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Review of Tax Regulator Secrecy Exceptions

CPA Australia, Chartered Accountants Australia and New Zealand and the Institute of Public Accountants (we/our/joint bodies) together with our respective affiliate bodies represent over 350,000 professional accountants in Australia, New Zealand and around the world.

We submit our comments on the Review of Tax Regulator Secrecy Exceptions (Review) consultation paper (consultation paper).

Executive summary

We support the sharing of appropriate information to protect the integrity of the regulatory framework for tax practitioners and the broader system in which they operate. However, the confidentiality of 'protected information' is integral to that very system. Erosion of taxpayer privacy should only be made by specific legislative amendments to Division 355 of the Taxation Administration Act 1953 (TAA 1953) which particularise what, to whom and when that information can be shared. Delegating this decision to the Minister or Governor-General is not appropriate and overturns years of practice.

Many of the proposals set out in the consultation paper may already be covered by the existing ability of the Australian Taxation Office (ATO) to share information, including information about fraud, provided it is for the general administration of the **tax** laws. This possibility has been raised by the Inspector General of Taxation and Tax Ombudsman (IGTO)[1].

There are also many existing provisions regarding the sharing of **data** with other agencies to help support the administration of non-tax programmes. Many of the proposals in the consultation paper propose that the ATO share **suspicions** of fraud that the ATO has formed regarding matters outside the tax system. The ATO is part of 13 prescribed taskforces which deal with egregious behaviour. Many of the proposals in the consultation paper propose that the ATO be able to share data about taxpayers that are not demonstrating egregious behaviour. Such proposals are therefore proposing an expansion of the ATO's powers.

We also support the sharing of information and data but have grave concerns about the sharing of suspicions. A much higher standard is required in justifying an exception to section 355-155 of the TAA 1953 particularly when a person's livelihood is at stake or vulnerable Australians are involved. This is particularly true for the Tax Practitioners Board (TPB) whose role is to investigate and sanction tax agents. Natural justice and due process require the TPB to only disseminate information about findings. The joint bodies do not support the TPB reporting suspicions to other government agencies.

Overview of specific responses

[1] *Tax Identity Fraud: an own initiative investigation. Interim Report - The importance of bank account Integrity* - Inspector-General of Taxation and Taxation Ombudsman 30 April 2024

The joint bodies do not support the creation of a mechanism by which the Minister can approve fraud prevention programs but do support a specific legislative provision to enable the ATO to provide information to superannuation fund trustees and the Australian Financial Crime Exchange (AFCX) provided that the ATO is satisfied that the information is about a fraudulent activity. That said, Attachment B demonstrates the joint bodies view, which is supported by the IGTO report, that the ATO should be able to do this under the existing tax secrecy exceptions and that the ATO needs to further develop its fraud deterrent mechanisms.

The joint bodies do not support the proposal that the Minister be able to allow by ministerial instrument the ATO to share information with non-law enforcement agencies. However, we do support the ATO providing information to AUSTRAC through a specific legislative provision.

It is understood from the consultation paper that the proposed sharing of information by the ATO for government purposes other than the administration of the tax system will be implemented through the ***enactment of specific legislative provisions***. More efficient processes for both administrators and taxpayers could be achieved if the proposals regarding research and development tax incentive, and statement of tax record are implemented. Alternative proposals are made by the joint bodies in relation to the proposed sharing of information with the Australian Business Register and myGov to address concerns raised in those areas. The joint bodies recommend a delay to the proposed sharing of information with the Fair Work Ombudsman so that definitional issues can be resolved which will reduce the risk of data being misused. Further consideration of issues is needed regarding the proposals affecting takeover applications and the indirect tax concession scheme.

The joint bodies support specifically legislating the ATO provision of information to internet service providers with the safeguard of only providing enough information to execute a website block.

The joint bodies do not support providing the Governor-General with the ability to declare that the ATO and TPB can disclose protected information. The potential scope of this exception is not defined and is potentially unconstitutional. The proposed 'safeguard' that information can only be shared for 90 days is insufficient. Once information is released, damage can be occasioned instantly.

Allowing the ATO to provide information to financial advisers is supported provided that the same technological and client identification standards that registered tax practitioners are required to meet are applied to financial advisers. Separate additional funding must be given to the ATO to implement this measure. Resources should not be taken away from urgently needed ATO system improvements, such as a tracking system for returns that shows status and practice mail improvements in functionality/support. Our members who are registered tax practitioners are struggling to have basic improvements made to the existing on-line service for agents to ensure that they can efficiently service their clients.

Consumer consent - With the large number of recent inquiries into unfair trade practices it is likely that business and consumers could be coerced into providing consent should such an exception to tax secrecy be created on that basis. The joint bodies do not support such an exception.

Addressing gender-based violence - There are several inquiries regarding gender-based violence and business financial abuse. Consideration of the findings and recommendations of these inquiries should occur before further action is taken regarding this issue. When that does occur, the impact of elder abuse should also be considered.

Other recommendations

To help identify phoenix activity early and so minimise the potential harm to creditors, the joint bodies call for the ATO to be able to advise ASIC of the existence of tax debts when strike off action is in progress.

The tax secrecy provisions also affect recipients of information, such as professional accounting bodies. Our staff in Conduct and Disciplinary roles have concerns about whether they can on-disclose the information contained in decision letters (notifications) received from the TPB under section 60-125(8) of the *Tax Agent Services Act 2009* (TASA). Our submission suggests changes to overcome this difficulty.

Attachment A sets out our detailed response to the consultation paper.

Attachment B sets out in further detail how the existing tax secrecy exception provisions can be used by the ATO to help combat fraud in the tax system.

If you would like to discuss our feedback in greater detail, please contact us to arrange a convenient time.

Yours sincerely

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Attachment A: Consultation Questions

In addressing the issues raised in the consultation paper, we provide the following overarching comments.

The consultation process

In discussions with Treasury in the week before submissions are due, it has become apparent that Treasury are considering drafting legislation to implement the proposed tax secrecy exemptions that are discussed in Part 3 of the consultation paper and the items in Part 4 of the consultation paper are in 'discovery phase'.

The 'discovery phase' of items in Part 3 of the consultation paper, which is understood to have taken over a year, has only included the ATO, the TPB and Treasury. The public and key industry representatives have not been involved. The only information about the issues in Part 3 is in the consultation paper itself.

The information that is contained in the consultation covers a very wide variety of topics and consequentially is necessarily brief. To respond to the issues covered, participants in the consultation process need to research a variety of areas that are not necessarily within their normal day-to-day operations and are left to understand the issues from ground zero. For example, the consultation paper includes comments critical of the role of prescribed taskforces[2], but little guidance as to how such taskforces are formed and operated either legally or practically is provided in the paper.

The high-level approach to the topics being raised means that minimal detail has been provided. This makes it very difficult to positively respond to questions such as "does the broad public interest in the proposal justify this possible new exception" or "are the proposed safeguards appropriate" or "does the proposed exception sufficiently help to address the issue identified". Accordingly, our responses to the consultation paper can only be limited in both quantum and depth due to this approach.

Ideally, rather than providing omnibus consultation papers with minimal detail and wide scope, consideration should be given to providing public reviews which can outline in detail the issues, arguments and alternative policy options before the issuance of narrower consultation papers that look to rectify the issues raised (where appropriate).

Review issue identification

Page 5 of the consultation paper states that the Review has not considered the operation of existing exceptions nor the appropriateness of the broader 'tax secrecy' framework.

