



12 February, 2010
File: ER 2007/05179

Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir/Madam

INQUIRY INTO THE TAX LAWS AMENDMENT (CONFIDENTIALITY OF TAXPAYER INFORMATION) BILL 2009

Thank you for the opportunity to provide a submission to the Senate Economics Committee's inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (the Confidentiality Bill). In this submission we outline the broad goals and principles underlying the Confidentiality Bill with a view to addressing some of the issues that have been raised in submissions to your inquiry and others that have arisen in the course of the Government's consultation on this measure.

Broad overview of the Confidentiality Bill

The need to reform Australia's tax secrecy and disclosure provisions has been evident for many years. The existing provisions are spread and replicated across 20 taxation law Acts. As some have been introduced at different times, using different drafting styles and have been subject to numerous ad-hoc amendments, the result is inconsistent protection of taxpayer information, lack of clarity between taxes and an increased volume of tax law.

In 2006, the Treasury commenced the *Review of Taxation Secrecy and Disclosure Provisions* with the release of a discussion paper. The paper put forward for discussion a proposal to consolidate the taxation secrecy and disclosure provisions into a single framework. A number of possible new disclosure provisions were also canvassed in the paper, some of which have been incorporated in the Bill and some of which have not been proceeded with. Submissions in response to the discussion paper unanimously supported the goal of creating a single, consolidated tax secrecy framework.

Consultation on draft legislation in early 2009 revealed ongoing support for the goal of standardising tax secrecy and disclosure provisions. Standardisation remains the fundamental purpose of the Bill currently before Parliament. If enacted, the Bill will increase certainty for taxation officers, taxpayers and other essential users of taxpayer information.

The Bill also proposes to introduce a number of new disclosure provisions in circumstances where the public interest in disclosure outweighs the impact of taxpayer privacy. To inform future consideration of new disclosure provisions, the Explanatory Memorandum to the Bill also provides a non-exhaustive list of factors that should be considered in determining whether a proposed disclosure achieves the desired balance between protecting taxpayer information and facilitating effective Government administration and law enforcement. These factors, many of which are based on recommendations from the Office of the Privacy Commissioner, include the potential impact on individuals and whether the information can be obtained from other sources.

Submissions on both the discussion paper and the exposure draft legislation can be found on Treasury's consultation website. Consistent with the Tax Design Review Panel's recommendations to the Government, Treasury has also published a consultation summary for the Bill. All this material can be accessed from www.treasury.gov.au.

Issues raised during consultation and in submissions to the Senate Economics Committee's inquiry

During each of the consultation phases, Treasury has sought comments from Government agencies, privacy stakeholders and the public more broadly. Upon consideration of these issues and concerns, where appropriate, changes have been made to the Bill. To inform the Committee's consideration of this Bill we appreciate the opportunity to discuss some of the issues that have previously been raised and to also address some of the concerns that have been raised in the course of the Committee's own inquiry.

Issues regarding disclosures to Ministers and Parliament

A number of submissions on the exposure draft raised concerns that the Confidentiality Bill would significantly *broaden* the circumstances in which taxpayer information could be disclosed to Ministers and Parliament. These concerns reflect a misunderstanding of the operation of the existing regime, a fact that perhaps reflects the complexities and ambiguities of the current law.

The existing law recognises the importance of ensuring a separation between the executive arm of Government and those charged with administering Australia's taxation laws by imposing restrictions on the circumstances in which taxpayer information can be disclosed to Ministers. This approach continues to be reflected in the Confidentiality Bill, which sets out an exhaustive list of circumstances in which taxpayer information can be provided to a Minister. These circumstances arise where a Minister has a specific role or function under the taxation law, where he or she has to respond to personal representation of a concerned taxpayer or where a Minister has a specific role under one of the Commonwealth's discretionary compensation mechanisms. If disclosure is not allowed in these specified circumstances, the Ministers would not be able to discharge their statutory responsibilities properly.

