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**Leonda by the Yarra,
Hawthorn**

BREAKFAST CLUB Offshore Voluntary Disclosure Initiative & Prosecution

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OFFSHORE VOLUNTARY DISCLOSURE INITIATIVE & PROSECUTION

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The views expressed in this paper are those of the author and are not necessarily those of Harwood Andrews Lawyers.

1 INTRODUCTION

1.1 Announcement

The Commissioner announced on 18 July 2007¹ increased tax haven audit activities together with a voluntary disclosure initiative for undisclosed income from offshore activities in the following terms:

Offshore voluntary disclosure initiative

We are increasing our audit activities on taxpayers who deal with tax havens and try to conceal their income and assets offshore. While not directly related to large business, we have worked with some Australian financial institutions with subsidiaries or branches in countries that are listed as tax havens on this initiative.

Ahead of these audits, I am announcing an initiative encouraging people to come forward and make disclosures of undisclosed income from offshore activities.

Taxpayers who contact us before they are the subject of an audit and make a full and true disclosure will have reduced shortfall penalty. The Commonwealth Director of Public Prosecutions has indicated that an indemnity from criminal prosecution may be granted in certain circumstances.

As part of this, I have asked the overseas subsidiaries or branches of some Australian financial institutions to write to their Australian customers in one tax haven, as a pilot, encouraging them to make a voluntary disclosure of unreported income, if required, to the ATO. The financial institution will also provide customers with information on how to make the voluntary disclosure to us. It is expected that their customers will receive these letters in the coming weeks. Later this year we will review the pilot and consider further roll out to other tax havens.

To further encourage voluntary disclosure, the ATO will also be writing to around 1000 taxpayers over the next five weeks where we have information that they have an offshore debit or credit card, issued by a financial institution in the tax havens of Jersey, Guernsey or the Isle of Man, or where they have made a high risk funds transfer identified through the Australian Transaction Reports and Analysis Centre.

I invite taxpayers with undisclosed income from offshore activities to contact us before we contact them. Our website¹¹ has full details about making a voluntary disclosure which reduce statutory penalties, including information on eligibility, how to make a voluntary disclosure, a fact sheet, frequently asked questions, and our 'Tax havens and tax administration' publication. Alternatively people can get this information by calling us on 13 28 61.

In addition to the offshore debit or credit cards from Jersey, Guernsey or the Isle of Man letters which were to be issued in July and August 2007, certain Australian financial institutions with Vanuatu branches will write to their Australian customers detailing the offshore voluntary disclosure initiative under an ATO pilot project.²

Appended is a copy of the Standard Form offshore voluntary disclosure statement.³

The offshore voluntary disclosure initiative has broader application than to tax haven activities. The initiative applies to taxpayers with offshore accounts or investments or who have participated in an offshore tax arrangement that is in any way connected to a loss of Australian tax such as by undisclosed

¹ M D'Ascenzo, 'Tax risk governance: the corporate and personal dimensions', Australian Institute of Company Directors, Sydney, 18 July 2007.

² M D'Ascenzo, 'Tax office announces offshore voluntary disclosure initiative', Media Release 2007/34, 18 July 2007.

³ NAT 71149.

income or over-claimed deductions. Types of income include remuneration, capital gains, interest, business income and attributed income.⁴

1.2 Concession

The ATO website contains further details regarding the initiative. In summary:

- The period of necessary disclosure is between 1 July 2002 and 30 June 2007.⁵
- Full disclosure of all requested information is required.
- All tax liabilities such as a GST must be disclosed at the same time as the income tax (including CGT) liabilities.
- The initiative does not apply to GST disclosure, but if the GST correction is made within the correction time limits, no penalties or GIC will be payable.⁶
- A valid offshore voluntary disclosure will result in no penalty being imposed for a shortfall of less than AUD\$20,000 and the penalty in respect of a shortfall of AUD\$20,000 or more will be capped at 5%.⁷ The additional primary tax and interest will be payable.
- Additional remission of penalties⁸ and interest⁹ and payment terms¹⁰ may be available under the usual terms.
- Persons the subject of audit activities, Project Wickenby investigation or have engaged in forms of criminal activities are ineligible for the initiative but can make voluntary disclosure under the usual terms.¹¹
- CDPP immunity from criminal prosecution is available in only limited circumstances under the *Prosecution Policy of the Commonwealth*.¹²

Graham Whyte will discuss these concessions in greater detail.¹³

1.3 Scope

Graham Whyte's presentation will focus on the potentially significant benefits of making an offshore voluntary disclosure statement and the real time audit activities being undertaken by the ATO increasing the prospect of ATO audit. Graham Whyte will also discuss examples of activities that are targeted by the initiative.

This paper discusses some of the matters requiring consideration on whether to make the offshore voluntary disclosure statement and the potential secondary civil and criminal liability that may arise for the taxpayer and the taxpayer's advisers. The activities subject to the voluntary disclosure initiative range from the innocuous to the criminal.

Where the taxpayer has undertaken potentially criminal activities, an adviser should be circumspect in recommending a course of action other than for the taxpayer to make disclosure as the adviser may be at risk of inadvertently committing a criminal offence. The complexity of criminal law would necessitate referral of the taxpayer for specialist criminal law advice.

This paper:

- considers whether there is a tax liability that requires disclosure;
- considers whether an adviser is at risk from the offshore voluntary disclosure initiative;
- provides examples of tax haven and other activities targeted by the offshore voluntary disclosure initiative;

⁴ Such as under the controlled foreign companies and foreign investment fund rules.

⁵ <http://www.ato.gov.au/individuals/content.asp?doc=/content/87097.htm> (reviewed 1 September 2007).

⁶ *Correcting GST Mistakes* (NAT 4700-07.2004).

⁷ This concession only applies to the income tax (including capital gains tax) disclosed component.

⁸ PSLA 2006/2 Administration of shortfall penalty for false or misleading statement; PSLA 2005 Penalty for failure to keep or retain records; PSLA 2006/11 ATO Receivables Policy Part F.

⁹ PSLA 2006/11 ATO Receivables Policy Chapter 93.

¹⁰ PSLA 2006/11 ATO Receivables Policy Chapter 10.

¹¹ TR 94/6 Income tax: tax shortfall penalties: voluntary disclosures.

¹² <http://www.cdpp.gov.au/Prosecutions/Policy/>.

¹³ Graham Whyte, Assistant Commissioner, International Relations Large Business & International ATO, TIA Breakfast Club (Victoria) 27 September 2007.

- provides examples of offshore activities that have an increased risk of civil or criminal prosecution despite the offshore voluntary disclosure initiative;
- identifies the various factors the ATO and the CDPP consider in determining whether to initiate civil or criminal prosecution; and
- identifies the various factors the CDPP considers in determining whether to grant a taxpayer a prosecution indemnity.

2 PRIMARY TAX LIABILITY

2.1 Australian residency and tax liability

Broadly, an Australian tax resident is taxable on all Australian source and foreign source income, unless otherwise exempt or excluded. Accordingly, it is a precondition to Australian tax liability for the purposes of the offshore voluntary disclosure statement that the taxpayer is an Australian resident. Where the taxpayer is not an Australian resident the offshore voluntary disclosure initiative is irrelevant.

A detailed discussion of Australian tax residency is beyond the scope of this paper.¹⁴ Relevantly, however, determining Australian tax residency is a vexed question of fact and often indeterminate. Some DTAs may allocate sole residency to one or other of the states for dual residents.¹⁵ Alternatively, for non tax haven countries the income may be exempt from Australian tax¹⁶ or sole taxing entitlement may be allocated to the foreign jurisdiction under the DTA.¹⁷ In these circumstances there will be no understatement of foreign sourced income for the purposes of the offshore voluntary disclosure initiative.

Where there is uncertainty regarding Australian tax residency or uncertainty concerning if an exemption or DTA applies, it may be appropriate to make an offshore voluntary disclosure statement together with a private ruling application regarding Australian tax residency, the exemption or DTA operation. The desirability of making a private ruling application will require careful re-consideration from 1 January 2006 after TLA (ISA No.2) 2005.¹⁸

2.2 Amendment period

Amended assessment period

The required disclosure period under the voluntary disclosure initiative is between 1 July 2002 and 30 June 2007 (5 years).

The ATO has the following periods for issuing an amended assessment:

Income Tax Year	Taxpayer Type	Time Limitation
2003/2004 & earlier years	SPOR individual taxpayers individual (not a trustee) with wages, interest or dividend income from listed resident company with donation, accounting, bank charges and tax affair deductions	2 years after date tax payable under the notice of assessment
	company or superannuation taxpayer	4 years after date of the deemed notice of assessment
	any other taxpayer	4 years after date tax payable under the notice of assessment
	where any of the above involved a Part IVA scheme to obtain a scheme benefit	6 years after date tax payable under the notice of assessment
	any of the above involved in tax fraud or evasion	unlimited

¹⁴ Refer to IT 2650 Income tax: residency - permanent place of abode outside Australia; IT 2681 Income tax: residency status of business migrants; TR 98/17 Income tax: residency status of individuals entering Australia; TR 2004/15 Income tax: residence of companies not incorporated in Australia - carrying on business in Australia and central management and control.

¹⁵ Such as the Australian-United States DTA, Article 4(2).

¹⁶ Such as exempt Australian company branch profits from listed countries (s. 23AH ITAA 1936), Australian company non-portfolio dividends out of profits taxed at normal rates in a listed country (s. 23AJ ITAA 1936) or Australian individual foreign source remuneration taxed at source or earned outside Australian on an approved project (ss. 23AG and 23AF ITAA 1936).

¹⁷ TR 2001/13 Income tax: Interpreting Australia's Double Tax Agreements.

¹⁸ Prof. S. Graw, *Living with ROSA – implications of the self-assessment changes for tax practitioners*, Taxation Institute of Australia 21st National Convention, 7 April 2006.

