IT 2246 - Australian Taxation Office Prosecution Policy

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TAXATION RULING NO. IT 2246

AUSTRALIAN TAXATION OFFICE PROSECUTION POLICY

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PREAMBLE COMMISSIONER'S FOREWORD

The legislative direction of the Parliament, conveyed in Act No. 123 of 1984, which is operative on or after 14 December 1984, makes plain that in the administration of the taxation laws, significant reliance is to be placed on sanctions in these laws - whether they be in the form of statutory penalties by way of additional tax or by punishment on court conviction. The Taxation Office recognises that prosecution is a very effective enforcement method. By this Ruling its central place in the Office's overall compliance strategy is set out and explained.

2. Provisions relating to statutory penalties by way of additional tax have already been addressed in previous Taxation Rulings (e.g. see IT 2141, ST 2130 and IT 2206).

3. The extent of the changes made to the law to modernise the prosecution provisions is a matter of note. Some significant features are set out below.

- In most cases, there has been a ten-fold increase in the maximum monetary penalties that courts may impose for taxation offences. Habitual offenders and those guilty of the more serious offences may also suffer imprisonment.

- Among the most frequent breaches of the tax laws are failure to file a return and failure to furnish information. Under the new prosecution provisions, those offences carry for a first conviction a maximum fine of $2,000, for a second conviction within 5 years of the first a fine of up to $4,000 and for a third or subsequent conviction within that time $5,000 or 12 months imprisonment or both for an individual, and a $25,000 fine for a company.

- Offences for making false or misleading statements or understating income carry fines of up to $2,000 plus

200% of the tax concerned for the first conviction, and up to $4,000 plus 200% of the tax concerned for a second or subsequent conviction within 10 years of a previous conviction.

. Still higher penalties apply where a person recklessly or knowingly makes a false or misleading statement or keeps records incorrectly. For such offences, first offenders face a maximum fine of $3,000 plus 200% of the tax concerned, and second and subsequent offenders face a fine of up to $5,000 or 12 months imprisonment or both in the case of an individual, or $25,000 in the case of a company, plus up to 300% of the tax concerned.

. In additional to these changes, the taxation law now provides for some new offences. It is, for example, now an offence to incorrectly keep records or to deface, mutilate, falsify or damage records, or to falsify the identity or address of a person, with an intention to deceive, hinder or obstruct a taxation officer. These offences carry, for a first conviction in the case of an individual, a fine of up to $5,000 or 12 months imprisonment or both, plus up to 200% of the tax concerned, and for a company $25,000 plus 200% of the tax.

. For a similar subsequent offence within 10 years by an individual a fine of up to $10,000 or 2 years imprisonment or both, plus up to 300% of the tax concerned, applies. For a company the penalty is up to $50,000, plus 300% of the tax concerned.

. Outside the taxation law itself, the Parliament has by section 29D of the Crimes Act (effective from 25 October 1984) specified that a person found guilty of defrauding the Commonwealth may be subject to a penalty of $50,000 or 5 years imprisonment.

4. Since the enactment of the new provisions, extensive work has been done in the Australian Taxation Office to spell out our general policy. This Ruling is the result. For example, when is a sanction of statutory penalty by way of additional tax appropriate rather than following a course of prosecution through the courts? Our proposed approach was referred for comment to the Commonwealth Director of Public Prosecutions, Mr Ian Temby, QC. I am pleased to say that, apart from a few minor changes that were suggested by Mr Temby, (and these suggestions have been incorporated in the policy) his Office applauded the clear guidance which this policy document provides to taxation officers charged with the administration and enforcement of taxation legislation.

5. Turning to the matters addressed in the Ruling and without attempting to cover all that it covers, the following points are worthy of note -

. Tax evaders can expect to face prosecution, including

business taxpayers detected during normal auditing activities. The emphasis will be on the large and more serious cases (see Chapter 6).

- Special provisions are now available to cover companies and, where that is not appropriate, individuals connected with a company (see Chapter 10).

- Reflecting the wider impact that a prosecution can have, and the fact that audits are often hampered by the absence of adequate records, a business taxpayer who breaches the statutory obligation to keep and maintain adequate records may face prosecution (see Chapter 7).

- There are situations in which not only taxpayers but also their tax agents and other advisers may be prosecuted (see Chapter 11).

- The prosecution sanction is also to be used for sales tax offences including wrongful quotation of a certificate and false pretences (these particular delinquencies are prevalent in "cash economy" practices) (see Chapter 8).

- A more streamlined procedure now exists for handling prosecutions in all areas such as the Prescribed Payments System, for offences such as false and misleading statements, keeping incorrect records and concealment of identity (see Chapter 12).

- Appropriate cases detected during our income checking programs will be prosecuted (for example, a person who operates a bank account in a false name so as to evade tax) (see Chapter 6).

6. All in all, it is clear that the legislature has provided very effective sanctions for the Australian Taxation Office in its efforts to combat tax evasion. While levying of statutory additional tax will remain the penalty technique that is most commonly used in practice, the prosecution approach is to be given a high place and to be employed in a significant range of cases. In using it, we will of course be working closely with the Director of Public Prosecutions.

7. It is ultimately for the Courts to weigh up the facts of each case to impose a level of fine (or imprisonment) considered appropriate to the circumstances. It is pleasing to note that in the cases that have been before the Courts so far under the new provisions the Courts have indicated that the new sanctions will be given their full force and effect.

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INTRODUCTION

1.1 In December 1982 the then Acting Attorney-General Mr Neil Brown QC presented to Parliament a document entitled the 'Prosecution Policy of the Commonwealth'. The document contains policy guidelines for the making of decisions by Commonwealth Officers in the prosecution process and the considerations upon which these decisions are made. The guidelines are presently under review by the Director of Public Prosecutions who intends to publish revised guidelines in due course. The A.T.O., as a Commonwealth body, operates under these guidelines as amended from time to time. It is, however, considered desirable that the A.T.O. publish prosecution guidelines which specifically relate to the provisions administered by the Commissioner of Taxation and pursuant to which the A.T.O. institutes prosecution proceedings. One aspect of taxation administration which is not touched upon in the 'Prosecution Policy of the Commonwealth' is the inclusion in the various taxation laws of provisions which impose, in respect of breaches of the law, administrative penalties in the form of statutory additional tax as an alternative to prosecution action. Accordingly this policy document deals specifically with the matters which should be taken into account when officers are deciding whether to impose an administrative penalty or to institute prosecution proceedings.

1.2 This document does not specifically deal with every offence provision under these laws. Rather it concentrates on those offences which impact on the mainstream of taxation administration. Nevertheless the general policy concepts enunciated will have application when circumstances arise which require an authorized officer of the A.T.O. to make a decision as to whether or not to prosecute in respect of an offence not specifically referred to here. Another matter not dealt with is the question of prosecutions in respect of tax related offences under the Crimes Act or the Crimes (Taxation Offences) Act, indictable offences under legislation administered by the A.T.O, or cases which because of their novelty, or degree of difficulty should be referred to the D.P.P. before proceedings are commenced. A decision to prosecute in respect of these offences will be made by the D.P.P. after referral and recommendation by the A.T.O. Standard operating procedures in respect of the referral of such cases are currently being developed by the A.T.O. in consultation with the D.P.P.

1.3 The enactment of the Taxation Laws Amendment Act which became law on 14 December 1984, amongst other things, gave effect to a thorough overhaul and updating of the penal provisions of the various taxation statutes. Some of the previous penal provisions had remained essentially unchanged since 1915, both with respect to their purview and the level of penalty provided. It has long been recognised that it is necessary for the Revenue authorities to have available effective weapons to prevent the requirements of the taxation laws from being trifled with and, in administering the penal provisions of the Taxation Laws Amendment Act, the ATO will give full effect to the policy inherent in the legislation.

