

Community and Public Sector Union

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4th May 2009

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**RE: CPSU (PSU Group) submission in response to the Exposure Draft
Confidentiality of Taxpayer Information Bill and Explanatory Material**

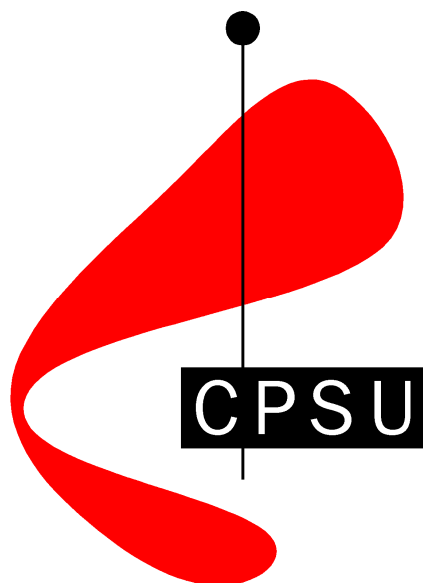
Please find enclosed a submission in response to the Exposure Draft
Confidentiality of Taxpayer Information Bill and Explanatory Material.

It is our intention to survey and collate the observations and experiences of CPSU members in the Australian Taxation Office in regard to confidentiality of taxpayer information. Given the timeframe necessary to undertake further research, this submission to Treasury should be considered an initial submission. The CPSU would like the opportunity to provide further comments to Government and Treasury once our members have had the opportunity to review and comment on this draft Bill.

If you wish to discuss any of the matters raised in this letter the contact is CPSU Parliamentary Liaison Officer Alison Rahill who can be reached on 02 6220 9630.

Yours sincerely

Rupert Evans
CPSU Deputy Secretary



**CPSU (PSU Group) Submission in
response to the:**

***Exposure Draft Confidentiality of
Taxpayer Information Bill and
Explanatory Material***

April 2009

The Community and Public Sector Union (CPSU) is an active and progressive union committed to promoting a modern, efficient and responsive public sector delivering quality services and quality jobs. We represent around 60,000 members in the Australian Public Service (APS), Commonwealth Government authorities, ACT Public Service, NT Public Service, ABC, SBS and the CSIRO.

CPSU is the major union representing Commonwealth Government employees working in the Australian Taxation Office (ATO). The CPSU actively represents the views of its members in any changes that will affect the work they do and how they do it. Submissions have been made to the recent Henry Tax Review and our members made expressed their views in a submission to Treasury's *Review of Taxation Secrecy and Disclosure Provisions* in August 2006.

CPSU has been an active participant in the Australian Law Reform Commission (ALRC) *Review of Secrecy Laws*. The definition and regulation of Commonwealth information as secret or confidential with criminal or civil sanctions is a fundamental issue for CPSU members, both as Commonwealth employees and as citizens.

This submission is based on the direction outlined in the CPSU's 'Agenda for Change'. The need for open, transparent and accountable government is a foremost concern for CPSU members. This can only be achieved by having clearly defined legislation dealing with secret information and when it can legally be disclosed.

The CPSU supports legislation that:

- provides clear rules to govern the on-disclosure of information provided by the ATO to another agency;
- that introduces new disclosure provisions where the public benefit in disclosure outweighs taxpayer privacy; and
- provides clarity for Commonwealth employees who need to quickly and easily identify what information is secret and in what circumstances legal disclosures can be made.

While these proposed changes are welcome, there are aspects of the draft Bill that cause concern. Of most concern is the proposal that the definition of 'taxation officer' as a singular authorised person in relation to secrecy is changed to include an 'entity or entities' (such as a labour hire company, debt collection agency, cleaning contractor or contract call centre).

The intention of this submission is to place this aspect of the Bill within the current operational environment and context of the ATO's outsourcing program, in doing so, demonstrate the greater risk to confidentiality of taxpayer information as a consequence.

Content:

- 1. Treasury's Review of Taxation Secrecy and Disclosure Provisions August 2006**
- 2. ATO Operations outsourcing – the next phase**
- 3. ATO Operations outsourcing – back office functions**
- 4. With so much outsourcing - is it only a matter of time for the Australian taxpayer?**
- 5. ATO Operations outsourcing – debt collection and contact call centres**
- 6. CPSU rejects Operations Business Model**
- 7. Support for proper funding and Quality Public Services**
- 8. Taxation officers strong record on secrecy and accountability**
- 9. ATO employment and accountability framework**
- 10. Legislative framework of the APS**
- 11. The vital role of APS employment**
- 12. The draft exposure Bill**
- 13. Review of secrecy and privacy laws**
- 14. Section 70 of the Crimes Act and a general statutory duty not to disclose?**
- 15. Summary of recommendations**

1. Treasury's Review of Taxation Secrecy and Disclosure Provisions August 2006

CPSU was one of twenty-six organisations to make a submission¹ to Treasury's *Review of Taxation Secrecy and Disclosure Provisions* in August 2006. Since that time Treasury has not contacted, consulted or advised CPSU about the content of or release of the exposure draft Bill.

