpayer information to a Project Wickenby officer for the purpose of determining the promotion of an international tax avoidance arrangement. It is not an offence for that Project Wickenby officer to on-disclose that information for the purpose of investigating an international money laundering arrangement even though that is a different Project Wickenby purpose.<sup>28</sup>

2.29 New Division 355 will also recognise that there will be limited situations where on-disclosure unconnected to the original purpose for which the information was provided by a taxation officer should be permitted. These limited circumstances will be specifically identified within Division 355; they involve the Inspector General of Intelligence and Security, the Australian Security and Intelligence Organisation, members of Royal Commissions and instances where information is provided in compliance with a requirement of an Australian law.

### **Disclosure of protected information unlawfully acquired**

2.30 Non-taxation officers who have received taxpayer information because of a breach of a taxation law will only be permitted to on-disclose that information if the

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25 Explanatory Memorandum, p. 63.

26 Explanatory Memorandum, p. 64.

27 Explanatory Memorandum, pp 70 – 71.

28 Explanatory Memorandum, example 6.5, paragraph 6.18, p. 74.

on-disclosure is required or permitted by a taxation law, or is for a purpose connected with administering a tax law.<sup>29</sup>

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29 Explanatory Memorandum, p. 77.

