



CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

22 February 2022

Mr Michael Pezzullo AO
Secretary
Department of Home Affairs
PO Box 25
Belconnen ACT 2600

Attention: Electronic Surveillance Reform Branch, Department of Home Affairs

By email: electronicsurveillancereforms@homeaffairs.gov.au

Dear Sir

Reform of Australia's Electronic Surveillance Framework Discussion Paper

Chartered Accountants Australia and New Zealand (CA ANZ) wishes to comment in brief terms on the tax administration aspects of the *Reform of Australia's Electronic Surveillance Framework Discussion Paper* (the Discussion Paper), specifically the proposal to provide the Australian Taxation Office (ATO) with the power to access telecommunications data.

About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 128,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

Our role in the fight against crime

Australian professionals have a vital role to play in the fight against crime. CA ANZ is particularly mindful of the trust placed in members of our professional association by the public, the business community, regulators and crime prevention agencies.

Regrettably, various reports of Australian law enforcement agencies over the years have identified the key role some professional enablers play in facilitating criminal activity. In 2017 for example, a report of the Australian Criminal Intelligence Commission on [Organised Crime in Australia](#) found that "professional facilitators have emerged as a fundamental issue for law enforcement and regulatory agencies", helping criminals "commit crimes, avoid detection and conceal assets".

At CA ANZ, apart from following up on any findings against our members of criminal or civil law breaches, our professional association's disciplinary processes also review the continued membership eligibility of those who breach our ethical standards.

In the tax arena specifically, CA ANZ has a long-standing history of supporting measures which address egregious tax behaviour. For example, representatives from CA ANZ worked closely with the Black Economy Taskforce and representatives of CA ANZ's tax team are members of the Black Economy Advisory Board.

CA ANZ has supported ATO and Tax Practitioner Board efforts to remove from the tax profession those tax agents whose conduct facilitates tax evasion. Importantly, we have worked with members of the ATO Integrated Compliance group to educate our members so that they can identify fraudulent behaviour.

CA ANZ's Australian Tax Leader, Michael Croker CA, was a member of the Federal Government's Expert Advisory Panel on whistleblower protections.

The role of client confidentiality

Like other professionals, members of CA ANZ must comply with ethical obligations which include the ethical principle of confidentiality. Those who work in tax-related areas are also bound by confidentiality rules found in the Code of Conduct within the Tax Agent Services Act 2009. Members who work in the ATO are bound by strict, statutory secrecy obligations contained in both relevant tax laws and in public service codes of conduct.

From a client (taxpayer) perspective, the confidentiality of discussions with their chartered accountant is a given. This facilitates candid conversations which, amongst other outcomes, can result in re-connecting taxpayers with the tax system (e.g. through the making of voluntary disclosures, lodging outstanding tax returns or amending previous returns which were false or misleading).

It is in this context – the potential undermining of trust and candour – that some members of CA ANZ have expressed concerns with the Discussion Paper, as they did when expanded ATO information access powers were raised in previous inquiries by:

- The Inspector General of Taxation, 2018. Recommendation 7.1, Review into the Australian Taxation Office's fraud control management.
- Parliamentary Joint Committee on Law Enforcement, 2015. Recommendation 3, Inquiry into financial related crime.

CA ANZ also notes that although the ATO was not included in the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*, the agency has access to electronic surveillance through its membership of the Serious Financial Crime Taskforce and other joint crime-fighting projects.

The need for detailed consultations

The Department's website makes clear that: "Feedback on the discussion paper will be used to inform the drafting of the new electronic surveillance legislation. This will be followed by open and iterative stakeholder consultation throughout development of the reforms."

With respect, CA ANZ recommends that the Discussion Paper should be followed by another, more detailed document which outlines the practical ways in the which the proposed legislation will be administered by the ATO and other agencies whose powers are enhanced. Or put another way, the

Discussion Paper should be followed by a further consultation process (or White Paper) which reflects the [best practice consultation principles](#) promulgated by the Department of Prime Minister and Cabinet.

The details our members seek include:

- The circumstances and scenarios when the ATO would seek to utilize any expanded powers;
- The internal and any external authorization procedures which the ATO would implement and need to comply with before exercising any expanded powers;
- The use the ATO would make of *other* information gleaned from the use of any expanded powers. For example, a telecommunications intercept might reveal nothing at all about the particular alleged criminal activity under investigation, but highlights other tax-related information (such as false deductions, failure to lodge tax returns etc). The ATO might also uncover information which although not tax-related would be of interest to ASIC or other agencies (e.g. possible defrauding of investors).
 - In the scenario above where access to *other tax* related information is “incidentally” gained from the ATO intercept, CA ANZ notes that section 166 of the *Income Tax Assessment Act 1936* would require the Commissioner of Taxation to use “any other information in the Commissioner’s possession” to make an assessment of taxable income etc. Judicial decisions already support the ATO’s use of information provided to it in breach of a third party’s obligation of confidentiality: *Donoghue* (2015) 237 FCR 316.
- The impact of any expanded ATO powers in exacerbating (from an accountant’s perspective) the lack of a level playing field vis-à-vis legal practitioners in the ability of clients to access legal professional privilege.

More broadly, external stakeholders such as CA ANZ and our members know little about the day-to-day operations of the ATO’s Integrated Compliance group (which includes tax crime fighting). This is no doubt primarily due to legitimate operational reasons, but nonetheless raises the observation that the ATO is not – to the best of our knowledge – configured as a crime fighting operation with police-like internal checks and balances, relying instead on collaboration with other agencies such as the Australian Federal Police.

There is no shared understanding of the ATO Integrated Compliance group’s internal controls and training in dealing with existing powers, let alone broader powers which may result from the Discussion Paper.

Put simply, as part of this consultation process there is a need to shine a light on whether the ATO’s current and *proposed* use of telecommunication surveillance powers contain appropriate safeguards for protecting the rights of individuals and is proportionate to the perceived threat.

If you would like to discuss our submission, please do not hesitate to contact me on 0434 333 452 or at michael.croker@charteredaccountantsanz.com

Yours sincerely



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Australian Tax Leader

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