Australian Taxation Office

Submission to the Parliamentary Joint Committee on Law Enforcement Inquiry into the gathering and use of criminal intelligence

Summary

This Australian Taxation Office (ATO) submission discusses how the ATO is working with the Australian Crime Commission (ACC) to address the tax crime risk to Australia and the vital role that the sharing of criminal intelligence plays in our shared ability to combat this risk. It also proposes four legislative reforms that would improve the availability and accessibility of the ACC's criminal intelligence, and a review of the existing framework that allows the ATO to disclose information in relation to serious and organised crime taskforces. In summary these proposals are:

- enabling the ATO to use its compulsory information gathering powers in relation to indirect tax to obtain this information from Commonwealth government agencies such as the ACC to ensure our ability to address the indirect tax crime risk (i.e. by amending section 353-10 of the *Taxation Administration Act 1953*),
- implementing Recommendation 7 from the Parliamentary Joint Committee on Law Enforcement 'Inquiry into Commonwealth unexplained wealth legislation and arrangements' relating to use of telephone intercept information by serious and organised crime taskforces,
- enabling the ATO to make derivative use of information that the ACC has obtained under the *Surveillance Devices Act 2004* where the ACC determines it appropriate to disseminate this information in relation to combating serious and organised crime,
- enabling the ATO to access real time content pursuant to the *Telecommunications (Interception and Access) Act 1979*,
- reviewing the existing legislative framework around the ATO's secrecy exceptions, to enable the ATO to be more responsive to new serious and organised crime taskforces.

1. The role of the ATO in reducing the threat and impact of serious and organised crime

The ATO is included in the Commonwealth's Organised Crime Strategic Framework (OCSF) as an agency with shared responsibility for addressing the impact on Australia of serious and organised crime. The Commissioner of Taxation is a member of the ACC Board and of the Heads of Commonwealth Operations Law Enforcement Agencies (HOCOLEA). The ATO is a member of the Serious and Organised Crime Coordination Committee (SOCCC) and represented on groups that fall under the SOCCC which have high level representation across law enforcement agencies, including Joint Management Groups and Joint Operations Groups. The illegal operations of organised criminals are profit driven, and the ATO is a key agency in the sharing of criminal intelligence and in removing the profit from serious and organised crime.

The ATO has broad data holdings and data matching capabilities, as well as analytic, data mining and interpretative capabilities. The greater our interaction with the ACC and Australian Federal Police (AFP) in sharing criminal intelligence, the better placed the government will be to combat serious and organised crime. We are well placed to identify unexplained wealth generated from illegal profits, and to identify priority targets

from a financial wealth perspective.[1] In a recent successful operation presented by the ATO to the SOCCC, the ATO undertook data mining and analysis in relation to a specific target group within the serious and organised crime population. The ATO's analysis of the demographic patterns, trends, tax and wealth characteristics of the target group supported a common understanding which guided the strategies applied to make them more effective.

In a recent evaluation of the OCSF, the ATO was viewed as a key framework agency by the law enforcement community. We add different, and at times preferred, treatment strategies to combat serious and organised crime.

2. The target population

The target population is those engaged in serious and organised crime. In our experience, in the majority of these cases, these people and their entities try to operate outside the tax system. They continually look for new ways to avoid detection in order to minimise the amount of information available to law enforcement agencies that directly links them to their criminal activities and that would allow for the profits from those activities to be traced back to them. They harm the community not only by their direct crimes and non-compliance with their taxation and superannuation obligations, but also by creating an unlevel playing field for honest taxpayers and businesses who are unable to compete with them because they do comply with their obligations. This affects the integrity of our taxation and superannuation systems.

It is for these reasons that agencies need to be equipped to work together to detect, scrutinise and apply firmer compliance action, including more onerous disclosure obligations, to those engaged in serious and organised crime. At the same time we must continue to provide a level of comfort for those who are willing to comply, that the information they provide to the ATO will be treated with the appropriate safeguards.

Underpinning the ability of law enforcement agencies to work together to detect and deal with the target population is our ability to effectively share information and criminal intelligence. Effective information sharing is achieved by removing impediments in relation to the target population (such as secrecy provisions restricting disclosure and on-disclosure) and ensuring our technology systems are compatible with those used by the ACC, AFP and other law enforcement agencies that work together to address this risk.