If the Committee wishes to learn more about the circumstances in which taxpayer information can currently be provided to a Minister, it may wish to refer to the Australian Taxation Office's Practice Statement (Law Administration) PS LA 2004/9. Consideration of this statement highlights the fact that, while the Confidentiality Bill seeks to address ambiguities and inconsistencies that currently exist, it has broadly retained the existing level of disclosures to Ministers.

The exposure draft Bill also contained a provision that would enable a taxation officer to disclose taxpayer information to a parliamentary committee. Again, submissions received in response to the Bill were concerned about the disclosure of identifiable taxpayer information in such circumstances. It should be noted that, as the Committee would of course be aware, parliamentary privilege operates to protect the disclosure of information for purposes related to parliamentary proceedings. As a consequence, the inclusion of such a provision in the Confidentiality Bill is consistent with the existing law.

As a practical matter, the circumstances in which a parliamentary committee would require identifiable taxpayer information to undertake its inquiry would be very limited. In the vast majority of cases, broad information on the operation of the tax system or aggregate data would be sufficient to assist a parliamentary committee. In any event, to address concerns regarding the disclosure of identifiable taxpayer information to parliamentary committees, the Confidentiality Bill was altered following consultation to provide that any such information be provided *in camera*. In the limited circumstances in which such identifiable information is provided to a parliamentary committee, the Confidentiality Bill does not then limit what the committee can do with the information. As the members of the Standing Committee on Economics would of course be aware, this approach recognises that such committees have their own rules and procedures for addressing privacy issues relating to the information they receive.

Issue regarding disclosures to the Department of Treasury

Another issue raised in the course of consultation on the exposure draft Bill was the inclusion of a specific provision enabling the disclosure of taxpayer information to the Department of Treasury for purposes related to tax law design and for broader policy and budgetary analysis and costing purposes. A number of submissions queried why the Treasury would require identifiable taxpayer information to perform these functions.

It is correct to say that in undertaking its policy analysis and advising role Treasury does need information other than 'de-identified' data. However, in some circumstances, even where unit-record data has been 'de-identified' by the ATO it may still be possible for the Treasury to identify a taxpayer, when the de-identified data combined with other freely available information. Where, for example, the information relates to a very large entity, or an industry in which few participants exist it is possible to surmise (even from the de-identified data) who a particular entity might be. Currently, there is doubt that Treasury is entitled to receive de-identified information in these circumstances and this can inhibit Treasury's ability to adequately analyse and cost policy proposals.

While the new framework in the Confidentiality Bill overcomes this problem by allowing disclosure to Treasury, there are two important limitations placed on such disclosures. The first relates to the type of information that can be provided. Following consultation, the draft Confidentiality Bill was amended to make it explicit that in no circumstances can the name, contact details or Australian Business Number (which could then be used to identify the name of the entity) of an entity be provided to Treasury. Secondly, the purpose of the disclosure is itself a limiting factor. Taxation officers, before disclosing information to Treasury, need to be confident that the information is to be used either for estimating revenue or analysing the cost of policy proposals. Moreover, under the new framework, there are strict on-disclosure obligations imposed on Treasury officers to ensure that the information is only used for these purposes.

Issue regarding disclosures for the purpose of preventing or lessening a serious threat to an individual's life, health or safety; or to public health and safety

A new disclosure provision in the Confidentiality Bill proposes to enable the disclosure of taxpayer information for the purpose of preventing or lessening a serious threat (to an individual or to public health or safety). The new provision is largely based on a similar provision contained in the Information Privacy Principles (paragraph 1(c)) in the *Privacy Act 1988* (Privacy Act). Some concern was raised as to why, unlike the Information Privacy Principles, the particular threat did not have to be 'imminent' in order for the information be able to be lawfully disclosed.

Under the Privacy Act where the serious threat is not imminent, the consent of the individual concerned can be sought in order to authorise the disclosure. However this cannot occur under the Confidentiality Bill as consent cannot authorise disclosure. Therefore, the requirement for the threat to be 'imminent' has not been included in the Bill. Should the threat be so serious and likely that disclosure is warranted, then it would be authorised, regardless of whether it is imminent.

