Thursday, 13 June 2024

Mr. Chris Leggett
Director, Governance and Integrity Policy Unit
Law Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: pwcresponse@treasury.gov.au

Dear Chris,

Response to PwC – tax regulator information gathering powers review

Chartered Accountants Australia and New Zealand and CPA Australia (the Joint Bodies) welcome the opportunity to respond to Treasury's consultation paper entitled 'Response to PwC – tax regulator information gathering powers review' (the Review) on behalf of our members and in the broader public interest.

We do not support the expansion of the ATO's powers into criminal law enforcement. Australia has a very well-established framework for the enforcement of criminal law through its various criminal law agencies and the ATO should work with these criminal law agencies to ensure appropriate application of the law, with a clear separation of civil and criminal powers.

The review seeks views about the following measures that would increase the information gathering powers of the Australian Taxation Office (ATO) and the Tax Practitioners Board (TPB):

- Enabling the ATO to **independently** access telecommunications data and stored communications.
- Enabling the ATO to issue notices to produce documents in relation to tax related crime.
- Enabling the TPB to require the production of a document prior to commencing a formal investigation.
- Reducing the minimum response period for an offshore information notice.

The Joint Bodies make the following key points on the Review:

- The ATO's existing formal powers for civil and administrative investigations are already extensive, with wider powers than many law enforcement agencies. We therefore do not support enabling the ATO to independently access telecommunications data and stored communications.

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- The government should firstly consider other options to help the ATO fulfil its functions, such as improving processes with prescribed taskforce procedures, increasing resource allocation to prescribed taskforces or creating new prescribed taskforces, such as one that deals with sales suppression software.
- Greater justification of an expansion of the ATO's information gathering powers to require the production of documents in its investigations into tax-related criminal offences is needed. In the absence of such a justification we do not support this proposal.
- We support in-principle the expansion of the TPB's information gathering powers to better enable it to administer the regulatory regime. Further detail is however needed on such powers and their design must meet the minimum thresholds and principles for the introduction of 'coercive powers to produce.'
- We believe that the 90-day minimum response period for an offshore information notice is appropriate and should not be reduced.

Please refer to the Appendix for our responses to the questions raised in the consultation paper. If you have any queries, contact Susan Franks, Senior Tax Advocate on 0401 997 372 or susan.franks@charteredaccountantsanz.com or Bill Leung, Tax Technical Advisor on (03) 9606 9779 or bill.leung@cpaaustralia.com.au.

Yours sincerely,

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Appendix

Enabling the ATO to independently access telecommunications data and stored communications.

Recommendation: The Joint Bodies do not support enabling the ATO to independently access telecommunications data and stored communications.

Whilst the ATO cannot independently access electronic surveillance, it can do so through its membership of the Serious Financial Crimes Taskforce and other similar taskforces. Little evidence has been produced as to why these existing systems are inadequate. Working with the Australian Federal Police (AFP), which deals with criminal proceedings daily, provides a natural check and balance on the appropriateness of whether the ATO can access data and the conduct of officials.

The consultation paper gives limited consideration to other options to help the ATO fulfil its functions, such as improving processes with prescribed taskforce procedures, increasing resource allocation to prescribed taskforces or creating a new prescribed taskforce, such as one that deals with sales suppression software[1]. Discussion of these options, rather than further increasing the already substantial power of the ATO should be considered.

We note that telecommunication intercepts are a significant intrusion into the privacy of individuals, thus the Telecommunications (Interception and Access) Act 1979 strictly limits the number of agencies that can access information that way to core Commonwealth, State and Territory law enforcement and anti-corruption bodies. It does not follow that, because the ATO has a role in undertaking criminal investigations that it should be able to access this power independently – there are many agencies appropriately vested with these powers.

Arguments for not allowing the ATO to independently access telecommunication data include:

- The ATO is not a criminal enforcement agency like a police force; it is an administrator of a tax system and may lack the internal controls and operations training to deal with such power.

[1] Treasury's statutory review of the operation of the ban on sales suppression software noted that "traditional benchmarking and risk modelling alone cannot be relied on to identify highest-risk sectors as they provide a distorted view " and "There are significant difficulties in gathering sufficient evidence to support the enforcement decision, given it is common for an ESST itself to delete the audit trail that the ATO would ordinarily rely on to take and justify compliance action" and "the ATO is aware of a 4-fold increase in the use of ESST since the pandemic."

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The 2018 IGOT report supports this argument. Paragraph 7.70 of the report states "For example, although an ATO investigator may have significant law enforcement specialist capability, the absence of corresponding institutional safeguards may expose that officer and the ATO to a range of risks including corruption. Such risks may also include the investigator's brief of evidence, to the CDPP, being either incomplete or unwittingly tainted. To address the latter risk, the CDPP's expertise, in relation to which cases to prosecute and the type of evidence required, could be sought earlier in the process."