Throughout the consultation paper there are statements to the effect that the possible actions that the ATO may take are deficient, or that the ATO cannot act. These statements are not backed by evidence or any explanation. Yet the IGTO has examined the existing tax secrecy provisions and concluded that the ATO takes a very conservative approach[3] to interpreting tax secrecy exemptions and that the ATO's interpretation should be reconsidered.

The IGTO has also recommended that substantial improvements are needed to ATO systems to improve fraud prevention and has suggested that this should be a first step[4].

Before concluding that action is needed to remedy perceived deficiencies, analysis should be undertaken to determine whether there are real issues that need to be resolved and whether there are simpler, more effective approaches to minimising fraud that do not involve the erosion of taxpayer privacy and the integrity of the tax system.

[2] Page 20 - Consultation paper
[3] Part 5.3 *Tax Identity Fraud: an own initiative investigation. Interim Report*
[4] Recommendation 1(a) *Tax Identity Fraud: an own initiative investigation. Interim Report*

Further discussion of the issue identified in this Review is provided in Attachment B.

Use of legislative determinations

The 'solution' to the perceived issues raised in the consultation paper is to make legislative amendments to allow the creation of legislative determinations that then can be used to create exceptions to taxpayer secrecy. This is in sharp contrast to the current process.

The ATO receives a vast array of information from and about taxpayers. The tax secrecy provisions are an integral part of the tax system that allows the ATO to have such a trusted position as a recipient of such information and helps contribute to voluntary compliance among Australian taxpayers.

The importance of maintaining privacy of taxpayer information obtained by the ATO is currently recognised by **Parliament** determining that only through the consideration of specific legislative amendments to Division 355 of Schedule 1 to the TAA, the **public benefit** from the disclosure of taxpayer information outweighs the impact on the taxpayer's privacy and the potential impact on voluntary tax law compliance. Generally, each of these legislative amendments specifies who and what information is to be disclosed.

In this consultation paper many of the proposals remove this legislative process which safeguards taxpayer's privacy in favour of delegating such decisions to a Minister, through legislative determinations. The removal of this safeguard is not appropriate.

Legislative determinations are increasingly being used as they are easier to enact than legislation. Legislation requires the government to find a spot on the Parliamentary timetable for a bill to be introduced and passed by both Houses of Parliament before it is enacted. A legislative determination, in contrast, is made and registered by, in the proposed case, the Assistant Treasurer, and is enacted upon registration. The only Parliamentary oversight of the legislative determination occurs when it is placed before Parliament where there is a very short, fixed time period for Parliament to disallow.

Whilst technically, there needs to be consultation about the legislative determination and there is limited Parliamentary oversight, in practice the use of tax legislative determinations means that the ATO's or TPB's views get legislated with potentially very little input from others and with virtually no chance of having the matter debated by Parliamentarians. When it comes to matters of taxpayer privacy this is not an appropriate approach. It is particularly concerning when it is proposed in this consultation paper that only mere 'possibility' of fraud from the regulator's perspective is adequate to override taxpayer privacy, substantially limiting the efficacy of section 355-155 of the TAA 1953.

Support for direct parliamentary oversight can be found in the history of the tax secrecy provisions. The primary objective of the secrecy provisions introduced into the TAA 1953 by the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010:*

> *'Is to protect the confidentiality of taxpayer information. Compliance with taxation laws could be adversely affected if taxpayers thought that their information could be readily disclosed*[5].

Further, the Explanatory Memorandum to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010* noted that:

> *'As a guide for future policy consideration, the disclosure of taxpayer information should be permitted only where the public benefit associated with the disclosure* ***clearly*** *outweighs the need for taxpayer privacy' [****emphasis added***[6].

When introducing similar rules, the Explanatory Memorandum to the *Tax Agent Services Bill 2009* noted:

[5] *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010* Explanatory Memorandum paragraph 1.15.
[6] *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010* Explanatory Memorandum paragraph 1.16.

'Significant consequences which may arise for an individual as a result of [disclosure of official information]'[7]. A 'significant loss of privacy ... would result from the disclosure of this information in a public forum[8].'

Bearing in mind the policy directive in the Explanatory Memorandum to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010*, the exceptions to the tax secrecy framework, as set out in the TAA 1953 and the TASA currently enable the sharing of protected information in the most urgent and egregious situations. A broadening of these exceptions should only be done by way of amendments to the TAA 1953 and the TASA tabled in Parliament, providing for appropriate public consultation and parliamentary oversight.

Reporting of wrongdoing – suspected, potential, satisfied, actual?

The consultation paper proposes to allow the sharing of information on the following bases:

- Possible fraudulent behaviour (pages 13, 14)
- Suspected fraudulent behaviour (pages 13 and 14)
- Indicates fraudulent behaviour (page 14)

We acknowledge that reporting based on mere suspicion is a threshold used in other consultations following the Government response to the PwC tax leaks matter, such as breach reporting[9] and as part of current exceptions[10]. However, in considering new exceptions, while it may be an appropriate threshold for an individual with a suspicion to report to a regulator holding investigative resources and enforcement powers, it does not follow that a tax regulator should on-disclose confidential information that they hold, nor that they share other information, based on the same threshold.

Similarly, while it may be appropriate for the Commissioner to share tax information with an entity such as an employee about a suspected failure by the employer to comply with paying the employee's superannuation contributions, it does not follow that the Commissioner should share such information with another non-tax government agency based on the same 'suspicion' threshold for an unrelated purpose.

Given the information-gathering powers, investigative resources and enforcement powers sit with the regulators, it is incumbent upon the regulator to use those resources and powers to raise the level of concern above mere suspicion before any protected information leaves the tax regulators' custody and control and is passed on to other agencies or regulators outside of the tax system. A higher threshold of 'Satisfied' would be consistent with existing tax secrecy exemptions regarding superannuation funds.

Ring-fencing the tax system and safeguarding protected information by setting appropriate boundaries is of paramount importance to maintaining its success and integrity.

Cybersecurity and privacy implications

There is an assumption in the consultation paper that sanctions regarding the on-disclosure of protected information, and potential requirements that an organisation receiving protected information has appropriate safeguards, are sufficient to ensure that protected information is protected. The joint bodies question this assumption.

[7] *Tax Agent Services Bill 2008* Explanatory Memorandum paragraph 5.145.
[8] *Tax Agent Services Bill 2008* Explanatory Memorandum paragraph 5.142.
[9] TASA sections 30-35, 30-40
[10] For example, TAA 1953 Schedule 1 section 355-65 Table 2 Item 7A.

The ATO deals with over 4.7 million cyberattacks[11] a month due to the type of information that it holds. The passing of protected information to other agencies is likely to make them targets as well. Whether these agencies are resourced to protect information as well as the ATO is questionable and a risk that most taxpayers are likely to find unacceptable.

Part 3: Proposed further exceptions

1 Are the above factors appropriate considerations when considering new exceptions to the TAA 1953 or TASA? What other factors (if any) should be considered?

The consultation paper indicates that the following factors will be considered when assessing the public benefit against the impact on the taxpayer:

- The purpose for which the information is to be used.
- The potential impact on the individual or entity from the disclosure and subsequent use of the information.
- The nature and amount of information likely to be provided under any new provision.
- Whether the information can be obtained from other sources
- Whether the new disclosures would represent a significant departure from existing disclosure provisions, and
- Whether not providing the information would significantly undermine the ability of government to effectively deliver services or enforce laws.

