

Chapter 3

Views on the bill

General support for the bill

3.1 Submissions received to this inquiry and during the earlier consultation process were generally supportive of consolidating the existing privacy and secrecy provisions into a single legislative framework:

...we applaud the consolidation of the various secrecy and disclosure provisions into the one subdivision...¹

The [Australian Federal Police] AFP supports the measures contained in the Bill that will enhance AFP operational capacity to investigate and prosecute serious offences with the assistance of taxpayer information.²

In our submission dated 20 April 2009 the CDPP [Commonwealth Director of Public Prosecutions], while indicating its support for the consolidation of the taxation secrecy provisions into a single framework ...³

In principle, APF [Australian Privacy Foundation] supports the objectives of the proposed legislation in terms of clarification and increased consistency...⁴

The Institute [of Chartered Accountants in Australia] continues to support the proposed consolidation of all taxation secrecy provisions that are currently spread across a variety of taxation laws...⁵

We [PricewaterhouseCoopers] support in principle the initiative to consolidate into a single comprehensive framework, taxation secrecy and disclosure provisions that are currently found across numerous taxation law acts.⁶

3.2 The proposed amendments did however attract some adverse comment. The provisions of most interest to submitters being those concerning disclosure by taxation officers (subdivision 355-B).

1 Rule of Law Association of Australia, *Submission 9*, 2 March 2010, p. 2.

2 Australian Federal Police, *Submission 2*, December 2009, p. 2.

3 Commonwealth Department of Public Prosecutions, *Submission 3*, 17 December 2009, p. 1.

4 Australian Privacy Foundation, *Submission to the Commonwealth Treasury*, April 2009, p.1.

5 The Institute of Chartered Accountants in Australia, *Submission to the Commonwealth Treasury*, 17 April 2009.

6 PricewaterhouseCoopers, *Submission to the Commonwealth Treasury*, 17 April 2009, p. 1.

3.3 Although the amendments set out in the bill are not intended to extend the existing disclosures, due to the inconsistent drafting styles that have been used over time some minor changes were inevitable.⁷

Disclosure in the public interest

3.4 In his second reading speech, the Hon. Dr Craig Emerson MP explained that proposed Division 355 would continue to protect the confidentiality of taxpayer information by prohibiting unauthorised disclosure of that information while broadly retaining the existing disclosure provisions. He also explained that the introduction of the new provisions would facilitate greater disclosure where the public benefit achieved through that disclosure outweighs taxpayer privacy.⁸

3.5 This principle that disclosure should only occur where the public benefit outweighs any loss to taxpayer privacy is also intended to inform future developments in this area of Government policy.⁹

3.6 How these purposes are to be achieved is explained in draft section 355-1 (Guide to the Division) which outlines that disclosure of information will be prohibited except in specified circumstances; these specified circumstances being the legislated exceptions of the proposed Division.¹⁰

3.7 The explanatory memorandum provides further guidance to assist in determining when the public interest of disclosure will outweigh the privacy of the taxpayer by prescribing a non-exhaustive list of factors that may require consideration:

- the purpose for which the information is to be used;
- the potential impact on the individual from the disclosure and subsequent use of the information;
- the nature and amount of information likely to be provided under any new provision;
- whether the information can be obtained from other sources;
- whether the new disclosure would represent a significant departure from existing disclosure provisions; and
- whether not providing the information would significantly undermine the ability of Government to effectively deliver services or enforce laws.¹¹

7 Explanatory Memorandum, paragraph 1.19, p. 9.

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

9 Explanatory Memorandum, p. 8.

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

11 Explanatory Memorandum, paragraph 1.17, pp 8-9.

3.8 These factors were added to the extrinsic material (following public consultation on the Exposure Draft)¹² to provide further clarification to the explanatory memorandum which provides:

In terms of framing new disclosure provisions, where the purpose for the disclosure is remote or disconnected from the reason that a taxpayer provided the information in the first place (for example, for use in locating people who are unlawfully in Australia), then the disclosure provisions should generally be very precisely targeted, allowing for the disclosure of taxpayer information only for a strictly defined purpose. On the other hand, where a disclosure is closely aligned with or connected to the purpose for which the Commissioner obtained the information in the first place (for example, for use in administering a taxation law), then the disclosure provision can be framed more broadly.¹³

