Australian Privacy Foundation

post: GPO Box 1196
Sydney NSW 2001
email: mail@privacy.org.au
web: www.privacy.org.au

Exposure Draft Tax Laws Amendment (Confidentiality Of Taxpayer Information) Bill 2009

Submission to the Commonwealth Treasury

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To: General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

confidentiality@treasury.gov.au

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

References in this submission are mainly to the paragraphs in the Explanatory Material at http://treasury.gov.au/documents/1489/PDF/Explanatory_material.pdf

We note that we made a submission in September 2006 to the Treasury Review of Taxation Secrecy and Disclosure Provisions which was the precursor to this Bill. (See http://www.privacy.org.au/Papers/index.html). Whilst some of the concerns we expressed in 2006 have been addressed, others have not.

We have no objection to our submission being made public.

Chapter 1- Introduction

In principle, APF supports the objectives of the proposed legislation in terms of clarification and increased consistency. We particularly applaud:

- the primary objective of the new framework, stated as:
  - "…to protect the confidentiality of taxpayer information." (1.15)
- the commitment to give effect to this objective by:

    - "…placing a general prohibition on the disclosure of taxpayer information" (1.16)
- and the stated principle that:
    - "…the more remote the use of information is from the purpose for which it was originally obtained, the stronger the public benefit needs to be before a disclosure can be justified." (1.17)

However, in our view the wide range of 'public interest' exceptions to the general prohibition – both existing and some proposed new ones - means that the claim that:

> "The level of compliance with all taxation laws could be adversely affected if taxpayers thought that their information could be readily disclosed" (1.16)

is arguably a case of wishful thinking – most taxpayers, if they were aware of the wide exceptions, would probably consider that they were a serious intrusion into their privacy, such that they already represent a deterrent to full compliance.

We believe that a clear distinction needs to be made between the role of secrecy provisions in providing protection against unauthorised disclosure (see Chapter 3), which we wholeheartedly support, and their role in legitimising authorised public interest disclosures (see Chapters 4-6), where we, and we suggest the taxpayer community, have some significant reservations and concerns.

1.20-1.22 - We note that no change is proposed to the separate regime of protection for ABNs, on the basis that ABNs need to be used and disclosed much more widely in the community than other tax information, to serve their functions. While we have no problem with this principle, we are concerned that the amendment proposed in Schedule 1, Item 3 may have the effect of applying the lesser protection of the ABN regime to information which just happens to be required both for ABN administration and for other tax purposes. The lesser protection should apply only to a very limited category of ABN information being the ABN itself and information required only for ABN administration. Unless this is limited, there is the potential for the protection of the new rationalised secrecy provisions to be seriously undermined. We seek assurances that this will not be the effect of the proposed changes.

1.23 - We note that no change is proposed to the separate regime of protection for Tax File Numbers provided by a combination of the taxation laws and TFN Guidelines issued under the Privacy Act. We do however observe that these separate provisions arguably provide a false sense of re-assurance – the 'voluntary quotation of TFNs' principle is ineffective given the significant financial disadvantage to anyone choosing not to give their TFN. We suggest that the additional bureaucracy and compliance costs associated with voluntary TFN quotation may outweigh any practical privacy benefit, and even bring privacy law into disrepute, and we are surprised that the review and new legislation has not sought to rationalise the rules relating to TFNs, instead of just treating them as a 'given'.

1.24 – We observe that the level of Australia's 'obligation' is markedly different under the ICCPR (a treaty obligation), the OECD Guidelines (a commitment to observe) and APEC Privacy Framework (purely advisory),

Interaction with other laws (1.24-1.28) – general comment: We note that there is no specific reference to the Data-matching Program (Assistance and Tax) Act 1990 (and as far as we can see no reference to 'matching', which is a significant use of tax information both within and outside the scope of the 1990 DMP Act). This is surprising and we seek assurances about the effect of the proposed changes on the specific limitations on disclosure imposed by that Act.

Chapter 2 – Key Definitions

We support the introduction of clear and consistent definition of key terms, including 'protected information', 'taxation officers' and 'taxation law'.

We are concerned that the inclusion of 'contractors' in the definition of 'taxation officers' may have the

unintended consequences of authorising them to exercise powers and make disclosures which should be reserved to public servants, who are subject to additional accountability mechanisms. It is appropriate that contractors should be subject to the limits and controls imposed by secrecy provisions, but they should not gain the benefit of authorisations, other than to a very narrow extent as required for the performance of the relevant contract. We suggest that consideration is given to drafting to avoid this consequence.

We note that 'protected information', also described as 'taxpayer information' can be about any entity, and as such is not confined to personal information, as defined in the Privacy Act (2.13). Whilst our main concern is with the privacy of individuals, we acknowledge that the taxation secrecy laws appropriately apply to all taxpaying entities. However, when assessing the balance between taxpayer privacy and other public interests, we submit that it will sometimes be appropriate to make a distinction between legal entities, which arguably voluntarily sacrifice some privacy rights in exchange for benefits e.g. of incorporation, and individual taxpayers who can make no such choice and should be entitled to a higher presumption of confidentiality.