3. The current environment

Substantial progress in the ability of agencies to gather and share criminal intelligence has been made in recent years, and a number of initiatives continue to be bedded down. Significant achievements and initiatives include:

- Project Wickenby: Project Wickenby has been recognised by the Australian National Audit Office as a template for cross-agency co-operation, with effective information sharing and cross-agency committees being crucial in developing and implementing strategies and "building taskforce cohesion."[2]

[1] As noted in a speech by the Commissioner of Taxation on 15 March 2012: "Disrupting the business model of crime" http://www.ato.gov.au/corporate/content.aspx?doc=/content/00313023.htm

[2] see paragraph 33 of the Australian National Audit Office report, 'Administration of Project Wickenby', February 2012

- The National Criminal Intelligence Fusion Capability (also known as the Fusion Centre): the Fusion Centre was established in July 2010 to maximise the effective use of Commonwealth and other data holdings, and to facilitate intelligence sharing in relation to serious and organised crime. It is led by the ACC, and the ATO pursued the process to have the Fusion Centre prescribed as a taskforce pursuant to the *Taxation Administration Act 1953* (TAA 1953). This was achieved in December 2011. This prescription allows the ATO to disclose protected information to the Fusion Centre. We have worked closely with the ACC to develop appropriate governance processes in accordance with the law to allow for the effective sharing of tax information. We have provided the ACC with information and training to ensure that they are aware of the legal obligations in relation to use and disclosure of the information.

- The National Criminal Intelligence Model (NCIM): The ATO is currently participating in the development of the NCIM chaired by the ACC. The ATO supports the strategic objectives of the NCIM, which includes recognition that criminal intelligence is a national asset which needs to be effectively shared and managed in order to effectively address serious and organised crime. The NCIM is underpinned by the National Criminal Intelligence Strategy. The ATO recognises that the strategy is still under development, and consequently the full identification of impediments and opportunities to maximise the usefulness of criminal intelligence are, at this time, yet to be fully realised.

Our operational experience demonstrates how the benefits of criminal intelligence exchange are able to drive a greater focus on *effective* outcomes. Below we discuss how the current area of information exchange can continue to improve to better target this risk area.

4. The availability and accessibility of the ACC's criminal intelligence

As noted above, effective information sharing between the ACC and ATO is crucial to the ATO's management of the tax crime risk. The ACC disseminates criminal intelligence to the ATO in instances where it identifies potential ATO interest. Principally, this is in situations where it appears that taxation or superannuation obligations have not been met.

ACC intelligence products provided to the ATO cover the three tiers of intelligence from strategic, operational and tactical and are noted for their high quality. The ACC readily responds to any ATO request for specific information and both agencies are working together to understand respective agency priorities in order to address key intelligence needs.

ACC intelligence products are provided to the ATO either by email or safe hand delivery, depending upon the security classification of the product and its size. Availability and access to criminal intelligence could be enhanced via technology solutions. As part of the work of the Criminal Intelligence Working Group, the ATO has participated in, and contributed to, the National Information and Intelligence Needs Analysis coordinated by the ACC. The ATO supports the findings of the report to facilitate collaboration and interoperability via enhanced technology which will further the efficiency and effectiveness of criminal intelligence.

The ATO has identified four potential areas for legislative reform which in our view would significantly improve our ability to access the ACC's criminal intelligence and thereby improve our capacity to address the tax crime risk:

4(a) enabling the ATO to use its compulsory information gathering powers in relation to <u>indirect tax</u> to obtain this information from Commonwealth government agencies such as the ACC

There is inconsistency in the ATO's ability to obtain information from Commonwealth government agencies. Some of our compulsory powers (such as the power relating to income tax) apply to obtaining information from government agencies, whereas some do not. The ATO has received advice from the Australian Government Solicitor. Of particular concern is our power in relation to indirect tax, section 353-10(1)(a)(i) of Schedule 1 of the *Taxation Administration Act 1953,* which does not apply to Commonwealth government agencies in relation to indirect tax information.