Income Tax Year	Taxpayer Type ¹⁹	Time Limitation
2004/2005 to 2006/2007	Individual taxpayer	2 years after notice of assessment served#
	STS taxpayer individual carrying on business	
	partners in STS partnership carrying on business	
	trustee an STS trust	
	beneficiary of an STS trust	2 years after notice of assessment served#
	STS company or trust taxpayer	
	partners in STS partnership carrying on business	
	trustee an STS trust	
	beneficiary of an STS trust	4 years after notice of assessment served
	where the above involved in scheme to obtain a scheme benefit	
any other taxpayer	4 years after notice of assessment served	
any of the above involved in tax fraud or evasion	unlimited	
to give effect to an objection or appeal decisions	unlimited	
Commissioner may apply for an extension of time in certain circumstances		
Service occurs in the ordinary course of the post, upon electronic service or actual receipt		
# Note: The 2 year period is extended to 4 years where the taxpayer is involved in non-arm's length transactions between associates, Div. 7A arrangement, employee share schemes, foreign income transactions, foreign property, services and tainted services income and specific anti avoidance provisions (reg. 20 Income Tax Regs 2006 (No2)).		

The amendments by TLA (ISA No.2) 2005²⁰ means that a 'no tax payable assessment' for the 2004/2005 income year is an assessment so time limitations apply. For earlier years, 'a no tax payable assessment' was not an assessment so no time limitation applied. Transitional rules apply.²¹

The ATO will generally have 4 years from either the date the tax was payable under an original assessment or the date the notice of assessment was served on the relevant taxpayer. Where Part IVA ITAA 1936 applies, the ATO has 6 years to issue the amended assessment. Where there has been fraud or evasion, the ATO has an unlimited period to issue an amended assessment.²² Accordingly, in the innocuous circumstances the ATO may be out of time to issue an amended assessment.

Fraud and evasion

Where the taxpayer has paid less tax than ought to have been paid, there has been an 'avoidance of tax'.²³ Fraud is not necessarily the criminal law concept of fraud. A detailed discussion of fraud and evasion is beyond the scope of this paper.

'Fraud' is not defined in the ITAA 1936, but fraud exists where a person makes a false statement or representation either knowing it is false, or without a genuine belief in its truth or is recklessly careless whether it is true or false.²⁴ Fraud imports design and purpose.²⁵ The test for fraud concerns the belief of the person who makes the statement. As long as the belief that the statement is not false does not exist, fraud cannot be established even if the belief was formed carelessly or on inadequate grounds. However, a deliberate blindness and avoidance of enquiry so as not to ascertain the truth would not avoid a finding of fraud.²⁶ The standard of proof is on the balance of probabilities.²⁷

¹⁹ Tax Laws Amendment (Small Business) Act 2007 (Cth) amended the reference to 'STS' to be 'small business entity' for the 2007/2008 and subsequent income years which is outside the offshore voluntary disclosure statement review period.

²⁰ Part 4 is effective after royal assent which was given on 1 January 2006. Assessment issued after 1 January 2006 for the 2004/2005 income year will be subject to the altered amendment periods.

²¹ *FCT v Ryan* 2000 ATC 4079; *FCT v BCD Technologies P/L* 2000 ATC 4522.

²² S. 170 ITAA 1936

²³ *Westgarth* [1950] 81 CLR 396 at 414.

²⁴ *Derry v Peek* (1889) 14 App Cas 337 at 374.

²⁵ *Kettlewell v Watson* (1882) 21 Ch D 685.

²⁶ *Candler v Crane, Christmas & Co* (1951) 2 KB 164.

²⁷ *Smith Brothers v Madden Brothers* (1945) QWN 33.

'Evasion' requires more than an intentional avoidance, but something less than fraud.²⁸ *Barripp*²⁹ held that:

It is inadvisable to attempt to define what is meant by 'evasion' in the Act. Its meaning is discussed in *Wilson v Chambers & Co Pty Ltd*. It is sufficient for the purpose of this appeal to say that where a taxpayer makes a profit, which he knows to be taxable income and wilfully omits this profit from his income tax return, he would be guilty of evasion in the absence of some satisfactory explanation of the omission. The appellant intentionally omitted the income from the return and there is no credible explanation before the Court why he did so. His conduct in my opinion answers to the description of an avoidance of taxation at any rate by evasion.

The leading case on fraud and evasion is *Kajewski*,³⁰ which held that:

[111] There will be "an avoidance of tax" within this provision where, without any active or passive fault on the part of the taxpayer, less tax has been paid than ought to have been paid. See, eg, *Australasian Jam Company Proprietary Limited v FCT* (1953) 88 CLR 23 at 34; 10 ATD 217 at 222. Fraud within s 170(2)(a) involves something in the nature of fraud at common law, ie, the making of a statement to the Commissioner relevant of the taxpayers' liability to tax which the maker believes to be false or is recklessly careless whether it be true or false. In *Denver Chemical Manufacturing Company v Commissioner of Taxation (New South Wales)* (1949) 79 CLR 296; 9 ATD 60, Dixon J, at CLR 313, ATD 64, said of the word "evasion" in a statute not materially different from s 170(2) in words applicable to this provision:

I think it is unwise to attempt to define the word "evasion". It is probably safe to say that some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is contemplated. An intention to withhold information lest the Commissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion.

[113] All the tax so avoided by Askena and the applicants was the result of fraud or evasion within the meaning of those terms in s 170(2)(a) by Mr Hart as the applicant's tax agent or by those working at his direction. But that the Kajewskis may themselves have been ignorant of Mr Hart's activities does not immunise the applicants' assessments from being reopened by the Commissioner in reliance on s 170(2)(a).

[114] To enliven the power to amend an assessment under s 170(2)(a), the Commissioner only has to be of the opinion that an avoidance of tax is due to fraud or evasion. There is no justification for implying a limitation on these clear words to restrict the Commissioner's power under the provision to amend an assessment only where the avoidance of tax is due to fraud or evasion by the taxpayers personally.

The Law Administration Practice Statement program³¹ has identified that the ATO is preparing a PSLA on fraud and evasion.³² This may provide further guidance on the ATO's views in respect of fraud and evasion.

The taxpayer has the onus to show that the avoidance of tax was not due to fraud and evasion if asserted by the ATO. Ultimately the question of whether there has been fraud or evasion is a matter of fact.

The intentional omission of income without creditable explanation for the omission has been considered evasion.³³ Accordingly, in the circumstances under consideration by the offshore voluntary disclosure initiative, there is often an appreciable risk that the amendment period is unlimited.

The required disclosure period may not cover the period of the activity or the period which the ATO is entitled to issue an amended assessment. It is unclear whether the voluntary disclosure initiative concessions will apply for activities in the period before 1 July 2002. The ATO should clarify whether the initiative will apply or the general penalty and interest remissions provisions.

²⁸ *Simms v Register of Probate* (1900) AC 332 at 334.

²⁹ *Barripp v CT(NSW)* (1941) 6 ATD 69; *Denver Chemical Manufacturing Co v CT(NSW)* (1949) 79 CLR 296.

³⁰ *Kajewski* (2003) 52 ATR 455.

³¹ As at 7 August 2007.

³² ID 1610 due to be finalised on 27 September 2007.

³³ *Chemical Manufacturing Co v CT(NSW)* (1949) 79 CLR 296.

3 ELIGIBILITY

3.1 Introduction

All taxation entities can make an offshore voluntary disclosure. Separate disclosure is required by each entity. Each partner and beneficiary must make a separate disclosure. The head company of a consolidated group makes disclosure for each group member. Trustees may need to provide revised ultimate beneficiary statements.³⁴

The voluntary disclosure statement is not available to anyone who:³⁵

- is already under review by the ATO, including as part of Project Wickenby;
- has been or is engaged in activities that exhibit a significant degree of criminality;
- is a promoter of a tax exploitation scheme;
- is a registered tax agent or who received a fee for providing tax advice;
- is under audit or has received a notice from the ATO or a law enforcement agency to produce information on offshore income;
- has engaged in falsification of documents or transactions or ownership of assets, entities or structures; or
- has engaged in money laundering activities or other forms of criminality.

Whether the taxpayer is under review general or under Project Wickenby may not be known at the time of making the offshore voluntary disclosure statement. Accordingly, an offshore voluntary disclosure statement may be ineffective in respect of the concessions. However, it should still be treated as a voluntary disclosure under the general rules.

The parameters of the other exclusions are not clear including, for example:

- what degree of criminality will invoke the exclusion;
- whether the test of being a promoter related to the promoter penalty provisions so is only operative after 6 April 2006; or
- whether a tax agent or other person is excluded where they provided mere advice for commercial fees so would not otherwise be a promoter under the advice exemption in the promoter penalty provisions.

Below is a discussion of several of the issues.

3.2 Project Wickenby

Project Wickenby is a statutorily sanctioned³⁶ multi-agency taskforce of the ATO, ACC, AFP, ASIC and CDDP and supported by AUSTRAC, the AGS and the AGD. The Federal Government has provided \$305 million over six years for Project Wickenby, which incorporates the AFP Operation Wickenby, to combat tax evasion, tax fraud and money laundering offences.

The ATO *2006-2007 Compliance Program* identifies the following Project Wickenby statistics:

- In June 2005, warrants to seize documents were executed at 48 sites across Australia and the ATO used its own access powers to make unannounced visits to another 37 sites.
- 18 voluntary disclosures received.
- 2 tax settlement offers received with \$3.2 million accepted in one matter.
- A spouse of a taxpayer currently under criminal investigation lodged a return declaring capital gains derived from shares involved in Project Wickenby activities with a tax liability of \$716,000.
- Exercised our powers of access to conduct a second round of unannounced visits at 27 sites across Australia on 21 June 2006.
- The ACC has, in July 2006, charged three participants with conspiracy to defraud the Commonwealth.

³⁴ PSLA 2001/12 Lodgment of Ultimate Beneficiary Statements.

³⁵ <http://www.ato.gov.au/individuals/content.asp?doc=/content/87096.htm> (reviewed 1 September 2007).

³⁶ For example, s. 3G TAA 1953. *Tax Laws Amendment (2007 Measures No 1) Act 2007* (royal assent 12 April 2007).

The ATO considers the ATO now has a good understanding of the scale and nature of the non-compliance, which centres on the creation of fictitious transactions, facilitated by offshore promoters.

The ATO *2007-2008 Compliance Program* identifies the following Project Wickenby statistics

- At 30 June 2007 it involved 16 criminal investigations led by the ACC or AFP.
- At 30 June 2007 it involved 136 tax audits involving 234 taxpayers.
- At 30 June 2007 it involved several investigations by the ASIC.