The exposure draft of the Bill makes a substantial departure from the Discussion Paper that was issued with the 2006 Review. That Paper proposed standardising the definition of officer²:

The current tax secrecy provisions provide various definitions of an 'officer'.³ The term 'officer' (as it applies to the secrecy provisions) would need to be standardised. A standard definition could be modelled on the definition in subsection 16(1) of the ITAA36:

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

The Paper also recommended³ clarification of disclosure in the 'course of duties of an officer' to include:

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

There were two distinct points made in that Discussion Paper:

1. Maintaining the definition of taxation officer as an individual, a person, not an entity.
2. The need to protect taxation officers when legitimately disclosing taxpayer information to third parties such as debt collectors.

The current draft Bill on the other hand, removes this distinction and merges these two elements. The Bill redefines third parties and entities that provide services to the ATO, such as debt collection agencies, cleaning contractors or contract call centres, as 'taxation officers' for secrecy purposes.

This is highly problematic for a number of reasons.

Firstly, 'entities' such as private companies performing services for the ATO are not subject to the same security regime, scrutiny, parliamentary oversight as ATO employees. A recent review⁴ by PricewaterhouseCoopers into ATO

¹ CPSU submission http://www.treasury.gov.au/documents/1170/PDF/24_CPSU.pdf

² Discussion Paper pg 20

http://www.treasury.gov.au/documents/1121/PDF/Secrecy_and_Disclosure.pdf

³ Ibid pg 21

⁴ Australian Taxation Office Information Security Practices Review April 2008
<http://ato.gov.au/content/downloads/COR138560InfoSecurity.pdf>

security practices lists outsourcing and data transfer to third parties as a 'hot spot' risk to the security of taxpayer information.

Secondly, the ATO has aggressively expanded its outsourcing program to include tax administration functions such as debt collection and overflow contract call centres. The ATO provides bulk transfer of taxpayer data to private companies to perform tax administration functions under contract.

Finally, the definition of 'entity' as a taxation officer makes no distinction between authorised officers who require access to information in the course of their duties (such as other government agency employees), and contract cleaners, who have no reason to access taxpayer information to perform services to the ATO.

This raises the question as to whether the ATO requires this Bill in order to retrospectively cover or protect contractual arrangements already entered into with 'entities'?

Since 2006/07 private companies have been performing functions for the ATO as 'taxation officers' in the absence of legislative change. The sub-contractors and personnel of these entities perform services for the contract call centre or debt collection agency and have no relationship with the ATO.

A further question for consideration by legislators should be to examine whether the delegation powers of the Commissioner extend beyond authorised individuals and give powers to private companies to perform tax administration functions.

While retrospective legislation is possible in Australia, each case, if not backed up by strong public policy arguments, strikes a blow to the validity of the rule of law and therefore should not be undertaken lightly and certainly should not be done simply to correct prior dubious application of the law.

2. ATO Operations outsourcing – the next phase

CPSU believes this Bill must be considered in the context of the ATO Operations (Ops) new business model which shows that the ATO intends to outsource as many as 3000 jobs in 2009/10.

The union briefing paper⁵ provided by the ATO to the CPSU makes it very clear that the outsourcing program will proceed:

“moving to this model is not a choice, we have to change... this is about how we change, not whether we change.” Raelene Vivian Chief Operating Officer

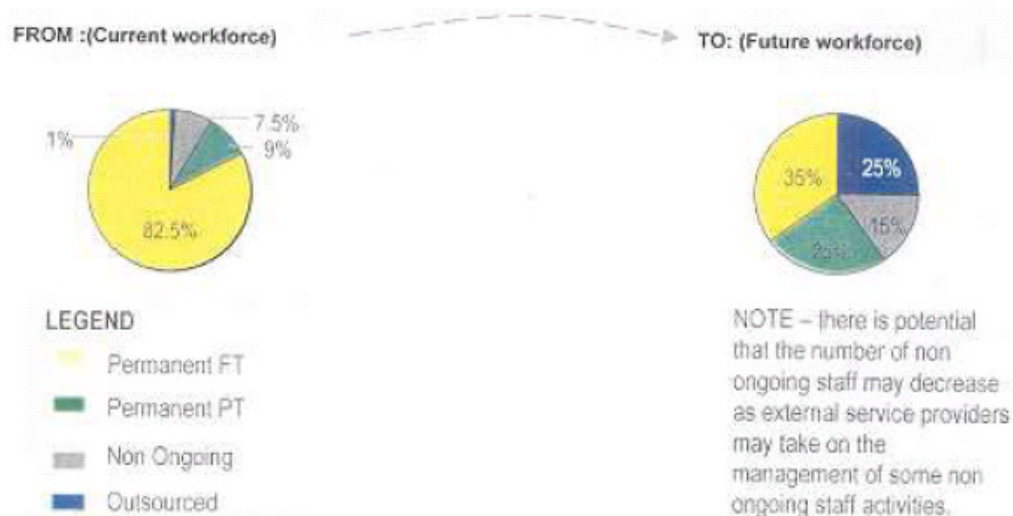
⁵ 9th Feb 2009 ATO Operations presented a 20 page document titled 'union briefing paper' to CPSU page 2 & 12

The paper says that the sole driver for this next phase of change in 2009/10 is to deliver cost savings to Government. These savings will be generated not through technological change but by cutting labour costs by outsourcing.

