

11 February 2022

Electronic Surveillance Reform Branch
Department of Home Affairs
PO Box 25
Belconnen ACT 2616

Online: <http://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers>

Dear Sir/Madam,

Reform of Australia's electronic surveillance framework Discussion Paper

CPA Australia represents the diverse interests of more than 168,000 members, working in over 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

We make this submission on the [Reform of Australia's electronic surveillance framework Discussion Paper](#) (the Discussion Paper) to provide the profession's views specifically in relation to the proposal to provide the Australian Taxation Office (ATO) with the power to access telecommunications data.

The reform project aims to repeal the [Telecommunications \(Interception and Access\) Act 1979](#) (TIA Act), the [Surveillance Devices Act 2004](#) and relevant parts of the [Australian Security Intelligence Organisation \(ASIO\) Act](#), and replace the current patchwork of laws with a single, streamlined and technology neutral Act. Previous consideration of the expansion of the ATO's powers has been undertaken within the confines of the TIA Act, however this reform project creates the potential for far more powers to be bestowed on the ATO, particularly given the intended broadening and modernisation of concepts and definitions.

The Report of the [Comprehensive Review of the Legal Framework of the National Intelligence Community](#) (the Review), to be read in conjunction with the Discussion Paper, did not contemplate the inclusion of the ATO in the reforms, nor is it referenced in any of the Review's [recommendations](#).

Instead, in relation to the expansion of ATO powers, the Discussion Paper refers to the Inspector General of Taxation and Taxation Ombudsman's (IGTO) 2018 [Review into the Australian Taxation Office's fraud control management](#), the Parliamentary Joint Committee on Law Enforcement's (PJCLE) 2015 [Inquiry into financial related crime](#) and Treasury's 2017 [Black Economy Taskforce Final Report](#).

These reports recommended:

- The use of telecommunication interception information obtained in joint investigations of prescribed taskforces in raising assessments for those who are subjects of such investigation¹
- Subject to appropriate safeguards including adequate privacy and oversight arrangements, the government designate the ATO as a 'criminal law-enforcement agency' under the TIA Act 1979, for the purpose of protecting public finances from serious criminal activities such as major tax fraud²
- Prosecution processes should be made more effective by designating the ATO as a criminal law enforcement agency and allowing the ATO access to appropriate telecommunications data in a timely manner, as it is impractical for all criminal investigations of these agencies to become joint investigations with the Australian Federal Police (AFP).³

However, we note that:

- the then-Government did not respond to the PJCLE's 2015 recommendation

¹ Inspector General of Taxation, 2018. Recommendation 7.1, Review into the Australian Taxation Office's fraud control management, p. 199

² Parliamentary Joint Committee on Law Enforcement, 2015. Recommendation 3, Inquiry into financial related crime, p.27

³ The Treasury, 2017. Recommendation 8.2: More effective prosecution processes, Black Economy Taskforce Final Report, p.187

- the then-Government agreed **in-principle** to the IGTO's recommendation of a broad review of interagency collaboration including the issue of intercepted telecommunication information to be undertaken by the ATO. However, no report has been made public on this work and we are not aware of its findings
- the Minister for the Department of Home Affairs (Home Affairs) has not availed him or herself of the Ministerial Declaration process available under section 176 of the TIA Act to declare the ATO a law enforcement agency to gain access to telecommunications data, at least temporarily, since the removal of the ATO's legislated authority in 2015
- the ATO was not included in the *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* that was introduced into Parliament on 20 September 2018
- we are not aware of any further public consultation after the 2018 Bill until this Discussion Paper.

Therefore, it is our view that the actions taken, or lack thereof, since these recommendations mean that the issue of expanding the ATO's powers is not resolved and has not been sufficiently progressed to justify inclusion as part of these reforms.

In contrast to the IGTO's recommendation, we believe it is critically important that information and evidence obtained for the purposes of investigating and prosecuting criminal offences related to loss to the revenue and fraud under the *Criminal Code Act 1995* (Criminal Code) must not be shared or used in administrative or civil actions, such as amending tax assessments and applying administrative penalties or the promoter penalty laws, or for offences below the threshold of criminality recommended by the Review. There is also the question as to the extent to which it should be able to be used by the ATO for intelligence purposes, as opposed to the investigation of a crime.

