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Discussion Paper
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INTRODUCTION

Scope of the Review

As part of its tax policy role, Treasury reviews tax legislation to improve the consistency and application of Australia’s tax laws.

This Review of Taxation Secrecy and Disclosure Provisions (the Review) examines the application of the various secrecy and disclosure provisions in Australia’s tax laws. The objective of the Review is to develop proposals to improve the application of these provisions, thereby increasing certainty for taxpayers and for users of tax information.

This discussion paper outlines an approach to standardising the various secrecy and disclosure provisions in the tax laws into a new framework in a single piece of legislation. The proposed standardisation would affirm the high level of protection given to taxpayer information by providing a framework to identify appropriate disclosure and use of protected information.

Although standardising the disparate rules is likely to mean some changes, the Review does not seek to compromise the protection of taxpayer information, nor does it seek to restrict the disclosures of protected information currently allowed under legislation. To improve the tax secrecy and disclosure provisions the proposed framework seeks to determine the appropriate level of disclosure that balances the protection of taxpayer information and the efficient administration of legislation.

The discussion paper recognises that a number of amendments have been made to the tax secrecy provisions in recent years to allow tax information to be disclosed to Australian Government departments and agencies. In most cases, the purpose of these disclosures is to assist in the administration of legislation. This paper also presents some potential new disclosures for consideration — disclosure to law enforcement and intelligence agencies, the Commissioner of Taxation as an employer, and third parties where the taxpayer consents or where a duty is owed to them.

Review process

Treasury has prepared this discussion paper in consultation with other Australian Government departments and agencies. The Australian Taxation Office (the Tax Office) assisted in the preparation of the paper, providing information about the administration and interpretation of the current tax secrecy and disclosure provisions.
Significant consultation is an important part of this review, as many stakeholders have an interest in the protection and disclosure of tax information. Stakeholders include Australian and state government departments and agencies, the Privacy Commissioner, privacy interest groups, and individuals and businesses whose tax information is held by the Tax Office.

Treasury welcomes submissions by 29 September 2006 on the ideas in this discussion paper, or any matters that may improve the operation of the tax secrecy and disclosure provisions.

Submissions
Post submissions to:
Tax System Review Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email submissions to:
taxationsecrecy@treasury.gov.au

Closing date for submissions is 29 September 2006.

If you do not want your submission to be made public please indicate that clearly.

Visit the Treasury website for additional information:
www.treasury.gov.au

Structure of the discussion paper
Chapter 1 provides background on the current tax secrecy and disclosure provisions and discusses the rationale for the importance of protecting taxpayer information. The discussion addresses circumstances where disclosure of information may be necessary.

Chapter 2 outlines changes that have been made to the tax secrecy and disclosure provisions within the context of other changes to the tax system, such as internationalisation and the increasing use of cross-agency taskforces. This Chapter explores the merits of standardising the various tax secrecy and disclosure provisions into a single piece of legislation.
Chapter 3 introduces key principles to guide the standardisation of tax secrecy and disclosure provisions. These principles address the information to be protected, on-disclosure, and penalties for unauthorised disclosure. This Chapter outlines the advantages and challenges associated with a standardised approach and also introduces a framework to guide and structure existing and future disclosures of taxpayer information.

Chapter 4 categorises existing disclosures according to the framework outlined in Chapter 3.

Chapter 5 identifies possible new disclosures for consideration, including the introduction of a consent provision and the possibility of additional disclosures to law enforcement agencies and third parties.

At the end of the discussion paper there is a list of questions which may be used as a guide when providing comments. Submissions need not be confined to addressing these questions.
CHAPTER 1: BACKGROUND TO THE TAX SECRECY AND DISCLOSURE PROVISIONS

Every year, Australian taxpayers provide a significant amount of information to the Tax Office about their income, expenditures, and business affairs. Taxpayers provide this information expecting it to be kept confidential. Compliance with tax laws is more likely if taxpayers know that the information they provide can only be used for limited purposes.

In order to maintain taxpayer privacy and confidence, the secrecy provisions in Australia’s tax legislation impose strict obligations on tax officers and others who receive tax information.

The most widely known secrecy and disclosure provision is section 16 of the *Income Tax Assessment Act 1936* (ITAA36).1 This provision has been present in the ITAA36 since 1936. However, secrecy and disclosure provisions exist in many different forms in many different tax Acts. The tax secrecy and disclosure provisions considered in this review are listed at Appendix A.

1.1 Balancing taxpayer protection with competing government requirements

The current secrecy and disclosure provisions seek to balance two important but competing interests. On one side, are the important interests of taxpayers having their personal information protected. On the other side, are the information requirements of government in delivering entitlements and in meeting law enforcement and integrity provisions. Government recognises that compliance with tax laws could be adversely affected if taxpayers thought their personal information could be disclosed easily. As such, tax secrecy provisions contain a general rule that officers cannot disclose information that allows for a taxpayer to be identified. Information in the form of aggregate, non-identifiable data does not necessarily require the same protection.

Exceptions to the obligation to protect taxpayer information are necessary because information collected by the Tax Office can be vital to other arms of government in performing their functions properly. For example, existing tax disclosure provisions allow specified departments and agencies to ensure that information received by them and the

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1 Subsection 16(2) of the ITAA36 states that ‘an officer shall not either directly or indirectly, either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer’.
Tax Office is accurate. In other circumstances, specific disclosure provisions allow bodies such as law enforcement agencies to use information collected by the Tax Office for purposes such as particular criminal investigations.

The Plain English Guidelines to Information Privacy Principles issued by the Office of the Privacy Commissioner (OPC) recognise that 'fair and effective administration of government programs would be impossible' if exceptions did not allow for the use and disclosure of personal information in specific situations.²

Disclosure provisions may be justified where the public benefit derived from the lawful disclosure of relevant information outweighs concerns about individuals' privacy. For example, the benefits that the public may derive from certain law enforcement operations and investigations may justify a decrease in taxpayer privacy. Chapter 3 discusses the need to justify disclosures on the basis of public interest and/or efficiency of government operations.

Tax secrecy provisions impose criminal sanctions for unlawful disclosure of information. These sanctions apply to the tax officer or any other person who legally receives and then unlawfully discloses taxpayer information.

1.2 Other secrecy provisions

In addition to the secrecy and disclosure provisions contained in tax legislation, protection of taxpayer information is also provided by the Privacy Act 1988, the OPC and by the Tax Office’s administrative procedures (see Appendix B). Other cross-portfolio legislation such as the Freedom of Information Act 1982, the Public Service Act 1999, the Crimes Act 1914 and the Archives Act 1983 also regulate the use of information. While it is important to acknowledge this broader regulatory framework for information, the focus of this paper is the additional protection that tax legislation gives to taxpayer information held by the Tax Office.

Most countries recognise the importance of protecting taxpayer information. Tax law secrecy and disclosure provisions are used to protect taxpayer information in most Organisation for Economic Co-operation and Development (OECD) member countries. Some OECD countries use other legislation, such as data protection provisions to achieve the same result. Several countries (including Canada, New Zealand and the United Kingdom) have similar tax secrecy and disclosure laws to Australia. A brief summary of those countries’ secrecy and disclosure laws is at Appendix C.
CHAPTER 2: COMPLEXITY AND CHANGE IN TAX SECRECY AND DISCLOSURE PROVISIONS

2.1 Development of the current secrecy and disclosure provisions

Numerous amendments have been made to Australian tax law secrecy and disclosure provisions since the first secrecy provisions were enacted. Such amendments have generally provided limited additional authorisations for the disclosure of taxpayer information in tightly controlled ways.¹

Whilst adhering to the general intent of Parliament to maintain taxpayer privacy while facilitating government business, successive amendments to the secrecy and disclosure provisions have not been consistent in their drafting. Some secrecy provisions have been modelled on earlier provisions, while others have been drafted as independent provisions.²

These ad hoc amendments have contributed to potentially inconsistent outcomes, complicated the secrecy and disclosure provisions, and increased the volume of tax law. The result is complexity and uncertainty for tax officers, other government officers and departments, tax agents and taxpayers. Uncertainty raises the risk that the protection originally intended for the taxpayer is not delivered or is preserved too strictly.

