

➤ Taxation Secrecy and Disclosure Provisions

9 October 2006

The Review of Taxation Secrecy and Disclosure Provisions
Tax System Review Division
The Treasury
Langton Crescent
PARKES ACT 2600

Review of Taxation Secrecy and Disclosure Provisions Discussion Paper

I am pleased to provide the following submission from the Administrative Review Council in response to the Review of Taxation Secrecy and Disclosure Provisions discussion paper.

The Council was established by the *Administrative Appeals Tribunal Act 1975* ('AAT Act'). The Council's role is to monitor and provide advice to Government, through the Attorney-General, in relation to Commonwealth administrative review and administrative law generally.

Overview of comments

1. the Council supports the broad concept of standardising taxation secrecy and disclosure provisions
2. the Council considers that the disclosure of personal information to law enforcement, intelligence and regulatory agencies should be subject to a threshold test equivalent to that which would apply if the information were obtained directly by those agencies. In practice, this would mean that information would rarely be made available by the ATO to some agencies
3. the Council considers that there are a number of factors relevant to establishing appropriate thresholds for consent to disclosure depending on how the original information was obtained and the purpose for which disclosure is sought
4. the Council considers that comprehensive training and guidelines in this area are very important, especially in relation to the interaction of the *Privacy Act 1988* and any standardised agency secrecy provisions; and
5. the Council recommends adoption of a number of accountability mechanisms in new legislation and internal ATO procedures in relation to the proposed new regime.

Standardising taxation secrecy and disclosure provisions

The Council supports the broad concept of standardising taxation secrecy and disclosure provisions and locating them within the one piece of taxation legislation. The Council also agrees with the general proposition that it is necessary to maintain a balance between protecting taxpayer privacy and allowing disclosures necessary to deliver entitlements and meet law enforcement and integrity provisions.

As recognised in the discussion paper, the collection and disclosure of personal information can represent a significant intrusion on individual rights. If the correct balance is not achieved, attempts to foster greater efficiencies within government may cause people to become more circumspect in the information that they are prepared to provide to the ATO.

Proposed disclosure regime

The discussion paper recognises that a number of amendments have been made to tax secrecy provisions in recent years to allow tax information to be disclosed to Australian Government departments and agencies, mostly to assist in the administration of legislation.

The paper also proposes potential new disclosures – disclosures to law enforcement and intelligence agencies and to the Commissioner of Taxation as an employer. Disclosure to third parties is proposed where the taxpayer consents or where a duty is owed to them.

As a general principle (Principle 3), the discussion paper proposes that all disclosures of taxpayer information must be justified (p 12). In support of the proposed principle, the paper refers to s 29 of the *Privacy Act 1988* and Information Privacy Principle (IPP) Guideline 38 which requires an agency to establish that the use or disclosure of the information is ‘reasonably necessary to safeguard a public interest’ (p 13). Factors that would assist in making this determination would include:

- where other practical and less intrusive approaches are available; and
- whether potential harm to the public interest outweighs the privacy interests of the people the information is about.

The discussion paper also proposes a graduated disclosure framework (p 16) having regard to the remoteness of the proposed use from the reason for which the information was originally collected.

The framework envisages increasingly specific disclosure requirements the greater the distance between the proposed use and the reason for original collection.

On this basis, provisions relating to the disclosure of information for the primary purpose of protecting public finances, such as the provision of information to Centrelink to enable the accurate payment of pensions, would be more generically defined than those for disclosures for the purposes of other Commonwealth legislation and for other purposes (pp 24, 25). In the latter case, both the purpose for the disclosure and the information able to be disclosed would need to be specified.

The discussion paper indicates that existing disclosures for other purposes include to entities such as law enforcement agencies, the Australian Securities and Investments Commission and intelligence agencies (p 26). The paper flags a proposed expansion of the ability to use tax information as evidence in non-tax-related serious criminal investigations and prosecutions and suggests that further disclosures could be modelled on IPP 11.1(e) which allows disclosure 'that is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty'.