The cost savings identified⁶ by ATO include:

- reducing the number of full-time and part-time employees;
- removing training and career paths for outsourced workers;
- no career paths and limited training for non-ongoing and casual workers;
- training and career paths for permanent employees only.

Current workforce versus potential future make up of workforce (estimates only)



<u>ATO Ops workforce in 2009</u>	<u>ATO Ops workforce in 2011</u>
8000 workers	8000 workers
- 6600 Permanent F/T	- 2800 Permanent F/T
- 720 Permanent P/T	- 2000 Permanent P/T
- 600 Non-ongoing	- 1200 Non-ongoing
- 80 Outsourced	- 2000 Outsourced

In summary, the next phase reduces the permanent workforce to ‘Tier 3’ specialist roles where the bulk of tax administration would be performed by a casual or outsourced workforce. The paper⁷ refers to:

- *“the orientation training for casual staff will be ‘lite’ (sic) compared to permanent staff”*
- *“Debt activities like account preparation could be undertaken by a basic / generalist workforce...”*

⁶ 9th Feb 2009 ATO Operations ‘union briefing’ page 12

⁷ 9th Feb 2009 ATO Operations ‘union briefing’ page 6

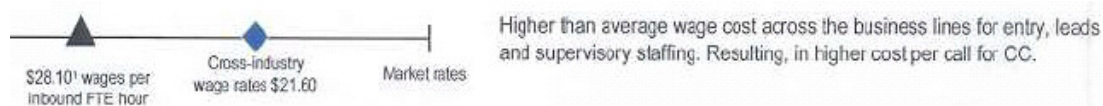
The paper⁸ benchmarks the ATO against 'call centre industry standards' (based on banks and telcos)..

The ATO paper identifies⁹ the reasons why its call centre productivity is below parity with banking industry benchmarks, such as:

- budget cuts causing high abandonment rate of 9% (callers to ATO call centres at peak times can be blocked)
- "...systems limitations to measuring staff productivity"
- "incentives are weak"
- "service standards are too accommodating"
- "team leaders are doing a lot of admin. Support ratios too high for coaches and technical advisors..."
- higher than average wages ATO \$28.10 per inbound FTE hour compared to the private sector average of \$21.60

Given budget constraints, and the complexity of legislation that the ATO administers compared to banking and finance sector, it is of no surprise that the ATO rates poorly against banking industry benchmarks. Quite simply, the benchmarking exercise fails to compare apples with apples. The ATO paper does note that when compared with other *Government* call centres, the ATO is in the lead for efficiency and productivity, however:

- "...we have not compared nature of the business and internal environmental factors that may constrain the industry for example industrial frameworks".



3. ATO Operations outsourcing – back office functions

The ATO outsources its back office functions to undertake bulk communications with taxpayers on behalf of the ATO. The ATO has paid panel providers¹¹ such as Salmat \$32 million dollars since June 2007 to perform services such as:

- Mailout to pursue lodgement of outstanding income tax returns and/or activity statements of self preparer clients.
- Various bulk personalised printing and mailout services related to Registrar Initiated ABN Cancellation, PAYG Self Managed Super Fund, Activity Statement, Income Tax Compliance, Reportable Fringe Benefits, Tax Office's pre-filing program, and PAYG withholding payment summary.
- Tax bonus mailout, debt reminder letters and escalation letters.

⁸ 9th Feb 2009 ATO Operations 'union briefing' page 9

⁹ 9th Feb 2009 ATO Operations 'union briefing' page 10

¹¹ Aus tender website www.tenders.gov.au contracts starting Jun 2007

The CPSU assumes that the Bill and the new definition of 'taxation officer' also include companies such as Salmat. The ATO provides bulk transfer of taxpayer data to these companies but according to the PWC review¹²:

"... does not require that transferred data be appropriately secured against loss or unauthorised disclosure while in transit. "

The PWC review¹³ found serious holes in ATO's handling and security of confidential taxpayer information and outsourced providers. Some concerning excerpts from the PWC review are below:

*Monitor service providers and recipients of Tax Office data
Observation – Service providers and third parties who hold and process Tax Office information are not consistently monitored or controlled*

...the Tax Office has contracted a number of service providers to provide transportation of information between source and destination, and to provide secure archival and destruction facilities.

When it provides information to others, the Tax Office has a legal obligation to ensure that the information it is providing will be appropriately handled, stored, processed and ultimately destroyed in accordance with security requirements.

Under privacy legislation, the Tax Office is bound to take "all reasonable steps" to protect the information it holds or provides from any unauthorised disclosure or loss.

The PWC review notes that the contracts the ATO enters into with service providers require parties to comply with security and privacy obligations. The ATO can terminate the contract where the provider has breached these obligations, however PWC reports:

"... that often the specifics of such requirements are not effectively communicated. While many agreements provide for a right of audit access they do not as a rule require the second party to provide the Tax Office with any assurance that they are actually in compliance with the security requirements of the organisation.