Duplication of the secrecy provisions in various Acts is common with respect to basic principles, such as the general rule to protect taxpayer information.³ Replication of similar rules in differing forms adds to the volume of tax law and adds unnecessary complexity to what should, in principle, be generic conditions.

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¹ For example, amendments that allow taxpayer information to be provided to various government departments for narrowly defined purposes, generally closely connected to their core functions. Section 16 of the ITAA36 has been amended numerous times to allow specific disclosures of protected information. For example, paragraph 16(4)(fb) was inserted in 1997 to allow disclosure to the Health Insurance Commission for the purpose of administration of the Private Health Insurance Incentives Act 1997. Since insertion, this paragraph has been amended twice.

² For example, section 53 of the Superannuation (Government Co-contribution for Low Income Earners) Act 2003 is similar to section 32 of the Superannuation Contributions Tax (Assessment and Collection) Act 1997, but quite different to section 16 of the ITAA36. Appendix A contains a list of the secrecy and disclosure provisions considered in this review.

³ For example, subsection 16(2) of the ITAA36, subsection 30(2) of the A New Tax System (Australian Business Number) Act 1999, subsection 16(2) of the Child Support (Registration and Collection) Act 1988, and subsection 159(2) of the Excise Act 1901 all provide protection for taxpayer information.
Another area of inconsistency relates to sanctions for misuse and unauthorised disclosure of information.

2.2 Changes affecting the tax system

As technology has advanced and new taxes and payments have been introduced, the volume and type of taxpayer information held by the Tax Office has changed.

Some changes have resulted from increased interaction between the tax system and the welfare system. Today, the Tax Office not only collects revenue, but also delivers government payments and incentives such as the Family Tax Benefit and the child care tax rebate. Income tests for many of these payments are based on taxable income. New information flows have been required to make these payments, establish entitlements and protect public finances.

Further changes to information flows have been necessitated by increased interaction between federal, state and territory government departments and agencies in cross-agency initiatives. As the tax system is instrumental in many government programmes and cross-portfolio initiatives, new disclosures of tax information have been considered. One example is the administration of taxation concessions to help the Australian film industry, which has necessitated information exchange between the Tax Office and the Department of Communications, Information Technology and the Arts.

Globalisation has also changed aspects of the tax system. As all levels of government adapt to internationalisation, new concerns such as identity fraud and terrorism affect the tax system, government objectives and necessary information exchange.

2.3 Standardisation

The simplest and most effective way to address the complexity and uncertainty caused by the existing disparate tax secrecy and disclosure provisions would be to standardise them into a single piece of clear legislation. Standardisation should apply to the secrecy and disclosure provisions across all laws administered by the Commissioner of Taxation including superannuation, excise, Australian Business Number and Tax File Number disclosures.

6 For example, breaching section 159 of the Excise Act 1901 can attract a penalty of $55,000 (500 penalty units) or imprisonment for two years, whereas a breach of section 8XB of the Taxation Administration Act 1953 (TAA) can attract a penalty of $10,000 and/or imprisonment for two years.
Proposal

The various tax law secrecy and disclosure provisions should be standardised into a single piece of legislation (such as the *Taxation Administration Act 1953 (TAA)*) to:

- maintain the principle of tightly protecting taxpayer information;
- clearly describe what information is to be protected and by whom;
- identify 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
- provide a uniform system of penalties for all tax secrecy offences.

Standardisation would encapsulate the substance of existing tax secrecy provisions and broadly retain existing disclosures. There is no intent to alter the protections under the *Data-matching Program (Assistance and Tax) Act 1990*, the *Freedom of Information Act 1982*, the *Crimes Act 1914* or other cross-portfolio legislation such as the *Public Service Act 1999* and the *Archives Act 1983*.

Chapter 5 presents possible new categories of disclosure of taxpayer information. These disclosures should be considered separately to the proposed standardisation of the existing tax secrecy and disclosure provisions.
CHAPTER 3: PRINCIPLES GOVERNING THE STANDARDISATION OF SECRECY AND DISCLOSURE LAWS

3.1 Protection of taxpayer information

Principle 1:
Information that identifies individual taxpayers should be tightly protected.

The current secrecy and disclosure provisions in tax legislation are based on the principle that information which identifies individual taxpayers’ affairs are confidential. The provisions begin with the general rule that officers cannot disclose protected taxpayer information, and then provide for certain exceptions to this rule. Compliance with tax laws could be adversely affected if taxpayers thought that their information could be disclosed easily. Taxpayers are obliged by law to provide their personal information to the Tax Office. In turn, the Tax Office is obliged by law to protect that information.

The standardisation of the secrecy and disclosure provisions would affirm the central principle of protecting the confidentiality of taxpayer information. However, there is no intention to remove existing legislative exceptions allowing for disclosure of taxpayer information under certain circumstances or for the purposes of certain Acts. Therefore, standardisation would generally preserve the existing common exceptions. To the extent that provisions are not common across different Acts, standardising may involve some minor change to disclosure rules.

3.2 Information to be protected

Principle 2:
Secrecy provisions should clearly describe the information to be protected and the circumstances in which particular information can be disclosed.

Tax secrecy and disclosure provisions should indicate clearly what information is to be protected. At present, provisions prohibiting disclosure of taxpayer information can be said to refer to three limbs of a single test (or possibly three distinct tests). These limbs are:

- information relating to the affairs of another person;
• information obtained in the course of official employment; and
• information disclosed or obtained under a particular law or laws.

Currently, the three limbs are drafted inconsistently in various tax laws. Different descriptions of protected information allow for potentially different outcomes and tend to obscure the underlying policy that information about a taxpayer should be tightly protected. For instance, the term ‘information obtained in the course of employment’ could be interpreted narrowly to cover only information acquired by legitimate means while performing duties’, whereas the policy basis should be broader.

It is proposed that a standard rule would clarify the meaning of these limbs across all tax legislation. The standardised meaning of protected information would incorporate all three aspects of the test described above. The meaning would also generally be consistent with the definition of personal information in subsection 6(1) of the Privacy Act 1988. This would provide comprehensive protection to taxpayer information.

Protected information' would include (but not be limited to) Tax File Numbers, personal details, and information provided to the Tax Office via income tax returns, Business Activity Statements and in response to requests. Any information that allows a taxpayer to be identified or recognised would be protected. This is similar to Canada’s definition of taxpayer information (see Appendix C) which excludes information that does not reveal the identity of the taxpayer to whom it relates.

3.2.1 Information that need not be protected

The tax secrecy and disclosure provisions need not protect information that is:

• already lawfully available to the public from other sources (and hence, is in the public domain); or
• non-identifiable data.

Publicly available information

As explained above, the tax secrecy and disclosure rules protect information obtained by the Commissioner in order to maintain the public confidence. However, these rules need

7 This could theoretically mean that if a taxpayer's information was unlawfully obtained by an officer, then that taxpayer would not receive the full protection of the tax secrecy provisions.

8 The term 'protected information' refers to information that is protected by the tax secrecy and disclosure provisions, rather than information which is subject to the 'protected' classification for the purposes of the Australian Government's Protective Security Manual 2005.
not protect tax information that is already in the public domain. For example, using only information from a public source such as a law court, the Tax Office could publicise the details of a conviction for tax offences handed down in an open court. Similarly, some information held on the Australian Business Register is publicly available and would not require protection under the tax secrecy provisions. While the information may have been obtained in the course of administering the tax laws, it is available to the public from other sources. Thus, no purpose is served by restricting the Commissioner of Taxation from disclosing it.