- The ATO is not a prosecuting agency for fraud – that is the role of the Commonwealth Director of Public Prosecutions.
- Section 166 of the Income Tax Assessment Act requires the Commissioner to assess a taxpayer's income from any information in the Commissioner's possession.

"While the use and disclosure of highly sensitive surveillance information may be reasonable, necessary, and proportionate for purposes relevant to security or the investigation of serious crime, this will generally not be the case for broader policy or regulatory purposes. This rationale also applies to the investigation of less serious criminal offences."[2]

ATO possession of such material, when combined with its already large and expanding data base and data analytics and modelling capabilities is likely to raise significant privacy concerns. The ATO latest tax gap finding indicates that 35% of the total tax gap ($16.3 billion) relates to the shadow economy activity associated with tobacco (which already has a prescribed taskforce to deal with the issue) and small business. In relation to small business, the ATO has found that 5% of small business taxpayers displayed shadow economy behaviour that resulted in 64% of the tax gap ($10.4 billion)[3]. Expanding the ATO's ability to gather information which potentially affects the privacy of a substantial proportion of taxpayers to target the egregious few not only needs careful consideration but also broader public consultation and publicity that has hitherto occurred.

[2] Agency functions, Comprehensive Review of the Legal Framework of the National Intelligence Community, paragraph 30.82 page 405.
[3] https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/tax-gap/small-business-income-tax-gap/latest-estimate-and-trends

Background

The consultation paper outlines views that have been long held by the ATO and cites reports; namely the 2015 Parliamentary Joint Committee on Law Enforcement's (PJCLE) "Inquiry into financial related crime", 2017 Final report of the Black Economy Taskforce and 2018 Inspector General of Taxation and Taxation Ombudsman's (IGOT) Review into the Australian Taxation Office's fraud control management.

It is important to note that:

- None of these reports heard views from the accounting and legal professions in relation to this issue.
- The 2015 PJCLE did recommend that the ATO obtain these powers subject to safeguards, but the Government did not respond to this recommendation.
- The 2017 BET did recommend that the ATO obtain these powers but only provided two paragraphs to support the recommendation. The Government only noted the recommendation and linked it to another recommendation to review penalties and prosecution processes for black economy activities.
- The 2018 IGOT did NOT recommend that the ATO have independent access to telecommunications data. The IGOT recommended that that Government consider a broad review of the current arrangements for interagency collaboration for combating tax fraud including the following key issues allowing the ATO to use telecommunication interception information **obtained in joint investigations of prescribed taskforces** in raising assessments for those who are subjects of such investigations." The government agreed in principle to a broad review. We are unaware of whether a such a review has taken place.

These are not the only forums where the ATO has raised this issue, some other forums include:

- 2018 Treasury consultation "Improving black economy enforcement and offences." CA ANZ did not support that proposal. No government response or other submissions to this consultation have been made public on the Treasury's website.
- 2019 Parliamentary Joint Committee on Intelligence and Security report on the Mandatory Data Retention Regime Review. The Final report did not comment upon, let alone endorse the ATO's proposals.

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- 2022 Department of Home Affairs "Reform of Australia's electronic surveillance framework" discussion paper. CPA Australia recommended that only after the new surveillance framework has been in operation for a reasonable period, that the question of whether there is still a need for the ATO to be given access to powers under the proposed Act be revisited.2024 Attorney General's "Reform of Australia's electronic surveillance frameworks"

It is unlikely that this list is a complete list of all the forums in which the ATO has raised this issue since losing its ability to independently access telecommunications data when the Telecommunications Interception and Access Amendment (Data Retention) Act 2015 was enacted.

Enabling the ATO to issue notices to produce documents regarding tax crimes

Recommendation: The Joint Bodies do not support enabling the ATO to issue notices to produce documents on tax crimes until there is justification for such an approach.

It is not clear why the ATO needs a power to issue notices to produce documents on tax crimes. The consultation paper notes that "significantly, the ATO does not use its formal information gathering power in criminal investigations" and the IGOT report at paragraph 7.44 states "although the ATO has compulsory information gathering powers under the TAA, they may not be exercised for criminal investigation purposes" with a reference to an ATO communications rather than legislation.

Enabling the TPB to require document production before a formal investigation

Recommendation: The Joint Bodies are supportive in-principle of expanding the TPBs information gathering powers to better enable it to administer the regulatory regime. However, our support is conditional upon any new coercive powers being carefully considered and designed. Further detail is needed on such powers and how they will be applied.

As noted in the consultation paper, the ability for the TPB to use its information gathering power to require the production of a document without the need to begin a formal investigation was raised in the 2019 discussion paper 'Review of the Tax Practitioners Board'. Few of the submissions made to the review commented upon this aspect of the review. Those that did were broadly supportive in principle as they support greater efficiency in the TPB's investigative processes but did not comment upon this proposal in detail. This is not surprising as the discussion paper did not provide details about why this proposal was needed or how it would work in practice.