In the case of contracts, the Tax Office has executed some compliance verification visits however the extent of such activity is driven by the ability to mobilise teams to carry out the work."

¹² Australian Taxation Office Information Security Practices Review April 2008
<http://ato.gov.au/content/downloads/COR138560InfoSecurity.pdf> pg 21

¹³ Australian Taxation Office Information Security Practices Review April 2008
<http://ato.gov.au/content/downloads/COR138560InfoSecurity.pdf> pg 54

4. With so much outsourcing - is it only a matter of time for the Australian taxpayer?

The PWC review lists a number of overseas events where confidentiality of sensitive taxpayer information was lost. For example:

- *Two discs containing unencrypted personal details of thousands of licensed drivers were lost en route to the Northern Ireland Driver and Vehicle Agency headquarters.*
- *The loss of a set of discs on their way to the National Audit Office containing unencrypted personal and financial details of approximately 25 million UK citizens resulted in the resignation of the Chief Executive at Her Majesty's Revenue and Customs (HMRC) in the UK.*
- *Hundreds of hard copy documents containing sensitive personal data, including photocopied passports, benefit claims and mortgage payment details, were found apparently dumped on a roundabout in Devon, UK.*
- *Hundreds of documents containing individual medical records from two hospitals were strewn across public streets en route to disposal.*
- *1.8 million social security numbers from the US Department of Veteran's affairs were found on the home computer of a former contractor.*
- *Over 170,000 records containing personal details of Irish blood donors were unexpectedly discovered in New York.*
- *Unencrypted data on all 84,000 prisoners in England and Wales was lost after a Home Office contractor lost the memory stick on which the data had been stored.*

Australia is clearly not immune from errors in data handling with the loss of a CD rom in October last year that contained personal details of more than 3,000 individuals. While this example was in-house, enabling it to be rectified quickly, the examples of other countries experiences of data security breaches as a direct consequence of outsourcing clearly suggest that alarm bells need to be raised with the ATOs proposal to increase the use of outsourcing in Australia.

5. ATO Operations outsourcing – debt collection and contact call centres

In 2006 ATO Ops commenced service contracts with 'outsourcing partners', specifically the outsourcing of debt collection to external providers and in 2008, outsourcing call centre 'overflow' to external call centres as part of business.

In 2008 PWC¹⁴ conducted a 'deep dive' review activity into operations at a contracted service provider's premises (providing overflow call centre services) because it was an identified 'hot spot' within the ATO.

¹⁴ Australian Taxation Office Information Security Practices Review April 2008
<http://ato.gov.au/content/downloads/COR138560InfoSecurity.pdf> pg 19

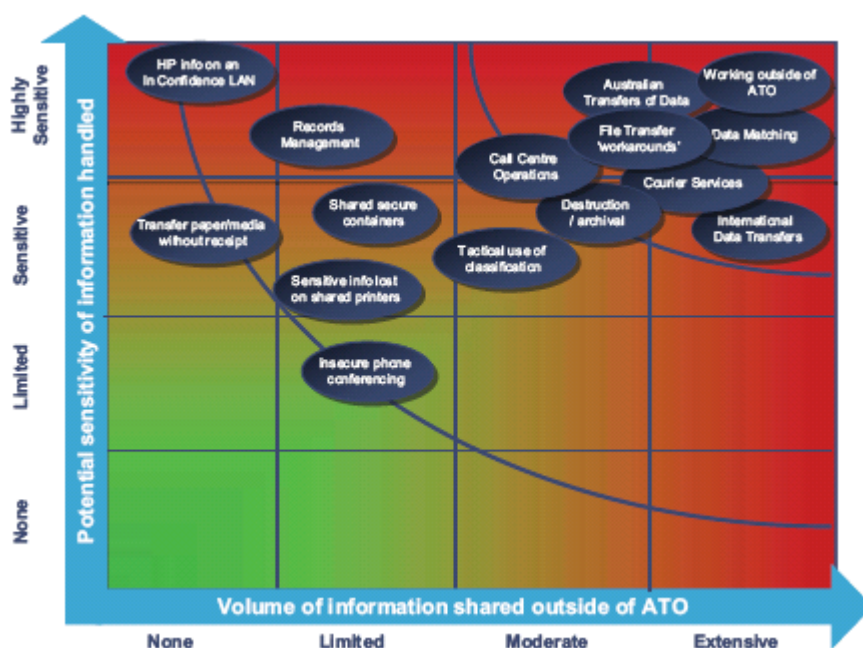
The PWC review was not an Audit and did not examine work practices as to the adequacy of controls in place to prevent or detect information leakage; however, it did make the following findings¹⁵:

“... Information provided in bulk to external parties is not always secured in transit, nor its receipt confirmed.

... the Tax Office does not seek independent assurance from recipients that information is properly handled, stored and destroyed...

... at an overflow call centre in Melbourne, optical media containing recorded voice calls was being stockpiled due to low awareness of available secure courier services”.