While the current formulation of most secrecy and disclosure provisions allows such disclosures (according to government legal advice), this has not always been clear. While it is reasonable that disclosure of information that is already publicly available should not be prohibited, there is no policy reason why the Tax Office should be obliged to bear the costs associated with providing information that is already publicly available for the convenience of another organisation. As disclosures of this kind largely serve the purposes of the body requesting the information and not the Tax Office, the interested body should bear any costs associated with the provision of such information by the Tax Office.

### Non-identifiable data

Tax secrecy and disclosure provisions need not protect taxpayer information which is in the form of non-identifiable data, for example, summary data or a unit record file with all identifiers removed. Taxpayer confidence cannot be undermined by releasing this type of information. Concerns about privacy still may arise where someone other than the Tax Office has the technological ability, through access to advanced data-matching programmes, to identify individuals or companies. Disclosure of non-identifiable data is invaluable for research purposes and policy development, however it can impose costs on the Tax Office. Therefore, access to non-identifiable data should be principally restricted to government departments and agencies that would utilise the information in the public interest, as the costs of such disclosures are borne by the Tax Office and thus the public. Alternatively, access could be extended to other bodies and organisations under a user pays approach. This would be similar to the model used by the Australian Bureau of Statistics (ABS).

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9 In 2001, the Government set up a taskforce to investigate claims that some barristers were misusing the law to avoid paying tax. The report, *The Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax*, recommended amending subsection 16(4) of the ITAA36 and section 3C of the TAA ‘to authorise the Commissioner of Taxation to provide publicly available information to prescribed industry or professional bodies’. The Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004 made the same recommendation.

10 Some summary data enters the public domain through Tax Office publications such as *Taxation Statistics* (the annual statistical overview of the income and tax status of Australian taxpayers) and the Annual Report.
where, for specific data requests, the ABS charges an amount equivalent to the overheads associated with providing the information.

### 3.3 Disclosures of taxpayer information need to be justified

**Principle 3:**

All disclosures of taxpayer information must be justified.

While taxpayer information should be tightly protected, there are some circumstances in which disclosure is necessary for the facilitation of fair and effective government administration, or because it is in the public interest.\(^{11}\) The existing disclosure provisions have grown in response to the needs of various government departments and agencies, particularly for the delivery of policy, programmes and benefits.

Section 29 of the *Privacy Act 1988* states that:

> the Privacy Commissioner shall have due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information (through the media and otherwise) and the recognition of the right of government and business to achieve their objectives in an efficient way.

The Privacy Commissioner considers the following matters when determining the balance between the public interest and individuals' privacy interests:

- the potential for the proposed act or practice to harm the interests of individuals;
- the extent to which the proposed act or practice is inconsistent with an individual's reasonable expectation of privacy;
- the nature of the public interest objectives served by the proposed interference with privacy;
- the impact on the public interest if the proposed act or practice is not permitted; and

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11 See Chapter 1.1.
Chapter 3: Principles governing the standardisation of secrecy and disclosure laws

- the need to balance the competing interests contained in section 29 of the *Privacy Act 1988* (this section is quoted in the text above).

Information Privacy Principle Guideline 38 provides a guide to considering the proposed use of disclosed information and the relevant public interest. The guideline requires an agency to establish that the use or disclosure of the information is ‘reasonably necessary’ to safeguard a public interest. Factors that would assist in determining what is ‘reasonably necessary’ include:

- whether 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.

3.4 Standardisation of secrecy and disclosure rules

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<th>Principle 4:</th>
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<tbody>
<tr>
<td>Secrecy and disclosure rules for tax information should be standardised and contained in a single Act.</td>
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Standardising the secrecy and disclosure rules for all tax laws would involve removing the existing secrecy and disclosure provisions from a wide variety of Acts and redrafting and centralising them. The logical and appropriate place for rules that apply to all taxes administered by the Commissioner of Taxation is the *TAA*.

Advantages of standardisation and centralisation include:

- reinforcing the high level of protection given to taxpayer information;
- producing a more transparent and certain tax law, which identifies disclosures and obligations more clearly;
- ensuring consistency in the application of secrecy and disclosure rules across all types of information collected by the Tax Office, whether for income tax, goods and services tax (GST), excise, superannuation or other taxes; and
- promoting consistency in the future development of secrecy rules.

However, the size and nature of a project to achieve a single set of rules would present some challenges.

- As the current secrecy provisions are not consistently worded, standardisation or consolidation would be likely to result in minor changes in some aspects of the law.
- If the provisions are not sufficiently standardised, the outcome could simply be a long, albeit consolidated, list of the current disparate secrecy provisions.
- Care would need to be taken to ensure that, if differences in the provisions have been deliberately enacted in response to different needs or policies, the new secrecy framework continues to fulfil those needs.

### 3.5 On-disclosure of information

<table>
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<th>Principle 5:</th>
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<td>A person who is given protected information under secrecy and disclosure provisions should also be subject to strict secrecy requirements.</td>
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A person or agency that receives protected information for particular purposes should be subject to strict secrecy obligations, otherwise the information is not securely protected. The on-disclosure of information should only be allowed where an exception in the secrecy provisions specifically authorises disclosure to another party.

This approach is generally consistent with Information Privacy Principle 11.3 which says that the recipient of disclosed information can only use or disclose that information for the purpose for which it was disclosed to them.

Restrictions on further disclosure need not apply to information that is not itself protected data. For example, the ABS receives taxpayer information for analysis that then may be summarised and published as part of ABS research. As discussed above, this form of summary data does not need to be protected.\(^{13}\)

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13 See Chapter 3.2.
3.6 Safeguards and penalties for disclosing information

**Principle 6:**

Penalties for unauthorised disclosure of protected information should be standardised.

Penalties are required to deter unauthorised disclosure of taxpayer information. These penalties need to be balanced with appropriate safeguards in the legislation, so persons who may disclose taxpayer information clearly understand the circumstances in which they can and cannot legally do so.

Currently, the maximum penalty for unauthorised disclosure of information under tax laws varies, but is usually $10,000 and/or two years imprisonment. This is a criminal penalty applied to the person who disclosed the information unlawfully.

Standardisation of the tax secrecy and disclosure provisions would require one maximum penalty (being a monetary fine or an imprisonment term) for all unauthorised disclosures, except where a departure is warranted.

To accord with current practices (A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers), a maximum imprisonment term would be maintained, and penalty units would be used to determine the monetary penalty. Section 4AA of the Crimes Act 1914 sets the current level of a penalty unit at $110. Subsection 4B(2) indicates that one month's gaol is equivalent to five penalty units. On this basis, by maintaining a penalty of two years imprisonment, a monetary penalty of 120 penalty units (currently $13,200) would apply.

The use of criminal penalties is more appropriate than the introduction of civil or administrative penalties for breaches of the secrecy and disclosure provisions, reflecting the seriousness with which legislators view such breaches. Although civil penalties may allow more flexibility while still imposing sufficient sanctions to ensure compliance, criminal penalties are used consistently in non-tax legislation to penalise breaches of secrecy obligations.

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14 For example, breaching section 159 of the Excise Act 1901 can attract a penalty of $55,000 (500 penalty units) or imprisonment for two years. Section 55 of the A New Tax System (Bonuses for Older Australians) Act 1999 imposes a penalty of imprisonment for two years, whereas a breach of section 8XB or 3C of the TAA, or section 5 of the Fringe Benefits Tax Assessment Act 1986 attract a penalty of $10,000 and/or imprisonment for two years.
3.7 Information disclosure framework

Principle 7:

A framework should guide to whom, and in what circumstances, protected taxpayer information may be disclosed.