3.9 The bill in its current form is silent as to who will make the determination that a specific disclosure is required on the basis that the public benefit of the disclosure outweighs a taxpayer's privacy. In their submission to the inquiry, the Rule of Law Association of Australia (RoLAA) suggested that such a decision should rest with a senior Tax Officer with at least the classification of Assistant Commissioner.¹⁴ RoLAA further suggested that the officer responsible for making this decision should be required to be independent of the particular business line area which is seeking to disclose the information to ensure impartiality.¹⁵

Recommendation 1

3.10 The committee recommends that the Government consider amending the bill to reflect that in instances where a determination as to whether the public benefit of a proposed disclosure outweighs taxpayer privacy concerns needs to be made, any decision is required to be made by an appropriately authorised tax officer.

Disclosure of publicly available information

3.11 Information that is already lawfully available to the public will be expressly excluded from the protections of the privacy and secrecy provisions of Division 355.

3.12 In its response to the consultation paper released in 2006, the Commonwealth Director of Public Prosecutions (CDPP) strongly supported the move to wind back protections from publicly available information to enable

12 These particular changes were influenced at least in part by the submission lodged by the Office of the Privacy Commissioner to the Treasury in April 2009.

13 Explanatory Memorandum, paragraph 1.18, p. 9. Prior to the addition of this list of factors, the explanatory memorandum only contained guidance similar to that now set out in paragraph 1.18. Public consultation identified a need to provide more certainty and clarity.

14 RoLAA, *Submission 9*, p. 3.

15 RoLAA, *Submission 9*, p. 3.

reporting of tax convictions.¹⁶ This view however was not universal as submissions received have generally been critical of this aspect of the bill raising concerns that the use of the term 'publicly available information' would have a broad application thereby weakening the protections of the Privacy Act.¹⁷

3.13 Following consultation on the exposure draft, the exception to protecting publicly available information was tightened. As a result the bill now reflects an added qualification that, in instances where personal information has become publicly available as a result of unlawful behaviour, a taxpayer's existing publicly available personal information is still protected and can only be disclosed in accordance with Division 355.

3.14 The concerns held by the Office of the Privacy Commissioner were addressed by this modification:

...the Office welcomes that the Bill incorporates...[the]...alternative suggestion made in our Treasury submission that exceptions to disclosure will not apply to taxpayer information made publicly available as a result of a security breach or in breach of another law.¹⁸

Committee view

3.15 As a result of the amendments made to the bill following earlier consultation and given that the framework is designed to operate consistently within the context of the Privacy Act¹⁹ the committee supports the proposed amendments and is of the view that no further modification is necessary.²⁰

Certain disclosures by taxation officers

3.16 Pursuant to subdivision 355-B, taxation officers will be authorised to disclose protected information²¹ to certain entities in specific circumstances. While

16 I support the view expressed in the discussion paper and would submit that in the process of standardising the secrecy and disclosure provisions in the tax law it should be made clear that the provisions do not protect information that is already publicly available.' Commonwealth Director of Public Prosecutions, *Submission to the Treasury*, 28 September 2006, p. 8. It is also noted that the Hon Dr Bob Such MP, in his submission to this inquiry (*Submission 2*) called for the names of 'tax dodgers' to be published.

17 Office of the Privacy Commissioner, *Submission to the Treasury*, April 2009, pp. 7-8.

18 Office of the Privacy Commissioner, *Submission 1*, paragraphs 6-8, p. 3.

19 Explanatory Memorandum, paragraph 1.29, p. 11.

20 The explanatory memorandum contends that the protections of Division 355 may be broader than those of the Privacy Act as taxation secrecy provisions extend beyond protecting the personal information of natural persons (individuals) to cover those of other entities.

21 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.

subdivision 355-B will standardise many of the existing disclosures permitted by taxation officers seeking to clarify those that fall within the meaning of the phrase 'in the performance of their duties as a tax officer'²² the bill will introduce some new disclosures that reflect situations where the decision has been made that the public benefit associated with the disclosure outweighs any impact on the taxpayer's privacy. These situations involve disclosure by taxation offices:

- for the design or amendment of a taxation law;
- to ministers or parliamentary committees; and
- for other government purposes such as facilitating effective administration.

3.17 As these new disclosures generated greater interest throughout the course of the inquiry the committee has sought to ensure they receive adequate consideration and attention.