1.4 A prosecution policy, to be effective, must further the statutory objectives of the A.T.O. Those objectives include the timely and efficient collection of revenue by firm but fair administration of the revenue laws through the promotion of voluntary compliance with those laws by the general body of taxpayers. As previously stated in many situations breaches of the revenue law expose the offender to either an administrative penalty or prosecution action and where this option is available the A.T.O. has to consider which of the two techniques should be used. The purpose of enacting provisions which make possible the application of administrative penalties in respect of contraventions of the law is to reduce the administrative workload on the A.T.O. and to relieve what might otherwise be an impossible burden on the court system. Prosecution action remains as an important instrument for achievement of ATO objectives, particularly as a successful prosecution carries effects wider than those in the particular case.

1.5 In broad terms, in determining whether, in a given case, an administrative penalty would be more appropriate than prosecution action regard should be had to the following factors:

a. The administrative objective being sought and whether it has been achieved, either in the particular case (for example lodgment of a return), or overall, (for example promotion of voluntary compliance).

b. The deterrent effect:

- the amount of administrative penalty which could be imposed;

- the potential penalty and/or order which might be achieved through prosecution;

- any publicity which the case may attract.

c. The administrative workload required by each option and whether there are any factors which tend to make one or other option impracticable (for example problems associated with the imposition of administrative penalties for late lodgment or non-lodgment where the tax liability is not known).

d. The time required by each option to achieve the administrative objective.

e. The seriousness of the offence and the degree of culpability of the person.

f. The degree of co-operation of the person.

g. Persons who repeatedly offend.

h. Other public interest factors (for example persons with disabilities).

1.6 In the final analysis, a decision whether or not to proceed with prosecution action must depend on the sufficiency of available evidence in satisfying the relevant burden of proof

- for a prima facie case
- for a conviction
- for an adequate penalty and/or order.

1.7 An effective prosecution policy must reflect the reality that the resources available for prosecution action are finite and should not be wasted on unpromising or trifling cases but rather should be concentrated on the vigorous pursuit of those cases deserving prosecution (see in this regard the draft policy statement of the D.P.P. at paragraphs 2.10-2.18).

1.8 A separate statement will issue to Deputy Commissioners indicating the specified amounts, periods and percentages referred to in the relevant paragraphs below.

TAXATION ADMINISTRATION ACT - SECTION 8C
FAILURE TO COMPLY WITH REQUIREMENTS UNDER TAXATION LAW

2.1 As a general rule, prosecution action should only be instituted where, at the time of issuing the summons, Australian Taxation Office records reveal that the person has not complied with the requirement. Where a person has complied with the requirement after the stipulated time but prior to the issue of a summons, it will generally be more appropriate to rely on administrative penalties.

FAILURE TO FURNISH RETURNS

2.2
- income tax
- sales tax
- stamp duty
- bank account debits tax
- estate duty
- gift duty
- payroll tax
- tobacco charge
- wool tax.

The various Assessment Acts contain provisions by virtue of which taxpayers are required to furnish returns. For ease of reference this policy document deals specifically with income tax and sales tax (see further chapter 18 below) only. However the principles referred to in this document should be taken as having general application to the other taxes.

2.3 Where despite the issue of a final notice a person has not furnished a return, prosecution is generally the most appropriate means of obtaining lodgment. Prosecution achieves lodgment fairly quickly and this approach avoids the resource intensive double handling associated with default assessments

(for example section 167 of the Income Tax Assessment Act) which almost invariably have to be amended. However, there will, of course, be some cases, for example persons who set out to subvert the tax law, where default assessments are appropriate.

2.4 It is essential that appropriate priorities be set for the selection of appropriate cases for prosecution. Priority is given to cases in accordance with the amount of revenue involved. The A.T.O. policy on lodgment enforcement in respect of income tax returns is presently being updated. In the meantime the principles set out in the published document should continue to be applied.

2.5 Where it seems clear that a person has no residual tax liability or is due for a refund, it is desirable (subject to resource constraints) that other efforts to obtain lodgment of returns are made (such as telephone contact with the person) before prosecution action is instituted. In cases of known hardship, serious illness, or infirmity which made compliance with the requirement very difficult, it would also be appropriate to take additional steps to obtain lodgment before last-resort prosecution action was considered.

FAILURE TO FURNISH INFORMATION

2.6 Normally information is specifically requested pursuant to the Commissioner's various enquiry powers (Income Tax Assessment Act - paragraph 264(1)(a), Sales Tax Assessment Act (No. 1) - paragraph 23(1)(a) etc.) from a person for a particular purpose. Generally speaking prosecution action should be instituted where a person fails to comply with such a requirement, so that a court order can be obtained to compel compliance.

2.7 In cases where, before the prosecution has commenced, the information sought has been obtained from some other source, and an administrative penalty is applicable, it is not expected that prosecution action would be undertaken.

INFORMATION REQUESTED FROM A TAXPAYER REGARDING THE TAXPAYER'S LIABILITY TO TAX

2.8 Because an administrative penalty is available (for example section 222 of the Income Tax Assessment Act and section 45 of Sales Tax Assessment Act (No. 1)) it would generally be more appropriate to penalise rather than prosecute in cases where a person with a potential tax liability fails to provide information. An example would be a claim for a deduction which on enquiry is not substantiated; the claim would be disallowed and a penalty imposed for failure to supply the information. Where there is evidence that a claim has been made that cannot be substantiated the claim itself might be significant enough to warrant prosecution as a false or misleading statement. On the other hand where the information is vital to the determination of whether a particular tax liability exists, e.g. information as to whether any sales were made during a particular period, then prosecution would be the only viable option. Additionally, in

audit cases the degree of co-operation shown by the taxpayer should be taken into account for the purpose of determining the level of penalty applicable under (for example) section 223 of the Income Tax Assessment Act or sub-section 45(2) of Sales Tax Assessment Act (No. 1), notwithstanding the fact that prosecution action in respect of the failure to provide the information may have been taken. In relation to the remission of administrative penalties reference should be made to the Commissioner's guidelines in force from time to time.

INFORMATION REQUESTED FROM A PERSON WHICH DOES NOT RELATE TO THE PERSON'S LIABILITY TO TAX

2.9 Because an administrative penalty is not available in these circumstances the institution of prosecution action would generally be justified, notwithstanding that the information had already been obtained. In deciding whether to prosecute it would be necessary to take into account such factors as the extent to which the non-compliance inconvenienced the A.T.O., the resources available to the recipient of the requirement to comply, and the history of the recipient in respect of co-operation. Where a decision is made not to prosecute it would be appropriate to serve the recipient of the notice with a warning that the failure to comply amounted to a breach of the relevant law and that although it has been decided not to prosecute on this occasion any future breach would be likely to result in prosecution action.

TAXATION ADMINISTRATION ACT - SECTION 8D
FAILURE TO ANSWER QUESTIONS OR PRODUCE BOOKS ETC.
WHEN ATTENDING AS REQUIRED

3.1 Offences will only occur where a person has been required to attend to give evidence and/or produce books, documents etc. by a notice pursuant to the Commissioner's various enquiry powers (e.g. paragraph 264(1)(b) Income Tax Assessment Act and paragraph 23(1)(b) Sales Tax Assessment Act).