To help standardise the secrecy exceptions, the framework outlined below can be used to organise existing and proposed disclosures. This framework demonstrates an approach to disclosures based on the degree of connection that the use of information has to the original use for which it was collected. The more remote the use of the information is from the reason it was originally collected means that more robust protection is required. This framework is illustrated as follows:

Figure 1: Information disclosure framework

The framework comprises a systematic categorisation of current tax information disclosure provisions; the four categories of disclosure included in the framework can accommodate all existing disclosures.

While it is unlikely that the framework, in this diagrammatic form, would be incorporated into the new operative provisions, it could guide the approach to disclosures and would contribute to the object of the standardisation.

3.7.1 Applying the framework

The framework would maintain protection of taxpayer information but still allow for the facilitation of government business and for disclosures which are demonstrably in the public interest. The further the use of the information is from the reason for which it was originally collected, the greater the level of justification required for the information
to be disclosed and the more precisely the circumstances of the disclosure would be described. Therefore, the further along the spectrum the proposed disclosure is, the stronger the public interest argument needs to be before disclosure can be justified.\textsuperscript{15}

For requests for access to taxpayer information which are closer to the reason for collection, the connection between the reason for disclosure and the reason for collection is stronger. These requests would be supported by relatively generic exceptions, in respect of disclosures of taxpayer information for the purposes of administration, maintenance and design of the tax laws.

A similar approach would apply to disclosure for the primary purpose of protecting public finances. An example of a disclosure under this category would be the provision of information to Centrelink to allow accurate payment of pensions, allowances and benefits.

With more remote uses of taxpayer information, allowable disclosures would need to be supported by secrecy exceptions which more narrowly define the purposes for which the tax information can be disclosed, and specify the amount or type of information allowed to be disclosed.

At the most remote end of the spectrum, a very specific description would be required, for example, disclosure to the Department of Immigration and Multicultural Affairs (DIMA) to assist in locating people who are unlawfully in Australia.\textsuperscript{16}

Existing disclosures to some government departments and agencies may fall under multiple categories of the framework.\textsuperscript{17} Chapter 4 discusses each category in greater detail.

\textsuperscript{15} See Chapter 1.1.
\textsuperscript{16} Paragraph 16(4)(hd) of the ITAA36.
\textsuperscript{17} For example, the current disclosure available to the Australian Customs Service (subsection 355-5(5) TAA) is not limited to a specific purpose or for a specific law. Under the new framework this disclosure would remain very broad and could fall into categories for the purposes of customs-related legislation and for the primary purpose of protecting public finances.
CHAPTER 4: DISCLOSURES OF TAXPAYER INFORMATION
UNDER THE INFORMATION DISCLOSURE FRAMEWORK

Organising existing disclosure provisions with reference to the information disclosure framework, it is possible to identify four classes of disclosure:

- disclosure for the purposes of the administration, design and maintenance of the tax laws;
- disclosure for the purpose of protecting public finances;
- disclosure for the purpose of other Commonwealth, state and territory laws; and
- disclosure for other specified purposes.

In each case, consideration would need to be given to whether the benefits to the public interest or the efficient administration of legislation outweighs the basic principle that tax information should not be disclosed.

4.1 For the purposes of the administration, design and maintenance of the tax laws

The following disclosures would be allowed under this category.

4.1.1 Disclosure in the course of an officer's duties

Current tax secrecy provisions allow disclosure in the 'course of duties of an officer'. However, the meaning of this term is uncertain and the term should be clarified.

The Solicitor-General has interpreted ‘course of duties of an officer’ to allow officers to disclose taxpayer information in some situations (such as to the trustee in bankruptcy of a particular taxpayer for the purpose of protecting the public revenue), but not others (such as the naming of serial bankrupts or participants in tax schemes). The Solicitor-General’s reasoning emphasises that the scope of disclosures allowed under the existing provisions is not necessarily evident. Disclosures have not been thought to be allowed in every case where the disclosure would enhance public confidence in the integrity of the tax system. Consequently, it is difficult for officers to be certain about what disclosures are legally authorised.
The new provisions would clarify the scope of the term ‘course of duties of an officer’ to include:

- disclosure to another person for the purposes of allowing or assisting that person to carry out their functions or duties under any tax law (for example, an officer may disclose protected information to a GST field officer to assist with their duties under the A New Tax System (Goods and Services Tax) Act 1999);

- disclosure to any party for the purpose of ensuring compliance with tax laws (for example, disclosure to an insolvency practitioner where a taxpayer has a debt due under taxation law and is under an insolvent administration);

- disclosure to Treasury for the purposes of providing advice to government on tax policy and law design;

- disclosure to a Tax Office contractor, such as a legal services provider or a debt collector, to enable them to provide services to the Tax Office;

- disclosure of information needed to identify a taxpayer in order to obtain additional information about that taxpayer from a third party such as a bank or employer; and

- disclosure to the Commonwealth Director of Public Prosecutions to enable the prosecution of tax-related offences.

The current tax secrecy provisions provide various definitions of an ‘officer’. The term ‘officer’ (as it applies to the secrecy provisions) would need to be standardised. A standard definition could be modelled on the definition in subsection 16(1) of the ITAA36:

`officer means a person who is or has been appointed or employed by the Commonwealth or by a State, and who by reason of that appointment or employment, or in the course of that employment, may acquire or has acquired information respecting the affairs of any other person, disclosed or obtained under the provisions of this Act or of any previous law of the Commonwealth relating to income tax.`

Departures from this definition may be necessary in some circumstances. Treasury is examining the various definitions under other Acts to identify those circumstances.

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18 For example the term ‘entrusted person’ is also used in tax secrecy and disclosure provisions to refer to an officer.
4.1.2 Disclosure to ministers in specified cases

Currently, the various tax secrecy and disclosure provisions can result in different degrees of disclosure to ministers according to the type of tax involved. Furthermore, the secrecy and disclosure provisions do not expressly prevent a tax officer from disclosing tax information for the purposes of parliamentary proceedings. However, as a matter of practice the Tax Office only discloses taxpayer information for parliamentary proceedings if the information disclosed is directly relevant and necessary for the purpose for which it was sought.

To provide certainty to the Tax Office, taxpayers, ministers and parliamentary committees, it is important to clarify what information should be provided to ministers and in what circumstances, including the application of parliamentary privilege. Comprehensive protection of taxpayers' privacy should not be compromised by the possibility of disclosure during parliamentary proceedings. However, disclosures could be allowed to assist ministers to perform duties or exercise discretions under tax laws. For example, disclosure could be authorised to:

- assist the Minister for Revenue and Assistant Treasurer to make decisions under the Compensation for Detriment Caused by Defective Administration scheme;
- assist the Treasurer to make decisions in relation to the Export Market Development Grants legislation;
- enable the Minister for Finance and Administration to receive taxpayer information where it relates to an application for an act of grace payment in connection with a Commonwealth tax debt or the waiver of a Commonwealth debt;
- assist Treasury ministers to respond to representations made by their constituents, allowing the Tax Office to provide information in cases where the initial disclosure is by the constituent; and
- enable the Commissioner of Taxation to provide information to parliamentary committees where requested, provided that disclosure were made in camera.

19 For example, information obtained for an income tax purpose can be disclosed to a minister where it is in the performance of an officer's duties, however there is an absolute prohibition on the disclosure to ministers of indirect tax information such as information relating to the GST. Australian Taxation Office 2004, Practice Statement PS 2004/9, Australian Taxation Office, Canberra.

20 Parliamentary proceedings include communications such as questions on notice, question time briefs and information requested by parliamentary committees.

Access to individual taxpayer information for the purpose of character checks or as part of briefings from the Tax Office would not be included as specified disclosures. The Tax Office would not be able to provide personal taxpayer information to allow ministers to respond to parliamentary questions about the Tax Office's administration of the tax laws in respect of particular individuals or entities.