Particularly in the current climate of pressure for more corporate responsibility and accountability, individual taxpayers could suffer collateral damage from a regime designed for, and making no distinction between, individuals and other legal entities.

We submit that the new provisions should make a distinction between 'individual taxpayers' and 'other legal entities', with a different public interest test to apply in justifying exceptions from the confidentiality principle.

'Protected information' is defined in the Bill as

> "… information which identifies (or is reasonably capable of being used to identify) an entity. " (2.15)

And includes:

> "…information in the form of written documents, conversations, electronic recordings, transcripts or any other form in which information *can be recorded*." (2.17 - our emphasis)

We note that in relation to the Privacy Act, the ALRC recommendation, currently under consideration by government, is for the definition of personal information to be:

> "information, or an opinion, whether true or not, and whether recorded in material form or not, about an identified or reasonably identifiable individual" (ALRC Report 108, Recommmendation 6-1)

The ALRC report canvasses all the arguments relating to this definition. We submit that the same issues arise in relation to taxation secrecy provisions, and that for consistency with the Privacy Act, the taxation Bill should use the same definition (only substituting 'entity' for 'individual').

We are concerned that the key concept of 'taxation law', which is of major significance in the authorised disclosure provisions (5.15-5.26) is essentially a circular definition in that it means any law or instrument "… of which the Commissioner has the general administration." (2.23-2.24). We note that:

> "Information that a taxpayer provides for the purposes of one taxation law can be used to administer another taxation law (5.16).

However, there would appear to be no objective limits to the range of functions which could be given to the Tax Commissioner with the effect that use of taxpayer information for those functions would automatically be an exception to the secrecy provisions.

We previously argued strongly against the concept of 'protecting public finances' suggested in the 2006 Treasury Discussion Paper. However, we submit that there is a need to constrain the range of potential functions of the Tax Commissioner which would qualify as 'taxation law' by reference to some commonly understood concept of revenue administration.

Chapter 3 - Offences

We support the suggested threefold categorisation of offences, designed to cover the three separate categories of person who may disclose taxation information – taxation officers, persons lawfully in possession of taxpayer information, and persons unlawfully in such possession. Information would be protected irrespective of how many times the information is on-disclosed and of whether an earlier disclosure was lawful (3.7-3.10).

We also support the application of the offence provisions to disclosure or recording (3.15) and to any individual or entity (3.12-3.14). We submit, however, that prohibitions on unauthorised 'use' would be preferable to 'recording' as it would cover uses that did not involve either disclosure or recording e.g. an official or other person using information they had lawfully viewed to make contact with a taxpayer for an unauthorised purpose (in Example 3.2 'Stacey' may not record information in her diary but could still make use of it).

We support the new treatment of disclosures to a taxpayer's representative that avoids reliance on the common law concept of 'agent' (3.18-3.21) and the provisions for evidencing representative status from persons who might not be an agent at all (3.22 and 3.27),

While paragraph 3.22 and Example 3.4 seem clear enough, the provision for an authorised representative accessing only limited information relevant to a particular transaction (3.23-3.24) is somewhat confusing and we seek further clarification of the distinction being made.

Chapters 4-6 – Disclosure Provisions

We support the provision that disallows a taxpayer's consent as an automatic defence (4.14 and clause 355-30) for the good reasons we argued in our September 2006 submission, and summarised well in paragraphs 4.15 and 4.16.

The government proposes that:

> "Under the new framework, information that is lawfully available to the public can be disclosed regardless of the source of the information." (4.10 4.29-4.33 and clause 355-40).

We are concerned that this creates a major potential loophole in the scheme of protection. As we said in our September 2006 submission:

> "8. A distinction must be retained between personal information that the Tax Office collects to administer tax laws, including information that may already be publicly available elsewhere, and information that is held in generally available publications. This distinction is maintained in the *Privacy Act* 1988 (Cth). The Tax Office has no obligation or authority to release the personal information it holds simply because the person asking for it could have obtained it from a public register, newspaper or other published material."

We welcome the recognition that the privacy interests should normally outweigh disclosures to ministers and Parliament and the approach taken to an exhaustive list of exceptions - circumstances in which taxation officers and non-taxation officers are permitted to disclose information to a minister or to Parliament (4.19-4.26; 5.28-5.39 & 6).

In relation to disclosure for the purposes of other (non-taxation) laws, the Bill not only consolidates existing provisions but also adds some new exceptions (5.43-5.78).

We have no objection to many of the proposed exceptions in this category, such as those relating to disclosures to the ABS. However, the ABS was not a good example for the explanatory paper to use as the ABS is itself subject to extraordinary secrecy provisions – much tighter than any other Commonwealth agency. Attention should focus on the other proposed exceptions.

The case for greater access by ASIC is one where we would see a distinction between individual taxpayers (natural persons) and legal entities being significant. The Bill proposes a significant lowering of threshold test for disclosure to ASIC, from:

> "… for the purpose of establishing whether a serious offence has taken place" to "…for the enforcement of a law administered by ASIC which is a criminal law or which imposes a monetary penalty". (5.53)

The justification in the paper relates to:

> "…the role of ASIC in regulating companies and financial services [is] integral to maintaining and protecting the integrity of the market." (5.55)

We submit that while this may justify allowing access to information about legal entity taxpayers, the threshold should remain higher for individual taxpayers.