Newspaper reports allege that the focus of Project Wickenby concerns certain arrangements advised upon by or connected to:

- Philip Egglshaw of Strachans SA;³⁷
- Richard Egglshaw of Strachans SA;³⁸ and
- Michael Brereton of Michael Brereton & Associates.³⁹

Arrangements with connections to Strachans may be excluded from the offshore voluntary disclosure initiative.

Glenn Wheatley was purported the first conviction of Project Wickenby.⁴⁰ Glenn Wheatley was sentenced 30 months jail with 15 months suspended after pleading guilty to defrauding the Commonwealth (maximum 10 years jail and/or \$100,000 fine),⁴¹ failing to advise the trustee of income (maximum 1 year jail and/or \$6,000 fine)⁴² and dishonestly obtaining a gain (maximum 5 years jails and/or \$33,000).⁴³

*R v Wheatley*⁴⁴ (on sentencing appeal) indicates that \$256,410 was omitted from the 30 June 1994 and 30 June 1995 income tax returns and was not declared to the Trustee in Bankruptcy. \$164,500 of that money was sent offshore under a 'bogus' loan arrangement. The unpaid tax was \$124,092.43 and the amount otherwise payable to the Trustee in Bankruptcy was not determined. Further, in respect of the Kostya Tsyzu fight promotion, \$400,000 was transferred overseas avoiding tax of \$194,000. The total loss to the revenue was \$318,092.43. On 3 July 2007 Glenn Wheatley paid the ATO \$416,012.36 in discharge of penalty and interest.

On 7 September 2007, the Honourable Justice Chernov of the Victorian Court of Appeal granted leave in *R v Wheatley* to appeal the sentence.

Companies associated with Paul Hogan have allegedly been subject to Project Wickenby.⁴⁵ John and Judith Barnes⁴⁶ are also allegedly subject to Project Wickenby.⁴⁷ Shane Warne is alleged to be under investigation.⁴⁸

When assisting a taxpayer to evaluate whether to make an offshore voluntary disclosure, the taxpayer should be advised of the Project Wickenby exclusion and given examples to assist the taxpayer to determine if the taxpayer has any risk exposure.

If the taxpayer is under review from Project Wickenby or participated in certain Strachan arrangements, the taxpayer is likely to be at higher risk of criminal prosecution.

³⁷ J. Garnaut, 'From tax shelter to life in the scary lane', *The Sydney Morning Herald*, 10 August 2005.

³⁸ 'Lawyer to the stars hits out at tax probe', *The Sydney Morning Herald*, 23 September 2005.

³⁹ J. Garnaut, 'Lawyer to stars charged as woes mount', *The Sydney Morning Herald*, 26 May 2007; Transcript of interview with M Brereton: <http://www.abc.net.au/am/content/2005/s1466756.htm> (reviewed 1 September 2007); N. McKenzie, J. Berry and D. Ziffer, 'Caught between rock and a hard place', *The Age*, 20 July 2007; L. Wood, 'The lawyer, his clients and one huge fraud probe', *The Age*, 10 June 2006.

⁴⁰ Senator D. Johnson, Minister for Justice and Customs, 'First Conviction Under Operation Wickenby', Media Release 19 July 2007.

⁴¹ s. 29D CA 1914.

⁴² s. 268(2)(g) Bankruptcy Act 1966.

⁴³ s. 135.1 CCA 1995.

⁴⁴ *R v Wheatley* [2007] VCC 718, County Court of Victoria, Wood J, 19 July 2007.

⁴⁵ S. Moran, 'Hogan linked to tax cases in court', *The Australian*, 13 February 2007.

⁴⁶ Refer to *Barnes v FCT* [2007] FCAFC

⁴⁷ S. Moran, 'Couple beat tax man on document fight', *The Daily Telegraph*, 3 September 2007.

⁴⁸ J. Garnaut and N. McKenzie, 'Warne part of 'safe tax' sweep', *The Age*, 12 February 2007.

3.3 Audit

Ruling TR 94/6 expresses the ATO's view on when a taxpayer will be considered to have been notified of a tax audit in the following terms:

10. The time at which a taxpayer is taken to have been informed of a tax audit is the time when the ATO first contacts the taxpayer or the taxpayer's representative about a tax audit for a particular year. Notification will normally be in writing or may be made orally. A tax audit includes audits to ascertain a taxpayer's proper income tax liability, record keeping audits, tax strategy reviews and monitoring or watching briefs. Audits relating to taxes other than income tax (e.g., sales tax, FBT, superannuation guarantee, training guarantee, etc) will be disregarded for the purposes of determining whether a person has acted voluntarily in making a disclosure of an income tax shortfall unless income tax audits are being conducted concurrently with audits of other taxes.
11. The Commissioner will generally exercise his discretion to treat a disclosure as having been made before the taxpayer was informed of a tax audit where:
 - (i) at the time that the taxpayer was notified of the commencement of the audit, the focus of the audit as advised to the taxpayer did not cover the type of tax shortfall disclosed by the taxpayer; or
 - (ii) it may be reasonably concluded that the taxpayer would have made the disclosure even if the tax audit had not been commenced.
24. To prevent harsh results arising because of the broad definition of a tax audit, the discretion available to the Commissioner under section 226ZA to treat a disclosure as having been made before the taxpayer was informed of a tax audit should generally be exercised in cases where, the tax shortfall disclosed was unlikely to fall within the focus of the audit notified to the taxpayer. It would assist taxpayers if notifications about an audit indicate as far as possible the type of audit being conducted and its scope unless it is apparent from the nature of the audit to be undertaken, eg, a record keeping audit.
25. Section 226Z (and sections 226E and 160ARZK) refer to a taxpayer being informed of a tax audit in respect of a particular year of income. Tax officers should, accordingly, be explicit about the years of income that are being reviewed when informing taxpayers that they are to be audited. While it will still be open for the ATO to look at other years, the taxpayer will be able to make a disclosure about those other years, which may still qualify for the 80% reduction in any penalty attracted, until such time as the taxpayer is specifically informed that the audit will cover those years. Ultimately, whether a disclosure made by a taxpayer about a year other than the years under audit may be accepted as having been made voluntarily will depend on the facts

Accordingly, it may be possible to give an offshore voluntary disclosure statement if the taxpayer or the taxpayer's advisers have received an audit in respect of a non-income tax matter. The scope of an audit letter should be considered, because an audit will not be considered to have commenced in respect of years of income not specified in the audit notification. It is unclear whether an audit in respect of, for example, specific CGT issues for a year will or will not be considered to cover other income tax issues, such as offshore income or deductions.

3.4 Money laundering

Money laundering describes the process where illicit economy money is deposited with financial institutions in small non-AUSTRAC reportable transactions or by purchasing negotiable instruments, transacting that money by transfer between financial institutions or in payment of controlled services or assets to divorce the funds from their original source and then employing those funds to acquire legitimate economy assets. Examples include excessive payments for imported goods or services, undervalued transfers of exported goods or services, or fictitious loans or transactions. A detailed discussion of the anti-money laundering regime is beyond the scope of this paper.⁴⁹

When assisting a taxpayer to evaluate whether to make an offshore voluntary disclosure, the taxpayer should be advised of the money laundering exclusion and given examples to assist the taxpayer to determine if the taxpayer has any risk exposure.

⁴⁹ <http://www.ag.gov.au/aml> (reviewed 1 September 2007).

4 SHORTFALL PENALTY

4.1 Introduction

If the additional taxable income disclosed under the voluntary disclosure is AUD\$20,000 or less, no shortfall penalty will be imposed and if it exceeds AUD\$20,000 the tax shortfall penalty will be capped⁵⁰ at 5% of the additional liability.⁵¹ The cap indicates that a lesser penalty may be possible in appropriate circumstances under the *ATO Receivables Policy*.

The penalty could be as high as 75% of the omitted tax where the omission resulted from an intentional disregard of the law.

4.2 Uniform penalty provisions

The uniform penalty provisions apply to statements made, returns lodged and scheme entered into from 1 July 2001.⁵² The extent of the penalty is determined by the behaviour of the taxpayer and the taxpayer's advisers. Accordingly, while the taxpayer may not have appreciated the risks associated with the arrangement, an adviser's knowledge and behaviour may be imputed to the taxpayer.

The ATO can impose the following base penalties determined as a percentage of the taxshort fall amount:

Penalty Basis	Base Penalty Amount	Penalty Adjusted Penalty %		
		Culpable Behaviour + 20%^	Voluntary Disclosure During Audit - 20%	Voluntary Disclosure Before Audit -80%
Penalties relating to Statement				
False and Misleading Statements				
Statement about a tax law that is not reasonably arguable				
Failure to lodge statement by the due date				
Disregard of a private ruling				
▪ Intentional disregard of the law	75% shortfall	90%	60%	15%
▪ Recklessness as to the operation of a law	50% shortfall	60%	40%	10%
▪ Failure to take reasonable care to comply with tax law	25% shortfall	30%	20%	5%
▪ Taking a position that is not reasonably arguable*#+	25% shortfall	30%	20%	5%
▪ Failure to provide documents under sec. 284-75(3)	75% total tax	90%	60%	15%
▪ Disregard private ruling pre 2004/2005 income year	25% shortfall	30%	20%	5%
Penalties relating to Schemes				
▪ Taking a position not reasonably arguable	50% shortfall	60%	40%	10%
▪ Taking a position is reasonably arguable	25% shortfall	30%	20%	5%
▪ Transfer pricing or DTA position not reasonably arguable (no avoidance dominant purpose)	25% shortfall	30%	20%	5%
▪ Transfer pricing or DTA position is reasonably arguable (no avoidance dominant purpose)	10% shortfall	12%	8%	2%

^ Note: Hindering ATO, repeat offences and failure to disclose within reasonable time of becoming aware of shortfall

* Note: No penalty unless results from a change of more the \$10,000 or 1% of income tax payable

Note: No penalty in relation to a trust unless results from a change of more the \$20,000 or 2% of trust net income

+ Note: No penalty in relation to a partnership unless results from a change of more the \$20,000 or 2% of partnership net income

The ATO has discussed reasonable care, recklessness and intentional disregard⁵³ and the procedure of voluntary disclosure.⁵⁴ In summary, those views are:

⁵⁰ <http://www.ato.gov.au/individuals/content.asp?doc=/content/87624.htm&page=2&H2> (reviewed 1 September 2007).

