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General Manager
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Email: confidentiality@treasury.gov.au

Dear Sir

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

The Taxation Institute of Australia ('Taxation Institute') is pleased to provide its attached comments in response to the Treasury's request for submissions on the exposure draft *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* and the accompanying Explanatory Material released for public comment on 13 March 2009.

The Taxation Institute welcomes the consolidation and standardisation of the current secrecy and disclosure provisions into the *Taxation Administration Act 1953* (**"TAA"**). We agree with the overriding principle, as set out in the Guide to, and Objects of, proposed Division 355, that the confidentiality of taxpayer information should be tightly protected, and disclosure of such information should be permitted only in specified circumstances and only where the public benefit of such disclosure outweighs the taxpayer's privacy interests. However, in relation to the proposed provisions set out in the Exposure Draft, the Taxation Institute has a number of comments, which are set out in our submission for your consideration. Unless otherwise indicated, all legislative references are to the proposed amendments to Schedule 1 of the TAA set out in the Exposure Draft.

If you would like to meet with representatives from the Taxation Institute or require any further information in respect of our submission, please contact the Taxation Institute's Senior Tax counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours faithfully

Joan Roberts
President

Submission by the Taxation Institute of Australia respect of the exposure draft *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* and the accompanying Explanatory Material

1. SUMMARY

Set out below is a summary of the Taxation Institute's key submissions in respect of the exposure draft *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009* ('Exposure Draft') and the accompanying Explanatory Material ('EM'):

- the preservation of rights to disclosure or access protected information provided for in other legislation should be explicitly stated in an operative provision of the *Taxation Administration Act 1953* ('TAA');

- the definition of protected information should be clarified to ensure that it encompasses certain types of information that is in the interests of taxpayers to be kept confidential;

- the EM should confirm by way of explanation and example that disclosure by a "covered entity" of information received from a taxation officer is not an offence under the proposed provisions;

- an exception to the offence provisions for disclosure of protected information that is publicly available should only be available where the taxation officer or other disclosing entity obtained the protected information from a public source;

- the EM should more fully explain the specific exceptions relating to disclosure in the course of performing a taxation officer's duties;

- disclosure to an entity other than a Minister in connection with the determination or administration of an ex gratia payment should not be permitted;

- Taxation officers should not be permitted to disclose protected information for the purpose of the design or amendment of a taxation law;

- amendments should be made to clarify the disclosures relating to Ministerial responses;

- a disclosure to a Parliamentary committee should only be permitted where the relevant committee compels the provision of that information and only in circumstances where that information will subsequently be afforded parliamentary privilege;

- the Taxation Institute does not support the proposed permitting of disclosure to the Australian Securities and Investments Commission (ASIC) for the purpose of enforcing laws imposing pecuniary penalties or creating an offence;

- permitted disclosures to ASIC for the purpose of administering of Chapter 7 of the *Corporations Act 2001* and Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* should be restricted to disclosure that would have been permitted under section 16 of the *Income Tax Assessment Act 1936* (1936 Act), that is, as the provisions of those Acts relate to superannuation entities and replace provisions of the *Superannuation Industry (Supervision) Act 1993*; and

- on-disclosure of protected information be strictly limited to the original purpose stated explicitly in proposed Sub-division 355-B or in other circumstances explicitly provided for in the legislation;

- on-disclosure permitted by a Royal Commission should not be expanded beyond that currently provided for in section 16 of the 1936 Act;

- the term "otherwise makes use of" protected information as that term is used in the offence provision of relating to protected information unlawfully obtained should be clarified in the EM;

- injunctive relief should be available on the application of any person, and not only the Commissioner in order to ensure a consistent approach to the manner in which taxpayer information under the proposed provisions and the *Privacy Act 1998* (**Privacy Act**) are protected; and

- in light of the decision in *Hartnell v Commissioner of Taxation (No 1)* [2009] FCA 230 (13 March 2009) the legislation needs to limit third party access to confidential tax “materials” in Federal Court matters where that information would be otherwise restricted from disclosure.