3.2 Where the information (in the form of evidence or records) sought is still outstanding at the time when prosecution action is being contemplated it would generally be appropriate to proceed with the prosecution on the basis that it was the only practical way of obtaining the evidence or records. Where, after the information or complaint has issued, the evidence and records are obtained, the prosecution should generally be proceeded with in the absence of strong mitigating circumstances (such as serious ill health or misfortune) that would have made compliance virtually impossible. Of course if such mitigating circumstances were known at the time when prosecution action was first being considered this would be a relevant factor for the purposes of paragraph 1.5h. In audit cases the degree of co-operation shown by the taxpayer should be taken into account for the purpose of determining the level of penalty applicable under (for example) section 223 of the Income Tax Assessment Act or sub-section 45(2) of Sales Tax Assessment Act (No.1), notwithstanding the fact that prosecution action has been taken. In relation to the remission of administrative penalties reference should be made to the Commissioner's guidelines in force from time to time.

FAILURE TO TAKE AN OATH OR AFFIRMATION WHEN ATTENDING AS REQUIRED

3.3 The power to require the taking of an oath or affirmation is generally confined in its use to cases where it appears necessary to specially impress upon a person the need to be truthful and co-operative. It therefore follows that a refusal by a person to comply with this requirement should generally result in prosecution action being taken. There may be cases, however, where a person, despite refusing to take an oath or affirmation, gives evidence which in the opinion of the interviewing officer is honest and complete. In these latter cases prosecution would generally not be appropriate.

TAXATION ADMINISTRATION ACT - SECTION 8E
PENALTIES FOR OFFENCES AGAINST SECTIONS 8C AND 8D

ELECTION UNDER SECTION 8F TO TREAT AS A CRIMINAL OFFENCE

4.1 The tiered penalty structure for offences against sections 8C and 8D provides a penalty of $5,000 and/or 12 months imprisonment for a third "relevant offence" by a natural person if the Commissioner elects, pursuant to section 8F to treat the offence otherwise than as a prescribed taxation offence. A "relevant offence" as defined in sub-section 8B(1) may be committed in respect of a failure to comply with a requirement under any taxation law. For example, when considering whether to make an election regard should be had to offences in relation to income tax and sales tax matters.

4.2 It is not intended to elect for the third tier in respect of every prosecution of a person who has two prior convictions under section 8C, 8D or 8H (ie "relevant offences"). Generally speaking the election power should be restricted to the more serious cases where there is a reasonable prospect of the court imposing a substantially higher penalty than if the election had not been made. It is anticipated that in most cases an election will only be made when the defendant was convicted of the "relevant offences" on an earlier occasion (see Taxation Administration Act, paragraph 8B(2)(a)). Unless there are substantial aggravating factors it would be inappropriate to make an election in reliance upon other offences which are being prosecuted on the same day.

4.3 By way of example it would be appropriate to elect in the following situations :

a. a taxpayer with prior convictions against section 223, 224 or 225 (now repealed) of the Income Tax Assessment Act has been convicted under section 8C for failing to furnish a return of income and under section 8H for failing to comply with a court order. In accordance with normal practice a further requirement has issued for the same return of income and prosecution action under section 8C has again been instituted and there are no

mitigating circumstances such as to make an election inappropriate;

b. a person has a history of failing to comply with a broad range of taxation requirements and has numerous prior convictions for breaches of Sales Tax, Income Tax, or PAYE provisions. Prosecution action is being instituted in respect of a failure to furnish sales tax information for 3 consecutive months. The evidence available indicates that the person has a substantial sales tax liability and is capable of meeting it. In these circumstances two of the three sales tax charges would be the "earlier" offences notwithstanding that all three may be heard on the same day.

TAXATION ADMINISTRATION ACT - SECTION 8G/8H
FAILURE TO COMPLY WITH A COURT ORDER

5.1 Where a person has not complied with the requirements of a court order, prosecution action should be instituted in the absence of exceptional circumstances. If A.T.O. records reveal that the person has complied with the requirement after the time specified by the court but before the summons issues, the following factors need to be taken into account in determining whether prosecution action should be taken:

a. an administrative penalty is precluded by the earlier section 8C prosecution (refer section 8ZE);

b. whether further Australian Taxation Office action was necessary to prompt compliance with the court order;

c. the extent of the time delay in complying with the court order and the financial advantage obtained by the taxpayer;

d. the record of the taxpayer in respect of complying with taxation laws; and

e. whether there are any mitigating circumstances.

Example 1

A person is interviewed to obtain evidence to support a section 8H prosecution by way of an admission that requirement has not been complied with. Where this action prompts compliance with the court order, prosecution action may be warranted, depending on a proper consideration of sub-paragraphs 5.1 a to e above.

Example 2

A person lodges a return three months after expiry of court order. As there is no administrative penalty for late lodgment or late payment, applicable for this period, prosecution action may be warranted.

FALSE OR MISLEADING STATEMENTS

CRITERIA FOR SECTION 8K, 8N, or 8P PROSECUTIONS WHERE STATUTORY PENALTY PROVISIONS APPLY

6.1 The following criteria are relevant to the choice between prosecution and statutory penalty for false and misleading statements:

a. The amount of revenue involved. Generally speaking if a person sought to evade a relatively large amount of tax it would be an indication in favour of prosecution action rather than the imposition of an administrative penalty. It should be noted that section 8W of the Taxation Administrative Act provides that the court may inpose a further penalty of up to 2 or 3 times the tax avoided, in addition to any fine imposed in respect of the offence.

b. The degree of negligence, recklessness, or wilfulness on the part of the maker of the statement. Where there was obvious negligence, recklessness, or wilfulness, this would be an indication that prosecution action should be preferred. In some cases there may be reasonable grounds for believing that the statement was in fact made recklessly or wilfully but there may be a doubt as to whether the admissible evidence available would be sufficient to secure a conviction under section 8N or 8P. The existence of circumstances such as these would be a strong indication that prosecution action should be initiated under section 8K.

c. The degree of craft or artfulness involved in the making of the statement. Often this factor will be present when the statement has been made or prepared by a person with some knowledge of the internal procedures of the A.T.O. and who is seeking to exploit that knowledge. Statements which evince these characteristics are a greater threat to the revenue than less contrived statements which are more readily identified as false. Accordingly, the presence of these features would be an indication that prosecution action may be the appropriate option.

d. The degree to which the statement departs from the truth. Where the facts asserted radically depart from the truth or are grossly inadequate the prosecution option may be the preferable option.

e. The circumstances of the maker of the statement. These circumstances would generally include the following:

    i. the previous history of the person. In some cases the previous record would indicate that additional tax had been imposed for false or misleading statements or in respect of the furnishing of

incorrect returns or information. Existence of these antecedents would be a good indication that prosecution action is required as a deterrent to the particular offender.

ii. the degree of co-operation of the person in establishing the true facts. Where a person has made a voluntary disclosure prosecution action should not be taken. Co-operation which fell short of a voluntary disclosure would have to be considered on a case by case basis taking into account such matters as the stage of the enquiry at which the person began to co-operate, and the amount of contrition shown. The general position would be the greater the level of genuine co-operation and the earlier the point at which the person seeks to set the record straight the more likely it would be that prosecution action would not be the preferable option.

iii. the extent to which the person, by reason of his professional or educational background, should have been more acutely aware of the illegality of his actions than the average person (C/F R & FC of T v McStay (1945) 3 AITR 209). Where the maker of the statement was, for example, an accountant, or legal practitioner or a registered tax agent it would be an indication that prosecution action might be the preferred option.

f. The prevalence of the particular offence and the extent to which the publicity of a prosecution would help to promote a greater level of compliance. This factor should never be the sole reason for prosecution. Care must be taken to ensure that the charge is not being brought simply to make an example of the defendant or simply to treat the defendant as a sacrificial victim.