To the extent that specific disclosures to ministers are not clearly identified in any new legislation, disclosures should not occur. Therefore, the legislation would need to exclude any broader disclosures that might otherwise be able to occur under the residual operation of the principles of parliamentary privilege.

Note that, where disclosure cannot be made to a minister or a parliamentary committee by the Tax Office, a taxpayer would always have the option of providing their own information directly to that minister. In these situations it might be deemed that the taxpayer consented to the minister receiving their individual tax information from the Tax Office (see discussion of consent provision in Chapter 5). The Tax Office could also provide information to the taxpayer in the presence of a minister, if the taxpayer allows such a disclosure.

4.1.3 Disclosure to Treasury portfolio agencies to prepare revenue forecasts

Treasury's role includes the preparation of revenue forecasts and costings for government, and the development of tax policy. To undertake this role effectively, Treasury currently receives certain protected information from the Tax Office.

This disclosure is allowed where it is within the 'course of an officer's duties' to do so. As outlined above, the meaning of this term is uncertain and requires clarification.

To assist in the accuracy of revenue forecasts and tax policy advice which relies on costings, the supply of protected information to Treasury officers for tax policy development, costing, revenue forecasting and estimates purposes would be authorised explicitly under the secrecy provisions. However, Treasury would not be entitled to disclose individual taxpayers' information further.

4.1.4 Disclosure to international jurisdictions to give effect to international tax obligations

Currently Australia's tax treaties support disclosure of information by competent authorities (in Australia, the Commissioner of Taxation) under the Exchange of
Chapter 4: Disclosures of taxpayer information under the information disclosure framework

Information Article\textsuperscript{22}, where disclosure relates to taxes covered by the treaty and is necessary to administer or enforce domestic tax laws of the requesting country.

The Exchange of Information Article that forms a part of all tax treaties to which Australia is a party, recognises the importance of protecting taxpayer information.\textsuperscript{23} It ensures that information communicated under the treaty's provisions is treated as secret under the domestic laws in the receiving state and sanctions are governed by the laws of that state. Current disclosures of protected information to international jurisdictions would be maintained under the new framework.

\textbf{4.2 For the purpose of protecting public finances}

The following disclosures would be allowed under this category.

\textbf{4.2.1 Disclosure to Australian Government bodies for the primary purpose of protecting public finances}

Allowing disclosures on these terms may enable many of the existing specific disclosure provisions to be condensed or absorbed into a single provision. Not only would this provision apply to Commonwealth tax revenues, it also would extend to tax revenues from taxes administered by the Commissioner of Taxation, such as the GST.

Disclosure under this category must be for the primary purpose of protecting the public finances and the use of disclosed information would be limited to this purpose. For example, the Tax Office discloses taxpayer information to Centrelink to assist that agency to determine social security entitlements and detect and recover overpayments. Disclosure would not be allowed where the protection of public finances including ensuring accurate payments was only a secondary or indirect outcome.\textsuperscript{24} The primary purpose test reflects that information may be requested for multiple purposes, however

\begin{itemize}
\item \textsuperscript{22} This Article imposes an obligation on the Commissioner of Taxation to provide information requested by the treaty partner. For example, Article 27 of the United Kingdom Double Tax Agreement in Schedule 1 to the \textit{International Tax Agreements Act 1953} covers information exchanges between the Australian and the United Kingdom tax authorities.
\item \textsuperscript{23} See paragraph 11 of the Updated Commentary to Article 26 of the \textit{OECD Model Tax Convention on Income and on Capital}.
\item \textsuperscript{24} For example, disclosure of taxpayer information to a law enforcement agency for investigation of an indictable offence, where it was recognised that tax evasion or fraud was present. As the primary purpose for disclosure is the investigation, the secondary or indirect outcome would be the protection of public finances via any action taken to address the evasion or fraud. In this example the disclosure required for the investigation would not be made under the category of protection of public finances.
\end{itemize}
disclosure would only be allowed if the primary purpose is the protection of public finances.

Information Privacy Principle Guidelines discuss public finance in terms of public revenue. Guideline 41 provides the following discussion of 'to protect the public revenue':

‘Public revenue’ clearly means federally collected revenue (taxes and similar charges). In some contexts, it may also include state and territory revenue. ‘Protecting the public revenue’ includes activities of the Tax Office (and other agencies with the power to levy taxes or charges) directed to ensuring those subject to the taxes or charges meet their obligations. Routine collection of taxes, levies and charges therefore is covered, as is audit, investigatory and debt recovery activity directed at ensuring that taxation and similar obligations are met."

The Privacy Commissioner acknowledges that protecting the public revenue extends to some aspects of administering Commonwealth assistance and payment programmes. This would encompass compliance activities to ensure that correct entitlements have been received by eligible people.

Such a provision may remove the need for many existing specific exceptions. For instance, if the Child Support Registrar is currently receiving information from the Tax Office to verify income declared in child support cases, then this disclosure is to ensure correct entitlement to benefits and so could be characterised as being for the primary purpose of protecting public finances. Hence, this disclosure would not require a specific exception.

Consolidation of these disclosure provisions would remove the need for new amendments each time an agency requires different information for the purpose of protecting public finances. Alternatively, the specific disclosures could be recognised via inclusive regulations made under a provision framed in these terms.

4.3 For the purpose of other Commonwealth, state and territory laws

Under the framework, specific disclosures for the purposes of specific laws would be achieved through legislation or regulations.

Specific provisions would allow disclosure of information to government departments or agencies (including of States and Territories) under specifically listed Commonwealth, state or territory laws. As this purpose is further removed from the purpose for which the information was collected, the framework discussed above suggests that each disclosure should be individually considered by Parliament. For convenience, listing of particular entities and relevant legislation could occur through regulations. Under this heading the regulations would be framed to comprehensively list the allowable disclosures, unlike the previous heading where the regulations would be inclusive (for clarity) rather than exhaustive.

In this way, departments and agencies could obtain the limited taxpayer information necessary to assist them to achieve their legislated purposes. Examples include disclosure of certain information to the ABS for specified purposes under the Census and Statistics Act 1905, or disclosure to state taxation authorities for the purposes of the administration of a state tax law.

Government departments and agencies with specific exceptions in the current secrecy provisions would be included in the exceptions of the new framework. However, a specifically listed department or agency would only receive information for the purpose of the specifically listed law. Being a 'specifically listed government department or agency' does not authorise access to other protected information held by the Tax Office, nor does it allow 'fishing' for information. Disclosure and use of information would be limited to the purposes of the specifically listed law.

4.4 For other purposes as specified

Disclosures that do not fit within the previous categories, but which can be clearly justified (refer to Principle 3 in Chapter 3) would require specific exceptions allowing disclosure of specified information.

All other entities that currently receive information and do not fall within a section of the framework outlined above would require specific exceptions. For example, disclosure to the Secretary of DIMA for the purpose of assisting in locating individuals who are unlawfully in Australia. This disclosure is not for the purpose of a specified Commonwealth law, therefore it does not fall within the categories previously discussed.

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26 While regulations are sometimes thought to involve less scrutiny than primary legislation they are still required to progress through the appropriate parliamentary procedures.
27 Paragraph 16(4)(ga) of the ITAA36.
28 Subsection 13J(1) of the TAA.
29 Paragraph 16(4)(hd) of the ITAA36.
Examples of other existing disclosures include allowing data to be provided to entities such as law enforcement agencies, Royal Commissions, the Australian Securities and Investments Commission and intelligence agencies, such as the Australian Security and Intelligence Organisation (ASIO), in relation to a particular event or purpose.
CHAPTER 5: ISSUES FOR FURTHER CONSIDERATION

The proposed standardisation approach outlined in Chapter 2 addresses the common elements of the existing tax secrecy and disclosure provisions. This Chapter presents four possible new disclosures of taxpayer information for public comment. If adopted these disclosures would be examples of specific disclosure ‘for other purposes’ in the information disclosure framework in Chapter 3.7.