The same applies, in our view, to the proposed exception for "Disclosures for the purposes of the Foreign Acquisition and Takeovers Act 1975" (5.56-5.58).

In relation to disclosures to law enforcement agencies, several changes are proposed.

The proposed change in the definition of 'serious offence' from 'indictable' to:

> "an offence that is punishable by more than twelve months' imprisonment"

appears reasonable given that it is consistent with the current Commonwealth definition of an indictable offence, and will ensure consistency across all jurisdictions, some of which have different meanings of 'indictable' (5.65).

We are however seriously concerned about the proposed removal of the limitation on the use which law enforcement agencies can make of taxpayer information. This allows for a major increased use of information collected for one specific purpose for other unrelated purposes – precisely the major 'function creep' which is fundamentally contrary to the principles in privacy law.

If anything is likely to "… undermine the level of compliance with … taxation laws…" (the fear expressed in paragraph 1.16) it is this wholesale and major shift in the permitted uses of taxpayer information.

We submit that a much more nuanced approach is required to the disclosure of taxpayer information for law enforcement purposes, with more specific targeted criteria and conditions where they can be justified on public interest grounds. We also submit that this is another area of exceptions where a distinction between individual taxpayers (natural persons) and legal entities is appropriate. The balance of public interest in protecting individual taxpayers' privacy is in our view much higher than for legal entities, which voluntarily give up certain rights in exchange for benefits of their legal status – a choice not available to individuals.

The examples given of money laundering and social security fraud (5.64) are precisely the sort of uses which should give the community serious cause for concern – successive governments have broken promises about restricting the scope of intrusive legislation to 'serious and organised crime', and the definition of money laundering offences in the AML/CTF Act, for example, now extends to a much wider range of offences, including technical breaches of onerous reporting requirements.

We submit that if the government is serious about the principle of taxpayer confidentiality, it should reconsider its approach to law enforcement exceptions, with much narrower and more targeted provisions.

We have no objection to the addition of the Victorian OPI to the list of law enforcement agencies (5.66), as this is consistent with existing class of agencies permitted to access taxpayer information in defined circumstances. We are however concerned about the ease with which 'other 'multi-agency] task forces' can be granted access by Regulation (5.72). The Project Wickenby precedent may or may not be acceptable (we are aware of serious criticisms of the breadth of that investigation), but there appears to be few constraints on how this prescription power could be used in future to allow further 'function creep'. The replication of existing access for Royal Commissions (5.76) is acceptable given that they are only established to investigate major public interest issues.

The Bill contains a proposed exception for:

> "…record[ing] or disclosure is necessary for the purpose of preventing or lessening: (i) a serious threat to an individual's life, health or safety or (ii) a serious threat to public health or public safety." (5.77-5.89 and clause 355-90).

This is based on exceptions found in privacy laws, but with the difference that there is no requirement for a threat to an individual's life health or safety to be 'imminent'. This difference anticipates likely changes to the Privacy Act 1888 (Cth) recommended by the ALRC and currently under consideration by government.

We are not so concerned about the removal of the 'imminent' criterion from the first part of the exception, as this is otherwise restricted to circumstances involving specific individuals. However, the absence of the 'imminent' requirement in the more general 'public health or public safety' part of the exception in our view opens up the possibility of excessive and inappropriate use of the exception. We believe that many agencies will be able to mount a case for 'speculative' access to complete sets of taxpayer information being 'necessary to prevent or lessen a serious threat to public health or public safety' and that without additional criteria or constraints, this exception strikes the wrong balance.

The Bill generally restricts on-disclosure by persons lawfully in possession of taxpayer information to the purpose of disclosure or a 'connected' purpose but with some exceptions. (Chapter 6).

It is not clear why this Bill cannot use the established concepts of 'related' and 'directly related' purpose used in the Privacy Act 1988 (Cth) – IPP 10.1(e) and NPP 2.1(a) rather than a separate concept of 'connected' (6.15).

The exceptions (ASIO and Royal Commissions – 6.22-6.25) appear appropriately limited, although our concerns about the breadth of the law enforcement purpose (see above) obviously carry over into concerns about authorised on-disclosure.

The provisions making it an offence for persons not lawfully in possession of taxpayer information to on-disclose that information (6.26) appear appropriately strict, with a sensible exception for returning taxpayer information to the ATO (6.30). We seek clarification of how this provision would relate to Whistleblower protection – we would have expected there to be an exception for any disclosures permitted under Whistleblower protection or Journalist 'shield' laws? (Example 6.2 is relevant).

Chapter 7 – Other Matters

We support the provisions relating to oaths, affirmations and injunctions, and note that the latter ensures consistency with the injunction provisions of the Privacy Act 1988 (Cth).

For further contact on this submission please contact
Nigel Waters, Board Member
E-mail: Board5@privacy.org.au

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