Due to this inherent limitation in the ATO's ability to obtain information relating to the application or administration of the indirect tax law from other government agencies, there is a concern that the ATO may not be able to use information disseminated from the ACC for a civil function even where it is essential in addressing the indirect tax crime risk. The ATO has taken the view that in order to be able to effectively manage the indirect tax crime risk, it is essential that our indirect tax powers are equivalent to our income tax powers which are effective on Commonwealth government agencies. We therefore recommend an amendment to section 353-10 which would require Commonwealth government agencies to provide both direct and indirect tax information to the ATO.

4(b) implementing Recommendation 7 from the inquiry into Commonwealth unexplained wealth legislation and arrangements

The limitation of the ACC's ability to effectively share criminal intelligence in relation to serious and organised crime was recognised by the Parliamentary Joint Committee on Law Enforcement in its "Inquiry into Commonwealth unexplained wealth legislation and arrangements." Recommendation 7 of that report was to amend the *Telecommunications (Interception and Access) Act 1979* so as to allow the ATO to use information gained by intercept agencies such as the ACC and AFP through telecommunications interception, in the course of joint investigations by taskforces. Law enforcement agencies advise us that some of the information held by them could be of particular benefit in combating serious and organised crime where the ACC or AFP does not have the requisite evidence to refer the matter for criminal prosecution, but where the ATO can still play an important role in removing the profit from the criminal activity by raising assessments or other taxation remedies. The ATO is currently liaising with the Attorney-General's Department in relation to this recommendation.

4(c) enabling the ATO to make derivative use of information that the ACC has obtained under the *Surveillance Devices Act 2004* where the ACC determines it appropriate to disseminate this information in relation to serious and organised crime

The importance of the ATO in the government's fight against serious and organised crime continues to grow, a point that was recognised by this Committee in its Recommendation 7 as discussed in 4(b) above. In order to effectively combat serious and organised crime, law enforcement agencies must have the tools and information available to detect and deal with this criminal activity. The ATO is not seeking these powers in its

own right. Rather, we are seeking to align the ATO's role and standing in the fight against organised crime, with the ability to assist the ACC in its treatment strategies. The ATO therefore recommends the Committee consider the option of allowing the ACC to disclose information obtained pursuant to a surveillance device warrant under the *Surveillance Devices Act 2004*, to the ATO, where the ACC determines ATO action is appropriate in the fight against serious and organised crime.

4(d) enabling the ATO to access real time content pursuant to the *Telecommunications (Interception and Access) Act 1979 (TIA Act)*

The ATO is currently preparing a submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into potential reforms of national security legislation. The terms of reference for that inquiry include a review of the *Telecommunications Act 1997* and the *Telecommunications (Interception and Access) Act 1979 (*TIA Act). As part of its submission, the ATO is highlighting the difficulty it faces in combating identity crime, and the threat that repeated attacks on our electronic lodgement and processing systems pose to the integrity of Australia's tax and superannuation systems. Currently the ATO is only able to access historical telecommunications information under the TIA Act. In cases where suspects are identified as attempting to defraud the Commonwealth by way of refund or credit fraud on the tax system, delays of multiple days in accessing historical information can be the difference between apprehending the offender or not.

Allowing the ATO's criminal investigators access to real-time telecommunications data will enable the ATO to become far more responsive to attempts to defraud the Commonwealth through credit and refund fraud. The Australian Customs and Border Protection Service is the only agency currently prescribed to be an enforcement agency for the purposes of section 5(k) of the TIA Act . The ATO proposes that consideration be given to enabling the ATO's investigators access to real-time telecommunications content to allow a more appropriate response to the ongoing threats to Australia's tax and superannuation systems. Further detail in relation to this recommendation can be provided upon request.

5. The ATO's ability to disclose information in relation to serious and organised crime

The ATO recognises that the tax secrecy provisions governing the use and disclosure of taxpayer information (called 'protected information' in the TAA 1953). are fundamental to ensuring taxpayer compliance with the tax laws and maintaining community confidence in the tax system. . The ATO's ability to disclose information in relation to serious and organised crime to the ACC is equally important as the ACC's ability to disclose information to the ATO.