Design or amendment of a taxation law

3.18 A number of submissions raised concerns with the proposed changes to enable a taxation officer to disclose information to the Secretary of the Department of the Treasury for the purpose of designing or amending a taxation law.²³ Although the explanatory memorandum suggests that this is a very minor change, it has been the focus of much comment throughout its development.

...Treasury and other bodies involved in the drafting of taxation laws should not have access to information for this purpose that is capable of identifying any particular taxpayer. Aggregate data...should be sufficient for the purpose...a taxpayer should not be concerned that confidential information provided by it to the ATO, in compliance with their obligations...may be used to draft legislation...²⁴

Disclosure for the purpose of the design or amendment of a taxation law is an extremely broad exception and any uncertainty in the limitation or application of the disclosure law carries the risk that protection originally intended for taxpayers is not delivered. This subsection should be amended to provide more prescriptive guidance on any limitations to a disclosure for the purpose of the design or amendment of a taxation law.²⁵

...the explanatory material does not provide sufficient analysis and justification as to why it would be appropriate to allow the...exceptions...²⁶

22 Explanatory Memorandum, paragraph 5.8, p. 42.

23 Item 7 s355-50.

24 Tax Institute of Australia, *Submission to the Treasury*, 22 April 2009, p. 5.

25 PricewaterhouseCoopers, *Submission to the Treasury*, 17 April 2009, p. 3.

26 Institute of Chartered Accountants in Australia, *Submission to the Treasury*, 17 April 2009, p. 1.

3.19 Given the concerns raised in respect of this proposed change the Committee sought the advice of Treasury who explained that the bill had been amended to address the key concerns, stating that:

The circumstances which cause a problem when Treasury needs information from the Tax Office to perform its policy function are where you have de-identified information but it relates to a particular industry in which there are a few players or one very, very big player whose identity, looking at the information – even though it is de-identified – can still be ascertained. That information at present cannot be disclosed to the Treasury, which causes some problems in terms of performing its analysis role with that information.²⁷

3.20 Treasury confirmed that although the bill now allows for de-identified information to be provided to Treasury for the purposes of designing or amending a taxation law even though it may be possible for the identity of a taxpayer to be determined, where such disclosure is necessary the amendments will impose requirements on Treasury to ensure that information is not further disclosed.²⁸

Committee view

3.21 The committee considers that the need to uphold taxpayer privacy is of paramount importance, particularly in situations where government organisations hold comprehensive and sensitive information. As a result, the committee endorses the protections that will be given through the requirement to remove any contact details²⁹ when providing de-identified information to Treasury for the purposes of designing or amending a taxation law.³⁰

Disclosure for the purpose of analysing and predicting revenue flows and costing policy proposals

3.22 Another proposed disclosure somewhat similar to that of disclosing information to Treasury for the purposes of designing or amending a taxation law is that which will enable the Tax Office to provide information to the Treasury for the purpose of analysing and predicting revenue flows and costing policy proposals.³¹

27 Mr Lucas Rutherford, Analyst, Business Tax Division, Department of the Treasury, *Committee Hansard*, Thursday 25 February 2010, p. 4.

28 Mr Paul McCullough, General Manager, Business Tax Division, Department of the Treasury, *Committee Hansard*, Thursday 25 February 2010, pp 4 – 5.

29 Including Australian business numbers and tax file numbers.

30 Explanatory Memorandum, p. 49.

31 Explanatory Memorandum, p. 61.

Committee view

3.23 Given its similarity to the proposed disclosure of information to Treasury for the purposes of designing or amending a taxation law, the committee again endorses the protections that will be afforded through the requirement to remove all contact information prior to it being disclosed.

Disclosure to ministers and committees of Parliament

3.24 As explained in Chapter 2, if passed, the bill will enable taxpayer information to be disclosed to ministers and Parliamentary committees in situations where:

- the information enables a minister (in most cases the Treasurer) to exercise a power or perform a function under a taxation law;
- the Treasurer is responding directly to a taxpayer's request for assistance/information;
- the information is to be provided to the Prime Minister or Cabinet in deciding whether or not to make ex-gratia payments; and
- when requested by a parliamentary committee, provided it is given to the committee *in camera*.³²

3.25 With the exception of disclosure to parliamentary committees, the proposed provisions are consistent with existing permitted disclosures spread throughout the various taxation laws.³³