The consultation paper lists 4 safeguards. It states that disclosure of protected information should only occur where the ATO and TPB has first confirmed:

- Proper governance and controls are in place by the recipient of the data
- The use of the data will be only for a proper and lawful purpose consistent with Parliament's intent
- The proposed use of data will not undermine the proper functioning of the tax system and
- The proposed use of data will not undermine public trust and confidence in the tax system or government agencies.

The joint bodies broadly agree that the above factors are appropriate considerations when considering new exceptions to the TAA 1953 or TASA and make the following comments:

- The way the consultation paper is framed, it appears that the ATO has the right to 'veto' the sharing of information if it has concerns about the criteria that are specified in the 4 safeguards. These 4 safeguards that the ATO are to consider are of such importance that they should be part of the assessment of the public benefit versus impact on the taxpayer.
- Ensuring that the recipient of the data has proper governance and controls (especially in relation to cybersecurity), and that the use of the data will be only for a proper and lawful purpose consistent with Parliament's intent, are both very important factors. In addition to privacy and data security concerns, shared data may be inadvertently misapplied. For example, due to the many

[11] https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-national-press-club-2024

definitions of 'small business' under various Acts, data used to classify an entity as a small business for one law could be misapplied under another law. For example, the definition of a small business under the Payment Times Reporting Act is effectively a business with an annual turnover of less than $10 million, while the definition of a small business employer under the Fair Work Act 2009 is fewer than 15 employees.

Whilst the ATO may be able, with the assistance of other data related government departments, to make an initial assessment of how the data will be protected and used, it is unclear how subsequent decisions made by the recipients of such data will be monitored and enforced. It is also unclear whether the ATO is the appropriate body to undertake such monitoring. Detailed consideration of how ongoing cybersecurity and future data use issues is also required.

- Whether information can be obtained from other sources is particularly important. Treating the ATO as the data warehouse for all governmental bodies may seem expedient, but it is highly likely to damage taxpayers' willingness to fully comply with the tax system. Where information is public, that source should be used in preference to data held by the ATO. Where the information has been provided to another government entity and the ATO, but is not publicly available, the ability of the other government entity to provide that information should be preferred over the ATO to ensure the integrity of the tax system.

3.1: Prevention of fraud – disclosure to approved fraud prevention programs

This section proposes that the ATO be allowed to share information about 'suspected' fraudulent behaviour beyond the tax system. This sharing is proposed to be implemented by allowing the Minister to approve an entity as a 'fraud prevention program'.

Fraud prevention program is not defined and may be a private sector backed program. It would need to:

- Be established – though no time period is specified.
- Have appropriate governance arrangements that ensure the correct use, storage and security of information.
- Have a predominant purpose of preventing or remediating fraud.
- Have a meaningful impact on reducing fraud in the tax and superannuation systems.
- Provide a strong public benefit with any private benefit being incidental.

It is suggested in the consultation paper that information that will be shared MAY be limited to contact details, bank details and superannuation member details.

The first two entities that the paper suggests may benefit from sharing of protected information through a 'fraud prevention program' are superannuation fund trustees and the Australian Financial Crime Exchange (AFCX).

The joint bodies hold serious concerns about the:

- threshold of 'suspected' and 'possible' which was discussed earlier in the submission. The Commissioner should be 'satisfied' that fraud has occurred before sharing information.
- Use of legislative determinations which was also discussed earlier in the submission. Legislative changes to section 355-65 that specify that superannuation fund trustees and AFCX can receive information from the ATO if the ATO is satisfied that there if a fraudulent situation is to be preferred.

Superannuation fund trustees

In principle, we support the proposition that the ATO should be able to disclose information to superannuation fund trustees on identified fraud, actual or imminent. Attachment B demonstrates the joint bodies view, which is supported by the IGTO report, that the ATO should be able to do this under the existing tax secrecy exceptions and that the ATO needs to further develop its fraud deterrent policy and mechanisms.

This should be undertaken in a manner similar to the disclosures the ATO can presently make to a superannuation provider to correct the record where an incorrect notification has been made regarding a claim as a downsizer contribution (see item 11 of section 355-65(3) Table 2 of Schedule 1 to the TAA 1953 and section 292-102(9) Income Tax Assessment Act 1997). Under these provisions information can be disclosed where the Commissioner is "**satisfied**" that the superannuation contribution does not meet the criteria to be a downsizer contribution as the fund was notified.

It is unclear how a superannuation fund trustee can participate in a 'fraud prevention program'. Superannuation fund trustees do not have a predominant purpose of preventing or remediating fraud. Nor do they operate for the public benefit with any private benefits being incidental. A whole new entity would need to be established along the lines of the Australian Financial Crime Exchange. *Australian Financial Crime Exchange*

The IGTO recommended that the ATO join the AFCX, which has now occurred. In the same report the IGTO commented upon the ability of the ATO provide information to the Fintel Alliance Tax Crime and Evasion Working Group and formed the view that the ATO did not share information even though it was entitled to.

> *"The IGTO considers that the ATO should carefully reconsider its view and obtain independent legal advice regarding the application of the 'in the performance of duties' tax secrecy provision exception to the facts and circumstances of TaxID fraud cases and tax secrecy provisions.* [12]*"*

This raises the issue as to whether a legislative change is required at all.

It was only after making such comments that the IGTO stated:

> *"However, to the extent the ATO considers it is prohibited from making disclosures for the purposes of preventing TaxID fraud, it should advocate for a specific exception to the tax secrecy provisions to facilitate such disclosures (for example, to the Fintel Alliance and AFCX) and ensure that appropriate criteria and controls are imposed on those disclosures.* [13]*"*

The IGTO did not advocate in the report for a legislative determination giving power to the Minister to approve a government or private sector backed program as a fraud prevention program to allow the ATO to disclose information to them for fraud prevention purposes.

The IGTO's report also suggested a large number of measures that the ATO could implement internally to reduce the impact of fraud on the tax system. This included investing in systems that can accurately and expeditiously detect TaxID fraud. We encourage Treasury and the ATO to revisit this report.

2 Does the broad public interest in the proposal sufficiently justify this possible new exemption?

Having the ATO disclose **possible** fraudulent behaviour to a potentially wide and unspecified number of recipients is not in the public interest.

3 Are the proposed safeguards appropriate? Are additional safeguards required?

[12] Page 64 https://www.igt.gov.au/wp-content/uploads/2024/04/240430-IGTO-TaxID-fraud-investigation-Interim-report.pdf
[13] Page 65 – see above reference

The proposal to allow the Minister to declare an approved fraud prevention program reduces the safeguard of effective Parliamentary oversight.

It is unclear what, if any, safeguards exist. If the 'safeguards' concern how a fraud prevention program would be determined, then the consultation paper's suggestion that a superannuation fund trustee would participate within the scope of a fraud prevention program category is very unclear.

4 ***Does the proposed exception sufficiently help to address the issue identified? Are further changes/exceptions necessary?***

The issue the proposal seems to intend to address has been defined as the ATO possibly holding information that may indicate possible fraudulent behaviour. The proposed exemption does address this issue, but the issue is not one that should be addressed. See Attachment 2 for further discussion.

Legislative changes to section 355-65 that specify that superannuation fund trustees and AFCX can receive information from the ATO if the ATO is satisfied that there is a fraudulent situation, is preferred.

5 ***Should there be any other limitations on what types of fraud prevention programs could be approved by the Minister?***

The Minister should not have authority to approve fraud prevention programs.

6 ***Are there any other considerations the Minister should take into account before approving a fraud prevention program?***

The Minister should not have authority to approve fraud prevention programs.