⁵¹ <http://www.ato.gov.au/individuals/content.asp?doc=/content/87082.htm> (reviewed 1 September 2007).

⁵² Pt. 4-25 TAA 1953.

⁵³ *Ruling* TR 94/4 Income tax: tax shortfall penalties: reasonable care, recklessness and intentional disregard.

⁵⁴ *Ruling* TR 94/6 Income tax: tax shortfall penalties: voluntary disclosure.

- Recklessness involves something more than mere inadvertence or carelessness. Recklessness is gross carelessness – the doing of something which in fact involves risk (whether known by the taxpayer) and the taking of that degree of risk would be described as reckless or unjustifiable. It is not necessary for the taxpayer to be acting dishonestly – it is sufficient that the taxpayer displayed a high degree of carelessness and indifference to the consequences.
- Intentional disregard of a tax law occurs where the taxpayer is aware of the tax obligation and chooses to disregard the obligation and intentionally decides to bring about a state of affairs by the taxpayer's own act of volition.

A taxpayer that omits assessable income may be suspected of having done so intentionally, but in the absence of an admission from the taxpayer that the omission was deliberate or of conduct that may indicate deliberate evasion, it is often difficult for the ATO to establish intentional disregard.

4.3 Voluntary disclosure

Under the uniform penalties regime voluntary disclosure before audit reduces the penalty by 80%. For example, where there is an intention disregard of the law the 75% base penalty amount would be reduced to 15%. Accordingly, the capping of the penalty to 5% is potentially a significant concession where the omission of assessable income would otherwise constitute intentional disregard (reduced to 5% from 15%) or recklessness (reduced to 5% from 10%).

4.4 Reasonably arguable position

Where a taxpayer adopts an interpretation of a tax law that is 'reasonably arguable' (which is subsequently found to be incorrect) the taxpayer may be obliged to pay any unpaid tax and interest on that tax, however, penalties should not be imposed on that unpaid tax.⁵⁵

A matter is 'reasonably arguable' if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect (or more likely to be correct than incorrect).⁵⁶

If the taxpayer has taken a reasonably arguable position, there is arguably little benefit from making the disclosure, except that the fall back position will be a penalty capped at 5%. To secure the fall back position by making an offshore voluntary disclosure statement, the taxpayer will place the reasonably arguable position under immediate scrutiny as it will be necessary to make a request for remission of penalty at the same time as lodging the Standard Form.

4.5 Instalment payments

The usual enforcement rules will apply. Chapter 10 of the *ATO Receivables Policy* details the circumstances in which instalment payments will be accepted by the ATO. ATO acceptance of an instalment program is not a certainty. Accordingly, unless the taxpayer meets the ATO's administrative requirements, the taxpayer may also have to manage ATO enforcement action arising from the offshore voluntary disclosure statement.

5 TAX HAVEN ACTIVITIES

5.1 Identifying tax havens

Although the voluntary disclosure initiative does not only apply to tax haven activities, tax haven activities are arguably the focus of the initiative and more likely to be the subject of criminal prosecution.

⁵⁵ S. 284-75(2) Sch. 1 TAA 1953.

⁵⁶ S. 284-15 Sch. 1 TAA 1953

In February 2004, the ATO published its *Tax haven and tax administration*⁵⁷ initiatives expressing the ATO's views and compliance activities for tax havens. A tax haven is a jurisdiction with no or only nominal taxes and which has a lack of effective information exchange and transparency.

OECD tax havens include:

Andorra	Anguilla	Antigua & Barbuda	Aruba	Bahamas
Bahrain	Belize	Bermuda	British Virgin Islands	Cayman Islands
Cook Islands	Cyprus	Dominica	Gibraltar	Grenada
Guernsey	Isle of Man	Jersey	Liberia	Liechtenstein
Malta	Marshall Islands	Mauritius	Monaco	Montserrat
Nauru	Netherlands Antilles	Niue	Panama	Samoa
San Marino	Seychelles	St Kitts & Nevis	St Lucia	St Vincent & Grenadines
Turks & Caicos Islands	US Virgin Islands	Vanuatu		

The ATO's concerns are not with legitimate transactions with tax havens,⁵⁸ but with schemes and arrangements where taxpayers exploit the secrecy laws of tax havens in an attempt to conceal assets and income that are subject to Australian tax. Accordingly, these latter activities contain a degree of misrepresentation (by act or omission).

5.2 Suspicious factors and activities

In *Tax haven and tax administration* the ATO states it will scrutinise arrangements that come to its attention with the following characteristics:

- anonymous offshore debit cards, anonymous merchant account (credit card transactions) or offshore bank accounts;
- anonymous and other companies or trusts resident or based in a tax haven;
- anonymous international and investment trusts;
- tax-free savings accounts without interest withholding;
- overseas licensing arrangements without royalty withholding; or
- companies based in a tax haven that undertake re-invoicing,⁵⁹ substitute purchasing or offshore sales distribution or purchasing activities.

The ATO has identified the following unacceptable arrangements:

- arrangements creating deductions in Australia such as foreign life insurance policies⁶⁰ and inflated interest expenses⁶¹ management fees or purchase price for assets a tax haven entity;
- arrangements that avoid an Australian resident taxpayer declaring tax haven sourced income such as undervalued transfers offshore before sale⁶² or to earn income in tax haven;⁶³ and
- arrangements giving inappropriate access to funds accumulated tax free in tax havens such as by offshore credit or debit cards.

Accordingly, these activities are high risk for audit activities. Further, the non-disclosure character of these arrangements increases the potential for criminal prosecution.

Particular offshore structures of interest in respect of the offshore voluntary disclosure include:⁶⁴

- an offshore trust, including a bare, blind or discretionary trust;

⁵⁷ NAT 10567-01.2004.

⁵⁸ For example, foreign currency trading and 24 hour international management businesses.

⁵⁹ TA 2005/5 Use of an outbound offshore re-invoicing arrangement to avoid or evade Australian tax and TA 2005/6 Use of an inbound offshore re-invoicing arrangement to avoid or evade Australian tax.

⁶⁰ TA 2003/2 Investment into Foreign Life Insurance Policies and TR 2004/3.

⁶¹ TA 2002/1 Internet Marketing Expenses Scheme and TD 2002/23.

⁶² TA 2005/7 Asset transfer to an offshore structure at below market value in anticipation of resale to a third party at market value.

⁶³ TA 2005/8 Asset transfer to an offshore structure at below market value with subsequent use to produce income not attributed to the taxpayer for Australian tax purposes.

⁶⁴ <http://www.ato.gov.au/individuals/content.asp?doc=/content/87097.htm> (reviewed 1 September 2007);

<http://www.ato.gov.au/individuals/content.asp?doc=/content/87624.htm> (reviewed 1 September 2007)

- an offshore company, including tax haven entities known as international business companies;
- another type of entity, including Anstalts, Stichtings or Stiftungs;
- offshore financial products including securities, managed investment interests, derivatives, superannuation products and insurance investment and bonds products.

The ATO *2006-2007 Compliance Program* details the compliance activities in respect of these matters.

6 TAX ADVISER LIABILITY

6.1 Identification of advisers

To be a valid disclosure notice, the Standard Form voluntary disclosure must identify the adviser and the nature of the advice in the following terms:

DISCLOSURE DETAILS

If offshore structures, bank accounts or other assets were set up on the advice of a financial or other adviser, provide the name and address of the adviser and the nature of the advice.

Accordingly, the ATO will receive information regarding the advice and promotion channels of tax arrangements. A tax adviser may be at risk from being fairly or unfairly disclosed for the promoter penalty regime⁶⁵ or as a criminal party or accomplice. The tax adviser will need to ensure that he or she is not in an ethical conflict with a client regarding the offshore voluntary disclosure initiative. Further, the adviser should ensure that the disclosure does not waive any privilege claim that ought to be sustained if the matter is litigated or criminal proceedings are commenced.

6.2 Promoter penalty regime

The promoter penalty regime applies to proscribed conduct on or after 6 April 2006. As the offshore voluntary disclosure initiative extends to the period 30 June 2007, there may be some exposure of advisers to the promoter penalty regime.

A detailed discussion of the promoter penalty regime is beyond the scope of this paper. Relevantly, however, on a literal interpretation of the provisions, the marketing of or encouraging growth or interest in a tax exploitation scheme for consideration may apply to advisers with a relatively passive role in advising upon or referring clients to other advisers involved in promoting a tax exploitation schemes despite the exception provided for advice.⁶⁶ Although the explanatory memorandum to the *Tax Laws Amendment (2006 Measures No. 1) Bill 2006* (Cth) seeks to exclude the provision of independent and objective tax advice, including regarding tax planning, the exclusion is not clearly reflected in the language of the provisions so a court may not form a similar view.⁶⁷

On 15 March 2007, the ATO issued two draft *Practice Statements* on the administration of the promoter penalty regime.⁶⁸ The PSLAs provide greater administrative clarity in respect of the checks and balances in applying very broadly drafted legislation.

Draft PSLA 2007 Promoter penalty laws – application in relation to tax exploitation schemes, specifically identifies the following factors that may indicate that an adviser is a promoter of an offshore tax exploitation scheme:

- the Australian entity recommended an offshore service provider to clients or prospective clients;
- the Australian entity provided material prepared by the offshore service provider to clients or prospective clients;
- the Australian entity facilitated direct contact between the taxpayer and the offshore service provider;

⁶⁵ Div. 290, Schedule 1, TAA 1953.

⁶⁶ R. Fisher, 'Charting the promoter penalty mire', *The Tax Specialist*, Vol. 9, No. 5, June 2006 at 252; D. Williams, *Promoter Penalties don't be fooled – you may be at risk*, (as amended) Taxation Institute of Australia 2007 Financial Services Taxation Conference, 15 February 2007.

⁶⁷ J. Davies, *Promoter Penalties*, Taxation Institute of Australia, Windsor Hotel, Melbourne, 22 May 2007.