SELECTION OF THE APPROPRIATE CHARGE

6.2 One of the duties of a prosecutor is to ensure that the offender is charged under a provision which properly reflects the seriousness of the offence and provides a basis for an appropriate penalty in all the circumstances of the case. In the context of the law in respect of false or misleading statements it will be necessary to carefully consider whether there is admissible and adequate evidence of 'recklessness' or 'wilfulness'. If such evidence is available, then as a general rule the offender should be charged under section 8N or 8P, as the case may be. It would be inappropriate to threaten an offender with a charge which was more serious than the evidence fairly indicated in the hope of obtaining an offer to plead guilty to a lesser charge. Conversely, it generally would be inappropriate to accept a plea of guilty in respect of a lesser charge (for example section 8K) in exchange for a decision not to proceed with a more serious charge (for example section 8P) where the decision had already been made that there was sufficient

evidence to sustain the more serious charge. Similar considerations would apply when the question is the appropriate number of charges that should be laid.

6.3 However in some circumstances it would be appropriate to enter into an agreement with an offender in respect of the nature of the charges to be brought and this is recognised in the DPP's draft Policy Statement at Chapter 4. Where such an agreement is contemplated care should be taken to ensure that any agreement reached is consistent with the guidelines set out in Chapter 4.

6.4 These principles could, for example find application in a case where a taxpayer, in reliance upon the special skills or knowledge of a Tax Agent or other professional adviser furnished a return or returns which included false or misleading statements (C/F Grapsas v Unger 85 ATC 4490; Bell v Canny (1973) VR 156). Reference should also be made to chapter 11 below.

THE MENTAL ELEMENT APPLICABLE TO SECTIONS 8K, 8N OR 8P.

SECTION 8K MAKING A FALSE OR MISLEADING STATEMENT

6.5 Section 8K imposes a prima facie liability whenever a statement is found to be 'false' or misleading. The maker of such a statement is guilty of an offence unless the maker is able to show that he or she did not know and could not reasonably be expected to have known that the statement was false or misleading. The onus of proof imposed upon the maker of the statement in this regard is the civil burden - ie the balance of probabilities (C/F Universal Telecasters (Qld) Ltd. v Guthrie (1978) 32 FLR 360). The meaning of the expression 'did not know' does not give rise to any conceptual difficulties. It is simply a question of fact as to whether the maker of statement knew or did not know that the statement was false or misleading. However the maker of the statement must be able to prove more than this. The person must also prove that he or she could not reasonably be expected to have known that the statement was false or misleading. The effect of this requirement is that the person must show that he or she was not careless and had taken all reasonable steps to ensure that the statement was accurate and complete. The concept of 'reasonableness' is that found in the law of torts. The section imposes upon the maker of statements the common law duty of care. As Lord Diplock said in Sweet v Parsley (1969) 1 All E.R. 347 at p 362:

> 'where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful is that of the familiar common law duty of care.'

6.6 In deciding what is the appropriate standard of care required by section 8K it is necessary to consider the nature of the statutory duty which was imposed upon the maker of the statement. In the context of a return lodged pursuant to the requirements of section 161 of the Income Tax Assessment Act, for

example, a taxpayer is required to furnish a return which, inter alia, sets forth a full and complete statement of the total income derived by the taxpayer and of any deductions claimed by the taxpayer.

6.7 This requirement evinces a clear legislative policy that the maker of statements is under a high duty to ensure that statements contained in returns are not false or misleading. Nevertheless it is important that section 8K not be administered in a harsh manner. In considering whether there has been a breach of the duty to furnish accurate information the first question to be determined is whether a reasonable person in the position of the maker of the statement would have foreseen that there was a risk that the statement might be false or misleading. If the answer to this question is in the affirmative the second question to be determined is whether, having regard to the magnitude of that risk, the degree of probability of its occurrence, and the effort and expense in taking corrective action a reasonable person in the position of the maker of the statement would have taken further or other steps to try to ensure that the information furnished was accurate. Reference might also be made to paragraph 21 of IT2141 where it is pointed out that if it is established that a person has made a statement based upon information provided by another person who could reasonably be expected to have been in a position to provide accurate information, the maker of the statement will not be in breach of section 8K even if the information is false or misleading unless there were circumstances which would have caused a reasonable person to doubt the accuracy of the information supplied and the statement was nevertheless made without an appropriate qualification.

6.8 In the case of corporations certain difficulties arise in respect of the statutory defence. The first question is which natural person connected with the corporation it is appropriate to look to for the purpose of ascertaining whether or not the corporation 'knew' that the statement was false or misleading. A similar problem arose in the Universal Telecasters Case (supra). In that case a television station was prosecuted under the Trade Practices Act 1974 for making a misleading statement in an advertisement that was broadcast. The defendant corporation sought to rely upon a statutory defence that it received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that the advertisement breached the Trade Practices Act.
The Full Federal Court adopted the approach taken by the House of Lords in Tesco Supermarkets Ltd v Nattrass (1971) 2 All E.R. 127 that the natural persons who are to be treated in law as being the corporation are to be found by identifying those natural persons who, by the memorandum and articles of association or as a result of action taken by the directors or by the corporation in general meeting, are entrusted with the exercise of the powers of the corporation.

6.9 In the context of statements made in respect of taxation matters this test would clearly include the public officer, since the public officer is appointed by the corporation for that very

purpose. It would also include the directors, whether or not they were directly involved in the preparation or making of the statement. Whether or not the knowledge of other natural persons would be relevant would be a matter to be determined by reference to the delegation of powers and functions which had actually taken place within the particular corporation. However it could generally be expected that the knowledge of the secretary or general manager would be relevant. It might be noted that in dealing with the question the Full Federal Court, in the Universal Telecasters Case (supra), took the view that sub-section 84(1) of the Trade Practices Act, which is in identical terms to sub-section 8ZD(1) of the Taxation Administration Act, did not touch the question of knowledge or reason to suspect, nor did it touch the situation where consideration has to be given to a failure of a corporation to act. Accordingly it is not appropriate to seek to place reliance upon sub-section 8ZD(1) for the purpose of determining whether a corporation could avail itself of the statutory defence.

6.10 The second question is how would a corporation show that it could not reasonably have known that the statement was false or misleading. Insofar as reliance on third party information is concerned no special difficulty arises and the position stated at paragraph 6.7 above would apply. However particular difficulties do arise in respect of internal enquiries that the corporation would be required to make to obtain information. This issue also arose in the Universal Telecasters Case (supra). There the question was whether the corporation had taken reasonable precautions and exercised due diligence to avoid the contravention. It is considered that this concept is similar in respect of the nature and extent of the obligation that it imposes to the concept 'could not reasonably be expected to have known'.

6.11 In respect of the phrase 'took reasonable precautions and used due diligence' Bowen CJ said (at 32 FLR 363):

> 'while these are plain English words, which have to be applied as they stand, it appears to me that two responsibilities which Universal Telecasters would have to show it had discharged, in order to establish this defence, would be that it had laid down a proper system to provide against a contravention of the Act and that it has provided adequate supervision to ensure that the system was properly carried out.'

In the context of section 8K this would mean that a corporation would need to be able to satisfy a court on the balance of probabilities that the information which was used in the preparation of the particular statement was produced by a financial, accounting or information system (as the case may be) that was adequately designed to reasonably safeguard against the possibility of the production of false or misleading information and that appropriate supervision of the relevant system had occurred.