The above submissions are considered in more detail below.

2. DETAILED COMMENTS

2.1 Scope of proposed amendments

The Note to the Guide to proposed Division 355 indicates that disclosure under certain other Acts is intended to be preserved, unaffected by the introduction of the proposed provisions.

As a general rule, a later statute will impliedly repeal an earlier statue where they cannot stand together (*Goodwin v Phillips* (1908) 7 CLR 1; *Butler v A-G (Vic)* (1961) 106 CLR 268). Further, a specific statutory provision will prevail over a general provision in an earlier statute where there is an inconsistency (*Smith v R* (1994) 181 CLR 338).

On this basis, if the intention of the legislature is to preserve the operation of certain provisions outside of the TAA, this should be provided for explicitly by way of an operative provision. The nature of the disclosures under the provisions so covered should also be explained in the EM where it addresses that operative provision.

2.2 Definitional provisions

The definition of "protected information" should be clarified in a number of respects:

- is it intended that paragraph (a) refer to information that was disclosed by or obtained ***from an entity*** (*being the entity referred to in paragraph (b) and (c)*) ***or another entity*** (*in either case, the "information provider"*) under or for the purposes of a law that was a taxation law when the information was disclosed ***by*** or obtained ***from the information provider***? If so, paragraph (a) should be drafted to provide clarity;

- information in relation action being taken by the Australian Taxation Office (ATO) in relation to a taxpayer should be considered to be within the scope of paragraph (a). That is, the fact that the ATO is conducting, or intends to conduct, an audit, review or investigation of an entity, should be considered information that "obtained under or for the purposes of a [taxation] law", and this should be clarified in the legislation or EM;

- under the definition, information will only be protected if it identifies an entity and relates to the affairs of that same entity. The fact that the ATO has taken, or intendeds to take, action in relation to one entity, in carrying out its duties in respect of the affairs of another, should also constitute protected information. For example, the fact that the ATO has issued or intends to issue a section 264 notice to A Co requesting information in relation to the affairs of a class of entities (Class B), should constitute "protected information". The relevant information identifies only A Co but it is not clear whether this information would be information relating to the affairs of A Co or Class B.

- the legislation or EM should provide further guidance on when information is "reasonably capable of being used to identify" an entity. In this respect, example 2.10 of the EM gives an example of when it may be possible to identify a particular "haysnorkel" manufacturer. In our view, where membership of a class is limited, information relating to a class of entities, that identifies that class, should also constitute protected information, particularly in circumstances where disclosure could potentially affect all members of that class. However, we acknowledge that taxation officers should be given sufficient scope to discuss industry level information with industry participants and representative bodies.

In our view, the benefit of keeping confidential the information outlined above outweighs any public benefit that may arise as a result of its disclosure.

2.3 Offence Provisions

It will not be an offence under proposed section 355-20 for a taxation officer to disclose protected information to an entity that is a "covered entity" as defined in proposed subsection 355-20(2).

It is our interpretation of the proposed provisions that the disclosure by a covered entity of the relevant protected information will not be an offence under either of proposed Subdivision 355-C or Subdivision 355-D on the basis that the protected information was not obtained under an exception in Subdivision 355-B or 355-C or as a result of a breach under either of those Subdivisions.

In these circumstances, disclosure by the covered entity will not give rise to criminal sanctions in accordance with the proposed provisions, and the primary entity's remedy as against the covered entity is to be found in the general law.

It is the view of the Taxation Institute that this is the correct approach and should be adopted in preference to such disclosure being treated as an offence in circumstances where the covered entity would also be subject to sanctions for breaching their duty in acting as such.

If this is the intention and correct interpretation of the proposed provisions, this should be confirmed and explained, including by way of an example, in Chapter 3 of the EM to the proposed provisions.