7 ***Would fraud prevention programs in the following sectors be considered to be in the broad public interest?***

- ***the superannuation system; and***
- ***the financial systems sector, including the banking, payments and insurance systems.***

While particular fraud prevention programs in those sectors may be in the broad public interest, expansion of the exceptions to the general prohibition on sharing information should only be done by legislative amendment to Division 355 of Schedule 1 of the TAA 1953 that specifies what can be shared, and to whom, if the ATO is satisfied that there is fraudulent behaviour as noted above. Legislative determinations should not be used.

3.2: Other investigative agencies – non-law enforcement agencies

This proposal intends to allow the ATO and the TPB to disclose protected information with non-law enforcement agencies for the purpose of assisting that agency to investigate a serious offence.

'Law enforcement agency' is a defined term (section 355-70(4) of Schedule 1 to the TAA 1953). Law enforcement agencies include the Australian Federal Police, state police, Director of Public Prosecutions, National Anti-Corruption Commission, the Australian Crime Commission and the Independent Commission Against Corruption, amongst other State and Federal government agencies. Law enforcement agencies have personnel with particular security clearances and training and the information provided is strictly limited to the investigative/enforcement purposes for which it was disclosed.

The consultation paper proposes that the Director of Military Prosecutions of the Australian Defence Force, the Australian Sanctions Office, and the Australian Transaction Reports and Analysis Centre (AUSTRAC), all of which are non-law enforcement agencies, be given the ability to receive information from the ATO (and in the case of AUSTRAC from the TPB) about serious offences.

These agencies do not have a specific legislated exemption.

We note however, that AUSTRAC, unlike the other two proposed agencies, can receive information from the ATO due to its participation in the following [14]

- Criminal Assets Confiscation
- Phoenix
- Shadow Economy
- Illicit Tobacco
- Serious Financial Crimes
- Fraud Fusion
- Morpheus.

The consultation paper does not propose to impose the high standards of personnel, training, or data use on these non-law enforcement agencies as it would on law enforcement agencies. Nor is there a discussion regarding how many non-law enforcement agencies who investigate serious offences could be encompassed by this proposal.

The joint bodies reiterate their lack of support of the use of legislative determination. If it is considered that such agencies should be able to receive protected information, it should be made by way of specific legislative amendment either to the definition of law enforcement agency or by way of a specific limited exception.

The joint bodies are supportive of a specific limited amendment in relation to AUSTRAC for the reasons below. However, we would question what protected information would be intended to be shared through this possible new exception that cannot already be shared through the Serious Financial Crimes taskforce noted above.

The joint bodies are not supportive of providing further exemptions to other non-law enforcement agencies without significant further justification of such an exemption being provided.

AUSTRAC

8 Does the broad public interest in the proposal sufficiently justify this possible new exception?

We support an exception to broaden the data the ATO shares with AUSTRAC.

As Australia's anti-money laundering and counter-terrorism financing regulator, and financial intelligence unit, AUSTRAC, plays a pivotal role in disrupting money laundering, terrorism financing and other serious crime.

Giving the ATO the ability to share protected information will enhance AUSTRAC's ability to carry out its responsibilities. The earlier an offence is detected the earlier AUSTRAC can act to minimise the harm caused.

Effective sharing of data is in the public interest and fosters the economic and social wellbeing of Australians.

However, we note the Serious Financial Crime Taskforce, referenced above, "brings together the knowledge, resources and experience of law enforcement and regulatory agencies to identify and address the most serious and complex forms of financial crime"[15]. Both the ATO and AUSTRAC are

[14] AUSTRAC taskforce participation https://www.austrac.gov.au/partners/law-enforcement-task-forces; Taskforces exception https://classic.austlii.edu.au/au/legis/cth/consol_reg/tar2017378/s67.html
[15] How the taskforce operates | Australian Taxation Office - accessed 26 February 2025

members of this taskforce. Therefore, we would question what protected information would be intended to be shared through this possible new exception that cannot already be shared through this taskforce.

9 Are the proposed safeguards appropriate? Are additional safeguards required?

We consider the safeguards adequate as information collected or received by AUSTRAC becomes AUSTRAC information and is subject to the controls and restrictions provided for by the secrecy and access provisions in the *Anti-Money Laundering and Counter-Terrorism Act 2006* (Cth).

10 Does the proposed exception sufficiently help to address the issue identified? Are further changes/exceptions necessary?

We consider the exception is a positive step in addressing the issue identified.

3.3: Professional integrity

To permit the ATO and TPB to disclose protected information about a Commonwealth employee to another Commonwealth agency on the basis of a **suspicion** of a serious offence risks untold damage to the reputation and good name of the individual should the suspicion be ultimately unproven. This proposal is a perfect example of the 'significant consequences which may arise for an individual as a result of [disclosure of official information]', as foreseen in the Explanatory Memorandum to the *Tax Agent Services Bill 2009*.

To permit wider disclosure about professionals to non-tax disciplinary bodies and about people to the Australian Government Security Vetting Agency (AGSVA) only heightens that risk.

11 Does the broad public interest in the proposal sufficiently justify this possible new exception?

No. Not if merely on the basis of a suspicion.

12 Are the proposed safeguards appropriate? Are additional safeguards required?

No. Any changes to the exceptions to the general prohibition on sharing information should only be done by way legislative amendment to Division 355 of Schedule 1 of the TAA 1953.

13 Does the proposed exception sufficiently help to address the issue identified? Are further changes/exceptions necessary?

No. The negative consequences for the individual are too great to allow disclosure based on suspicion.

14 Should these proposals extend to prospective employees and contractors, and if so, what further matters should be considered?

The above comments apply equally to prospective employees and contractors.

15 Is the proposed threshold of 'reasonable suspicion of breach of a serious crime (relating to fraud or dishonesty)' or 'a serious breach of a Commonwealth Code of Conduct has been committed' appropriate?

No. The negative consequences for the individual are too great to allow disclosure based on suspicion.

16 Should the disclosure be allowed in relation to any other serious crimes?

No. Not on the basis of a mere suspicion and only if the disclosure is to an entity permitted under the exceptions to the general prohibition on sharing information.

17 Is the proposed threshold of 'suspected misconduct having occurred on multiple occasions' appropriate for disclosures about a person who is not a legal, tax or accounting trusted professional?

Not until the misconduct is proven.

18 Are there other trusted professionals, covered by a Code of Conduct, that should be considered by the new power to prescribe professional associations or disciplinary bodies?

Consideration of potential changes is important to ensure that the secrecy framework remains relevant. However, any changes to the exceptions to the general prohibition on sharing information should only be done by way legislative amendment to Division 355 of Schedule 1 of the TAA 1953.

19 Are there other trusted professionals, covered by a code of professional conduct, that should be covered by a new disclosure to employers as the employers enforce the code?

Please see our comments above.

3.4 Further government purposes exceptions

This section proposes that specific legislative provisions be made for the ATO to use or disclose protected information with a variety of government entities either for broad purposes or specific purposes. The joint bodies are supportive of adopting an approach that makes specific legislative changes. However, we note that substantial consultation is required on the scope and design of any exception. Questions 20, 21 and 22 are addressed under each particular proposal.

3.4.1 Research and Development (R&D) Tax Incentive

In the Board of Taxation (BoT) Review[16], the BoT found that the statutory secrecy provisions preventing Department of Industry, Science and Resources (DISR) and the ATO from sharing information were creating significant inefficiencies in the administration of the Research and Development Tax Incentive (R&DTI) program, with companies making claims under the R&DTI Research program ultimately bearing the burden of this inefficiency.