SECTION 8N RECKLESSLY MAKING A FALSE OR MISLEADING STATEMENT

6.12 Section 8N proscribes the reckless making of false or misleading statements. As was pointed out by Lord Hailsham LC in R v Lawrence (1981) ALL ER 974 at page 978 the word 'reckless' has been in general use at least since the eighth century and has almost always had the same meaning, ie evincing a state of mind stopping short of deliberate intention and going beyond mere inadvertence or mere carelessness. In the context of false or misleading statements this meaning of reckless was applied in R v Grunwald (1960) 3 ALL ER 380 when Paull J. held that to be satisfied that a defendant was guilty of making a reckless statement under the Prevention of Fraud (Investments) Act (UK) 1958 the jury must be satisfied that (i) it was a rash statement to make and (ii) that the defendant had no real basis of facts on which he could base the statement. His Lordship held that a finding of dishonesty was unnecessary. As to the basis on which the statement was made his Lordship held that the maker of a statement was entitled to rely upon information supplied by apparently respectable and responsible persons.

6.13 It is considered that this is the meaning which should be attributed to 'recklessly' in section 8N of the Taxation Administration Act.

6.14 In the case of a corporation, it would appear from the decision in the Universal Telecasters Case (supra) that sub-section 8ZD(1) would not operate so as to make a corporation liable for the recklessness of any servant or agent. Rather a statement would be made recklessly when those persons referred to in paragraph 6.9 above who were entrusted with the exercise of the powers of the corporation evinced the lack of care referred to in paragraph 6.12 above.

SECTION 8P KNOWINGLY MAKING A FALSE OR MISLEADING STATEMENT

6.15 In some contexts a person may 'knowingly' make a false or misleading statement even though that person does not have actual knowledge that the statement is false or misleading. An example of such a provision is the now repealed section 230 of the Income Tax Assessment Act 1936. In the case of Jackson v Butterworth (1946) VLR 330 Fullagar J. took the view that a taxpayer knowingly and wilfully omitted income from a return if the taxpayer either knew that the omitted receipt was income or had reason to suspect that the receipt might be income and had nevertheless decided to omit it. It is considered that "knowingly" in section 8P includes situations where the maker of the statement had actual knowledge of the incorrectness of the statement and also situations where the maker of the statement actually suspected that the statement was incorrect. Situations where the maker of the statement objectively had reason to suspect that the statement was incorrect but in fact did not turn his or her mind to the question would fall within the meaning of "reckless" in section 8N.

6.16. In the case of a corporation to show that a statement had been made "knowingly" it would be necessary to establish that the statement had been made by, or with the authority of, a

person who is a director or manager whose mind or will represents the directing mind and will of the corporation (Bolton (Engineering) Co. Ltd v Graham & Sons Ltd (1957) I QB 159. In some cases the statement will be made by a person who, although not a director or executive, is a person to whom the power to make the statement on behalf of the corporation has been delegated. In those cases the knowledge of that person can be treated as being the knowledge of the company. (Essendon Engineering Co Ltd v Maile (1982) R.T.R. 260). An example of such a case would be where a corporation authorised its public officer or accountant to make a statement on its behalf.

MULTIPLE OFFENCES IN ONE RETURN

6.17 In many cases a taxpayer will furnish a return which is false or misleading in respect of a number of material particulars. For example a taxpayer may omit income from several specific sources and additionally a betterment statement may indicate a general understatement which exceeds the total of the identifiable specific income items. In other cases a taxpayer may both omit specific items of income and include overstated claims for specific deductions. In cases such as these a taxpayer will have committed a number of offences against sections 8K, 8N or 8P and the question arises as to how many charges should be preferred. A somewhat similiar situation arose in the case of McGovern V Chaplain 9 ATD 357. In that case a number of taxpayers were charged with offences under the (now repealed) penal provisions in Part VII of the Income Tax Assessment Act 1936 in respect of understatements of income discovered by audit activities. One defendant was charged with offences under sections 227, 230 and 231 in respect of the understatement of income in one return.

6.18 In dealing with the matter Webb J said (at 9 ATD 357):

> "If, say, a return is false as to a total sum $10,000 of which $1,000 is knowingly and wilfully understated, contrary to s.230 (1), and the assessment or taxation of the same $1,000 is also avoided or attempted to be avoided by fraud, there would, I think, be separate offences under s.227(1), s.230(1) and s.231(1).
>
> Section 230(1) and s.231(1) appear to be the more serious offences, not only in view of the moral turpitude involved in their commission, but also because the legislature has imposed what might be termed a minimum initial penalty of $25 and a maximum initial penalty of $500 in respect of each section, and only $2 and $100 respectively, in respect of s.227(1). Moreover the additional penalties imposed under s.230(1) and s.231(1) would ordinarily be a greater proportion of the maximum than would be the additional penalties imposed under s.227(1).
>
> The same amount of taxation and the same return are here involved as to both s.230(1) and s.231(1), and so if penalties were imposed under each section the defendant

> Sydney Malcolm Chaplain would be twice punished substantially in respect of the same amount of taxation and the same return, although the understatement is of income and the fraud is in respect to tax. For these reasons I do not convict or impose any penalty under s.230(1); and for the purpose of penalty under s.227(1) I deduct the tax avoided or attempted to be avoided by the fraud from the tax which apart from the fraud, would have been avoided or attempted to be avoided by the false particular in the return. Again unless this deduction is made the defendant Sydney Malcolm Chaplain will be twice punished in respect of the same amount of tax and the same return, although the falsity is in respect of income and the fraud is in respect of tax. There is power to punish him twice, but I think the power should not be exercised when it is not necessary for the purpose of doing justice between the defendant and the Crown. Justice will be done by dealing with him under the section providing for the heavier penalty i.e. under 231(1), so far as that section applies".

6.19 It is considered that this is the appropriate policy to adopt. Therefore where a number of specific false or misleading statements are contained in a return the first question to be decided is whether all of the statements were made with the same degree of culpability. Where that is the case it would be appropriate to bring one charge which covered the total understatements. Each of the constituent false or misleading statements would amount to particulars of the false or misleading statement in respect of which the charge was laid. For example if a taxpayer omitted the following income; salary $2000, commission $1000, interest $1000, and overstated the following deductions, gifts $500, travelling expenses $2000, so that he declared a taxable income of $20,000 instead of a correct taxable income of $26,500 the relevant false statement for the purposes of laying a charge would be the statement that his taxable income was $20,000. The formulating of a charge in this manner is in accordance with the decision of the High Court of Australia in Hughes v Phillips (1948) 75 CLR 436.

6.20 Where, however, it is apparent that some of the false or misleading statements have been made knowingly or recklessly and others have been made carelessly it would be appropriate to bring a charge in respect of the total understatement of taxable income under section 8K and to bring a further charge or charges under section 8N or 8P in respect of the false or misleading statements which related to specific items of income or claims for deductions which were made knowingly or recklessly. An example of such a case would be where a taxpayer knowingly omitted $5000 commission from his return and a betterment statement indicated a total understatement of $30,000 which, except in respect of the deliberate omission of the $5000 was due to a careless accountant who was not properly supervised by the taxpayer. It would be important, however, not to seek from the court orders that went further than those made by Webb J in McGovern v Chaplain (supra) ie the additional penalty applicable to the section 8N or 8P offence should be deducted from the additional penalty otherwise

payable in respect of the section 8K offence.

PROSECUTION POLICY IN RESPECT OF SPECIFIC FUNCTIONAL AREAS
FALSE OR MISLEADING STATEMENTS

AUDIT CASES

6.21 In the Compliance Branch the majority of audit or special examination cases would not be suitable for prosecution under sections 8K, 8N and 8P. This is so because:

a. the level of administrative penalty available would be sufficient to penalise at an appropriate level.

b. proof of understatements of income based upon "T" accounts or betterment statements may give rise to greater problems in prosecution proceedings than in proceedings pursuant to Part V of the Income Tax Assessment Act. This could result in a lower penalty under section 8W than would be indicated by section 223 of the Income Tax Assessment Act.

c. the revenue gain per manhour expended would be considerably lower (perhaps 1/2 to 1/4) because of the need to have more probative evidence than is normally required to defend an assessment under Part V of the Income Tax Assessment Act.