5.1 Disclosure to third parties with taxpayer consent

The Privacy Act 1988 incorporates a consent provision as an exception to the general rule that personal information cannot be disclosed. The tax laws do not contain a general consent provision. Inclusion of a similar provision in tax legislation would allow a taxpayer to request the Tax Office to provide their confidential taxpayer information to a third party. For example, a taxpayer could consent to the Tax Office:

- contacting a particular relative or friend in relation to any queries about the taxpayer’s tax affairs that arise while the taxpayer is travelling overseas;
- providing details of their recent tax assessments directly to their lending institutions and insurers;
- providing details of their tax affairs to their local Member of Parliament.

Incorporating a consent provision would represent a significant broadening of the current disclosure provisions, which rarely allow disclosure to third parties. However, it would be in line with provisions in other Commonwealth Acts that expressly allow disclosure of information collected under those Acts if the person to whom the information relates, consents. Consent would need to be express, voluntary and informed.

A taxpayer can always directly disclose their own information to a minister or a parliamentary committee. In these situations it might be deemed that the taxpayer has consented to the Tax Office providing their individual tax information to the minister.

31 For example, currently disclosure of taxpayer information may occur indirectly where a spouse’s financial information impacts on the assessment of their partner’s tax liability.
32 For example, paragraph 130(3)(c) of the Health Insurance Act 1973 and section 90L of the Australian Postal Corporation Act 1989.
In other countries, the tax secrecy and disclosure provisions contain an exception allowing for disclosure where taxpayers consent for their information to be disclosed. Alternatively the offence for disclosing information is framed in such a way that consent is a defence against 'knowingly' disclosing information (see Appendix C for international perspectives on secrecy and disclosure).

However, there could be concerns that the presence of a consent provision would be used to unduly influence taxpayers to consent to disclosure of personal information. For example, taxpayers could be denied a service or good if they did not consent to the Tax Office providing their confidential information to the provider of that good or service.

An alternative approach is that the taxpayer could obtain their confidential information from the Tax Office and provide the necessary information to the third party. This approach would allow the taxpayer to know what information is available for disclosure and to control the level of disclosure they are willing to accept. This approach is already available under existing secrecy provisions. In most circumstances taxpayers do not need to request or pay for the provision of their information (such as copies of income tax returns or notice of assessments) under the Freedom of Information Act 1982.

If a consent provision were included in the new regime, stringent administrative procedures would be required to ensure that the identity of the taxpayer providing consent could be verified.

### 5.2 Disclosure to law enforcement agencies and intelligence agencies

Law enforcement agencies currently have access to protected taxpayer information for the investigation of serious offences or the making of a proceeds of crime order. However, the information cannot then be used as evidence in the prosecution of offences, unless the prosecution is for a tax-related offence.

Current disclosures to law enforcement agencies would be maintained in the standardised secrecy and disclosure provisions and the definition of law enforcement agency could also be retained. This definition includes the Australian Federal Police, the police force of a State or the Northern Territory, the Office of the Director of Public Prosecutions, the Australian Crime Commission and the NSW Independent Commission Against Corruption.

33 Section 3E of the TAA.
Disclosures are also available to intelligence agencies such as ASIO. Given the similarities between law enforcement agencies and intelligence agencies, and the similar public interest argument for disclosing tax information to them, similar levels of disclosure of taxpayer information could be achieved through the information disclosure framework.

Law enforcement agencies consider that the present secrecy and disclosure provisions create significant difficulties in the investigation and prosecution of serious crime. Difficulties arise because taxpayer information provided by the Tax Office cannot be used as evidence in the prosecution of non-tax related offences. Disclosures to law enforcement agencies are also limited to information relevant to establishing whether an indictable offence has been or is being committed. This means that information cannot be disclosed in relation to serious but non-indictable crimes such as non-indictable social security fraud, or civil penalties for breach of directors’ duties or insolvent trading in relation to phoenix companies.²⁴

An increase in ability to use tax information as evidence in non-tax related serious criminal investigations and prosecutions would assist law enforcement agencies in the effective administration of criminal law, and would play an important role in combating a range of criminal activity including money laundering, non-taxation fraud on the Commonwealth, identity crime, corporate crime, national security and terrorist financing.

Further disclosures to law enforcement agencies could be modelled on Information Privacy Principle 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. Criminal law encompasses Commonwealth, state and territory laws. This expansion would allow for the use of tax information as evidence in criminal prosecutions. Disclosure for the enforcement of criminal law includes the investigation of a crime, the prosecution of criminals, and intelligence gathering to support the investigating and prosecuting functions of law enforcement agencies.

Expanded disclosures to law enforcement and intelligence agencies would have particular application in joint task forces where several agencies (including the Tax Office) work together to share information to investigate and prosecute serious crimes. An example of where additional disclosure could be in the public interest would be the disclosure of information concerning a possible non-tax related crime to the relevant law enforcement agency.

³⁴ Phoenix companies are companies that accumulate debts, usually to the Tax Office, and then go into liquidation only to ‘rise from the ashes’ and carry on business through a newly formed company.
This expansion would be a departure from current policy in relation to the protection of tax information. The result would be an increased flow of information between the Tax Office and the various law enforcement agencies. In this context, consideration needs to be given to the balancing between the public interest associated with providing additional information to law enforcement agencies for the investigation and prosecution of serious criminal matters and the impact on taxpayer privacy.

5.3 Disclosure to the Commissioner of Taxation as an employer

The community, tax agents and government expect a high standard of tax compliance by tax officers. Tax compliance in the general community could be affected if tax administrators were perceived to be breaching tax laws. For example, if a Tax Office employee was making a decision about late lodgment of income tax returns and had not lodged their own return, then the community could view this as a conflict of interest, or at least a double standard.

Currently, the Commissioner in his capacity as head of an agency can only access employee tax information that has been obtained from a public source, such as in open court. An exception could be included in the new secrecy and disclosure framework to allow disclosure of a tax officer’s tax information to the Commissioner of Taxation, in his capacity as head of a government agency. Officers who have not complied with their tax obligations could face disciplinary charges. Contractors engaged by the Tax Office would also be encompassed by this new exception. For example, if the Tax Office contracts a barrister to assist in the prosecution of a tax offence, the Commissioner could obtain the barrister’s tax information to ensure that they have complied with their tax obligations. In such instances, disclosure could enhance community confidence in the Tax Office.

The Commissioner of Taxation’s access to employee details was previously raised in the hearings of the House of Representatives Standing Committee on Legal and Constitutional Affairs in respect of the Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004. The report considered that the Commissioner as Chief Executive of the Tax Office (a large entity which engages the services of many contractors and service providers) should arguably have the ability to conduct due diligence enquiries on successful tenderers or others who provide services to the Commissioner.

The essential question is whether the fact that a person happens to be employed by the Tax Office should be sufficient justification for their personal tax affairs to be disclosed to their employer. Currently, employees and service providers may reasonably have an expectation that their tax information will remain protected and their private
information will be treated confidentially. This is particularly relevant where the person’s duties do not relate to the Tax Office’s core activities, for example system programmers, facilities officers, cleaners or furniture retailers.

From an equity perspective this type of disclosure could be seen as a precedent for other government employers to seek protected information about employees. In turn this may deter people from seeking employment with government employers.

5.4 Disclosure to third parties where a duty is owed to them

Where information relates to a duty owed by another to a third party, a new rule could allow information to be disclosed in strictly limited circumstances to the third party. Under this rule only clearly defined relevant information could be disclosed. This exception could be applied to pay-as-you-go withholding amounts and payment summaries. In these circumstances, disclosure to an employee could occur where the employee has concerns that an obligation has not been met by an employer.