For example, because of the co-administrators not being able to share information, problems arose with having joint meetings with DISR and the ATO as there were sensitivities around the information discussed while both administrators were present. Similarly, documentation provided to either the ATO or DISR could not simply be shared by one with the other to streamline the process when both agencies were reviewing an R&D claim at the same time.

The BoT noted that DISR and the ATO can share information in relation to the Venture Capital program (which is co-administered by the ATO and DISR), and as such there is an existing protocol. The BoT recommended that broader information sharing should be permitted between DISR and the ATO in relation to the R&DTI program to improve the experience for companies participating in the program and ultimately creating a more efficient process.

As it seems clear that broader information sharing between DISR and the ATO is necessary, this should be done by way of amendments to the exceptions to the general prohibition on sharing information in Division 355 of Schedule 1 of the TAA 1953. Specific consultation sessions with R&D practitioners, DISR and the ATO would be required to gain an understanding of what information sharing is required and appropriate to enable a suitable exception to be designed and drafted.

[16] Board of Taxation, Review of the R&D Tax Incentive Dual Agency Administration Model (2021)

3.4.2 *Financial Sector (Shareholdings) Act 1998 and the Insurance Acquisitions and Takeovers Act 1991*

Most of the information proposed to be shared under 3.4 of the consultation paper is in relation to facts and documents. The proposal that the ATO will provide information about non-compliance with tax laws so that better consideration of whether a transaction is in the national interest is commendable but raises some issues that need further consideration.

For example, it is unclear how 'history of non-compliance' will be interpreted. If it is about facts of non or late lodgement or payment of tax that is one matter, if it is an opinion about whether the taxpayer is aggressive in its tax structuring, then questions arise as to whether the taxpayer should/will be informed about the opinion that the ATO has provided and what mechanisms exist to discuss any differences of views. The subjective perception of ATO auditors that a taxpayer might be tax aggressive should not lead to such a conclusion without independent review and evidence of such behaviour.

3.4.3 *Statement of Tax Record (STR)*

The ATO should be permitted to confirm the genuineness of an STR at the request of a federal government department or agency, where the STR has been lodged with that agency by the business tendering for the Commonwealth procurement. As proposed in the consultation paper, this should be restricted to the ATO verifying on a 'yes' or 'no' basis whether an STR is genuine and whether it is the most recently issued STR and should not extend to the ATO providing details or particulars about the STR.

3.4.4 *myGov*

The consultation paper proposes that the ATO should be permitted to disclose protected information about changes to contact details on myGov with other government agencies linked to that user's myGov account. Whilst this sounds like a great initiative to reduce red tape, the joint bodies are aware of government agencies, particularly the ATO, having increasing concerns about myGov accounts being compromised.

Allowing the ATO to disclose a change in contact details across other government agencies in this case may heighten the adverse impacts that hackers have on individuals. An alternative approach would be to provide myGov with the capability to compare such data across the linked services and alert the individual where conflicting information is identified. It would then be incumbent upon the individual to determine which information is accurate and to update the various agencies providing the linked services.

3.4.5 *Fair Work regulatory functions*

This is an area of the law where there are numerous different definitions for similar concepts. Consequently, there is a higher risk that data will be misapplied.

The implementation of PayDay super rules has highlighted this complexity, and some of that complexity is to be addressed through greater alignment of definitions and simplification. The joint bodies recommend that data sharing be delayed until these legislative alignments and simplifications have occurred to minimise the prospect of another Robodebt type scenario.

3.4.6 *Australian Business Register*

We do not support the automatic identification of businesses as small, medium or large on the ABR. This approach would risk exposing private financial information and presents significant practical challenges, given the many different definitions of 'small businesses across federal and state laws, as well as government programs. Such a uniform classification is neither feasible nor appropriate.

However, we recommend that businesses be given the option to be identified on the ABR as a "small business for the purpose of the Payment Times Reporting Act". This is a single definition that is much

easier apply in practice and could reduce the burden that payment times reporting entities must go through to identify small businesses for the purposes of that Act.

3.4.7 National Disability Insurance Scheme Act 2013

While National Disability and Insurance Scheme (NDIS) fraud is widespread with the NDIS identifying over 15,000 NDIS participants who may have been impacted by fraudulent providers[17], NDIS information is highly sensitive and must be subject to the highest levels of protection. Therefore, the joint bodies support providing the ATO with the ability to share protected information where it is done by way of legislative amendment to Division 355 of Schedule 1 of the TAA 1953.

3.4.8 Indirect Tax Concession Scheme (ITCS)

While taxation fraud is a serious issue that should be urgently addressed, the disclosure by the ATO of protected information to Department of Foreign Affairs and Trade regarding the application of the indirect tax laws to foreign consulates, embassies, high commissions and foreign diplomatic staff, for the purposes of administering the ITCS is a sensitive political area that demands that any such permission be the subject of parliamentary oversight with the opportunity for public consultation.

3.4.9 Australian Securities and Investments Commission (ASIC)

While not contemplated by the consultation paper, for the purposes of verifying an application for voluntary deregistration of a company, we seek consideration of an exception to the general prohibition on sharing information to enable the ATO to provide ASIC a 'Yes' or 'No' to the question of whether a company with the status 'Strike Off Action in Progress' (SOFF) has an outstanding tax liability.

The purpose of this proposed exception is to address the misuse of deregistering a company which has outstanding tax liabilities. Deregistration can be used to close a company and phoenix assets into a new company to continue the same business activities. This can leave the creditors of the deregistered company, including the ATO, with no option but to recover payment through legal means at their cost.

The key issue being that there is no positive obligation on ASIC to verify the claims made in an application to deregister a company, which include that there are no outstanding labilities. However, if ASIC becomes aware that a company fails to meet all conditions of deregistration, it may refuse the application to deregister. While the company remains registered, creditors can take action to recover monies due without incurring additional costs and the required investigations by a registered liquidator can detect creditor-defeating actions such as phoenix activity.

As provided by ASIC in its response to Questions on Notice, number 024, to the Inquiry into Corporate Insolvency in Australia[18], the ATO is provided daily, a bulk data download that includes the status of all companies. This includes companies with the SOFF status.

For those companies with the SOFF status, the ATO could revert to ASIC with a simple 'Yes' or 'No' to indicate whether a company has an outstanding tax liability, without revealing the value of that liability. ASIC can then draw on this information to verify claims made in applications to deregister a company, which include that the company has no outstanding liabilities.

As the ATO itself has stated, 'the economic impact of illegal phoenix activity on business, employees, and government is estimated to be $4.89 billion annually'[19]. Using ATO information effectively to detect and

[17] See 'Protecting the NDIS: fraud fusion taskforce marks two-year milestone' NDIS website, 21 November 2024
[18] Inquiry into Corporate Insolvency in Australia
[19] ATO QC 33609 (last updated 3 December 2024), Illegal phoenix activity, https://www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/our-focus/illegal-phoenix-activity

prosecute phoenix activity is in the public interest and a crucial contribution to the economic and social wellbeing of Australians.

If appropriate, the exception should only be implemented by way of legislative amendment to Division 355 of Schedule 1 of the TAA 1953.

3.5 TPB other government purposes exception

Under this proposal the TPB will be able to disclose information to other government entities such as:

- National Disability Insurance Agency (NDIA) and the NDIS Quality and Safeguards Commission (NQSC) for the purposes of administrating the NDIS if it has a reasonable suspicion that a tax practitioner is assisting their clients to misled NDIA or NASC.
- Industry and Innovation Science Australia and DISR for the purposes of administrating the R&DTI
- Department of Employment and Workplace Relations for the purposes of administrating the Fair Entitlement Guarantee Recovery Program
- Services Australia for the purposes of administrating the Social Security (Administration) Act and
- Office of the Migration Agents Registration Authority for the purposes of administering migration agents under the Migration Act.