⁶⁸ Draft PSLA 2007 Promoter penalty laws – application in relation to tax exploitation schemes (15 March 2007); Draft PSLA 2007 Promoter penalty laws – application to schemes in relation to product rulings (15 March 2007).

- the Australian entity dealt with Australian parts of the scheme, for example, setting up structures, arranging for financing, preparing and lodging documentation;
- the Australian entity arranged for the payment of fees;
- the Australian entity received payment from the offshore service provider (which may or may not be disclosed to the clients) or from clients or prospective clients; or
- the Australian entity represented the offshore service provider in dealings with Australian entities in respect of the arrangement.

The PSLAs distinguish between promotion and provision of independent and objective tax planning advice. To assist advisers to identify circumstances when they may be at risk from the promoter penalty regime, the PSLAs makes the following relevant statements in summary:

- the mere provision of positive and supportive advice about an arrangement or structuring of an arrangement is not the promotion of a tax exploitation scheme;
- receipt of success or contingency fees, hourly billing in excess of time actually spent, mark-ups on normal fee rates generally or for skill care and attention or commissions will likely exclude the mere provision of advice exemption;
- the higher the degree of involvement in the activities the more likely to be a promoter (such as doing presentations to the deviser's clients explaining the advice);
- the higher the degree of involvement in the management of the deviser or marketing the more likely to be a promoter;
- the more robust the advice and review and quality assurance procedures the less likely an adviser will be a promoter; or
- well drafted scoping, qualification and disclaimer provisions in advice may reduce the risk that an adviser will be a promoter.

Criminal proceedings will take precedence over any current or future civil proceedings. Any adviser that has undertaken the above activities should consider the adviser's exposure to the promoter penalty regime.

The civil penalty is the greater of twice the consideration received or receivable in respect of the scheme or \$550,000 for an individual and \$2,750,000 for a company.⁶⁹

6.3 Criminal parties and accomplices

An adviser may have a criminal law exposure where the adviser has committed or attempted to commit an offence or as a party or an accomplice to the promoter's criminal offence or client's criminal offence. A detailed discussion of the extensions of criminal responsibility to a party or accomplice is beyond the scope of this paper.⁷⁰ Relevantly, however, in summary, accessories,⁷¹ concealing the offence of another,⁷² abetting,⁷³ conspiring,⁷⁴ inciting,⁷⁵ or attempting⁷⁶ may constitute an offence.

A person who attempts, incites or conspires to commit an offence commits a discrete offence of attempting, inciting or conspiring to commit that offence. In contrast, an accomplice is taken to commit the same offence as the principal criminal. The area of parties and accomplices is very complex.

6.4 Privilege claims

To be a valid disclosure notice, the voluntary disclosure statement must specify the 'nature' of the advice. One assumes that it is not a condition of a valid offshore disclosure statement that the taxpayer waives

⁶⁹ 5000 penalty units for individuals and 25,000 penalty units for a company section 290-50 Sch. 1 TAA 1953 and each penalty units is \$110 – s. 4AA CA 1914.

⁷⁰ S. Odgers, SC, *Principles of Federal Criminal Law*, Thomson Lawbook Co, 2007

⁷¹ S.325 CA 1958; S. 6 CA 1914.

⁷² S.326 CA 1958.

⁷³ S. 323 CA 1958; S. 11.2 CC 1995.

⁷⁴ S. 321 CA 1958; S. 11.5 CC 1995.

⁷⁵ S. 321G CA 1958; S. 11.4 CC 1995.

⁷⁶ S. 321M CA 1958; S. 11.1 CC 1995.

any legal privilege (**CLP**). The ATO should clarify the type of disclosure that is required by examples and specifically state that the disclosure is subject to any valid claim of CLP.

Care in describing the nature of the advice is required to ensure that any CLP is not waived. Different rules apply in respect of 'legal advice privilege' and 'litigation privilege' in determining if a confidential communication is subject to CLP. A detailed discussion of CLP is beyond the scope of this paper.

Relevantly, if a confidential communication or document that is otherwise subject to CLP is disseminated outside the permitted relationships⁷⁷ the dissemination will likely waive CLP and potentially result in disclosure of the confidential communication to the ATO. Once CLP is effectively waived it cannot be reinstated.⁷⁸ Accordingly, if waived under the voluntary disclosure statement CLP cannot be relied upon in any subsequent litigation.

Implied waiver occurs where by reason of some conduct on behalf of the privilege holder it becomes inconsistent to maintain the privilege around documents concerning that issue.⁷⁹ Disclosure will occur where the content of the privileged material is disclosed by the privilege holder (such as the taxpayer client disclosing the contents of legal advice or the ultimate conclusion of the advice without the reasoning process).⁸⁰

*FCT v Rio Tinto Ltd*⁸¹ is now the leading case on implied waiver and has clarified the law in the following terms:

- [52] These authorities show that, where issue or implied waiver is made out, the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence. Where the privilege holder has put the contents of the otherwise privileged communication in issue, such an act can be regarded as inconsistent with the confidentiality that would otherwise pertain to the communication.
- [61] Both before and after *Mann*, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence. In *DSE* (at 519 [58]), Allsop J put the matter somewhat more descriptively, saying waiver arises when "the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication". (Emphasis in original.)
- [65] In any event, even if his Honour was correct in holding that, by the SFIC, the Commissioner raised an issue in the substantive proceeding as to his states of mind, this alone would not provide a proper basis for "issue waiver". As the previous examination of the authorities shows, the question is not whether the Commissioner has put his state of mind in issue but whether he has directly or indirectly put the contents of the otherwise privileged communications in issue in the litigation, either in making a claim 63 ATR 97 or by way of defence. Put another way, to adapt Allsop J's language in *DSE*, has the Commissioner (being the privilege holder) made an assertion as part of his or her case in the litigation that lays open the privileged documents to scrutiny, with the consequence that an inconsistency arises between the making of the assertion and the maintenance of the privilege?
- [68] In this case, everything turns on the particulars given by the Commissioner in response to Rio's request. The question is whether, by his particulars, the Commissioner made an assertion as part of his case that puts the contents of the privileged scheduled documents in issue, or necessarily lays them open to scrutiny, with the consequence that an inconsistency arises between the making of the assertion and the maintenance of the 63 ATR 98 privilege. To answer this, the relevant assertions must be considered in their proper context.
- [72] The Commissioner has not, however, simply said that the 8 privileged scheduled communications were relevant to reaching his state of satisfaction or exercising his discretions. Nor has he said that he took them into account in so doing. We interpolate that a document may be relevant to a decision without evidencing any matter taken into consideration in the making of it (as, for example, an instrument conferring authority to make the decision). The Commissioner could have identified his bases for 63 ATR 99 satisfaction and exercises of discretion by listing the matters he took into account in each case, but he did not do so. Instead, he identified his bases for satisfaction and exercises of discretion as the matters evidenced in the scheduled documents. In so doing, the Commissioner did more than make an assertion about the relevance of these communications. In his particulars, the Commissioner has said that he took into account the matters evidenced by numerous documents, including the 8 privileged scheduled

⁷⁷ *Pratt Holdings P/L v FCT* (2004) 56 ATR 128.; *Barnes v FCT* [2007] FCA 3.

⁷⁸ *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALJR 28 at 32.

⁷⁹ *A-G (NT) v Maurice* (1986) 161 CLR 475 at 487; *Mann v Carnell* (1999) 201 CLR 1 at 13.

⁸⁰ *Goldberg v Ng* (1996) 185 CLR 83 at 95-96; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALJR 28 at 32.

⁸¹ *FCT v Rio Tinto Ltd* (2006) 63 ATR 79.

documents. In so doing, the Commissioner has made an assertion that puts the contents of these 8 documents in issue, or necessarily lays them open to scrutiny, with the consequence that there is an inconsistency between the making of the assertion and the maintenance of the privilege.

Care will be required to disclose the nature (or structure) of the arrangement without waiving CLP by specifying:

- the contents of any privileged advice or document;
- the purported taxation effect asserted by any privileged advice or document;
- that the facts, reasoning or purported taxation effect stated in the Standard Form is referable to a particular advice or document; or
- listing the documents or advice (such as by author or date).

Advisers should carefully consider the wording of the disclosure in the offshore voluntary disclosure statement to ensure that they do not inadvertently waive privilege or expose themselves to criticism or potential negligence claims.

7 PROSECUTION

7.1 Introduction

The decision to make an offshore voluntary disclosure is relevant in that it may affect:

- the decision of the ATO to refer the matter to the CDPP for prosecution;
- the decision of the CDPP to proceed to prosecution;
- the recommendation to the court by the CDPP for a more lenient or non-custodian sentence;
- the granting of a reduction in sentence by a court for co-operation under s. 21E CA 1914; and
- the granting of an indemnity from prosecution by the CDPP for providing witness evidence under s. 9(6) and 6(A) – (6F) DPPA 1983.

A detailed discussion of the ATO and CDPP prosecution policies is beyond the scope of this paper.⁸² A detailed analysis is required to advise a taxpayer on the likelihood of prosecution action arising from the offshore voluntary disclosure initiative. Rarely will it be possible to conclude that there will be no possible prosecution action.

The highest risk of prosecution involves matters of fraud and dishonesty.

Fraud involves dishonestly obtaining a benefit by deception or other means and includes obtaining a financial advantage or benefit by deception, causing a loss or creating a liability by deception, providing false information to the ATO or failing to provide information when obliged to do so and making using or possessing falsified documents. The following is not fraud.⁸³

Fraud and other forms of Non-Compliance

47 Tax Office employees should note that because fraud involves dishonesty it is different from other forms of non-compliance as shown in the Compliance Model and as reflected in the Tax Office Compliance Continuum on page 29. Other forms of non-compliance include, but are not limited to:

- (a) Not wanting to pay the correct amount of tax by:
 - looking to avoid tax;
 - resisting compliance;
 - maintaining limited or poor record-keeping systems; and
 - being unco-operative.
- (b) Taking aggressive tax positions that do not involve dishonesty.
- (c) Trying to comply but not always succeeding by:

⁸² The Prosecution Policy of the Commonwealth 1990 (2nd ed), Commonwealth Fraud Control Guidelines 2002, Australian Government Investigation Standards 2003, Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA) principles for case selection, prosecution and enforcement, Memorandum of Understanding with CDPP, Various Memoranda of Understanding or Service Level Agreements with key agencies including Australian Federal Police, Australian Crime Commission, Australian Customs Services and Australian Securities and Investments Commission, PSLA 2006/11, PSLA 2006/11, PSLA 2007/5 and PSLA 2007/6.