Issues regarding disclosures to law enforcement agencies

The Commonwealth Director of Public Prosecution (CDPP) has, in a submission to this inquiry, raised a number of issues regarding disclosures to law enforcement agencies. By way of background, while the existing tax secrecy provisions enable the disclosure of taxpayer information to such agencies, in recognition of the sensitivity of such disclosures, there are a number of limitations on when and how they can occur. The first is that disclosures may generally only be made in relation to a serious offence which, under the existing definition, is defined as an indictable offence. The information, once disclosed, cannot be used in the prosecution of such offences and the disclosures themselves must be made between only authorised taxation and law enforcement officers (with law enforcement agencies being defined in the law). In his annual report the Commissioner of Taxation must also indicate the number of times that the

ATO was requested by a law enforcement agency to disclose taxpayer information, and how often the information was disclosed.

The Confidentiality Bill replicates many of these constraints. Under the Bill, disclosures may only be made between authorised taxation and law enforcement agencies. Law enforcement agencies will continue to be those as defined under the existing law (although the Bill does propose expanding this list to include the Office of Police Integrity Victoria) and the annual reporting requirements will remain. Moreover, disclosures will be able to be made only in relation to offences that carry a term of imprisonment of more than 12 months, consistent with the Commonwealth definition of an indictable offence. Ultimately, the retention of these constraints in the Bill recognises the need to balance competing interests – on the one hand, the importance of ensuring the protection of taxpayer information and maintaining confidence in the administration of the taxation system and, on the other hand, the need to facilitate law enforcement.

As the CDPP has correctly identified, one change that the Confidentiality Bill is seeking to make is to remove the restriction on the use of taxpayer information (once disclosed to a law enforcement agency) in the prosecution of a serious offence. The CDPP raises some concerns that the Bill, as currently framed, would not adequately give effect to this policy intent. Treasury is currently in discussions with the CDPP, the ATO and other affected agencies to examine this issue further and the extent to which it would require a legislative, as compared to an administrative, solution.

Issue regarding disclosures to the Commonwealth Ombudsman

The Commonwealth Ombudsman's submission to the Committee's inquiry has raised concern that the Confidentiality Bill would limit the ATO's existing ability to assist the Ombudsman in investigating complaints of individual taxpayers.

Treasury has had an opportunity to discuss this matter with the ATO and can confirm that the Confidentiality Bill will have no detrimental impact on ATO's existing ability to assist the Ombudsman. The Explanatory Memorandum to the Bill specifically highlights the ATO's ability to disclose information to the Ombudsman in response to a formal information gathering notice. In addition, under the existing law taxation officers are able to (and do) provide information to assist the Ombudsman in the course of less formal investigations. They do so in the course of their duties – this will not change under the Confidentiality Bill (see section 355-50).

Issue regarding availability of an injunction in anticipation of a breach of the Confidentiality Bill

An Issue was raised during consultation regarding the availability of injunctive relief under the Confidentiality Bill. One of the submissions suggested that the injunction power available for the Commissioner to stop impending unauthorised disclosures should also be made available to the individuals to whom the information relates.

The Confidentiality Bill provides the Commissioner with the power to apply for an injunction with the Federal Court of Australia. This is drawn from the existing law and recognises the significant harm that authorised disclosures cause to confidence in the tax system.

Of course, the unauthorised disclosure of an individual's information would also cause harm to the individual themselves. The Privacy Act recognises this and incorporates an injunction provision (framed in very similar terms to the one proposed in the Confidentiality Bill) which enables an individual themselves to apply for an injunction where a disclosure would contravene the Privacy Act. Significantly, where taxpayer information protected by the Confidentiality Bill is also personal information (that is, information covered by the Privacy Act) then a disclosure of such information in breach of the Confidentiality Bill would also likely be a disclosure in contravention of the Privacy Act. Therefore, in such circumstances, an individual would have a right under the Privacy Act to seek an injunction against the disclosure of such information.

Should you require any further information, or have any queries regarding our submission please do not hesitate to contact Lucas Rutherford on (02) 6263 4334 or lucas.rutherford@treasury.gov.au.

Yours sincerely

Paul McCullough
General Manager
Business Tax Division