6.22 However, there would appear to be a minority of cases in which prosecution action would be justified and cost effective having regard to the value of the deterrent effect that the resulting publicity would have. Set out below are criteria which could indicate that a case was suitable for prosecution.

a. SPECIFIC OMISSIONS OF INCOME:

Where a taxpayer has omitted specific receipts which are clearly of an income nature above a specified minimum threshold the case would, prima facie, be suitable for prosecution under either section 8N or 8P. Examples of such specific omissions would be salary or wages, commissions, trading or business receipts, interest or dividends and section 26AAA profits or a failure to properly bring to account closing stock. Generally speaking cases involving more contentious items, such as disputed values of trading stock which involve competing technical arguments as to the appropriate method of valuation, would not be suitable for prosecution action. Cases will arise where in addition to specific omissions of the type referred to above an auditor, will, by use of a T account or betterment statement discover other understatements of income. In such cases it may be appropriate to prosecute in respect of the total understatement under section 8K and in respect of the specific omissions under section 8N or 8P. The question

of multiple charges is referred to at paragraphs 6.17-6.20 above.

b. SPECIFIC OVERSTATEMENTS OF DEDUCTIONS

Where a taxpayer has made a claim for items which the taxpayer knew or should be taken to have known were not deductible and has described the item in a way to mislead the assessor then prosecution action may be indicated. As with omitted income a specified minimum threshold should be applied. Specific types of claims would include repairs, where the expenditure was clearly capital; investment allowance which was to the taxpayer's knowledge not deductible because the plant or equipment was not new, or because the purchase was made outside of the prescribed period; or private or domestic expenditure which has been deliberately misdescribed as business expenditure.

6.23 It is likely that the number of suitable prosecution cases will be significantly in excess of the number that, within the resource limitations, could be handled by the office. Subject to any change in available resources it is suggested that prosecution action be limited to a specified percentage of the total audit cases. Accordingly it would be important that in selecting a case for prosecution care was taken to ensure not only that the case satisfied the criteria adverted to above in paragraphs 6.1 - 6.15 but also that it was more suitable than other available cases, which because of resource limits would not be prosecuted. In other words it is essential that priority be given to the most serious cases. It should also be noted that other offences such as concealment of identity, destruction of records, the keeping of false records, failure to supply information or obstruction are not included in the specified percentage and should be prosecuted in accordance with the stated policy in relation to these offences.

INTERNAL CHECK CASES

6.24 Based on past experience the majority of cases detected internally will involve omissions of dividends or interest, or false claims for rebates although it needs to be borne in mind that internal checking activities are progressively expanding beyond these categories. In the 1985 annual report the numbers were:-

omissions of Dividend and Interest	41,000(approx)
false Spouse Rebates	21,000(approx)
other	12,000(approx)
TOTAL	74,000(approx)

As with audit cases, the availability of an administrative penalty would indicate a legislative intent that it should be applied in the majority of cases (refer Chapter 1). Unlike audit cases problems of proof of the commission of the offence will

rarely arise and the number of cases suitable for prosecution, having regard to the criteria referred to at paragraphs (6.1 - 6.15) above would significantly exceed the resource capacity of the A.T.O. to institute the prosecutions, and also the resource capacity of the State courts to hear and determine the cases and enforce the penalties imposed. An appropriate policy, having regard to these constraints, would be to prosecute only a specified percentage of cases. It should follow from this that the cases selected for prosecution would always involve sufficient culpability to justify charges under section 8N or 8P. As a general rule a specified minimum threshold should be applied. The specified percentage does not include other offences which may be detected in the course of internal checking activities which should be prosecuted in accordance with the stated policy in relation to these offences.

PROSECUTION IN RESPECT OF FALSE OR MISLEADING STATEMENTS WHERE THERE IS NOT AN ADMINISTRATIVE PENALTY OPTION

6.25 It should be noted that the definition of a 'statement made to a taxation officer' and of a 'statement made to a person other than a taxation officer' in section 8J of the Taxation Administrative Act are very wide. Accordingly false or misleading statements may be made in circumstances where an administrative penalty is not available. This will be so because the statement will be made by a person other than a taxpayer, or if made by a taxpayer will not be a statement which affects the taxpayer's liability to tax. Examples of such cases would include:

a. statements made by tax agents or other professional advisers on behalf of taxpayers (see further Chapter 11);

b. statements made to recovery officers in respect of a taxpayer's capacity to meet the taxpayer's taxation liability; and

c. applications for registration as a sales tax payer, group employer, eligible paying authority etc.

6.26 Generally speaking all cases detected which involve a clear breach of section 8K and which have significantly operated to the detriment of the operations of the Australian Taxation Office (or would have so operated if not detected) should be prosecuted. Where the false or misleading statement constitutes a breach of sections 8N or 8P it would require the existence of exceptional circumstances before a decision not to prosecute would be justified.

6.27 Where resource constraints are such that not all suitable cases under sections 8K, 8N or 8P can be prosecuted, generally speaking priority should be given to the prosecution of cases in respect of which an administrative penalty option is not available.

ELECTION UNDER SECTION 8S IN RESPECT OF A PROSECUTION UNDER

SECTION 8N OR 8P

6.28 Generally speaking the election power should be restricted to the more serious cases where there is a reasonable prospect of the court imposing a substantially higher penalty, whether by way of fine or imprisonment (or both), than would have been the case had the election not been made. It is anticipated that in most cases where an election is made the prior convictions which found the right to elect will be "earlier offences" in respect of which the defendant was convicted on an earlier occasion (see paragraph 8J(4)(a) of the Taxation Administration Act.) Unless there are substantial aggravating factors it would be inappropriate to make an election in reliance upon other offences which are being prosecuted on the same day. In each case where an election is contemplated it would be necessary to evaluate the available evidence to ensure that the prosecution would be able to discharge the burden imposed upon it to prove the commission of the offence according to the standard of proof applicable to criminal cases, ie beyond reasonable doubt.

OFFENCES RELATING TO INCORRECTLY KEPT RECORDS ETC.
SECTIONS 8L, 8Q, 8T AND 8U

7.1 It is the policy of the A.T.O. to actively prosecute for incorrectly kept records and the use of false names, in order to promote voluntary compliance with taxation laws. Where resource constraints are such that it is not possible to prosecute all such cases it is important that priority be given to the prosecution of offences against sections 8Q, 8T and 8U in view of their more serious nature. It should be noted that section 8W of the Taxation Administration Act provides that the court may impose a further penalty of up to 2 or 3 times the tax avoided in addition to any fine imposed in respect of the offence. In respect of elements of the defence available under sub-section 8L(2) and the mental elements applicable to section 8Q reference should be had to paragraphs 6.5 - 6.7 above.

7.2 Where a taxpayer has falsified a record etc as part of a scheme to understate his or her own taxable income it would generally be appropriate to prosecute both in respect of false record and the understatement of income (pursuant to sections 8K, 8N or 8P). By way of example an auditor may discover that a taxpayer has maintained two sets of books and has used the incorrect set to support his income tax returns. It would be appropriate to prosecute such a taxpayer in respect of the false records under section 8Q or 8T (depending on the facts of the case) and to also prosecute in respect of the false or misleading statements contained in the returns. Another example would be where a taxpayer maintained a bank account in a false name and omitted the interest from returns of income. In such a case it would be appropriate to prosecute the taxpayer in respect of the false account under section 8U and also in respect of the omitted income under section 8P. By this means the full gravity of the taxpayer's offence would be drawn to the court's attention. However before charges were brought in respect of the understatements of income it would be necessary to ensure that there was an appropriate foundation for a prosecution under

section 8K, 8N or 8P.