ATO employees who participated in the review’s¹⁶ consultations and security culture survey identified overflow call centres as work practices and work areas of high level risk in relation to loss or unauthorised disclosure of information; loss of confidentiality of sensitive information, as shown in this chart below:



In October 2007 the ATO announced¹⁷ an external debt collection services panel and \$42 million additional Budget funding to establish and pay for the services to contact taxpayers with a debt and encourage them to pay up.

¹⁵ Australian Taxation Office Information Security Practices Review April 2008 <http://ato.gov.au/content/downloads/COR138560InfoSecurity.pdf> pg 4 & 24

¹⁶ Australian Taxation Office Information Security Practices Review April 2008 <http://ato.gov.au/content/downloads/COR138560InfoSecurity.pdf> pg 27

¹⁷ ATO press release Oct 2007 <http://www.ato.gov.au/corporate/content.asp?doc=/content/91651.htm>

The ATO 'bundles' packages of debt and provides taxpayer details to the debt collection agencies to chase outstanding superannuation guarantee payments and income tax debts.

The ATO has entered into contracts with debt collection agencies which it maintains, requires adherence to strict privacy and professionalism guidelines and monthly reports on their progress and adherence to these guidelines.

In March 2008 the ATO released a request for tender for the provision of an overflow contact centre contract¹⁸. The contract was awarded to Excelior (Skilled Engineering). Under this contract, the private company has direct dial-in access to confidential taxpayer data as the contract requires direct network access to the ATO systems:

“2.4. Description of Goods and/or Services

2.4.1. The OCC will manage the overflow of calls, especially during the Tax Office’s peak and campaign periods.

The successful Tenderer(s) will have sufficient systems, compliant to that of the Tax Office and will be provided with access to Tax Office systems to enable reading of, and writing to, internal systems.

The Tax Office will provide the successful Tenderer(s) with standard procedures, scripts and information to enable OCC staff to undertake daily duties whereby full training will be provided.”

Another condition of the draft* contract¹⁹ with the ATO relates to Excelior’s personnel, which must ensure its employees comply with the APS Code of Conduct *“as if they were members of the Australian Public Service.”*

The contract call centre draft RFT documents require the service provider to comply with the:

- APS Values
- APS Code of Conduct
- ATO’s Ethical Relationships Guide
- Taxpayers’ Charter

The draft contract also required a:

“demonstrated understanding of and compatibility with the Tax Office culture.”

Right: job ad for Excelior call centre

Customer Service Consultants

An exciting opportunity exists within the Burnie Excelior Contact Centre for motivated casual Customer Service Consultants.

We are seeking enthusiastic people who enjoy interacting with customers and are flexible with their work commitments.

Previous contact centre experience is not essential, however will be highly regarded. Successful applicants will need to be prepared to commence immediately.

To be successful for these roles you must:

- Have basic computer skills
- Have strong written and communication skills
- Enjoy working in a strong team environment
- Be friendly and have a can do attitude
- Be customer focussed and have strong problem solving skills

By sending a resume to Excelior at 34 Wilmot Street Burnie or emailing to jtownsend@excelior.com.au

a member of **SKILLED** Group

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¹⁸ Pg 2 Provision of Overflow Contact Centre (OCC) 08.016 Part One Conditions of Tender www.tenders.gov.au

¹⁹ Provision of Overflow Contact Centre (OCC) 08.016 Part Five Draft Contract (Services) 9. Contractor Personnel

* draft contracts are used where the actual contracts are subject to business-in-confidence

6. CPSU rejects Operations Business Model

The CPSU rejects absolutely the need for ATO to dramatically increase the amount of work to be outsourced and performed by non-ongoing or outsourced staff.

We have informed ATO that we consider this bad public policy and bad administration. It is a direct threat to the security of full-time ongoing employment in the ATO.

The figures provided to CPSU in the above example cannot be achieved voluntarily in the next 3 years which is the timeframe ATO have referred to previously.

7. Support for proper funding and Quality Public Services

The CPSU has also publicly stated our support for the ATO to receive sufficient funding to perform its essential services (all ATO work) including calling on Government to abolish the 'efficiency' dividend, and to rule out proposals like this that undermine job security and service delivery in the APS.

The CPSU believes there is strong community support for the concept of a career in the public service by making the APS a model employer, a place where Australians want to work, and by limiting and reducing non-ongoing employment in the APS.

There is little community support for privatisation and outsourcing, and with the global financial crisis there is a need for Government to meet expectations and provide services generated for service rather than profit.

The CPSU believes there are characteristics, which are unique to the public sector that render outsourcing of these services less effective. These include the multiplicity of objectives of government agencies, the need for higher standards of accountability, the need to respond to the changing requirements of governments and, that there are limits to the extent to which private sector practices can or should be applied to the public sector.

The focus of government should be on achieving benefits for the Australian community as a whole. While cost effectiveness will be an important consideration, equity, social cohesion and the provision of opportunities for all Australians should be of prime importance and ensuring that contracting-out is not used as a vehicle to cut wages and working conditions.