While noting the proposed increase in legislative specificity as disclosure moves further away from protecting public finances, the Council considers that this increased specificity should also be accompanied by a tightening of the disclosure threshold of 'reasonably necessary to safeguard a public interest'. The Council considers this to be so particularly where information sought to be disclosed may be used in law enforcement or penalty proceedings against the original information provider or a third party.

In these circumstances, the Council is of the opinion that disclosure of information by the ATO to other agencies should be subject to a threshold test equivalent to that which would apply if the information were obtained directly by those agencies. That is, the ATO should not be able simply to disclose information that it receives for its purposes under its legislation to another agency such as ASIC or APRA unless, in seeking information, that agency can satisfy its own legislative trigger requirements.

Because they only have the power to collect information relevant to their own legislative purposes, in practice, it is unlikely that the ATO would have information for disclosure to such agencies. With other agencies, such as intelligence agencies, the scope for disclosure may be greater because of the broader nature of their powers.

Consent to disclosure

The discussion paper proposes inclusion in the tax legislation of a consent provision as an exception to the general rule that information cannot be disclosed similar to that provided for in the Privacy Act (s 14, IPP 11) (p 27).

As this exception would be included in the 'for other purposes' category in the information framework at chapter 3.7, both the purpose for the disclosure and the information able to be disclosed would need to be more narrowly defined.

This approach is reflected in the examples provided at p 27 of the discussion paper which are quite limited in nature. However, the discussion paper recognises that incorporation of a consent provision 'would represent a significant broadening of the current [ATO] disclosure provisions'.

The Council notes and supports the proposal in the discussion paper that consent should be express, voluntary and informed. The Council considers that particular care will need to be taken to ensure that consent is express, voluntary and informed in circumstances where the disclosure of personal information may lead to more serious consequences for the individual.

A distinction may be drawn between the circumstances in which information was originally collected, that is, voluntarily or through coercive information-gathering powers. In the latter circumstances, again particular care will need to be taken to ensure that any consent to disclosure is express, voluntary and informed.

For a customer service organisation, it would seem necessary for information provided to be potentially available across a range of functions within the one organisation if customer service is to be of a high standard. Customers are likely to be perplexed if one section of an organisation is not aware of their dealings with another section.

The Council considers that similar considerations apply to information sought for monitoring purposes. Pooling of such information encourages efficiencies even across agencies and can be of benefit to both the collector and the provider of the information.

These examples serve to highlight another critical distinction – between information disclosed for service provision or monitoring purposes and information disclosed for law enforcement or intelligence purposes or to regulatory agencies in the exercise of their coercive investigative powers. In the first two situations, benefit to the individual is clearly a factor that would not apply in the latter.

Training

The Council stresses the need for comprehensive training in this area, especially in relation to the interaction of the *Privacy Act 1988* and any standardised agency secrecy provisions. Legislative secrecy provisions can often be complex, can cause confusion and be difficult to apply in practice. Guidelines designed for use by non-legally trained officers may be a useful tool in dealing with any uncertainty that arises about the effect of, and interaction between, privacy and secrecy provisions.

Accountability

The Council also submits that it will be important for a range of accountability

mechanisms to be included in both the new legislation and internal Australian Tax Office procedures adopted to implement the new regime.

This should include maintenance of full documentary records being of any delegation of powers under the tax secrecy provisions and written records of the “reasonable grounds” for deciding to disclose personal information under the new proposed disclosures to law enforcement agencies and intelligence agencies.

The Council also recommends development of standardised procedures for the storage of personal information and destruction protocols.

The Council would like to record its thanks for the opportunity to make a submission to the Review of Taxation Secrecy and Disclosure Provisions. I note that the Council is presently preparing for public release a draft report on agency coercive information-gathering powers. There are intersections in our draft report with some of the issues raised in the context of the discussion paper. We would be happy to speak with you further about our work in this area if you consider that it would be of assistance to you.

Yours sincerely

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President