2.4 Publicly Available Information

Pursuant to the Exposure Draft, it will not be an offence for an entity to disclose protected information, provided that information was lawfully available to the public. This is the case notwithstanding the disclosing entity may not have obtained the information from such a source.

The Taxation Institute submits that this is not an appropriate extension of the current provisions found in section 16 of the *Income Tax Assessment Act 1936* **("1936 Act").**

By way of example, if a newspaper publishes information obtained unlawfully from a taxation officer (Taxation Officer A), each of the newspaper and Taxation Officer A will have committed an offence under the proposed provisions. However, another taxation officer (Taxation Officer B) who subsequently discloses the same information will not be guilty of an offence, purely by virtue of the fact of the committal of the offences by Taxation Officer A and the newspaper. Further, it is not necessary under the proposed provisions for Taxation Officer B to be aware of the newspaper article or its contents.

In our view, this is not an appropriate outcome. A taxation officer is placed in a privileged position by virtue of their employment. The information obtained and held by taxation officers in the course of carrying out their duties as such should be protected as confidential and disclosed only in carrying out those duties and in additional specified circumstances. A taxation officer should not be permitted to disclose information obtained in the course of their duties merely because that information is also publicly available. Limiting permitted disclosures to information obtained by the taxation officer from publicly available sources recognises the importance of this principle.

Looked at in a slightly different way, the second disclosure increases the extent of disclosure in circumstances where this should not be permitted to happen.

As a result, we submit that the exception contained in proposed sections 355-40 and 355-170 be amended to refer to information lawfully obtained by the taxation officer from public sources.

2.5 Disclosure in Performing Duties

Item 5 of the table in proposed subsection 355-45(2) effectively permits the disclosure of protected information to any entity for the purpose of determining the making of, or administering, an ex gratia payment. Paragraph 5.22 of the EM and the following example 5.6 refer to the Prime Minister and Cabinet determining such payments.

Given proposed section 355-60(1) (which states that the only permitted disclosures to Ministers are those set out in proposed section 355-40 and 355-55), the permitted disclosure under item 5 in proposed subsection 355-55(1), and the fact that on-disclosure is permitted where that is in accordance with the original disclosure, disclosure to any other entity should not be necessary and the item should therefore be deleted.

If it is considered that disclosures to an entity other than a Minister is necessary, the EM should be amended to remove example 5.6 and replace this example with an example of protected information being provided to another entity that is administering an ex gratia payment.

Further, a disclosure is permitted in accordance with this item only where the purpose of the disclosure is determining or administering the payment "in connection with administering a taxation law". At present, paragraph 5.22 of the EM states that "While disclosures made by a taxation officer fulfilling this function [of administering such payments] are not strictly for the purpose of administering a taxation law, they are still within that taxation officer's duties." If the permitting of disclosure in these circumstances is to be retained, paragraph 5.22 of the EM should explain this disclosure more fully.

Item 7 of the table in proposed subsection 355-45(2) permits the disclosure of protected information for the purpose of designing or amending of taxation laws. In our view, 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, from which the identity of a particular taxpayer is not capable of being determined, should be sufficient for this purpose.

Where information relating to the affairs of a particular taxpayer is available for the legislature, compliance with disclosure obligations of taxpayers may be negatively affected. A taxpayer should not be concerned that confidential information provided by it to the ATO, in compliance with their obligations as such, may be used to draft legislation in a fashion which may target that particular taxpayer. The Taxation Institute submits that this item should be deleted.

2.6 Disclosure to Ministers

Item 2 in proposed subsection 355-55(1) should be amended to clarify that the purpose of the disclosure is to allow the Minister to respond to the entity directly by amending paragraph (b) to read: "is for the purpose of enabling the Minister to respond to the entity in relation to a representation made by the entity to either: (i) the Minister; or (ii) another member of a House of the Parliament."

We understand this to be the intention from a reading of the EM to the proposed provisions.

Item 5 in proposed subsection 355-55(1) should be amended such that the disclosure is permitted only where the disclosure relates to the administration of a tax law.