The information that the TPB gathers is mainly second-hand information. A tax practitioner could be referred to the TPB by the ATO or be reported by another tax practitioner due to the triggering of the breach reporting obligations contained within Subdivision 30-C of the TASA, and the additional disclosure obligations imposed by section 15 of the *Tax Agent Services (Code of Professional Conduct) Determination 2024*.

These new provisions, together with the general provisions of Part 3 of the TASA, give the TPB authority to pursue and sanction tax practitioners involved in questionable behaviours, bringing the behaviour to public attention.

The information that the TPB collates is in relation to investigations of tax practitioners. The TPB has traditionally had 6 months to complete investigations that it undertakes. This has recently been extended to 2 years so that complex cases can be completed in time. The extension was not meant to increase investigation times for the majority of TPB cases.

This proposal is suggesting that information relating to current or proposed investigations of allegations against a tax practitioner be disseminated throughout government before an investigation is completed and a finding made. Given the TPB has been provided with over $30 million to assist it with its investigation program and that investigations take a short period of time to be resolved, it seems premature to allow the TPB to disseminate damaging, and potentially incorrect information about a registered tax practitioner before a finding has been made against the practitioner.

Discussions about the Australian Charities and Not for Profit Commission (ACNC) revealing its incomplete investigations regarding charities was subject to a long and detailed consultation process which concluded that such an approach should only occur if the Commissioner:

- **reasonably suspects** that a registered entity has contravened the *Australian Charities and Not for Profit Commission Act 2012* (ACNC Act), a governance standard, or external conduct standard, and
- is satisfied that the disclosure is necessary to prevent or minimise the risk of **significant**:
    - harm to public health, public safety or an individual; or

- mismanagement or misappropriation of funds or assets of the entity or contributions to the entity; or
- harm to the public trust and confidence in the Australian not for profit sector or part thereof.

In addition, the Commissioner needs to be satisfied having regard to the above matters, the seriousness of the contravention, and the strength of evidence, that any harm likely to be caused to the registered entity or the registered entity's employees, contractors, volunteers, service providers by the disclosure would not be disproportionate.

The role of the TPB is to be the determinator of truth. It is only in very exceptional circumstances that the TPB should have any possibility or need to publicly reveal its future or ongoing investigations. The joint bodies do not support this proposal in its current form.

23 ***Does the broad public interest in the proposal sufficiently justify this possible new exception?***
No. Natural justice applies to everyone, including registered tax practitioners. Speedy resolution of investigations and due process is what is needed. Dissemination of conclusions, if they need to be disseminated, should occur when investigations are concluded. It is noted that the dissemination of incorrect information to NDIA, NQSA and Services Australia can inappropriately affect some of the most vulnerable Australian citizens. The dangers of this proposal outweigh possible benefits.

24 ***Are the proposed safeguards appropriate? Are additional safeguards required?***

No safeguards are proposed. As such, they are inadequate.

25 ***Does the proposed exception sufficiently help to address the issue identified? Are further changes/exceptions necessary?***

It is not the role of the TPB to disseminate information about potential or current investigations. Registered tax practitioners deserve natural justice. If the TPB needs further resourcing to ensure that investigations are completed in a timely and professional manner, then that funding should be provided. There may be a role for the TPB to disseminate information once an investigation is completed.

3.6 Internet Service Providers (ISPs)

It is proposed that the ATO and TPB be able to make limited disclosure of protected information to ISPs to disrupt access to websites under the *Telecommunications Act 1997* when deemed reasonably necessary for protecting the public revenue.

The spread of misinformation through various social media platforms has resulted in the Australian tax system being defrauded of around $4.6 billion. The ATO clearly has a need to shut down some websites.

26 ***Does the broad public interest in the proposal sufficiently justify this possible new exception?***

In the case of serious criminal or civil offences or threats to national security/finances our position is that the broad public interest justifies the sharing of such protected information by the ATO or the TPB.

27 ***Are the proposed safeguards appropriate? Are additional safeguards required?***

The paper suggests that as the *Telecommunications Act 1997* is reserved for the most serious offences that there are enough safeguards in place. In drafting this provision, it should explicitly require that sharing of protected information must:

- be restricted to 'serious criminal or civil offences or threats to national security';
- not be allowed to extend to less egregious behaviour over time;
- be undertaken strictly in accordance with subsection 313(3) the *Telecommunications Act 1997* and the protocols set out in 'Guidelines for the use of section 313(3) of the *Telecommunications Act 1997* by government agencies for the lawful disruption of access to online services.

Additionally, the protected information shared must be the bare minimum required to achieve the desired outcome, and failure by the ISP to maintain strict confidentiality of the protected information must be subject to significant sanctions.

28 Does the proposed exception sufficiently help to address the issue identified? Are further changes/exceptions necessary?

Incorporating such a provision should sufficiently help to address the issue identified, although the ability of the ISPs to protect the information provided should also be considered.

Part 4: Further issues for future consideration

4.1 Exceptional and unforeseen circumstances

The paper proposes that the Governor-General be provided the power in unforeseen and exceptional circumstances to temporarily declare urgent circumstances in which the ATO and TPB may disclose protected information in the public interest.

The paper suggests that this will enable the Commonwealth to respond appropriately to a disaster. Yet there is already an existing exception in section 355-66 (together with item 13 of table 7 of section 355-65) of Schedule 1 to the Taxation Administration Act to allow the sharing of protected information for administering a program declared to be a major disaster support program. This provision includes a specific list of items to be considered when determining whether an event is a major disaster and for the Prime Minister to make a national emergency declaration.

In discussions with Treasury, the only example that was raised was the PwC event for which legislation has now been enacted to rectify perceived deficiencies in the tax secrecy provisions. As such, it is difficult to envisage why this provision is needed.

29 Should the Governor-General be provided with a power to enable the ATO and TPB to share protected information in exceptional and unforeseen circumstances?

Numerous reviews of changes to the tax secrecy laws have emphasised the importance of taxpayer privacy which is why the tax legislation has specific narrowly defined exemptions that have received the full consideration of Parliament. This proposal does not appear to have even the very limited safety of a legislative determination or the involvement of Parliament in declaring what is unforeseen and exceptional (in contrast to the natural disaster provision).

The question as to whether the Governor-General is the appropriate office to hold a power to enable the ATO and TPB to share protected information is a substantive constitutional law question which is not addressed in this consultation. Providing such an unfettered power appears to be a most unusual expansion of the role of the Governor-General and may offend the doctrine of separation of powers. This could make the power and its exercise unconstitutional and therefore invalid.

The final point to note is that the intent of the existing 'national disaster' exception appears to be that it operates beneficially in favour of taxpayers, i.e. to enable them to access disaster payments.

Whereas it appears that the intent of this proposed exception is to primarily operate in cases of unforeseen circumstances to protect the integrity of the tax system against an individual or taxpayer, i.e. in dealing with serious breaches of the law. The Governor-General's executive decision in such a case to remove vested rights of taxpayers is not appropriate and arguably may not be lawful.

30 Would the benefits outweigh the risks and costs associated with introducing an exceptional and unforeseen circumstances exception?

