



**Submission by the
Commonwealth Ombudsman**

**SENATE ECONOMICS
LEGISLATION COMMITTEE:**

**INQUIRY INTO
TAX LAWS AMENDMENT
(CONFIDENTIALITY OF TAXPAYER
INFORMATION) BILL 2009**

Submission by the Commonwealth Ombudsman, Prof. John McMillan

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Introduction and summary

The Committee has invited the Commonwealth Ombudsman to make a submission on the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009. The Bill is intended to unify what is currently a range of provisions across a number of tax laws. It does so with a clear policy in favour of the protection of taxpayer information.

Background

The primary function of the Commonwealth Ombudsman's office is to handle complaints and enquires from members of the public about government administration. The Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The *Ombudsman Act 1976* gives the Ombudsman a special role as Taxation Ombudsman. In that role, the Ombudsman focuses on handling and investigating complaints from taxpayers and tax professionals about the administrative actions of the Australian Taxation Office (ATO). The Ombudsman's office also initiates own motion investigations on broader questions of administration and issues public reports and formal recommendations aimed at improving administration.

In the last financial year the Ombudsman received 45,719 approaches, of which 19,719 were about agencies within the Ombudsman's jurisdiction. We investigated 5,233 of these. The majority of complaints were about the correctness, propriety or timeliness of agencies' decisions or actions.

Included in these figures are 1,422 complaints and approaches about tax administration. The complaints the office received about the ATO covered a broad range of areas. The most frequent complaints related to the lodgement and processing of forms, debt collection, superannuation, taxpayer information (this includes complaints about tax file numbers) and ATO complaint handling.

The Ombudsman's office welcomes the opportunity to comment upon the Bill.

Submission

Our submission raises two specific issues for further consideration. Our object in identifying them is to ensure that the Ombudsman can continue to investigate complaints about the ATO in an efficient and effective manner. We start with some general observations about the scheme of the Bill

Generally, we support any proposal that reduces inconsistencies between pieces of legislation that deal with similar issues and that are largely administered by the same officials. A consistent scheme of protection of taxpayer information, such as that proposed, should provide more certainty to officials about their powers and obligations and should give the public a greater basis to understand and be confident about the way that sensitive taxation information is handled. The recent work of the Australian Law Reform Commission on privacy¹ and secrecy² points to a need for agencies to re-examine the way they deal with information about members of the public.

Inevitably, the path to consistency (once it is seen as desirable) is an uneven one, because there are many different legislative starting points. Each starting point can potentially be used to argue for a different legislative intent in resolving the tension between existing legislative provisions that are either drafted differently or that rest on different policy objectives. It is important that current and effective approaches to the protection and disclosure of taxpayer information are maintained.

The Bill recognises (in the Guide to Division 355) that s 9 of the *Ombudsman Act 1976* (the Ombudsman Act) will continue to apply, along with other provisions, to enable the disclosure of taxpayer information for specific purposes contemplated under specific legislation. We support this, but do not consider that the discussion reflects adequately the relationship between the Ombudsman and the Australian Taxation Office and the way the Ombudsman carries out investigations.

By way of explanation, the Ombudsman receives some 20,000 complaints in any given year, and investigates a substantial number of them, say 5,000. In the majority of the cases where there is no investigation, the Ombudsman's office suggests that a matter be raised and resolved by the relevant agency or through some other process. Some complaints do not proceed to investigation for other reasons.

In the case of complaints about the ATO, the Ombudsman's office is reasonably confident that the ATO provides a prompt and cost effective response to taxpayer complaints. This enables the ATO to resolve most problems quickly and effectively and it enables the Ombudsman's office to limit investigation to cases where:

- the internal process has not yielded an outcome satisfactory to the complainant
- the internal process is for some reason inappropriate to the complaint.

What may be described as an investigation is a very broad class of activity. At one end of the spectrum, it may amount to no more than a telephone call to an agency or an exchange of e-mails or correspondence aimed at allowing the Ombudsman's delegate to develop an opinion about the matter. At the other end, an investigation may include the issue under s 9 of the Ombudsman Act of a notice requiring information or documents or that a person attend and answer questions. This may lead ultimately to the issue of a report under s 15 of the Ombudsman Act.

¹ *For Your Information: Australian Privacy Law and Practice*, ALRC report 108.

² *Review of Secrecy Laws*, ALRC Discussion Paper 74.

Our preference is for the former, informal approach to investigation. Authority for this approach exists in s 8 of the Ombudsman Act. Section 8 allows for an investigation in private, conducted as the Ombudsman thinks fit, with a capacity for the Ombudsman to obtain information and make inquiries. Until 2005, agencies disclosed information to the Ombudsman on the basis of an implied consent arising from the person's complaint or on the basis of the disclosure being within the duties of the relevant officer. Amendments were made in 2005³ in response to concerns by some agencies that they were inhibited from cooperating with the Ombudsman because of secrecy provisions in other legislation, the risk of breaching privacy or the risk of compromising legal professional privilege.

The approach sanctioned by s 8 is quicker, more flexible and less formal than that in s 9 and it does not require that a Minister have first been informed of the investigation. It requires the cooperation of an agency and its contact officers who will be asked to provide information, documents or answers with no compulsion to respond. Their truthfulness is ensured by provisions of the Criminal Code.

The use of these informal processes enables the Ombudsman's office to investigate many more matters than would be possible if we were compelled to rely in every case on the use of statutory coercive powers. We understand that agencies prefer us to use the less formal investigation process where possible and many agencies (including the ATO) have staff whose duties include liaising with the Ombudsman's office and, for example, collecting and forwarding information that has been requested for an Ombudsman investigation or progressing suggestions made by Ombudsman delegates and aimed at resolving a complaint. It is only where an agency or other person is unwilling to provide information, or in a few other cases, that it is now necessary for the Ombudsman to issue a s 9 notice.

We would be concerned if the Bill were to make it more difficult for the ATO to deal cooperatively with these Ombudsman investigations. The tables at s 355-50 and s 355-65 do not refer to disclosure to the Ombudsman. Consent by the taxpayer is no longer to be relevant. The creation of a barrier to disclosure to the Ombudsman would reinstate a problem that was thought to have been overcome in 2005.

Another specific matter is that the Bill contains a provision (s 355-75) dealing with disclosure by a tax officer to a court or tribunal and precluding tax officers from being required to provide information to such an entity, other than for the purposes of a tax law. This office would be concerned if the removal of the obligation also removed any obligation to comply with a notice issued by the Ombudsman requiring the production of information or documents or that a person attend and answer questions.

Finally, this office is aware that secrecy provisions in taxation legislation have been taken up in other Acts (for example those dealing with child support). It may be worth considering whether those Acts should be amended to reflect the standards recognised in the Bill, as informed by the Committee's consideration of it.

³ *Migration and Ombudsman Legislation Amendment Act 2005.*