⁸³ CMPS 2007.

- not being fully competent;
- failing to take reasonable care;
- inadvertent error; and
- being ignorant or unsure.

In advising a taxpayer, an adviser must consider whether activities could constitute fraud or other criminal offence or refer the matter to specialist lawyers.

7.2 Introduction to criminal law

A particular criminal act or omission may be punishable under the State criminal law or the Federal criminal law (or both) depending on the actual offence. The State courts, procedures and sentencing apply Federal criminal prosecutions, unless the Federal law expressly or by implication makes provision contrary to the State law.⁸⁴ Where the State law and the Federal law are equivalent, the Federal law will prevail.⁸⁵

The CCA 1995 and CA 1914 codify the Federal criminal law. The CA 1958 and common law state the Victorian criminal law.

The court can make reparation orders to disgorge proceeds of crime.⁸⁶

7.3 Offences

Part III TAA 1953 imposes a number of taxation offences, including:

- the making of false or misleading statements;⁸⁷
- falsifying or concealing the identity of another.⁸⁸

The ATO may elect to treat these offences as civil 'prescribed taxation offences' rather than as criminal offences. Civil standards of prosecution apply. Such offences are summary in nature and sentences are limited to fines.

More serious indictable offences are under the State criminal law or Federal criminal law. Possibly relevant offences include (Commonwealth offences are identified in italics):

- Obtaining a financial advantage by deception⁸⁹ fraudulently inducing person to invest money⁹⁰ conspiracy to defraud⁹¹ *obtaining a financial advantage of Commonwealth property by deception*⁹², *obtaining a gain of Commonwealth property by dishonesty*⁹³ *obtaining a financial advantage of Commonwealth property*⁹⁴ *conspiracy to defraud the Commonwealth*⁹⁵
- False accounting⁹⁶ falsification of documents⁹⁷ suppression of documents⁹⁸ destruction of evidence⁹⁹ *fabricating evidence*¹⁰⁰ *destroying evidence*¹⁰¹ *making false statements in application*¹⁰² *false or misleading information or documents*¹⁰³ *forgery*¹⁰⁴ *using forged documents*¹⁰⁵ *falsification of documents*¹⁰⁶

⁸⁴ Ss. 68 and 79 JA 1903.

⁸⁵ *Miller v Miller* (1978) 141 CLR 269.

⁸⁶ S. 116 PCA 2002.

⁸⁷ Ss. 8K, 8N and 8P TAA 1953.

⁸⁸ S. 8U TAA 1953.

⁸⁹ S. 82 CA 1958 'A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence' (max 10 years).

⁹⁰ S. 191 CA 1958 (max 15 years).

⁹¹ Common law offence with statutory penalty S. 320 CA 1958 (max 15 years).

⁹² S. 134.2 CC 1995 (max 10 years).

⁹³ S. 135.1 CC 1995 (max 5 years).

⁹⁴ S. 134.5. CC 1995 (max 1 year).

⁹⁵ S. 135.4. CC 1995 (max 10 years).

⁹⁶ S. 83 CA 1958 (max 10 years).

⁹⁷ S. 83A CA 1958 (max 10 years).

⁹⁸ S. 86 CA 1958 (max 10 years).

⁹⁹ S. 254 CA 1958 (max 5 years).

¹⁰⁰ S. 36 CA 1914 (max 5 years).

¹⁰¹ S. 39 CA 1914 (max 5 years).

¹⁰² S. 136.1. CC 1995 (max 1 year).

¹⁰³ S. 137.1 and 2 CC 1995 (max 1 year).

- Secret commissions¹⁰⁷
- Money laundering¹⁰⁸ *money laundering of at least \$1,000,000¹⁰⁹ or smaller amounts.*

If prosecution occurs based on the same act or omission for which a taxpayer was liable for an administrative penalty, then the administrative penalty must be abandoned.¹¹⁰

7.4 Fraud

CMPS 2007¹¹¹ expressed the ATO's view of applying the *Commonwealth Fraud Control Guidelines 2002* to the ATO and in particular it provides guidance on the types of behaviours that are considered fraudulent. Although not exhaustive, indicators of fraud include:

- deliberately hiding income;
- omissions of entire sources of income;
- unexplained failure to declare income;
- claiming fictitious deductions;
- backdated or post dated documents or false documents;
- distribution of income to fictitious partners or beneficiaries;
- the existence of non-arm's length transactions or arrangements;
- inclusion of an overseas loop in a domestic transaction;
- transactions not in the ordinary course of business or surrounded by secrecy;
- deposits in secret bank accounts.

7.5 ATO referral for prosecution

Chapters 23 and 70 of the *ATO Receivables Policy* detail the ATO's policies for prosecution action in respect of debt recovery and lodgement of documents (respectively). In summary:

- Administrative penalties will be imposed and prosecution action reserved for the most serious offenders.
- Prosecution action is directed at those taxpayers whose behaviour is least compliant in terms of the Compliance Model.
- Case selection concentrates on offences in the following categories:
 - those that are particularly serious, blatant or involve persistent offenders;
 - those for which there are no other effective means of securing compliance or no other sanctions; or
 - those which are representative of significant/prevalent non-compliance practices and which, if prosecuted on a timely basis, may carry effects wider than those of the particular case.
- Prosecution should not be pursued unless in the public interest after considering:
 - the degree of seriousness of the offence and whether it is of a 'technical' nature only;
 - any mitigating or aggravating factors;
 - the youth, age, intelligence, physical health, mental health or special infirmity of the taxpayer;
 - the period that has elapsed since the alleged offence;
 - the degree of culpability of the taxpayer in connection with the offence;
 - the availability and efficacy of any alternatives to prosecution;
 - the prevalence of the offence and the need for deterrence, both for the offender and generally; and
 - the necessity to maintain public confidence in the tax system.

¹⁰⁴ S. 144.1. CC 1995 (max 10 year).

¹⁰⁵ S. 145.1 CC 195 (max 10 years).

¹⁰⁶ S. 145.4 CC 195 (max 7 years).

¹⁰⁷ S. 176 CA 1958 (max 10 years).

¹⁰⁸ S. 194 CA 1958(max 20 years).

¹⁰⁹ S. 400.3. CC 1995 (max 25 years).

¹¹⁰ S. 8ZE TAA 1953.

¹¹¹ CMPS 2007 replaces the ATO Prosecution Policy 2001.

- Prosecution will normally only be considered where it is clear that:
 - the entity or their agent is clearly aware of their obligations and would have sufficient knowledge to meet those obligations;
 - the entity has made no attempt to come to an acceptable arrangement for lodgement with the ATO;
 - the entity has a poor history of compliance with taxation laws having regard to an entity's entire payment, lodgement, withholding and correspondence compliance history; or
 - circumstance such that failure to comply by the entity represents a significant risk to tax administration.

CMPS 2007 relevantly states:

20. A referral for possible prosecution will be considered in circumstances where:
 - taxpayers or Tax Office employees:
 - are resisting other compliance strategies;
 - have decided not to comply; or
 - have deliberately, dishonestly and/or systematically obtained or tried to obtain a benefit to which they are not entitled;
 - having regard to the Memorandum of Understanding with the Commonwealth Director of Public Prosecutions and the *Prosecution Policy of the Commonwealth*, the materiality of the amount of the fraud or the nature of the conduct is such that prosecution by the Commonwealth Director of Public Prosecutions is the most appropriate response;
 - the alleged offender is in a position of influence or trust such as that of a tax agent, financial adviser or legal adviser, and uses this position to perpetrate fraud which undermines confidence in the taxation system;
 - the alleged offender is promoting or involved in the design, marketing or implementation of fraudulent schemes;
 - the Tax Office needs to send a clear signal of deterrence to the alleged offender or the community that certain fraudulent conduct will be dealt with firmly; or
 - the relevant Tax Office business strategy will be progressed by appropriate prosecution action
 - prosecution by the Commonwealth Director of Public Prosecutions is the only means of redress available.
21. Tax Officers do not have the authority to make it a condition of a settlement that a taxpayer or another person will not be prosecuted, or that proceedings associated with a prosecution will not be taken either by the Tax Office or another agency.