3.26 This proposed disclosure is premised on the principle that the benefits to public interest will outweigh any impact on taxpayer privacy, as identified by the Australian Privacy Foundation (APF), more often than not disclosure in such circumstances will not be closely connected with the purpose for which the Commissioner obtained the information, particularly in situations involving individual taxpayers.³⁴

3.27 Given the previous concerns raised with Treasury the committee sought to clarify that the issues concerning disclosure to parliamentary committees had been addressed. Confirmation was obtained that the bill as it now reads will provide a clear framework for taxation officers to disclose information to parliamentary committees and that provisions will be introduced that specifically require any identifiable information to be provided *in camera*.³⁵

32 Explanatory Memorandum, pp 51-54.

33 The Treasury, *Submission 7*, February 2010, p. 2.

34 As required by paragraph 1.18 of the Explanatory Memorandum.

35 Treasury, *Submission 7*, p. 3.

3.28 These provisions do not displace or disrupt the operation of parliamentary privilege; rather they clarify the circumstances where information can be given to a parliamentary committee and those instances in which identifiable information will be disclosed to parliamentary committees will continue to be very limited.³⁶

Committee view

3.29 While the committee acknowledges the concerns raised in respect of disclosure to parliamentary committees, it is satisfied that the requirement to provide identifiable information to a parliamentary committee *in camera*, together with the operation of parliamentary privilege will ensure that taxpayer information is adequately protected.

Serious threat to life or health

3.30 The introduction of a new provision that will enable information to be given by a tax officer to a commonwealth or state government agency where the disclosure would enable the agency to identify and better address a serious threat to life or health (including public health or safety) is another example of a disclosure that has been developed in accordance with the principle that the public benefit of the disclosure outweigh any impact on taxpayer privacy.³⁷

3.31 This new provision has been modelled on Information Privacy Principle (IPP) 11, the difference being that unlike IPP 11, the proposed provision does not require that the serious threat to be mitigated be 'imminent'.

3.32 Although this difference was cited in submissions to the exposure draft as a cause of concern on the basis that it did not provide adequate guidance,³⁸ the explanatory memorandum was modified and now explains that disclosure in these circumstances must have an impact on the threat.³⁹ It also requires that the tax officer consider whether there are any alternatives to disclosure that would achieve the same result and sets out that:

...the gravity of the outcome and the likelihood of its occurrence are factors to take into account when determining if there is a serious threat.⁴⁰

36 Treasury, *Submission 7*, p. 2. In giving evidence at the public hearing Treasury stated that 'it is not a common occurrence and, as a result, neither the Tax Office or I ... could identify any particular case... it is a very rare circumstance where it would be required.' Mr Lucas Rutherford, Treasury, *Proof Committee Hansard*, 25 February 2010, p. 3.

37 Explanatory Memorandum, paragraphs 5.59-5.60, p. 59.

38 Office of the Privacy Commissioner, *Submission to the Treasury*, April 2009, paragraph 19, p. 5.

39 Explanatory Memorandum, pp 59-60.

40 Explanatory Memorandum, paragraph 5.66, p. 60.

3.33 The Office of the Privacy Commissioner has approved of the addition of the reference to gravity in the explanatory material but further requests that 'proximity in time' be added to paragraph 5.66.⁴¹

Committee view

3.34 The committee is satisfied that the changes made to the bill following consultation on the exposure draft to include 'gravity of outcome' and 'likelihood of occurrence' in the explanatory memorandum sufficiently aid application of this provision. The committee takes the view that further amendment of the explanatory memorandum is not required.

Disclosure for other government purposes

Disclosure to the Fair Work Ombudsman

3.35 Item 5 of Table 7 in proposed section 355-65 (disclosure for other government purposes) will facilitate the sharing of compliance information gained by the Tax Office with the Fair Work Ombudsman⁴² on the basis that 'an entity's non-compliance with taxation laws may be an indication of their non-compliance with workplace laws.'⁴³

3.36 This proposed disclosure will be limited; all it will allow for is the Tax Office to identify non-compliance with taxation requirements which will in turn enable the Fair Work Ombudsman to better target its compliance programme and work.⁴⁴

3.37 At its public hearing the committee raised the issue of the disclosure of information to the Fair Work Ombudsman as being less connected with the original purpose for which the information was collected.⁴⁵ In responding Treasury acknowledged that although that is the case with this particular proposed disclosure, as the provision is framed in restrictive language it still aligns with principles of reform as set out in the discussion paper released in 2006.⁴⁶

41 Office of the Privacy Commissioner, *Submission 1*, pp 4-5.

42 The role of the Fair Work Ombudsman is to ensure compliance with Australia's workplace laws under the *Fair Work Act 2009* – Explanatory Memorandum, p. 63.