The issue of agencies such as the AFP, Home Affairs and the Australian Transaction Reports and Analysis Centre (AUSTRAC) having dual functions which are not limited to the protection of essential public interests was considered by the Review. The Review draws the conclusion that, "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"⁴ and, "In sum, the new Act should not enable the AFP, the Department of Home Affairs or AUSTRAC, to use, disclose or otherwise deal with surveillance information, or receive surveillance information from another agency, for all of their statutory functions."⁵

These challenges are even more evident in relation to the ATO whose primary function is the administration of Australia's tax and superannuation laws. Addressing the potential, real or perceived risk of the ATO misusing or abusing these powers requires the strictest external oversight and legislative constraints to maintain confidence in the ATO's administration and voluntary compliance levels. This is particularly so given the ATO's expansive existing administrative information gathering powers and its data analytics and modelling capabilities. It is also likely to require significant additional investment in and duplication of functions to which the ATO already has access through its use of taskforce models, such as the **Serious Financial Crime Taskforce** and the **Illicit Tobacco Taskforce**. Criminal convictions have resulted from the work of these taskforces, as well as other taskforces such as **Project Wickenby** which operated using a similar approach, indicating that the joint agencies can successfully investigate and prosecute revenue-related offences within the current framework.

We are supportive of the Government's efforts to deal with serious financial crime, including crimes related to the revenue. However, we question whether the case has been properly and sufficiently made as to the specific inadequacies of the taskforce model that may justify the expansion of ATO powers. There also remains a lack of clarity as to the specific powers to be conferred upon the ATO, particularly given that the TIA Act is proposed to be repealed. We also question the Black Economy Taskforce's assertion that it is impractical for all serious criminal investigations related to the revenue to become joint investigations with the AFP.

We believe that a more effective and efficient approach is to consider making the joint agency taskforce model permanent rather than enabling the ATO to obtain and use intercepted telecommunications for its own purposes. This is particularly so given that none of the offences in tax and superannuation legislation reach the thresholds of criminality recommended by the Review, with the exception of illicit tobacco offences. This enables a more holistic approach to the surveillance and investigation of suspected criminals with the joint agencies bringing their respective capabilities together to target the most serious financial crimes. We also believe that the involvement of the AFP, Australian Criminal Intelligence Commission (ACIC) and fellow agencies provides an additional level of scrutiny and oversight which provides assurance that the most serious financial crimes are being investigated with the proper use of powers. It also reduces the risk of misuse or abuse of powers in such an important and sensitive area.

It is our view that a well-funded and dedicated serious financial crime investigation function residing within a, or as a separately designated, criminal law enforcement agency would create the necessary separation from the ATO to assure the Government and Australian public that the ATO is not undertaking surveillance of individual taxpayers or treating them like criminals.

⁴ Agency functions, Comprehensive Review of the Legal Framework of the National Intelligence Community, paragraph 30.82, p.405

⁵ Ibid, paragraph 30.90, p.406

The sentiments expressed by our members include:

“The proposed changes to enable the ATO to have access to telecommunications data is over-reaching and a breach of privacy. It gives the ATO too much power, which could lead to an abuse of that power. We need to protect the population from unnecessary surveillance and interference by the ATO.”

“The majority of the population are law abiding with regards to their taxes and this is over-reaching surveillance by the ATO on the whole population to find a very small percentage of people committing tax fraud.”

“We find the current direction of the ATO is already very concerning. Overriding basic legal principles with no regard for taxpayers.”

“Giving the ATO electronic surveillance of telecommunications and any other data will continue in breach of people’s rights. The ATO’s powers should be curtailed and reduced, not extended. They already have enough data and access to data to do their job. Their lack of respect for taxpayers is already very disappointing.”

Consideration could, for example, be given to a model such as the **Fiscal Information and Investigation Service** (FIOD) which is part of the Dutch Ministry of Finance and is dedicated to investigating financial crimes emanating from a range of portfolios within a specific agency. In the Australian context, this could sit under the Attorney-General’s Department either as a separate agency complementing the ACIC, AFP and AUSTRAC, or as a dedicated division of the AFP with expert capability and specified powers to deal with financial crime, including revenue fraud. This would greatly mitigate the concerns in relation to the ATO improperly using its powers, the duplication of capabilities and powers that currently exist in partner agencies and the potential for ATO over-reach by using the proposed powers against taxpayers under audit for serious criminal offences without sufficient basis or due process.

We recommend that the Government and in particular, the Department of Home Affairs, focus efforts on the reforms proposed by the Review. The intended improvements to the surveillance framework arising from the Review should enable existing arrangements to be more effective in dealing with criminal offences including those related to the revenue. After the new framework has been in operation for a reasonable period, the issue of whether there remains a need for the ATO to be given access to powers under the proposed Act can be revisited. We also suggest that the Government considers further investment in the serious financial crime investigation capabilities in our law enforcement agencies by optimising the taskforce model for this purpose.

We also support the points made on this issue by the Law Council of Australia in their submission.

If you have any queries about this submission, contact Elinor Kasapidis, Senior Manager Tax Policy on 0466 675 194 or elinor.kasapidis@cpaaustralia.com.au.

Yours sincerely,

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