8. Taxation officers strong record on secrecy and accountability

CPSU believes the record of ATO employees on protecting secrecy and accountability of taxpayer data speaks for itself. According to its 2007/08 annual report the ATO employed 23,303 people across twenty-one branch

and regional offices. The low level of ATO employees who have had action taken against them is an indicator of the high standard of integrity maintained by officers and a reflection of the legislation, policies, training and procedures in place to ensure the confidentiality of taxpayer information²⁰:

Outcomes of investigations

We investigate or take action on all allegations of fraud and/or serious misconduct made against our employees. We work with other law enforcement agencies where appropriate. In 2007–08 we finalised 238 allegations and substantiated 45 of them. We refer substantiated matters for misconduct action and/or criminal prosecutions.

During 2007–08 three ATO employees and/or former employees were prosecuted and convicted for various offences, including fraud and unauthorised access to taxpayer records.

9. ATO employment and accountability framework

The Bill seeks to amend 18 pieces of legislation. In order to assess and explore the consequences of those amendments it is necessary to outline the powers of the Commissioner, the staff necessary to assist the Commissioner, the delegated powers of the Commissioner to those officers, and the secrecy provisions which bind those officers.

The central point that the CPSU wishes to emphasise throughout this submission is that currently all sections of current legislation relating to authorisation, delegation of powers, definitions of officers, requirements to take an oath and sanctions are made to individuals / persons and not to entities.

Most of the powers and functions of taxation officers are delegated by the Commissioner to other persons under Section 8 of the *Taxation Administration Act 1953 (TAA 1953)*. Note: *TAA 1953* does not specify whether the Commissioner has power to delegate to an entity.

8 Delegation

(1) The Commissioner may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Commissioner, delegate to a Deputy Commissioner or any other person all or any of the Commissioner's powers or functions under a taxation law or any other law of the Commonwealth or a Territory, other than this power of delegation.

The Tax Commissioner is able to report to Parliament with surety, knowledge and confidence that ATO employees have performed their duties with the utmost professionalism. The Commissioner has that high degree of confidence because taxation officers are engaged under the accountability framework that accompanies employment under the *Public Service Act 1999* as required under *TAA 1953* Part 1 Section 2:

²⁰ ATO Annual Report 2007/08 pg 100

<http://www.ato.gov.au/content/downloads/cor00166129n995AR08.pdf>

“officer means a person appointed or engaged under the Public Service Act 1999. “

It is relevant to include TAA 1953 section 4 states:

*4A Statutory Agency etc. for purposes of Public Service Act
(1) The staff necessary to assist the Commissioner are to be persons engaged under the Public Service Act 1999.*

The Commissioner can require that ‘an officer shall’ make an oath or declaration in writing to maintain secrecy. Again the legislation points to an officer being authorised to conduct delegated functions of tax administration.

Taxation officers are persons bound by secrecy provisions of taxation acts such as the TAA 1953 Section 3C Secrecy:

- (1) In this section, *officer* means a person:
- (a) who is or has been appointed or employed by the Commonwealth; or
 - (b) to whom powers or functions have been delegated by the Commissioner;
- and who, by reason of the appointment or employment or in the course of the employment, or by reason of, or in the course of the exercise of powers or the performance of functions under, the delegation, as the case may be, may acquire or has acquired information with respect to the affairs of any other person disclosed or obtained under or for the purposes of this Act.

TAA 1953 Section 3C Secrecy provisions also apply to persons who provide services to the Commonwealth.

Importantly, this section applies to persons such as IT contractors, legal services, back-office service providers, contract cleaners are all providing services to the ATO – But are not exercising any delegated powers of tax administration.

This group remain distinct from taxation officers who have delegated authority, tax administration powers and in the course of their duties may come across confidential taxpayer information but are bound to non-disclosure obligations.

- (1A) For the purposes of this section, a person who, although not appointed or employed by the Commonwealth, performs services for the Commonwealth shall be taken to be employed by the Commonwealth.
- (2) Subject to subsection (4), a person who is or has been an officer shall not directly or indirectly:
- (a) make a record of any information with respect to the affairs of a second person; or

Similarly, the *Income Tax Assessment Act 1936* (Cth) makes it an offence for a person who performs services for the Commonwealth to unlawfully make a record of, or divulge or communicate to any person any information acquired by that person in the performance of the services for the Commonwealth;

All references in current taxation acts refer to persons or individuals as officers performing functions for the Commonwealth. Heavy sanctions for unauthorised disclosure apply with criminal offences and penalties of up to two years jail.

10. Legislative framework of the APS

APS Agencies and APS Act employees are covered by legislative requirements regarding audit and access, privacy, security, confidentiality, conflict of interest. There are direct obligations on APS employees to perform their roles with integrity and be accountable to the public and the Parliament:

- *APS Act 1999 (including Australian citizenship)*
- *Auditor General Act 1997*
- *Privacy Act 1988*
- *Financial Management Act*
- *Legal Services Directions issued under section 55ZF of the Judiciary Act 1903 (Cth)*
- *Crimes Act 1914* (Cth) including its official secrets obligations section 3(1). The term "Commonwealth officer" includes a person who "performs services for or on behalf of the Commonwealth", and that my attention has been drawn to sections 70 and 79 the Crimes Act 1914 (Cth).
- official secrets obligations under the *Criminal Code 1995* restricting disclosure of taxpayer information
- *Disability Discrimination Act 1992*
- *Equal Opportunity for Women in the Workplace Act 1999*
- custody, control or possession of Commonwealth records under the *Archives Act 1983*

The legislative framework of the APS also provides employee protections, rights of review of decision-making, whistleblower protections, external scrutiny, powers to investigate and sanctions for non-compliance.