43 Explanatory Memorandum, p. 63.

44 Mr Lucas Rutherford, Treasury, *Committee Hansard*, 25 February 2010, pp 7 – 8.

45 Sen. Fierravanti-Wells, *Committee Hansard*, Thursday 25 February 2010, p. 9.

46 That paper set out a framework for secrecy and disclosure based on 7 principles, principle 7 being the degree of connection that the information has to the original use for which it was collected and requiring that the more remote the use of information from the reason it was originally collected, the more protection that is required and therefore a more specific exception allowing the disclosure.

Disclosure for law enforcement purposes

3.38 Further modification proposed by the bill in respect of disclosure for law enforcement purposes is an amendment to the definition of 'serious offence'. The current definition relies on whether or not an offence is indictable. As the current definition differs according to jurisdiction, its application results in inconsistencies. The bill will amend the definition with the effect that a 'serious offence' will be an offence that is punishable by more than 12 months imprisonment.⁴⁷ The CDPP has expressed concern that there will be limitations with this approach⁴⁸ and recommended that the definition should instead reflect that a serious offence 'includes offences punishable by imprisonment for a period of 12 months or more.'⁴⁹

3.39 Treasury countered this argument explaining that the proposed change will accord with the Commonwealth definition of 'indictable' in the *Crimes Act 1914* thereby addressing the current inconsistencies.⁵⁰ This change being made on the basis that the reforms of the bill are intended to standardise the provisions rather than change the current policy settings.⁵¹ Adoption of the CDPP's request would have broadened the current settings.

Committee view

3.40 The committee is satisfied with the definition of serious offence that is to be introduced on the basis that it is consistent with the principle of the bill to consolidate and standardise existing privacy provisions rather than introducing or extending new provisions.

Injunctive relief

3.41 Proposed subsection 355-330 in subdivision 355-E will provide the Commissioner with the ability to seek injunctive relief⁵² in instances where there is a concern that an entity has engaged, is engaging or is proposing to engage in any conduct that constitutes or would constitute an offence under Division 355.

3.42 The Tax Institute of Australia identified a concern with the apparent limitations of this proposed power stating that although the proposed provision

47 Explanatory Memorandum, p. 65.

48 The CDPP contends that the proposed definition would mean that tax information could not be disclosed in relation to the investigation of some serious non-indictable offences. Commonwealth Director of Public Prosecutions, *Submission 4*, 17 December 2009, p. 2.

49 Commonwealth Director of Public Prosecutions, *Submission 4*, 17 December 2009, p. 2.

50 Section 4G of the *Crimes Act 1914 (Cth)* defines indictable offences as being those punishable by imprisonment for a period exceeding 12 months.

51 Treasury, *Proof Committee Hansard*, Thursday 24 February 2010, pp 5 – 6.

52 Injunctive relief in this context refers to the seeking of an injunction (a court order compelling a party to refrain from doing a specified act) to be relieved from some act or behaviour.

'purports to replicate the injunction provisions in section 98 of the Privacy Act...it restricts the application to the Commissioner only.'⁵³

3.43 In their submission Treasury identified that the injunction provisions that are to be included in Division 355 of the TAA 1953 relate to Commonwealth secrecy regimes and therefore apply to government departments and organisations. As a result the provisions will work in conjunction with those of the Privacy Act (which relate to natural persons and on which they have been modelled) to enable a taxpayer who is concerned that a government agency is going to disclose their information to seek injunctive relief under that act.

Committee view

3.44 The committee is satisfied that injunctive relief will be available to those persons to whom protected information relates (or their representative) under the Privacy Act and therefore is satisfied that additional changes to these particular provisions are not required.

Recommendation 2

3.45 The committee recommends that the Senate pass the bill.

Senator Annette Hurley

Chair

53 Tax Institute of Australia, *Submission to the Treasury*, 22 April 2009, p. 8.