7.3 In addition to the type of case referred to above, prosecution action generally should be instituted against a person who maintained incorrect records for the purpose of avoiding, for example, the person's liability to make PAYE or PPS deductions. As an illustration of such a case a person may incorrectly record wages as purchases and fail to make deductions from those wages.

7.4 In determining whether a corporation has committed an offence against either section 8T or section 8U regard will need to be had to sub-section 8ZD(1) which provides that for the purposes of a prosecution the intention of a servant or agent of the corporation shall be treated as the intention of the corporation.

INCOME TAX ASSESSMENT ACT		
SECTIONS	221 F(5)(a)	PAYE - GROUP
	221 G(1)(b)	PAYE - STAMP
	221 G(2B)(b)	
	221 YHD(1)(b)(v)(A)	PPS

FAILURE TO REMIT PAYE DEDUCTIONS BY GROUP EMPLOYERS
FAILURE TO PURCHASE AND AFFIX TAX STAMPS BY STAMP EMPLOYERS
FAILURE TO REMIT PPS DEDUCTIONS BY ELIGIBLE PAYING AUTHORITIES

8.1 Having regard to the regime of administrative penalties available, as a matter of policy those penalties should be applied with maximum effect with the objective of achieving voluntary compliance. Prosecution action also has a place in achievement of the stated objective.

8.2 An effective use of the penalty option should normally reduce the number of defaulting group employers to cases falling into the following categories:

i. those whose default is due to genuine insolvency; and,

ii. companies whose assets are being misappropriated by associated natural persons and/or whose insolvency has been or is being engineered for the purpose of defeating creditors.

8.3 Cases falling into the first category would generally not be cases suitable for prosecution. The appropriate course of action is to promptly commence bankruptcy, liquidation or other appropriate recovery proceedings. Cases falling into the second category would normally be suitable for prosecution action (by utilising section 8Y) against the natural persons who have profited from the offences. In most cases where section 8Y is utilised it would be appropriate to seek a reparation order under section 21B of the Commonwealth Crimes Act. Because of the need to demonstrate to the court that the company is incapable of making the remittances it would be important to have appropriate evidence of this fact available at the time when the prosecution

is commenced. Normally this would entail the commencement of liquidation proceedings and the appointment of a liquidator.

8.4 Apart from the cases referred to above it is anticipated that some cases will be detected where the degree of culpability will indicate that prosecution action should be taken. By way of example a case where a defaulting group employer was repeatedly delinquent or obstructed or hindered an officer who was seeking to establish the employer's liability would be suitable for prosecution action under both section 8X of the Taxation Administration Act and paragraph 221F(5)(a) of the Income Tax Assessment Act. A further example of a suitable prosecution case would be a situation where it was discovered that the defaulting group employer had committed offences against sections 8L, 8Q, 8T or 8U of the Taxation Administration Act in relation to the group tax records. In this type of case the group employer should be prosecuted under the appropriate provision of the Taxation Administration Act and paragraph 221F(5)(a).

INCOME TAX ASSESSMENT ACT SECTIONS . 221C(1A) - PAYE
. 221YHD(1)(a) - PPS

FAILURE TO DEDUCT FROM - SALARY AND WAGES (PAYE)
- PRESCRIBED PAYMENTS (PPS)

9.1 As with situations involving failure to remit referred to in paragraphs 8.1 - 8.5 above, as a matter of general policy the full range of available administrative penalty should be utilised for the purpose of obtaining maximum voluntary compliance. Prosecution action should be taken in cases where the information available indicates that the person has deliberately ignored the requirement to make deductions. Examples of such situations include:

(i) cases where the person has repeatedly offended, especially where an administrative penalty has previously been imposed;

(ii) cases where the person has been given a warning and has ignored it; and

(iii) cases where both the person required to deduct and the employee/contractor have been party to the contravention.

9.2 Where prosecution action is the preferred option it would be desirable (subject to paragraph 9.3 below) to prosecute in respect of a number of payees for a particular pay-day or payment period or in respect of a particular payee for successive pay-days or payment periods rather than to prosecute in respect of every offence detected. In respect of those offences not prosecuted an administrative penalty should be imposed.

9.3 In cases where a corporation has failed to make the required deductions and it is established that the corporation is insolvent due to circumstances of the type referred to in paragraph 8.2(ii) above then it would be appropriate to prosecute

the natural persons who have profited from the offence by utilising section 8Y. The need to properly co-ordinate prosecution and liquidation action is referred to in paragraph 8.3 above. Additionally it will be desirable to prosecute the natural persons for as many of the detected offences as is practicable to ensure that an order pursuant to sub-section 221C(1B) or sub-section 221YHD(4) (as the case may be) for an appropriate amount is obtained.

9.4 Where there is a bona fide dispute as to whether the relationship between the employer and his payees is such as to require the employer to make deductions it would generally not be appropriate to prosecute. Rather the employer should be subjected to an administrative penalty so that the question of the existence of an obligation to deduct can be tested on objection before an appropriate tribunal. An example of an exception to this principle would be the case of an insolvent company where the circumstances were such as to justify prosecution action against natural persons utilising section 8Y.

SECTION 8Y OF TAXATION ADMINISTRATION ACT
PROSECUTION OF OFFICERS OF CORPORATIONS IN RESPECT OF BREACHES OF TAXATION LAWS BY CORPORATIONS

10.1 As a matter of policy where a corporation breaches a taxation law and prosecution action is the appropriate course, the corporation, and not the corporation's officers, should be prosecuted. Where, however, there is information available which indicates that prosecution of the corporation would be pointless because the corporation does not have sufficient assets to meet any penalty imposed then it may be appropriate to prosecute those officers of the corporation who were concerned in or who took part in the management of the corporation. Where it is considered appropriate to seek a sanction against a natural person who is associated with a defaulting corporation section 8Y generally should be used in preference to "public officer" provisions such as section 252 of the Income Tax Assessment Act.

10.2 In situations where, on the basis of information available, officers of a corporation were deliberately using corporations for the purpose of defeating the operation of taxation laws, sheltering behind the corporate veil, prosecution action should be taken against those officers whether or not the corporation would have the capacity to meet any penalty imposed.

10.3 A further situation in which prosecution action against an officer of a corporation would be justified is where it was apparent from previous experience that prosecution of the corporation (or associated entities) did not have a deterrent effect and the corporation has continued to offend against taxation laws.

10.4 A prosecution of an officer of a corporation should not be instituted unless, on the basis of information available, the prosecuting officer was satisfied that it was unlikely that the officer of the corporation could prove on the balance of probabilities that he did not aid, abet, counsel or procure the

relevant act or omission which gave rise to the breach of the taxation law, and was not in any way by act or omission, directly or indirectly, knowingly concerned in or party to, the relevant act or omission.

10.5 Whenever it becomes apparent that a corporation has failed to remit instalments of Prescribed Payments and/or Paye deductions and/or sales tax and there are indications that the corporation will be unable to make payment of amounts due, then careful consideration should be given to prosecuting the appropriate officers and seeking a reparation order under section 21B of the Commonwealth Crimes Act (see further Chapters 8 and 9 above).

PROSECUTIONS OF TAX AGENTS AND ADVISERS

11.1 The Australian Taxation Office expects the highest standards of conduct from tax agents. It is clearly in the public interest that should such persons abuse their position of trust they should be prosecuted. Delinquent tax agents can have a serious impact on the proper administration of taxation laws because of the large numbers of returns, objections, etc submitted through them and the frequency with which recourse must be had to them by tax officers for the purpose of obtaining information.