An example of the possible benefits of this rule is the measure announced in the 2006–07 Budget relating to Superannuation Guarantee contributions. Currently, if an employer fails to pay employees’ Superannuation Guarantee amounts, then the employee can apply to the Tax Office to investigate the non-payment. However, the Tax Office can not disclose information to the employee until the conclusion of its investigation. This is because the debt was a debt of the employer to the Tax Office, even though the debt is for the employee’s benefit. The new measure will allow employees to receive some information during the Tax Office investigation of their employer’s required Superannuation Guarantee contributions.
QUESTIONS FOR CONSULTATION

Submissions need not be confined to addressing these questions. Contributors are welcome to provide comments on areas related to their major interest.

1. Should the tax secrecy and disclosure provisions be built around a primary principle of protecting taxpayers’ privacy?

2. Is there benefit in the idea that the various tax secrecy and disclosure provisions should be standardised with the assistance of an information disclosure framework and placed in the Taxation Administration Act 1953?

3. What is the optimal balance between the protection of taxpayer information held by the Tax Office and the need for disclosure to address government’s information requirements in delivering entitlements and meeting law enforcement and integrity provisions?

4. Should a person who is given protected information under secrecy and disclosure provisions also be subject to strict secrecy requirements?

5. Should penalties for all offences in respect of unauthorised disclosures be standardised, or are there circumstances in which the penalties for breach of the tax secrecy and disclosure provisions should vary according to the type of tax involved?

6. Do you agree that the further the use of the information is from the reason it was collected, the greater the level of justification should be for the information to be disclosed?

7. Is there benefit in including a consent provision in the tax law to allow a taxpayer to request the Tax Office to provide their confidential information to a third party?

8. Should the Tax Office be able to disclose taxpayer information to law enforcement and intelligence agencies for the investigation and prosecution of non-tax related crimes?

9. Should the Commissioner of Taxation, as an employer, have access to Tax Office information about his employees and others providing services to the Tax Office?

10. Should the Tax Office be able to disclose taxpayer information to a third party who is owed a duty by the taxpayer?
APPENDIX A: SECRECY AND DISCLOSURE PROVISIONS

The following are secrecy and disclosure provisions considered in this review.

A New Tax System (Australian Business Number) Act 1999, subsection 26(4) and section 30
A New Tax System (Bonuses for Older Australians) Act 1999, sections 3A and 55
A New Tax System (Family Assistance) (Administration) Act 1999, sections 154A, 161 to 167
Banking (State Bank of South Australia and other matters) Act 1994, Part 2.4, Division 4
Child Support (Assessment) Act 1989, sections 150 and 150D
Child Support (Registration and Collection) Act 1988, sections 16 and 16C
Crimes (Taxation Offences) Act 1980, section 4
Development Allowance Authority Act 1992, section 93AA, 108 and 118
Excise Act 1901, section 159
Fringe Benefits Tax Assessment Act 1986, section 5
Fuel (Penalty Surcharges) Administration Act 1997, section 47
Higher Education Funding Act 1988, sections 78, 98K, 98ZD, 106F, 106ZA and 106ZK
Higher Education Support Act 2003, Division 179
Income Tax Assessment Act 1936, sections 16, 16A and 221ZXL
Income Tax Assessment Act 1997, subsection 30-229(5), sections 396-95 and 396-100
Inspector-General of Taxation Act 2003, sections 14, 15 and 37
International Tax Agreements Act 1953, relevant articles regarding secrecy and disclosure
Petroleum Resource Rent Tax Assessment Act 1987, sections 17 and 18
Product Grants and Benefits Administration Act 2000, section 47
Sales Tax Assessment Act 1992, section 110 (inoperative)
Sales Tax Procedures Act 1934, section 4A (inoperative)
Student Assistance Act 1973, section 12ZU
Superannuation Contributions Tax (Assessment and Collection) Act 1997, section 32
Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997, section 28
Superannuation (Government Co-contribution for Low Income Earners) Act 2003, section 53
Superannuation Guarantee (Administration) Act 1992, section 45

Superannuation Industry (Supervision) Act 1993, section 252C
Superannuation (Unclaimed Money and Lost Members) Act 1999, Part 6
Taxation Administration Act 1953, sections 3C, 3D, 3E, 3EA, 3EB, 3EC, 3F, 8WB, 8ZK, 8XA, 8XB, 13H, 13J, 17B and Division 355 of Schedule 1
Taxation Boards of Review (Transfer of Jurisdiction) Act 1986, section 231
Taxation (Interest on Overpayments and Early Payments) Act 1983, section 8
Termination Payments Tax (Assessment and Collection) Act 1997, section 23
Tobacco Charges Assessment Act 1955, section 10 (inoperative)
APPENDIX B: THE TAX SECRECY AND DISCLOSURE PROVISIONS AND OTHER PRIVACY SAFEGUARDS

Secrecy provisions in tax law are not the sole determinants of the disclosure of tax information. The Privacy Act 1988, containing the Information Privacy Principles in section 14, sets out the general standard for protection of personal information. This level of protection is supplemented by guidelines such as the Tax File Number Guidelines and by agency specific legislation.

The tax secrecy and disclosure provisions provide an additional level of protection for taxpayers above that provided by the Privacy Act 1988 by reinforcing the strict obligation of the Tax Office to maintain taxpayer privacy. Appendix D outlines the relationships between the proposed taxation secrecy regime and the Information Privacy Principles.

According to the Plain English Guidelines to the Information Privacy Principles the principles apply alongside other legislation. However when an agency is required by law to disclose personal information where a law governing it specifically requires the disclosure, the agency must comply with this law.\(^\text{35}\)

Standardisation of the tax secrecy and disclosure provisions would not generally restrict or reduce the protection currently provided. The substance of existing disclosure provisions that recognise unique information flows that occur in relation to the tax laws would be maintained.

Office of the Privacy Commissioner

Taxpayers also receive additional protection and remedies through the Office of the Privacy Commissioner (OPC). The OPC's responsibilities under the Privacy Act 1988 include promoting an Australian culture that respects privacy and investigating complaints by individuals about interferences with privacy under the Privacy Act 1988 by Australian and ACT Government agencies and private sector organisations. The OPC also investigates possible breaches of the Tax File Number Guidelines, the Data-matching Program (Assistance and Tax) Act 1990 and associated guidelines, and may audit the Tax Office and other agencies.

\(^{35}\) Office of the Privacy Commissioner 1996, Plain English Guidelines to Information Privacy Principles 8-11, Office of the Privacy Commissioner, Sydney, p 42.
Tax Office administrative procedures
The Tax Office also implements administrative procedures to ensure that taxpayer information is provided the greatest level of protection possible under the secrecy provisions. Administrative practices include:

- memoranda of understanding that provide further controls on other government agencies in receipt of taxpayer information;
- practice statements;
- security practices to restrict officers' access to taxpayer information; and
- training to guide officers in how to determine what, and when, information can be disclosed.

Public Service employees
In addition to a tax officer's obligation to abide by the tax secrecy provisions, as a Public Service employee they are also subject to provisions in the Public Service Act 1999 that address protection of information.
APPENDIX C: INTERNATIONAL PERSPECTIVES ON SECRECY
AND DISCLOSURE

Many countries recognise the importance of protecting taxpayer information through secrecy provisions. Several countries have similar tax secrecy laws to Australia. Their tax secrecy and disclosure laws are outlined below.

Canada

Section 241 of the Canadian Income Tax Act 1952 is Canada’s equivalent of Australia’s section 16 of the ITAA36. Section 241, ‘Communication of information’, like Australia’s provision governs the release of taxpayer information. Canada’s definition of taxpayer information excludes information which does not reveal the identity of the taxpayer to whom it relates. Section 241 also includes a long list of exceptions like those contained in section 16. The main distinction between Canada’s and Australia’s offence provision is the inclusion of the word ‘knowingly’ as an element of ‘unauthorised communication’ of taxpayer information in Canada. The penalty is a fine of up to CAN$5,000, or imprisonment for up to 12 months, or both.