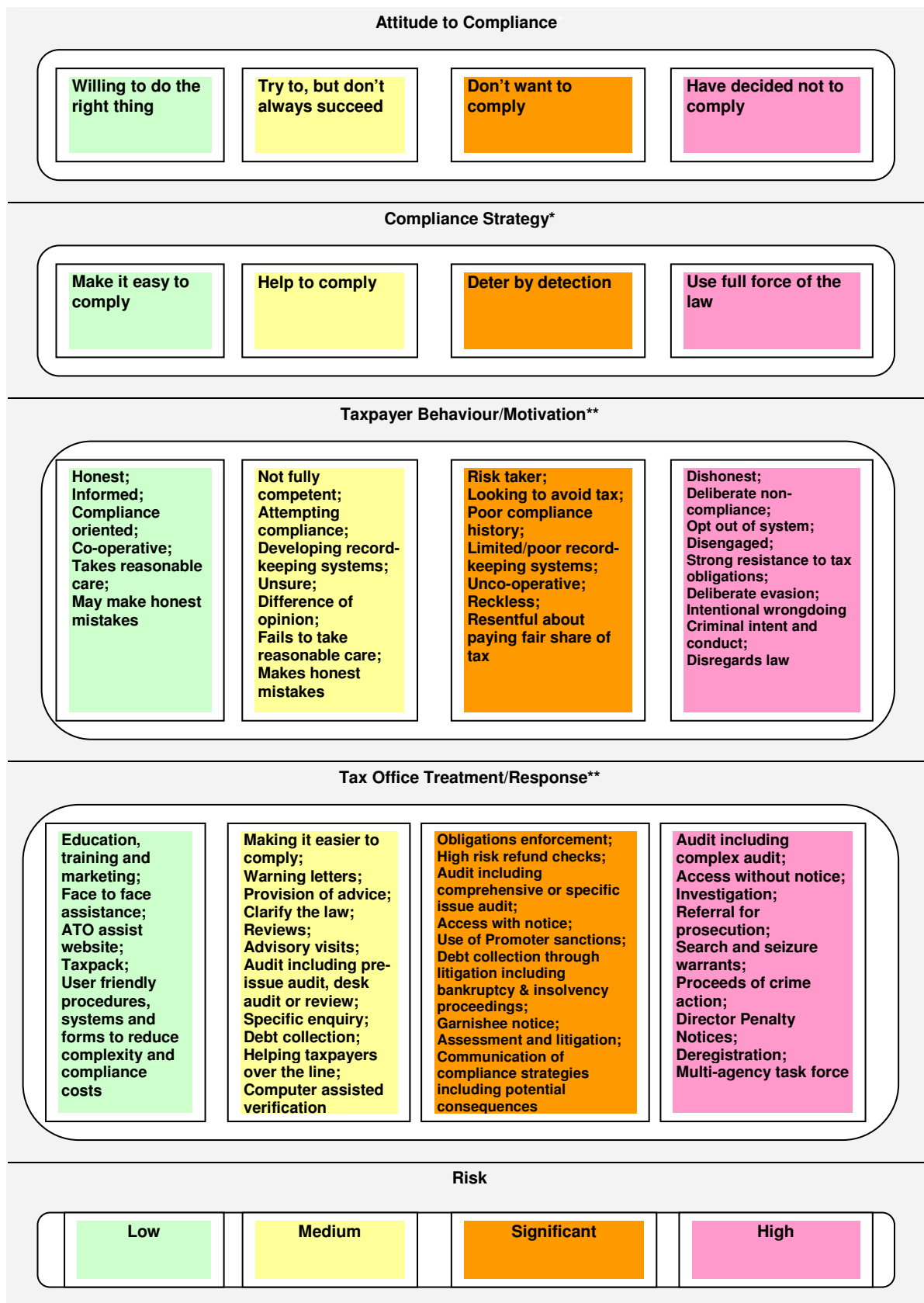
ATO considers the following factors in selecting potential cases of fraud for referral:

- the significance of the loss to the Commonwealth revenue;
- when detection occurred;
- the culpability of the behaviour including if repeated or systematic;
- the availability of alternate sanctions and likelihood of obtaining voluntary compliance;
- the number of participants involved;
- the ATO's corporate priorities;
- the taxpayer's compliance history;
- the impact on the ATO's resources; and
- the sensitivity or impact of prosecution action on community confidence.

The decision to refer the matter to the CDPP concerns the balancing of several factors outside the characteristics of the taxpayer. Accordingly, there is little ability to accurately predict whether the ATO will refer the matter to the CDPP for consideration.

The following table extracted from CMPS 2007 and identifies the relevant characteristics and the risk of prosecution:

TAXATION OFFICE COMPLIANCE CONTINUUM



*Taken from the Compliance Model; **These lists are indicative only and not exhaustive.

Under the *DPP ATO Liaison Guidelines* the ATO and the CDDP have agreed the allocation of prosecution duties. The ATO will prosecute most offences under the TAA 1953. The following matters will be referred to the CDDP:¹¹²

23.6.3 Those categories of matters referred to the DPP include:

- all prosecution for offences against the Crimes Act 1914 or the Crimes (Taxation Offences) Act 1980;
- all offences where the maximum penalty available includes a term of imprisonment exceeding 12 months;
- any case where, in the Commissioner's view, there is a realistic possibility of the court sentencing the defendant to a term of imprisonment in the event of a conviction;
- all prosecutions where the Commissioner elects to treat an offence otherwise than as a prescribed taxation offence;
- all cases which involve novel or difficult questions of law or previously untested areas of law (once a precedent has been established, referral may not be necessary in future matters);
- all appeals against a decision of a court, either by the person convicted or by the Commissioner;
- all applications under the Administrative Decisions (Judicial Review) Act 1977 which seek to challenge a ruling made in the course of the criminal process;
- any cases which involve prominent or high profile figures or which, for any reason, are likely to attract public attention;
- any matter involving, directly or indirectly, a case that is being investigated by the Australian Federal Police or National Crime Authority, or prosecuted by the DPP or in which civil recovery action is being brought or coordinated by the DPP (even if the later prosecution does not involve a matter of great substance);
- all cases in which the defendant's previous history indicates that the matter should be handled by the DPP (eg the person has behaved in a violent manner in the past or has a history of defending cases);
- defended cases in which the person will be represented by legal counsel or it is apparent that the issues raised by the defence are of substance; and
- any other matter where, in the opinion of the Tax Office officer, the prosecution should be handled by the DPP.

In these circumstances, the ATO will have little authority to negotiate prosecution issues.

The courts are unwilling to grant injunction to prevent prosecution. Although the decision to prosecute may in the past have been reviewable under ADJR 1977¹¹³ in exceptional circumstances.¹¹⁴ However, in 2000, the ADJR 1977 was amended to exclude the use of ADJR 1977 to challenge decisions to prosecute or contests other related criminal justice process decisions.

7.6 CDDP decision to prosecute

The CDDP giving favourable consideration to not prosecuting for a voluntary disclosure is not new or restricted to offshore voluntary disclosure statements. *Ruling* TR 94/6 states:

51. The fact that a person has made a voluntary disclosure does not necessarily preclude a prosecution. However, it is a factor to be taken into account in deciding whether the public interest requires criminal proceedings. The Director of Public Prosecutions (DPP) has advised that, as a general rule, it is unlikely that a person who has genuinely made a voluntary disclosure will be prosecuted, unless the offence exhibits a significant degree of criminality.

However, the relevant factors in determining whether to prosecute are significantly more complex.

The *Prosecution Policy of the Commonwealth* and the Victorian *Prosecutorial Guidelines* contain the factors for evaluating whether prosecution should occur. Fox¹¹⁵ summarises the guidelines as follows:

- (1) Whether there is sufficient admissible, substantial and reliable evidence of a crime known to the law to create a reasonable prospects of securing a conviction. This factor depends not only on an evaluation of the weight and sufficiency of available evidence, but (in the case of indictable offences) also upon whether or not a reasonable jury, properly instructed, would be likely to convict in all the circumstances.

¹¹² *ATO Prosecution Policy at 23.6.3.*

¹¹³ *Newby v Moodie* (1988) 83 ALR 523, *cf Reid v Nairn* (1985) 60 ALR 209; *Smiles* (1992) 109 ALR 449.

¹¹⁴ *Maxwell* (1996) 184 CLR 501.

¹¹⁵ R. Fox, *Victorian Criminal Procedure State and Federal Law*, Monash Law Book Co-operative Ltd 2005 at 2.3.3.1.

- (2) Whether the public interest requires a prosecution to be pursued. Evaluation of the public interest factor requires account to be taken of such matters as:
- (a) the seriousness or triviality of the alleged offence;
 - (b) the existence of mitigating or aggravating factors;
 - (c) the offender's background;
 - (d) the youthfulness, mental health or infirmity of the alleged offender;
 - (e) the staleness of the alleged offence;
 - (f) the alleged degree of culpability of the offender;
 - (g) the obsolescence or obscurity of the law under which the charge has been laid;
 - (h) whether the prosecution itself would tend to bring the law into disrepute;
 - (i) the availability of alternate forms of disposition, e.g. civil commitment under mental health or relate legislation, formal cautioning of young offenders, or other special arrangements for persons under special disability;
 - (j) the prevalence of the alleged offence;
 - (k) whether the consequences of conviction would be harsh or oppressive;
 - (l) the degree of apparent public concern;
 - (m) the effect on compensation, reparation and forfeiture if a prosecution is undertake;
 - (n) the victim's attitude;
 - (o) the likely length and expense of the trial;
 - (p) the degree of cooperation provided by the accused in relation to the prosecution of others;
 - (q) the likely sentencing outcome;
 - (r) whether the offence is only triable by indictment; and
 - (s) the necessity of maintaining public confidence in the courts

The decision to prosecute concerns the balancing of several factors outside the characteristics of the taxpayer. Accordingly, there are limitations on the ability to accurately predict whether the CDPP will prosecute.

7.7 CDPP sentencing recommendation

The CDPP can negotiate the exchange of a guilty plea to selected charges for the withdrawal of other charges (charge negotiation) and can agree the recommendation to the court on sentencing option in exchange for a plea of guilty (plea negotiation).¹¹⁶ This process is distinguished from inappropriate discussions with the court over likely sentencing by the court.¹¹⁷ The procedure and strategy of charge negotiation or plea negotiation is beyond the scope of this paper.¹¹⁸

Accordingly, once criminal proceedings are commenced, the taxpayer's legal representatives can negotiate the charges and the sentencing recommendation. The CDPP attitude to such overtures can be variable.

Practice Rule 147 *Victorian Bar Good Conduct Guide* permits the prosecutor to inform the court of an appropriate range of severity of penalty, including a period of imprisonment by reference to relevant appellant authority, but must not seek to persuade the court to impose a sentence of a particular magnitude. The Honourable Justice Osborn has indicated that this rule is given little effect in practice.¹¹⁹

*R v Wheatley*¹²⁰ demonstrates the uncertainty of plea negotiation. It appears that on 19 December 2005 CDPP indicated it the CDPP would recommend to the court that any sentence be fully suspended provided Glenn Wheatley cooperated by giving evidence against others. However, on 20 January 2006 that assurance was withdrawn as a result of a further review.

The uncertainty of such plea negotiations as publicised in *R v Wheatley* will, in the writer's opinion, undermine confidence in the offshore voluntary disclosure statement.

¹¹⁶ *Prosecution Policy of the Commonwealth* 5.12- 5.18.

¹¹⁷ *Marshall* [1981] VR 725.

¹¹⁸ B Martin, 'Prosecution Issues', CDPP, Australian Institute of Judicial Administration Conference - Perspectives on White Collar Crime: Towards 2000, 27 February 1998; G. Lewis, 'Plea bargaining', (1985) 59 *LJ* 235; P. Gerber, 'When is plea bargaining justified', [2003] *QUTLJJ* 13.