For the ATO to be able to disclose protected information, in relation to serious and organised crime to a law enforcement agency such as the ACC or AFP, the disclosure must currently fall within one of three exceptions to the secrecy provisions:

<u>(i) Disclosures in relation to serious offences</u>

Disclosure to an authorised law enforcement agency officer, or a court or tribunal where the disclosure is for the purpose of investigating a serious offence; or enforcing a law, the contravention of which is a serious offence; or the making or proposed or possible making of a proceeds of crime order: section 355-70 (Item 1) of the TAA 1953 . "Serious offences" are those punishable by greater than 12 months jail: section 355-70(10).

(ii) Disclosures for the purpose of Project Wickenby
Disclosure to a Project Wickenby officer, or a court or tribunal where the disclosure is for or in connection with a purpose of the Project Wickenby Taskforce; and is made before 1 July 2013: section 355-70 (Item 3).

(iii) Disclosures to prescribed taskforces
Disclosure to a taskforce officer of a prescribed taskforce, or a court or tribunal for or in connection with a purpose of the prescribed taskforce and is made within the time limit, if any, prescribed by the regulations: section 355-70 (Item 4). To date, two taskforces have been prescribed: the Criminal Assets Confiscation Taskforce (CACT) and the Fusion Centre.

6. Limitations on the ATO's ability to share information in relation to serious and organised crime

The above three exceptions to the secrecy provisions do provide some capacity for the ATO to share information in relation to serious and organised crime. In the context of Project Wickenby, the information sharing exception has underpinned the broader outcomes achieved by the Wickenby agencies. It is worth emphasising that the Wickenby information sharing exception was specifically introduced by the parliament in recognition of the limits inherent in the existing taxation secrecy provisions which would have significantly impeded achieving the objectives of Project Wickenby.

However, the same broad ability does not currently exist in relation to the risk area of serious and organised crime. Briefly stated, the limitations with the two secrecy exceptions other than for Project Wickenby are:

- For the 'serious offences' exception: it is restrictive in the sense that information cannot be shared as freely between law enforcement agencies as occurs with the taskforce disclosure provisions. For example, in the very early stages of tactical planning, the ATO may not yet possess sufficiently detailed information or intelligence to have identified a suspected 'serious offence' and this would prevent the disclosure of the information under this provision. Additionally, there is a range of effective offence provisions relevant to combating serious and organised crime that are not classified as 'serious offences' and this would prevent disclosure.

- For the 'prescribed taskforce' exception: the limitation is not with the provision itself, but with the sometimes lengthy process that must be undertaken to have a taskforce prescribed under the Regulations. This process can necessarily take many months, which can be contrasted to the often urgent nature of serious and organised crime taskforces that are attempting to act quickly to address real time risks. Another reason for concern is that the ATO is currently involved in 29 separate taskforces relating to serious and organised crime, and this number is expected to grow over the coming years. If we were to attempt to prescribe all of these taskforces it would be time consuming and potentially take resources away from where they are needed. The consultation process itself could also have the potential to expose the goals and targets of the taskforce to some level of publicity which could jeopardise the covert nature of some of these taskforces.

6(a) proposal to review the existing legislative framework around the ATO's secrecy exceptions, to enable the ATO to be more responsive to new serious and organised crime taskforces

We therefore consider there may be some advantage in considering a new regulation or provision, targeted specifically at disclosures from the ATO to taskforce agencies in relation to serious and organised crime. This would serve to increase interoperability in this area, while maintaining the current safeguards that apply to those taxpayers not involved in such activities.

We recommend that the existing legislative framework be reviewed to enable the ATO to be more responsive to new serious and organised crime taskforces. Examples of amendments that may be considered include the following:

(i) enacting a new disclosure provision in section 355-70 of the TAA 1953 to allow for information to be disclosed for the purpose of combating serious and organised crime (i.e. a provision equivalent to that which applies for Project Wickenby but in relation to the serious and organised crime risk), or

(ii) linking in the ability to disclose tax information with the governance structure currently in place to combat serious and organised crime in Australia (for instance the ACC Board, Joint Management Group and Joint Operations Group), or

(iii) linking in the ability to disclose tax information with relevant ACC determinations that cover the tax crime risk in Australia,

(iv) linking in the ability for the ATO to disclose tax information to criminal law enforcement agencies, with their identification of targets involved in serious and organised crime.

Option (iii) above appears to us to be the most clear cut in outlining the circumstances under which information can be shared and has the governance safeguard of the ACC determination.