

The Senate

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Economics  
Legislation Committee

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Tax Laws Amendment (Confidentiality of  
Taxpayer Information) Bill 2009 [Provisions]

March 2010

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# Senate Economics Legislation Committee

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No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attack.<sup>1</sup>

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1 Article 12 of the Universal Declaration of Human Rights – [www.un.org.au](http://www.un.org.au)





# Chapter 1

## Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009

### About the inquiry

1.1 The Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 will amend the secrecy and disclosure provisions applying to tax information.

1.2 It was referred to the Senate Economics Legislation Committee for immediate inquiry on 26 November 2009.<sup>1</sup> The report was due to be tabled on 25 February but the Senate granted an extension to 11 March 2010 to enable further evidence to be gathered. A list of those entities that made submissions to the inquiry is set out in Appendix 1.

1.3 The bill seeks to consolidate and standardise the existing privacy provisions by introducing a new framework into Schedule 1 to the *Taxation Administration Act 1953* (the TAA 1953). This framework will replace the many provisions which are currently spread throughout 18 tax laws.<sup>2</sup>

1.4 The need to reform these many provisions was first identified in 2006, the then Treasurer announcing a review and releasing a discussion paper, 'Review of Taxation Secrecy and Disclosure Provisions', for public consultation.<sup>3</sup>

1.5 Following that review, an exposure draft and explanatory material were published in March 2009; the Assistant Treasurer announcing that the draft bill proposed 'to implement the single and consolidated framework outlined in the Treasury discussion paper of 2006 to govern the protection and disclosure of taxpayer information received by the tax office in the course of administering the taxation laws'.<sup>4</sup>

1.6 The bill currently before Parliament has incorporated comment received during that period of public consultation.

1.7 If passed, the provisions will generally commence the day after Royal Assent. A number of transitional provisions, in Part 2 of Schedule 2 of the bill, will operate to

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1 Selection of Bills Committee, *Report No. 18 of 2009*, 26 November 2009, Appendix 6.

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

3 Source: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1121>

4 The Hon Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, 'Government Moves to Consolidate the Taxation Secrecy and Disclosure Provisions', Press Release 015, 13 March 2009.

ensure that information collected previously is treated as falling within the exceptions of the new provisions and continues to be protected.

### **Financial impacts of the bill**

1.8 The bill is not expected to have any financial or compliance related impacts.

### **Conduct of the inquiry**

1.9 The committee advertised the inquiry in the national press and contacted a number of organisations inviting submissions to be lodged by 18 December 2009. Nine submissions were received. A public hearing was held in Canberra on the evening of 25 February 2010 at which evidence from the Department of the Treasury was heard.

1.10 The committee would like to thank all those who contributed to and participated in the inquiry.

1.11 In examining the proposed bill, the committee has referred to the submissions received in response to this inquiry as well as those received by the Department of the Treasury following the release of the exposure draft and explanatory material in early 2009.

### **Structure of the report**

1.12 The report consists of three chapters. Chapter 2 outlines the main provisions of the bill explaining how they will operate. Chapter 3 sets out and analyses in more detail those aspects of the bill which attracted greater scrutiny and then gives the committee's views and recommendations on the bill.

# 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.



# 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...<sup>1</sup>

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.<sup>2</sup>

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 ...<sup>3</sup>

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

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...<sup>5</sup>

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.<sup>6</sup>

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).

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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.<sup>7</sup>

### **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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup>

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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)<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

## 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

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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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

#### *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 Act<sup>19</sup> the committee supports the proposed amendments and is of the view that no further modification is necessary.<sup>20</sup>

### **Certain disclosures by taxation officers**

3.16 Pursuant to subdivision 355-B, taxation officers will be authorised to disclose protected information<sup>21</sup> to certain entities in specific circumstances. While

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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.

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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'<sup>22</sup> 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.<sup>23</sup> 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...<sup>24</sup>

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.<sup>25</sup>

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

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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.<sup>27</sup>

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.<sup>28</sup>

*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 details<sup>29</sup> when providing de-identified information to Treasury for the purposes of designing or amending a taxation law.<sup>30</sup>

***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.<sup>31</sup>

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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.



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*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*.<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup>

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*.<sup>35</sup>

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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.<sup>36</sup>

*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.<sup>37</sup>

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,<sup>38</sup> the explanatory memorandum was modified and now explains that disclosure in these circumstances must have an impact on the threat.<sup>39</sup> 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.<sup>40</sup>

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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.<sup>41</sup>

*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 Ombudsman<sup>42</sup> on the basis that 'an entity's non-compliance with taxation laws may be an indication of their non-compliance with workplace laws.'<sup>43</sup>

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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup>

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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.<sup>47</sup> The CDPP has expressed concern that there will be limitations with this approach<sup>48</sup> 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.'<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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 relief<sup>52</sup> 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

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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.'<sup>53</sup>

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**

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



# **Additional comments by Coalition senators**

## **Introduction**

While the Coalition broadly supports the Tax Laws Amendments (Confidentiality of Taxpayer Information) Bill 2009, there is some concern about the safeguards that are being applied.

## **Recommendation 1**

The Coalition believes that the first recommendation in the Committee Report is an appropriate one for the circumstances. Amending the bill to ensure that an appropriately authorised tax officer is the decision maker when a determination needs to be made regarding the public benefit against the taxpayers' privacy is a sensible measure that means that there is a level of independence from the business line area in question.

## **Additional safeguards**

There is some concern about the safeguards relating to the disclosure of taxpayer information and that that information may be inappropriately accessed. It is the opinion of the Coalition that there should be some consideration of regular independent reviews of the process of information flows. While the option of injunctive relief is a positive one, the risk of unauthorised tax officers or individuals accessing the relevant taxpayer information is one that needs to be considered.

The option of an independent review, with powers to investigate the transparency of relevant safeguards, should be considered by the Minister. Regular reviews of the disclosure provisions would encourage consistency by the relevant authorised tax officer, substantially reducing the risk of information fraud and the like.

## **Conclusion**

The Coalition is broadly supportive of the legislation and believes that consideration needs to be given for regular reviews of the process relating to the disclosure of taxpayer information, as well as considering safeguards for the disclosure of taxpayer information relating to other agencies or organisations who may receive information collected by the ATO.

**Senator Alan Eggleston**  
Deputy Chair

**Senator David Bushby**





# APPENDIX 1

## Submissions Received

<b>Submission Number</b>	<b>Submitter</b>
1	Office of the Privacy Commissioner (Cth)
2	Dr Bob Such
3	Commonwealth Director of Public Prosecutions
4	Office of the Victorian Privacy Commissioner
5	Confidential
6	Commonwealth Ombudsman
7	Treasury
8	Australian Federal Police
9	Rule of Law Association of Australia



## **APPENDIX 2**

### **Public Hearing and Witnesses**

**CANBERRA, THURSDAY 25 FEBRUARY 2010**

McCULLOUGH, Mr Paul, General Manager, Business Tax Division,  
Treasury

RUTHERFORD, Mr Lucas, Analyst, Business Tax Division,  
Treasury