European Union

The European Union (EU) has no specific legislation on tax secrecy, as individual member nations formulate their own tax laws. EU Directive 95/46/EC protects the processing and movement of personal data in the EU. However, Article 13 allows Member States to exempt the scope of the operation of the directive in certain circumstances, effectively allowing their own tax secrecy provisions to remain operative.

New Zealand

New Zealand’s tax secrecy provisions are in Part IV of its Tax Administration Act 1994. This Act generally prohibits disclosure of information by officers, but qualifies this with a general exception allowing for disclosure for the purpose of giving effect to the tax laws. This is followed by a number of specific exceptions that allow for disclosure in certain other circumstances.

The specific exceptions allow for the exchange of information between the Inland Revenue Department and bodies such as Work and Income New Zealand, the Ministry of Education, the Accident Compensation Corporation, and the Department for Courts. There is no specific exception allowing disclosure to Royal Commissions, however, in practice, disclosure relies on the general exception (of giving effect to tax law).
The Act provides for criminal penalties if an officer breaches the secrecy provisions. However, the imprisonment penalty is less onerous than under Australian law. The penalty is a fine of up to NZ$15,000, or imprisonment for up to six months, or both. Officers must ‘knowingly’ act in contravention of the secrecy provisions before they can be subject to these penalties.

**United Kingdom**

The United Kingdom controls the release of tax information under section 182 of the Finances Act 1989. The section 'Unlawful disclosure' deals with the information collected or held in the exercise of ‘tax functions’. The control over the flow of information collected or held in the exercise of ‘tax functions' is limited to information concerning any identifiable person. The provisions also contain an explicit exception for the lawful release of publicly available information.

Subsection 182(7) also provides defences for the release of information based on a reasonable belief that the person had ‘lawful authority’ or information was already ‘publicly available’.

The penalty is a fine of up to £15,000 or imprisonment for up to six months.

**United States of America**

Tax secrecy and disclosure in the United States of America is governed by the Internal Revenue Code, in particular section 6103, ‘Confidentiality and disclosure of returns and return information’. This section contains a general prohibition on disclosure of information, followed by several specific exceptions.

The specific exceptions allow for disclosure where taxpayers consent for their information to be disclosed, for disclosure to specified government departments, and for disclosure to courts in specified circumstances. The code also contains safeguards to prevent on-disclosure of information.

The penalty is a fine of up to US$10,000, or imprisonment for up to five years, or both.
APPENDIX D: THE INFORMATION PRIVACY PRINCIPLES AND THE TAX SECRECY AND DISCLOSURE PROVISIONS

The standardised framework for tax secrecy provisions would not seek to alter the existing interaction between the tax provisions and the privacy regulatory framework. The new disclosures would be authorised by law and would therefore accord with Information Privacy Principles 10.1 and 11.1. Full consideration would be given to any privacy impacts that may result from the design and introduction of this new framework.

Chapter 4 outlines how existing tax secrecy and disclosure provisions would be categorised using the information disclosure framework. Any new privacy impacts would be in relation to the new disclosures outlined in Chapter 5. These disclosures would have to be justifiable in terms of achieving a public benefit and would have to outweigh the impact on the taxpayer's privacy.

Other aspects of the framework such as the clarification of the term 'in the course of an officer's duties', the on-disclosure rules and consistent sanctions, would reinforce the protection of taxpayer information.

The table below outlines the relationships between the proposed tax secrecy regime and the Information Privacy Principles. The table does not address administrative impacts.

<table>
<thead>
<tr>
<th>Information Privacy Principles</th>
<th>Impact on and relationship to the proposed framework</th>
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</thead>
<tbody>
<tr>
<td>1. Manner and purpose of collection</td>
<td>Principles 1 to 3 apply to the collection of personal information. The new framework does not propose to alter the collection of information by the Tax Office.</td>
</tr>
<tr>
<td>2. Solicitation of personal information from individual concerned</td>
<td>Principle 4 addresses the storage and security of personal information. The new framework would complement the security of personal information by assisting officers to determine when they can and cannot disclose information.</td>
</tr>
<tr>
<td>3. Solicitation of personal information generally</td>
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<tr>
<td>4. Storage and security of personal information</td>
<td></td>
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<tr>
<td>5. Information relating to records kept by record keeper</td>
<td>Principles 5 to 9 would be addressed through administrative practices, which is outside the scope of this paper.</td>
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<td>6. Access to records</td>
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<td>7. Alteration of records</td>
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<td>8. Record keeper to check accuracy</td>
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<td>9. Personal information to be used only for relevant purposes</td>
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</tbody>
</table>
### Information Privacy Principles

#### Principle 10

10.1 The record keeper shall not use the information unless:

- **(a)** the individual consents; or
- **(b)** the use of the information is necessary to prevent/lessen a threat to life or health; or
- **(c)** use is required or authorised by law; or
- **(d)** use is reasonably necessary for enforcement of the criminal law or a law imposing a pecuniary penalty, or for the protection of the public revenue; or
- **(e)** the use of the information is directly related to the purpose for which it was obtained.

10.2 The record keeper will note in the record the use of personal information for enforcement of criminal law or of a law imposing a pecuniary penalty, or to protect the public revenue.

#### Principle 11

11.1 The record keeper shall not disclose the information unless:

- **(a)** the individual concerned is aware that information of that kind is usually passed on; or
- **(b)** the individual has consented; or
- **(c)** the disclosure is necessary to protect against a serious/imminent threat to a person’s life or health; or
- **(d)** the disclosure is required or authorised by law; or
- **(e)** the disclosure is necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue.

11.2 An agency disclosing personal information under 11.1(e) must note that disclosure on the record containing the information.

11.3 If an agency discloses any personal information, the recipient must only use or disclose it for the purpose for which it was disclosed to them.

### Impact on and relationship to the proposed framework

#### Principle 10 and 11

- **10.1(a)** and **11.1(b)** refer to an administrative issue that is satisfied through the Taxpayer’s Declaration on return forms. This declaration also contains an Information Privacy Principle 2 notice.
- **10.1(c)** and **11.1(d)** would be satisfied as disclosures would be authorised following the passage of legislation to give effect to the standardisation.
- **10.1(d)** and **11.1(e)** are consistent with the new framework which allows for disclosure for the purpose of protecting public finances (which in certain circumstances would allow law enforcement agencies to use information collected by the Tax Office for investigations).
- **11.2** would be addressed through administrative practices.
- The ‘on-disclosure of information’ principle outlined in Chapter 3.5 of the discussion paper is consistent with Information Privacy Principle 11.3. The on-disclosure principle states that ‘a person to whom information is disclosed under the secrecy provisions would also be subject to the secrecy provisions’.
**BIBLIOGRAPHY**

**Tax Office publications**


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Legislation

A New Tax System (Australian Business Number) Act 1999

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Archives Act 1983

Crimes Act 1914

Customs Administration Act 1985

Data-matching Program (Assistance and Tax) Act 1990

Freedom of Information Act 1982


Health Insurance Act 1973

Income Tax Assessment Act 1936

Privacy Act 1988

Public Service Act 1999

Sales Tax Assessment Act 1992

Social Security Act 1991

Taxation Administration Act 1953
ABBREVIATIONS

ABS    Australian Bureau of Statistics
ASIO   Australian Security Intelligence Organisation
DIMA   Department of Immigration and Multicultural Affairs
EU     European Union
GST    Goods and services tax
ITAA36 Income Tax Assessment Act 1936
OECD   Organisation for Economic Co-operation and Development
OPC    Office of the Privacy Commissioner
TAA    Taxation Administration Act 1953
Tax Office Australian Taxation Office