A disclosure under proposed subsection 355-55(2) should only be permitted where the relevant committee compels the provision of that information and only in circumstances where that information will subsequently be afforded parliamentary privilege. Proposed subsection 355-55(2) should be amended accordingly.

2.7 Disclosure to Treasury for the purposes of revenue forecasting

Treasury and other bodies should not have access to information for this purpose that is capable of identifying any particular taxpayer. Aggregate data, from which the identity of a particular taxpayer is not capable of being determined, should be sufficient for this purpose. Where information relating to the affairs of a particular taxpayer is available for the legislature, compliance with disclosure obligations of taxpayers may be negatively affected.

2.8 New disclosures for the purposes of other laws

The Taxation Institute is concerned by the proposed permitting of disclosure to ASIC for the purpose of enforcing laws imposing pecuniary penalties or creating an offence as set out in item 1 of table 3 in proposed subsection 355-65(1). The Taxation Institute submits that this proposed item be deleted, on the basis that it may increase taxpayer reticence to provide information to the ATO, in its current form is too broad, and is covered in a more appropriate manner by proposed subsection 355-70.

The proposed permitting of disclosure to ASIC for the purpose of administering Chapter 7 of the *Corporations Act 2001* and Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* is far broader than previously provided. Further it is broader than that described in the EM to the proposed provisions.

The EM, at paragraphs 5.51 and 5.52 justifies this additional disclosure on the basis that ASIC has regulatory responsibilities for superannuation entities, and that a part of its role in relation to superannuation entities has moved to these other Acts. This is misleading and does not disclose the fact that the inclusion of these items in the table would broaden the disclosure that may be permitted to be made to ASIC quite dramatically.

Chapter 7 of the *Corporations Act 2001* relates to Financial Services and Markets. This section of the law covers all types of financial products, Australian Financial Services Licenses, clearing and settlement facilities, and financial services disclosure. This is far broader than the mere regulation of superannuation entities.

The Taxation Institute agrees with the inclusion of paragraphs (b) and (c) in item 3 of table 3 of proposed subsection 355-65(1), however its operation should be limited such that the disclosure must relate to ASICs administration of the provisions in those Acts that were previously located in the *Superannuation Industry (Supervision) Act 1993*. That is, the scope of the disclosure must not be any broader than provided under section 16 of the 1936 Act. Any wider operation of this proposed item should be specifically excluded.

2.9 Authorised On-disclosure

In the opinion of the Taxation Institute, on-disclosure of protected information should be authorised only where that on-disclosure is made for the original purpose or is in circumstances explicitly provided for in the legislation. The test of "in connection with" and original purpose as currently drafted is too broad and extends the ability for protected information to be disclosed in circumstances that are inappropriate and un-regulated.

In particular, any disclosure to an entity, court or tribunal should be specified in the legislation. Allowing protected information to be disclosed to a court or tribunal for the purpose of criminal or civil proceedings that are "related to" the original purpose is an unacceptable extension of the current permitted disclosures.

This issue is exacerbated when this exception provision can be applied multiple times. That is, if a taxation officer discloses protected information to Entity A for an original purpose, Entity A will be permitted to disclose the protected information to Entity B for a purpose that is "connected with" that original purpose (purpose 2). Entity B will then be permitted to disclose the information to Entity C for a purpose "connected with" purpose 2 (purpose 3) and Entity C may on-disclose the protected information for yet another purpose "connected with" purpose 3 (purpose 4). Purpose 4 may have therefore only a remote connection with the original purpose for the disclosure. Further, the information may then be provided to a court in the bringing of criminal or civil proceedings that "relate to" purpose 4.

Allowing on-disclosure in these circumstances can result in protected information being disseminated in an inappropriate manner, to those who may use that information in a fashion not envisaged by the legislature.