No. The benefits of an *exceptional and unforeseen circumstances* exception are not obvious from the consultation paper. Nor is there a discussion about what could be an exceptional circumstance or defining factors to determine what an unforeseen and exceptional circumstance could be.

Consideration of such an exception requires substantially more consultation and definition.

31 Are the identified safeguards appropriate? Are additional safeguards required?

No. Safeguards cannot be identified to be appropriate when the circumstance is undefined.

The proposal that the protected information can only be made for a period of 90 days is not sufficient as a safeguard as once the information is released the damage is done.

32 Are there alternative mechanisms to provide the flexibility to address exceptional and unforeseen circumstances that should be considered?

A mechanism of last resort is not appropriate unless a risk or failing in the status quo can be more clearly identified.

4.2 Financial advisers

It is proposed that regulated financial advisers be able to obtain protected information from the ATO when they are providing financial (tax) advice to their clients. This would require the ATO to develop a new platform to implement this proposal.

33 Should the ATO be permitted to disclose ATO-held information (such as taxable income, super balance, contributions, and tax components) to financial advisers (that are qualified tax relevant providers)?

Prima facie, financial advisers should be able to access information from the ATO provided they meet the same rigorous requirements that registered tax practitioners need to meet to access ATO information. This would include not only meeting the ATO's technological requirements but also the onerous client/agent linking requirements[20].

In our joint submission[21] of October 2020 to the TPB's consultation on the then proposed *Tax Agent Services (Specified Tax (Financial) Advice Services) Instrument 2020* we commented that:

> *We are therefore supportive of the elements of the draft LI that enable tax (financial) advisers to access ATO-held information about a client's superannuation affairs, to the extent that this information assists the tax (financial) adviser to provide customised advice or explain an ATO-issued notice to a client.*

We would extend this support to disclosure of ATO-held information (such as taxable income, super balance, contributions, and tax components) to financial advisers, that are qualified tax relevant

[20] Client-to-agent linking
[21] Joint submission on proposed Tax Agent Services (Specified Tax (Financial) Advice Services) Instrument 2020

providers[22] and are providing tax (financial) advice services[23], provided that the disclosure of ATO-held information is through a dedicated platform.

Providing access to financial advisers will come at a cost to the ATO. The consultation paper notes that a separate platform would need to be created. Our members who are registered tax practitioners are currently reporting extreme dissatisfaction with ATO service standards and the ability to use online services for agents. Repeated requests for basic improvements to online services for agents have not been implemented on the basis that other technological changes are required or that it is too costly. This proposal should only proceed if substantial funding is provided to the ATO to improve online services for agents and separate funding is given to a financial adviser's portal.

34 Would the benefits outweigh the risks and costs associated with disclosing client superannuation information to financial advisers?

The costs of creating a portal for financial advisers is unknown. Therefore, it is difficult to determine the costs/benefits of this proposal.

4.3 Consumer consent

35 Should consideration be given to changing the TAA 1953's limitation on consent as a means for disclosure of protected information?

No, we do not support consideration being given to using consumer consent as a means for disclosure of protected information. Key to disclosure of taxpayers protected information is an assessment of the public benefit. In this case, the potential benefit would be for a small group of taxpayers while the cost to implement a secure digital channel would be borne by all taxpayers. Also, information required by a third party can be obtained from other sources and provided by the taxpayer themselves.

Noting that the statutory review of the Consumer Data Right (CDR) recommended facilitating government participation in the CDR, we raise that the review also found the complex consent process limits participation and contributes to 'consent fatigue' (Finding 2.2). This is evident as, after 4 years of CDR operation, by 2024 only 0.31% of bank customers have an active data sharing arrangement, and consumer participation is trending down.[24]

Without evidence that consumers seek consent as a means for disclosure, no consideration should be given to changing the TAA 1953's limitation on consent.

36 Would the benefits outweigh the risks and costs associated introducing consent as an authorisation for ATO disclosure?

No. Learnings from the implementation of the CDR indicate that the associated costs would significantly outweigh any potential benefit to consumers who may utilise a secure digital channel to disclose their protected data held by the ATO.

A reference for estimating potential costs is the Consumer Data Right Compliance Costs Review in December 2023 (the CDR Costs Review). The CDR Costs Review found that implementation and ongoing compliance costs have far exceeded regulatory estimates, leading many participants to

[22] *Corporations Act 2001* section 910A
[23] TASA section 90-15; TPB(I) 20/2014
[24] Australian Banking Association, Consumer Data Right Strategic Review, Retrieved 16/01/2025

question the cost-benefit justification. The Review also found that costs fall most heavily on data holders which, in this scenario, would be the ATO.

Further, the CDR Costs Review found, and Treasury has recognised in the many consultation papers on the CDR, that implementation and on-going compliance costs are outside the resources of small to mid-sized data holders. This has resulted in participation in the CDR regime is only mandated for very large and large data holders, in sectors other than banking.

The outcome for consumers being that their ability to disclose data through the CDR is determined by who their financial service, telecommunications or energy provider is, distorting, rather than improving competition. This indicates that, even if the ATO were to establish a secure digital channel through which to share protected data, that data would need to go through an accredited party and may not be accessible to all consumers.

While there does not appear to be any evidence that consumers are seeking a consent process to share their protected data, the cost to the ATO as the data holder, funded by all taxpayers, would significantly outweigh any potential benefits.

As noted above, the ATO is already defending 4.7 million cyber-attacks a month and needing to implement administratively burdensome identity verification programs to overcome identification fraud. The proliferation of sensitive tax information in organisations outside of the ATO would only increase these issues.

37 As highlighted in Part 4.1, what safeguards would be necessary to prevent coercive sharing and ensure that taxpayer consent is only granted in an informed and consensual way?

We do not consider it possible to prevent coercive sharing, though safeguards can mitigate some of the risks. Unfortunately, safeguards are generally enforced through regulation which, by design, would add complexity to the consent process.

The balance between consent being informed and not coercive with the ease of providing consent has yet to be achieved in the CDR and we are not aware of another comparable system. This complexity is another reason for not considering changing the TAA 1953's limitation on consent.

4.4 Interoperability with other data sharing regimes

38 Are any further changes necessary to the tax secrecy regime to ensure it operates in a complementary manner with the DAT Act?

We would submit that it is for the Treasury to ensure that legislation operates in a complementary manner.

4.5 Addressing gender-based violence

39 Are any further changes necessary to the tax secrecy regime to address gender-based violence and support victim-survivors?

Gender-based violence is an issue which is currently subject to several studies and reviews, including by the Inspector-General of Taxation[25], the Parliamentary Joint Committee[26], and Monash University[27].

[25] https://www.igt.gov.au/current-investigation-reports/identification-and-management-of-financial-abuse-within-the-tax-system/
[26] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/FinancialAbuse
[27] https://lens.monash.edu/2024/11/25/1387186/eliminating-gender-based-violence

It is appropriate to wait for the outcome of those studies and to understand the issues that are being raised. A whole of government, rather than ATO led approach may be required. It is too early to assess how changes to the tax secrecy regime may assist in addressing this issue.

Further developments in this area should also consider elder abuse.

However, we do highlight the need for legislative clarity as to the meaning and scope of 'a serious threat to an individual's ... health or safety' as set out in Item 9, Table 1, section 355-65 of Schedule 1 to the TAA 1953, which provides an exception for a disclosure made to a government agency for the purpose of 'preventing or lessening a serious threat to an individual's life, health or safety'.

Specifically, does the expression 'health or safety' include economic, financial, emotional and mental health, and security? If so, then the existing exception already enables disclosures in circumstances where there is tax-related financial abuse without physical abuse.