¹¹⁹ The Honourable Justice Osborne, 'The Judge's perspective on sentencing', 2 April 2007.

¹²⁰ *R v Wheatley* [2007] VCC 718, County Court of Victoria, Wood J, 19 July 2007.

7.8 Court sentencing

The sentencing law of State courts exercising Federal jurisdiction has been described as labyrinthine and a legislative jungle.¹²¹ A detailed discussion of sentencing law is beyond the scope of this paper.¹²²

In broad terms, voluntary disclosure and cooperation with authorities¹²³ and an early plea of guilty¹²⁴ will result in a sentencing reduction for contrition or administrative convenience. Accordingly, an offshore voluntary disclosure statement, cooperation with authorities and pleading guilty can significantly reduce a sentence.

*R v Wheatley*¹²⁵ (on sentencing appeal) indicated that the sentence of 30 months imprisonment with 15 months suspended would have been 45 months with 15 months suspended but for the assistance to authorities and plea of guilty. Accordingly, the assistance to authorities and plea of guilty reduced the term of imprisonment by 1/3rd.

7.9 CDDP prosecution indemnity

Only the CDDP can grant an indemnity from prosecution. The relevant powers are:

SECT 9 Powers of Director

- (6) The Director may, if he or she considers it appropriate to do so, give to a person an undertaking that:
- (a) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in specified proceedings;
 - (b) the fact that the person discloses or produces a document or other thing in specified proceedings; or
 - (ba) any information, document or other thing that is obtained as a direct or indirect consequence of an answer that is given, a statement or disclosure that is made, or a document or other thing that is disclosed or produced, in specified proceedings;
- will not be used in evidence against the person, and where the Director gives such an undertaking:
- (c) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in the specified proceedings;
 - (d) the fact that the person discloses or produces a document or other thing in the specified proceedings; or
 - (e) any information, document or other thing that is obtained as mentioned in paragraph (ba);
- as the case may be, is not admissible in evidence against the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory, other than proceedings in respect of the falsity of evidence given by the person.
- (6D) The Director may, if the Director considers it appropriate to do so, give to a person an undertaking that the person will not be prosecuted (whether on indictment or summarily):
- (a) for a specified offence against a law of the Commonwealth; or
 - (b) in respect of specified acts or omissions that constitute, or may constitute, an offence against a law of the Commonwealth.

The indemnity is from use of self incriminating evidence (s. 9(6) DPPA 1983) or from prosecution (s. 9(6D) DPPA 1983).

The CDDP has indicated he will give favourable consideration to granting immunity for an offshore voluntary disclosure where:¹²⁶

- the case does not exhibit a significant degree of criminality on the part of the taxpayer, with some of the indicators of such criminality including
 - offences committed over a long period of time;
 - offences involving a degree of sophistication, such as the creation of false documents or sham arrangements;
 - offences which resulted in the unlawful obtaining of a substantial sum of money, and

¹²¹ *Carroll* [1991] VR 509 at 514.

¹²² R. Fox and A. Freiberg, *Sentencing State and Federal law in Victoria*, *2nd ed 1999), Oxford University Press; Victorian Sentencing Manual, www.justice.vic.gov.au (reviewed 1 September 2007).

¹²³ *Su* [1997] 1 VR 1 at 77; *Carey* [1998] 4 VR 13 at 17 & 19.

¹²⁴ *Grey* [1977] VR 225 at 232; *Donnelly* [1998] 1 VR 645 at 649.

¹²⁵ *R v Wheatley* [2007] VCC 718, County Court of Victoria, Wood J, 19 July 2007.

¹²⁶ <http://www.ato.gov.au/corporate/content.asp?doc=/content/87095.htm> (reviewed 1 September 2007).

- the taxpayer's criminal conduct not ceasing voluntarily;
- the taxpayer provides information about how the arrangements relating to the commission of the criminal offences operated, including the role and identity of the promoter, such as, for example by:
 - making full and frank disclosure to the authorities; or
 - providing to the authorities original documents and material, where these are available, which were used in the commission of the offence; and
- the taxpayer co-operates with the investigation and consequential proceedings, such as, for example by:
 - making a formal written witness statement to the authorities setting out how the offences were committed and the role and identity of the promoter; or
 - giving full and frank evidence for the Crown in any proceedings, including confiscation proceedings, relating to any offence that the Crown may nominate in respect of the promoter.

How the above statement reconciles with the following statements from the *Prosecution Policy of the Commonwealth* is unclear:

Undertakings under section 9(6) or 9(6D) of the DPP Act

- 5.4 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases this course maybe appropriate in the interests of justice. Nevertheless, an undertaking under either section 9(6) or section 9(6D) will only be given as a last resort.
- 5.5 Apart from being a course of last resort, an undertaking under either section 9(6) or section 9(6D) of the Act will only be given provided the following conditions are met:
- (a) the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant, and that evidence is not available from other sources; and
 - (b) the accomplice can reasonably be regarded as significantly less culpable than the defendant;
- 5.6 The central issue in deciding whether to give an accomplice an undertaking under either section 9(6) or section 9(6D) is whether it is in the overall interests of justice that the opportunity to persecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. In determining where the balance lies, account should be take of te following matters:
- (a) the degree of involvement of the accomplice in the criminal activities in question compared with that of the defendant;
 - (b) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;
 - (c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies – apart from taking into account such matters as availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;
 - (d) the likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);
 - (e) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act; and
 - (f) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.

The CDPP statement in respect of the conditions immunity will be considered does not appear to reflect the action of last resort policy or the requirement that the evidence is imperative to obtain a conviction. It is unclear whether the CDPP statement is more concessionary than the *Prosecution Policy of the Commonwealth*. The interaction should be subject to further ATO comment.

8 CONCLUSION

The offshore voluntary disclosure initiative is of undoubted benefit for those taxpayers that have undeclared offshore income in innocuous circumstances. However, for taxpayers that have been involved in tax haven products or promoted offshore structures and products, there is an appreciable risk that the offshore voluntary disclosure initiative will not apply. Where the arrangement contains acts of dishonesty such as fictitious transactions, documentation alterations or falsifications, undervalue transfers and over valued transfers there is an appreciable risk that criminal prosecution action may be instigated.

An adviser should consider whether the adviser has any exposure under the offshore voluntary disclosure initiative. If the adviser does, the adviser should take steps to mitigate that exposure in a manner that avoids any conflict of interest.

Arguably, advisers will have to undertake a significant level of review to determine whether an offshore voluntary disclosure will be valid and binding. Even after that review it is unlikely that the adviser will be able to state categorically whether the voluntary disclosure will be binding and whether or not the CDPP is likely to prosecute the taxpayer.

While the offshore voluntary disclosure initiative appears simple, a proper analysis of the taxation administration and criminal prosecution aspect of the disclosure are extremely complex. Specialist criminal law advice is likely to be required in other than the innocuous circumstances.

In providing advice in respect of offshore arrangements that have an element of criminality, the adviser should take care to ensure that the adviser does not inadvertently commit a criminal offence such as concealing an offence, falsification of accounts or documents or suppressing documents.

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9 GLOSSARY

ACC	means the Australian Crime Commission
ADJR 1977	means the <i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth)
AFP	means the Australian Federal Police
AGD	means the Attorney General's Department
AGS	means the Australian Government Solicitor
Anstalt	means a Liechtenstein establishment being a legal entity hybrid between an company limited by shares and a foundation and does not have members but has beneficiaries. An Anstalt, whether commercial or non-commercial has to pay an annual capital tax of 0.1% on the net asset value of the company. Without membership and a contractual ability to divert income without can potentially conceal ownership of assets and sources of income
ASIC	means the Australian Securities and Investments Commission
ATO	means the Australian Taxation Office
ATO Prosecution Policy	means the ATO Prosecution Policy 2001 (2 nd Ed) now replaced by CMPS 2007
ATO Receivables Policy	means PSLA 2006/11
AUSTRAC	means the Australian Transaction Reports and Analysis Centre
Australian tax resident	means a resident or resident of Australia as defined in section 6 ITAA 1936
CA 1914	means the <i>Crimes Act 1914</i> (Cth)
CA 1958	means the <i>Crimes Act 1958</i> (Vic)
CCA 1995	means the <i>Criminal Code Act 1995</i> (Cth)
CDPP	means the Commonwealth Director of Public Prosecutions
CGT	means capital gains tax
CMPS 2007	means Corporate Management Practice Statement Fraud control and the prosecution process (April 2007)
Commissioner	means the Commissioner of Taxation
DPPA 1983	means the <i>Director of Public Prosecutions Act 1983</i> (Cth)
DTA	means double tax agreement under the <i>International Tax Agreements Act 1953</i> (Cth)
EA 1995	means the <i>Evidence Act 1995</i> (Cth)
FTRA 1988	means the <i>Financial Transaction Reports Act 1988</i> (Cth)
GST	means goods and services tax
ITAA 1936	means the <i>Income Tax Assessment Act 1936</i> (Cth)
JA 1903	means the <i>Judiciary Act 1903</i> (Cth)
OECD	means the Organisation for Economic Cooperation and Development
PCA 2002	means the <i>Proceeds of Crimes Act 2002</i> (Cth)
Prosecution Policy of the Commonwealth	means the CDPP <i>Prosecution Policy of the Commonwealth 1990</i> (2 nd ed) updated at 1992
Prosecutorial Guidelines	means the <i>Prosecutorial Guidelines</i> as published on http://www.legalonline.vic.gov.au
SA 1991	means the <i>Sentencing Act 1991</i> (Vic)
Standard Form	means offshore voluntary disclosure statement standard form (NAT 71149)
Stichting	means a Dutch foundation being a legal entity with corporate status and does not have members. Distributions must be for ideological purposes but third party can benefit from contracts with the Stichting. The Stichting is subject to corporate tax to the extent it carries on an enterprise but will otherwise be tax transparent. A transferor can transfer shares to the Stichting which can contract to derive and distribute all profits from the shares to the transferor. Without membership and a contractual ability to divert income without can potentially conceal ownership of assets and sources of income
Stiftung	means a Liechtenstein foundation similar to a Stichting
TAA 1953	means the <i>Taxation Administration Act 1953</i> (Cth)
TLA (ISA No.2) 2005	means <i>Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005</i> (Cth)