In order to adequately protect taxpayer confidentiality, and encourage disclosure and compliance with taxation laws, the Taxation Institute submits that any on-disclosure of protected information be strictly limited to the original purpose stated explicitly in proposed Sub-division 355-B. Where further disclosure is considered necessary, provision should be made within the legislation in an explicit manner and not by an expansive and general provision in terms of disclosures that are "in connection with" or "relate to" the original disclosure.

Similarly, the Taxation Institute considers it inappropriate to allow a taskforce to on-disclose protected information obtained by it for one purpose to another entity for an unrelated purpose of the taskforce. This is primarily due to the fact that a taskforce, its purposes, and the agencies of the taskforce can all be prescribed by regulation rather than enacted as legislation.

Although the Taxation Institute accepts that the purpose in providing the original exception in proposed Sub-division 355-B is to allow for information to be obtained and action to be taken quickly where necessary, it does not consider that this should be expanded to allow on-disclosure of that protected information in an unregulated manner.

In particular, the Taxation Institute is concerned that this will allow entities to whom a disclosure could not be made under Sub-division B, to obtain access to information through the making of a regulation and the passing of the protected information through a taskforce.

The Taxation Institute is of the view that permitted disclosures should be set out explicitly within the terms of the legislation and taxpayers should have confidence that the information they provide to the ATO will be kept in the strictest confidence, and disclosed only in a limited number of specified circumstances. The provisions allowing for on disclosure for connected, related and "other" purposes defeats the confidence the taxpayers have in the protection of their personal information and potentially the compliance of taxpayers both generally and in specific circumstances with the taxation system.

The circumstances in which a Royal Commission can disclose information under section 6P of the Royal Commission Act are broader than those currently set out in section 16(4A) of the 1936 Act. Proposed section 355-185 should therefore be drafted in a manner that reflects the current permitted disclosures in section 16 of the 1936 Act.

2.10 Disclosure of information that has been unlawfully obtained

The Taxation Institute view is that a disclosure by implication or juxtaposition should also be covered by the offence set out in proposed section 355-265. It is possible, in interpreting this proposed provision, that a publication of an article in a newspaper on a no-names basis, juxtaposed by a photograph of a particular taxpayer or executive of a corporate taxpayer, would constitute the "use of" protected information and would constitute an offence if obtained by a newspaper unlawfully. Chapter 6 of the EM should include an explanation of the term "otherwise

makes use of", and confirm, including by way of example that an offence would be committed in the circumstances described.

2.11 Other matters - Injunctive relief

Proposed subsection 355-330 purports to replicate the injunction provisions in section 98 of the Privacy Act. However, unlike that section which allows for the granting of an injunction "on the application of the Commissioner ***or any other person***", proposed section 355-330 restricts the application to the Commissioner only.

Clearly the relevant taxpayer concerned has an interest in preventing disclosure of protected information relating to them, and should not be reliant upon the Commissioner to bring an application in order to prevent publication or other disclosure of such information. This is so particularly in circumstances where the disclosure may be being made by a taxation officer.

Section 355-330 should be amended such that any person may seek and be granted an injunction to prevent unauthorised disclosure and the commission of an offence under the proposed provisions in order to accurately replicate the Privacy Act provisions and ensure a consistent approach to the manner in which taxpayer information under the proposed provisions and the Privacy Act are protected.

2.12 Limiting third party access to Court held confidential tax “materials”

The recent case of *Hartnell v Commissioner of Taxation (No 1)* [2009] FCA 230 (13 March 2009) confirms that under the Federal Court rules access will normally be made available to the material contained in the court’s case file even if it is confidential and the person seeking the material has no standing in the matter (eg a journalist). Although the Court recognised the importance of the need to protect Taxation File Numbers, it did not apply the same concern to most of the material that would that would otherwise have been kept confidential by the ATO. Such scope for disclosure does raise issues about the taxpayer’s ability to mount their best case.

Therefore, in light of the decision in *Hartnell* the legislation needs to limit third party access to confidential tax “materials” in Federal Court matters where that information would be otherwise restricted from disclosure.