The system of public accountability is strengthened with policies and guidelines to ensure that the ATO and its employees act with integrity regarding Australia's taxation system:

- National Privacy Principles
- Information Privacy Principles
- Protective Security Manual 2005
- The Taxpayers' Charter

11. The vital role of APS employment

ATO employees are subject to the terms and conditions in the *Public Service Act 1999*. The *PS Act*:

- Allows all potential ATO employees to be subject to a police check for prior convictions and pending charges.
- Provides that breaches of the APS Code of Conduct may be addressed by the Agency Head through a variety of disciplinary actions.

While ATO employees are both subject to and have the protections of the *PS Act*, employees of service providers, contractors, sub-contractors and labour hire workers do not. They are not subject to the disciplinary processes in the Act, and they are more likely to work in an environment where ATO work is intermittent and interspersed with work performed for private sector clients where the protections and obligations are not as strictly defined.

There are clear protections & processes that apply to APS employees when there has been a systemic failure. These allow for management failures to be identified & rectified because employees have the right of reply, natural justice, review of actions and access to whistleblower protections. In contrast, the draft ATO contracts give the power to the ATO to remove a contractor's employee where the employee will not be informed of any problem with performance, nor will they have any access to appeal or right of reply. A system that can potentially scapegoat an individual employee at the expense of thorough transparent investigation is in not in the public interest.

It is a strongly held view of the CPSU that persons employed by the Commonwealth to administer Australian tax laws must be *employees* who are subject to both the protections and the restrictions contained in the *PS Act* to ensure that taxpayers information is kept confidential. They must be ATO employees, must be properly resourced both in training and in terms of staffing levels, and must be able to undertake their duties and raise concerns without fear of retribution.

The CPSU submits that the use of private service providers in the delivery of tax administration should be reviewed urgently to determine whether it meets existing legislative obligations, particularly the requirement to delegate powers to individuals, good governance, and to improve the accountability of the services to Parliament.

It is the long held position of CPSU that the delivery of tax administration should operate solely under the employment structure of *Public Service Act 1999* and under the governance structure of the Australian Public Service.

The ATO has a range of flexible employment arrangements available under the *PS Act* and the Collective Agreements – such as ongoing (permanent), non-ongoing (temporary), part-time or casual and their variable remuneration options.

The CPSU regards ATO outsourcing arrangements as a means of bypassing the terms and conditions set out in the Collective Agreements and creating a secondary workforce on inferior terms to ATO employees.

Contractor arrangements also devolve employer responsibility for professional development and training; outsource accountability of service delivery outcomes; public liability; and potentially offload employer OH&S responsibilities to other parties.

It also the opinion of the CPSU that outsourcing tax administration functions to entities such as contract call centres and debt collection agencies is inconsistent with the powers of delegation of the Commissioner which require these functions be performed by persons, individuals and officers engaged under the PS Act.

By moving tax administration functions outside of Commonwealth Government employment, the framework of accountabilities that pertains to APS employees is also removed. Under the PS Act, breaches of the APS Code of Conduct may be addressed by the Agency Head through a variety of disciplinary actions. However, the only powers available to the Agency Head in relation to contractors are those specifically written into contracts, as well as remedies for breach of contract under common law.

The ATO has no control over outside employment of contractors, unlike APS employees who are required to notify ATO of outside employment and determine conflict of interest between prospective ATO duties and outside employment, and effectiveness to undertake duties safely and meet ATO's operational shift schedule.

APS employees rely on the security of public service employment to remain independent from the pressures of enforcement and to carry out their duties with diligence.

The question for Treasury and the Government will be to what extent can the Tax Commissioner guarantee the security, confidentiality and secrecy of taxpayer information in an outsourced private sector environment?

12. The draft exposure Bill

The CPSU believes that the proposed broadening of the definition of taxation officer to include 'entities' weakens and dilutes the operation of the current provisions as outlined in the Explanatory Material:

Operation of current provisions

1.2 In order to maintain taxpayer privacy and confidence, the secrecy provisions in Australia's tax legislation impose strict obligations on taxation officers and others who receive taxpayer information. There is a general rule that 'officers' cannot disclose information that would identify a taxpayer. Serious sanctions are imposed for breaches of these obligations.