Other issues - Tax Professional bodies

The following comments relate to the tax secrecy law exceptions that are applicable to tax professional bodies and their staff who receive information disclosed by the TPB.

(i) Purpose

The professional accounting bodies have in the past had concerns, and continue to have uncertainty, around whether our staff in Conduct and Disciplinary roles can on-disclose the information contained in decision letters (notifications) received from the TPB under section 60-125(8) of the TASA. The information was originally disclosed by the TPB under an exception in section 70-40 of the TASA for a purpose specified in that exception. Section 70-45(4) of the TASA provides an exception to the tax secrecy laws where the information was originally disclosed for a purpose specified in section 70-40. There is no purpose specified in section 70-40 that involves the taking of disciplinary action, so the professional bodies are reliant on the purpose being inferred. This is inadequate from the professional accounting bodies perspective, and it is inappropriate to expect our staff members to take the risk of on-disclosing protected information in reliance on an 'inference', rather than a clear statutory exception.

We consider that it is important that these concepts and exceptions be expressly articulated in the TASA, particularly given that criminal sanctions resulting in imprisonment for 2 years can arise from a breach of section 70-45 of the TASA. For example, section 70-45(1)(c) could be tweaked as follows:

> *(c) the first-mentioned person did not acquire the information in the course of, or because of, his or her duties **or responsibilities** under or in relation to this Act or the regulations, **including by way of any notification pursuant to section 60-125(8)(c)(iia) and (d)(ia).***

Section 70-45(4) could be tweaked as follows:

> *(4) Subsection (1) does not apply if:*
>
> *(a) the information was originally disclosed under an exception in section 70-40 for a purpose specified in that exception, **including any notification pursuant to section 60-125(8)(c)(iia) and (d)(ia)** (the original purpose); and*
>
> *(b) the information was acquired by the person under this section or an exception in section 70-40; and*
>
> *(c) the record or disclosure is made by the person for the original purpose, or in connection with the original purpose*

(ii) Official Information

The professional accounting bodies often receive information from the TPB in connection with a TPB investigation that includes third-party taxpayer information.

To ensure that un-redacted third-party taxpayer information is covered by the exceptions in the TASA and can therefore be used for the purpose of taking disciplinary action, we recommend that it be clarified in the law that such information either falls within the definition of "official information", or that such information is excluded from the prohibition.

(iii) Prescribed Disciplinary Body

The new exception to section 70-35 – subsection70-40(6) - applies to a prescribed disciplinary body.

As opposed to section 70-40(1) and 70-45, this exception does refer to a "purpose" of enabling or assisting the prescribed disciplinary body to perform one or more of its functions and it does specifically exclude third party taxpayer information unless the Board is satisfied that the inclusion of the information is necessary for that purpose.

We note however, that the "prescribed disciplinary bodies" exception applies to the record or disclosure of information that:

> *concerns another person (the **second person**) and an act or omission (or a suspected act or omission) of the second person that the first person reasonably suspects may constitute a breach by the second person of the prescribed disciplinary body's code of conduct or professional standards …*

It follows that this section does not appear to apply to decision letters issued under section 60-125(8), which are a different type of information, so the discussion in relation to decision letters as referred to above is still relevant. In addition, no details on the criteria for prescribed disciplinary bodies have been defined or published as yet. In any event, not all professional bodies will become a "prescribed disciplinary body". Therefore the on-disclosure exception based on "original purpose" (and receiving TPB notifications) will continue to be important, hence the need to amend s 70-45 as suggested above so that it covers bodies who are not a prescribed disciplinary body.

Attachment B: Review issue identification

It is difficult to foresee a situation so urgent and egregious in which involvement by the appropriate government agencies and law enforcement is not enabled under the current exceptions. The definition of a "taxation law" includes the Acts (or parts of Acts) of which the Commissioner has the general administration.

The Acts (or parts of Acts) administered by the Commissioner generally contain a provision which states that 'the Commissioner has the general administration of this Act'. These include:

- section 8 of the *Income Tax Assessment Act 1936* for the income tax laws
- section 43 of the *Superannuation Guarantee (Administration) Act 1992* for the superannuation guarantee law
- section 7 of the *Excise Act 1901* for the excise laws
- section 3 of the *Fringe Benefits Tax Assessment Act 1986* for the fringe benefits tax law, and
- section 356-5 of Schedule 1 to the *Taxation Administration Act 1953* for the indirect tax laws (including the goods and services tax law and the fuel tax law).

Therefore, the general exceptions in s 355-50 - Disclosure in performing duties, which relate to any "taxation law" and the ability to disclose to "any entity" would extend to the administration of all of the above laws by the Commissioner, such as superannuation, excise, and GST. See in particular, the general exception in Item 1 (Table in s 355-50(2)):

1	any entity, court or tribunal	is for the purpose of administering any *taxation law.

If an approved fraud prevention program would require the Minister to *"be satisfied the program's purpose will 'have a meaningful impact on reducing fraud in the tax and superannuation system'"*, [28] then we query why the Commissioner's general power of administration to manage and negate risks to the integrity of the tax and superannuation systems would not apply, and therefore why item 1 would not apply to cover such disclosures necessary to remove the kind of fraudulent actors mentioned in the discussion paper, e.g. fraudulent accounts identified by the ATO?

We would anticipate that the ATO should be able to communicate about and purge such frauds that are in progress and posing imminent threats from the tax and superannuation system, in order to protect the integrity of the tax and superannuation systems.

Our views above are consistent with the IGTO's analysis of the 'performance of duties' secrecy exception and tax administration law, concluding that:

> *One of the relevant exceptions to the tax secrecy provisions is a disclosure made in the performance of the taxation officer's duties under a taxation act. This exception appears to provide a more reasonable basis for the Commissioner to make lawful disclosures to the banks for the purposes of dealing with TaxID fraud. .....*
>
> *Disclosure of information that identifies taxpayers, such as name and bank account numbers, and the ATO's suspicions would be reasonably necessary if the ATO were to obtain information from the banks that would assist it to determine whether the bank account and its controller were connected to TaxID fraud.* [29]

[28] Page 15 - Consultation paper
[29] Pages 62-64 IGTO report *Tax Identity Fraud: an own initiative investigation. Interim Report*

It is also noted that there are 13 prescribed taskforces, namely:

1 Criminal Assets Confiscation Taskforce
2 National Criminal Intelligence Fusion Centre
3 National Anti - Gang Taskforce
4 Trusts Taskforce
5 Phoenix Taskforce
6 Fraud and Anti - Corruption Centre
7 Taskforce Cadena
8 Shadow Economy Taskforce
9 Illicit Tobacco Taskforce
10 Serious Financial Crime Taskforce
11 Fraud Fusion Taskforce
12 Operation Protego Integrity Taskforce
13 National Taskforce Morpheus

The explanatory memorandum regarding the establishment of Taskforce Cadena states:

"Taskforce Cadena was established for the purposes of reducing visa fraud, illegal work and the exploitation of foreign workers in Australia. A major purpose of Taskforce Cadena is to protect the public finances of Australia, including by deterring visa fraud, fraudulent phoenix activity, and unlawful employer and labour hire practices."[30]

This would seem to cover egregious behaviour regarding the exploitation of workers and the tax system. The proposed extension to information sharing between the ATO and the FWO would seem to extend to day-to-day errors. This goes beyond any suspicion of fraud and is a substantial increase in data sharing.

[30] https://treasury.gov.au/sites/default/files/2019-03/C2016-001_Explanatory_Materials.rtf