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The Joint Bodies' submission to that discussion paper noted that it needed "further details and context. It is unclear what is being proposed and what formalities are problematic. The legislated investigation process at section of 60-95 of the TASA is broad and non-prescriptive. Where the Board can delegate certain decisions to TPB staff, this may make the investigation decision making process more efficient. The TPB needs to have the appropriate capability and talent pool supported by efficient processes to undertake timely, efficient investigations. A review of the TPB's current investigation processes and a capability assessment may assist in identifying opportunities to improve the TPB's effectiveness."

There have many regulatory changes since the discussion paper. Many more organisations can exchange information with the TPB, the TPB will be receiving self and peer breach reports, the investigation period of the TPB has increased from 6 to 24 months, the TPB has become financially independent of the ATO, and the TPB is able to delegate powers. All of which will assist the TPB with its investigations.

The Joint Bodies are supportive of the TPB being able to conduct investigations efficiently and effectively – this is essential to ensuring that agents engaged in egregious behaviour are removed from the profession. However, a whole of system view of this change is needed. There is a danger that this proposed change will result in:

- Multiple investigations into the one incident occurring simultaneously. This is highlighted in the example in the consultation paper about the state-based agency not being able to release details of people it was investigating for fraud and the TPB not being able to commence a formal investigation as it did not know who those people were. This raises the issue as to who should be conducting the investigation – should it be the state-based agency who once the investigation has been completed and legal action begun can then advise the TPB who then imposes its own sanctions or should the TPB be conducting its own investigation simultaneously with the state-based agency? The Joint Bodies also note that this interaction between the ATO and the TPB has already been the subject of scrutiny and commentary by parliamentary committees examining how the two agencies responded to the PWC matter.
- Privacy laws being undermined. This is highlighted in the example in the consultation about the bank being unable to release the information until a formal investigation had started due to privacy concerns – which seems an appropriate response by the bank to give effect to Privacy laws.

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As a matter of principle, new coercive powers should only be granted in exceptional circumstances and where existing powers do not adequately address an identified law enforcement need. The examples provided in the consultation paper may not meet that level of exceptional circumstances and necessity. According to the Commonwealth government's Guide:[4]

> "While coercive powers may be necessary to ensure effective administration of Commonwealth law, the exercise of these powers infringes upon fundamental rights of individuals, including rights to dignity, privacy, and the security of premises. Intrusion upon these rights should not occur without due process and is only warranted where the use of the power is in the public interest."

The Scrutiny of Bills Committee has stated that it expects the development of legislation allowing the use of coercive powers to be 'preceded by careful consideration of all practicable avenues balanced against consideration of the implications for individual rights and liberties.[5]

The Joint Bodies would be pleased to work with the government to ensure the right balance is struck.

In developing this proposed change, the design of the power must comply with the principles in the Guide. Further detail should be provided in later consultations about the following matters:

- Greater detail about the circumstances in which the TPB will be leading enforcement agency vis-a-vis other enforcement agencies and thus may need such a notice.
- The impact on tax intermediaries vis-a-vie the clients they confidentially advise.
- Requirements around the notice, such as the threshold to invoke the power. The principle is that the issuer of the notice must hold a reasonable belief that the person issued with the notice has custody or control of that information or record, and that it will be of assistance in administering the regime.
- Who should be entitled to issue the notice - generally authority to issue notices to produce or attend should be conferred on a Secretary of a Department or equivalent, e.g., Chair of the TPB or the agency itself, namely the Board.
- Time in which to comply with such a notice.
- Consequences of failure to comply with such a notice.
- Whether the tax agent will be advised that such a notice is to be issued

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[4] Australian Government, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, Commonwealth, at Chapter 7.3, and Chapter 9.1 to 9.5: https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers

[5] Scrutiny of Bills Committee in Report 4/2000: Entry and Search Provisions in Commonwealth Legislation and Report 12/2006: Entry, Search and Seizure Provisions in Commonwealth Legislation

Importantly, the design of the power must also address the Safeguard principles in 9.5 of the Guide, such as how does the power interact with the common law privilege against self-incrimination.

Reducing the minimum response period for an offshore information notice

The Joint Bodies do not support reducing the minimum response period.

The consultation paper recognises that there can be substantial difficulties in taxpayers gaining access to information held overseas. Not all information requested is within the control of the taxpayer and they often need to persuade others to provide it – for example trying to access documents such as wills to show where funds have come from. Other difficulties include translating concepts of trust and other legal concepts to a different jurisdiction, and in the case of multinationals it may be difficult for 'head office' to recognise there is an issue, though the penalties for significant global entities have helped in that regard. Greater digitalisation and technological advances do not overcome these barriers.

It is also recognised in the consultation paper that there are significant consequences in not providing this information, namely that such information cannot be used by the taxpayer in court proceedings.

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