1.3 *Exceptions to the obligation not to disclose taxpayer information are necessary because information obtained by the Australian Taxation Office (ATO) needs to be used by the ATO to fulfil its role and can often be vital to other arms of government in performing their functions effectively. So, for instance, existing exceptions allow:*

- *'officers' to use taxpayer information in the performance of their duties;*
- *law enforcement agencies to use information obtained by the ATO for certain criminal investigations; and*
- *other government departments and agencies to use taxpayer information for specific purposes.*

Summary of the draft exposure Bill:

Definition of 'taxation officer'

2.8 A **taxation officer** is defined broadly to mean:

- *an individual filling the statutory appointments of Commissioner or Second Commissioner;*
- *an individual directly engaged under the Public Service Act 1999, and performing duties in the ATO;*
- *an entity engaged to provide services relating to the ATO (such as cleaning firms or IT contractors) and any individual employed or sub-contracted by such an entity;*
and
- *an individual appointed or employed by, or performing services for, the Commonwealth who performs functions or exercises powers under or for the purposes of a taxation law.*

[Schedule 1, item 1, subsection 355-25(1)]

Recommendation:

1. **delete section third dot point “*an entity engaged to provide services relating to the ATO (such as cleaning firms or IT contractors) and any individual employed or sub-contracted by such an entity;*” and**
2. **delete section fourth dot point words or performing services for underlined “*an individual appointed or employed by, or performing services for, the Commonwealth who performs functions or exercises powers under or for the purposes of a Commonwealth taxation law*”**

13. Review of secrecy and privacy laws

Legislative provisions that make Commonwealth information secret must be clear, transparent and simple. The application of secrecy provisions should be clearly delineated and the scope and provisions allowing for the sharing of information between government agencies needs to be clearly spelled-out.

Recommendation:

Secrecy provisions should apply logically, consistently and clearly across all Commonwealth government agencies and other relevant bodies. This Bill should be postponed until the completion of the Australian Law Reform Commission review of Secrecy Laws is complete.

14. Section 70 of the Crimes Act and a general statutory duty not to disclose?

The CPSU is concerned at the breadth and scope of the general criminal provisions relating to disclosure of Commonwealth information. These include s70 and s79 of the *Crimes Act 1914* and clause 91 of the *Criminal Code Act 1995*. The CPSU broadly agrees with the findings of the Gibbs Review, which recommended:

It is undesirable that the sanctions and machinery of the criminal law should be applied in relation to the unauthorised disclosure of all forms of official information and this should be avoided if possible.

The application of criminal sanctions under the general criminal law of the Commonwealth to disclosure of official information should be limited to certain categories of information and that these should be no more widely stated than is strictly required for the effective functioning of Government.²¹

There should not be a broadly defined criminal offence relating to disclosure of any Commonwealth information based upon the exercise of employment duties, as is currently expressed in s70. That provision is too broad, and insufficiently tailored toward keeping information secret. It is unhelpful in providing guidance on what information is confidential or where disclosure is permitted.

15. Tax administration legislation

In 2008 the ATO announced²² that the panel of debt collection service providers would perform functions such as the collection of debt, including tax debts over two years old and employer superannuation guarantee charge debt.

“Some of the debt to be referred for collection will be superannuation money owed to employees so will help protect retirement savings,” Ms Granger said.

²¹ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991) at p.315, 317

²² ATO media release

<http://www.ato.gov.au/corporate/content.asp?doc=/content/91651.htm>

These tax administration functions are performed with delegated powers to the ATO under the *Superannuation Guarantee (Administration) Act 1992*.

The Act provides that officers are defined under **Part 2 (6) a)**

authorised officer means a person appointed or engaged under the *Public Service Act 1999* who has been authorised in writing by the Commissioner for the purposes of the provision in which the expression appears.

taxation officer means a person exercising powers, or performing functions, under this Act.

Under the Act, authorised officers have powers to access premises, have full and free access to documents (s76), and may inspect or examine information and gather evidence (77).

The Superannuation Contributions Tax (Assessment and Collection) Regulations 1997 provides for similar definitions of who can be an authorised officer and the powers that can be exercised. The regulations provide:

36 Authorised officers

The Commissioner may, by writing, authorise a person who is engaged under the *Public Service Act 1999* to be an authorised officer for the purposes of a provision or provisions of this Part.

And again in part 7 section 43

authorised officer means a person engaged under the *Public Service Act 1999* who has been authorised in writing by the Commissioner for the purposes of the provision in which the expression occurs.

38 Access to premises etc.

Powers of authorised officers

- (1) For the purposes of this Act, an authorised officer:
 - (a) may, at any reasonable time, enter and remain on any land or premises; and
 - (b) is entitled to full and free access at any reasonable time to all documents; and
 - (c) may inspect, examine, make copies of, or take extracts from, any documents.

15. Conclusion

The CPSU is not aware of the powers or abilities of the Commissioner of Taxation to monitor, investigate or report to Parliament the instances of persons not employees of the ATO unlawfully accessing or disclosing confidential taxpayer information. This is a matter of grave concern for the Australian public and does nothing to provide confidence to persons providing such confidential information that it will not be disclosed or misused.

The CPSU is concerned by the proposal to legislatively facilitate the increased use of outsourcing by the ATO. Given the grave breaches of security of private, personal information that have resulted from outsourcing overseas and concerns raised by the Price Waterhouse review, it is imperative that the Government urgently rethink this policy direction and properly fund the ATO to provide a complete suite of taxation functions – functions which are an essential public service.