11.2 In relation to the furnishing of returns or information the A.T.O. policy is to prosecute a tax agent as a principal where the evidence discloses that the agent, at the agent's own initiative, has omitted income or invented or inflated claims (C/F Grapsas v Unger (supra). A clear example of such a case would be a situation where an agent procured a signed blank return from a taxpayer and completed the return without obtaining appropriate instructions from the taxpayer (C/F Bell v Canny (supra).

11.3 Further examples of situations where an agent or adviser should be prosecuted as a principal are:

a. cases where an agent completes a certificate relating to sources of information which is false or misleading;

b. cases where an agent lodges an objection or furnishes a reply to a questionnaire which contains false or misleading information;

c. cases where during an interview with a taxation officer an agent orally supplies false or misleading information to the taxation officer in circumstances where it is clear to the agent that the statement is being relied upon by the taxation officer as a specific statement of fact and not merely as an expression of opinion; and

d. cases where a sales tax consultant furnishes false or misleading information in order to obtain

exemption from sales tax for clients.

11.4 In the situations referred to in paragraphs 11.1 and 11.2 above the appropriate charge should be selected by reference to the matters referred to at paragraphs 6.5-6.15 above.

11.5 In situations where the evidence discloses that an agent has been an accomplice of the taxpayer in respect of the furnishing of false returns or information then the agent should be charged with the same offence as the taxpayer in reliance on the operation of section 5 of the Crimes Act. (C/F Mallan v Lee (1949) 80 CLR 198.) An example of a situation where the agent should be charged as an accomplice would be a case where a taxpayer supplies false information to an agent for inclusion in a return and the agent includes the information even though he knows or ought reasonably to have known that the information is false.

11.6 Where it is ascertained that an unregistered person is charging a fee for the preparation of returns etc contrary to section 251L of the Income Tax Assessment Act the general policy is to prosecute that person provided there is sufficient evidence to sustain the charge. Priority should be given to cases where the returns prepared by the person contain false or misleading information and in these circumstances the person should also be charged with the appropriate offences in respect of that information having regard to the matters referred to in paragraphs 11.1-11.4 above.

INCOME TAX ASSESSMENT ACT SECTIONS 221V - PAYE
221YHU - PPS

OFFENCES OF ATTEMPTING TO OBTAIN PAYE OR PPS CREDIT BY FRAUDULENT ACTIONS

12.1 In view of the seriousness of these offences all identified offences should be prosecuted unless extraordinary mitigating factors exist or the amount in question is less than a specified amount and prompt restitution has been made by the offender.

INCOME TAX ASSESSMENT ACT SECTIONS 221F(1),(2) and (2A) - PAYE
221YHB - PPS

FAILURE TO REGISTER AS A GROUP EMPLOYER
FAILURE TO LODGE

- A PAYING AUTHORITY NOTIFICATION FORM
- A HOUSEHOLDER NOTIFICATION FORM
- A HOUSEHOLDER NOTICE OF COMPLETION OF CONSTRUCTION PROJECT

13.1 All offences should be considered for prosecution. With regard to householders, prosecution action normally would be appropriate only where it appears that the person was aware of the legal requirements and chose to disregard them.

13.2 The failure of a group employer or an eligible paying authority to register should be considered in terms of culpability in the context of a failure to deduct or failure to remit. Where there are indications that the offence has been committed as part of an attempt to defeat the operation of the taxation laws or to defraud the revenue the offences should be prosecuted. In other situations where a previous A.T.O. warning had been given and ignored prosecution action should also be instituted. On the other hand there will be situations where the offence will be due to inadvertence and the tax involved has been recovered. In those circumstances prosecution action generally should not be taken.

INCOME TAX ASSESSMENT ACT SECTION 221E(3) - PAYE
221YHS(2) - PPS

FAILURE TO RETURN CANCELLED PAYE CERTIFICATES OF EXEMPTION
FAILURE TO RETURN REVOKED PPS DEDUCTION EXEMPTION CERTIFICATES OR DEDUCTION VARIATION CERTIFICATE

14.1 A failure to return the above certificates is a contravention of the above sections and also paragraph 8C(e) of the Taxation Administration Act. For the reasons set out in paragraph 15.1 below prosecution action may be taken under either section. A conviction under paragraph 8C(e) provides for a higher penalty and also for an order for compliance with the requirement pursuant to section 8G of the Taxation Administration Act, and therefore prosecution action under paragraph 8C(e) should be preferred.

14.2 Where there is reason to believe that it is likely that an unreturned certificate is currently in use prosecution action should be commenced where the person is in default for a specified period. In other cases prosecution action should be taken where the person is in default for the further specified period.

SELECTION OF APPROPRIATE CHARGE WHERE ACT OR OMISSION IS AN OFFENCE AGAINST SECTION 8C OF TAXATION ADMINISTRATION ACT AND SOME OTHER TAXATION LAW

15.1 In some situations an act or omission may amount to an offence against both section 8C of the Taxation Administration Act and a specific provision of one of the other Taxation Acts. Sub-section 30(1) of the Acts Interpretation Act provides

> "where an Act or omission constitutes an offence under two or more Acts ..... the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts .... but shall not be liable to be punished twice for the same offence".

15.2 As a matter of policy an offence should be prosecuted under the provision which deals specifically with the act or omission rather than under section 8C unless it is clear that a prosecution under section 8C would be more efficacious. By way

of example a group employer who fails to return group stationery by 14 August contravenes sub-section 221F(6) of the Income Tax Assessment Act and commits an offence against sub-section 221F(15). The maximum penalty is $2000. The contravention of sub-section 221F(6) is also an offence against paragraph 8C(e) of the Taxation Administration Act. The maximum penalty in respect of a first offence against section 8C is also $2000. However conviction under section 8C enables the court to order compliance with the requirement whereas a conviction under sub-section 221F(15) does not. Therefore as a general policy group employers who contravene sub-section 221F(6) should be prosecuted under paragraph 8C(e) of the Taxation Administration Act and an order for compliance obtained. Further examples of situations where prosecution under the Taxation Administration Act is preferable are referred to in chapter 18 below.

SECTION 263 INCOME TAX ASSESSMENT ACT; SECTION 8X TAXATION ADMINISTRATION ACT

OBSTRUCTION ETC OF OFFICERS

16.1 Where an officer exercising his statutory powers of access under section 263 is hindered or obstructed in the course of his duties the person so hindering or obstructing will have committed an offence against section 8X of the Taxation Administration Act and section 76 of the Crimes Act. As a matter of policy where prosecution action is instituted the proceedings generally should be taken under section 8X rather than section 76. In each case it will be a matter for judgment as to whether the offence can be seen as too trifling to justify such action. The following factors should be taken into account in this regard:

a. the seriousness of the obstruction (for example whether threats were made to officers);

b. the duration of the obstruction;

c. the importance of obtaining access;

d. the feasibility of obtaining the information etc from some other source; and

e. the previous history of the relevant person and the extent to which the person has voluntarily made amends for the actions taken (for example by co-operating over and above the minimum requirements of the law).

16.2 In cases where the offender, by violence, or threats, or intimidation obstructs or hinders an officer the case should be referred to the D.P.P. for consideration as to whether action should be taken under section 76 of the Crimes Act.

SECTION 252 INCOME TAX ASSESSMENT ACT FAILURE TO APPOINT A PUBLIC OFFICER

17.1 Pursuant to section 252 of the Income Tax Assessment Act

every corporation carrying on business in Australia, or deriving in Australia income from property is required to appoint a public officer who complies with the requirements of sub-section 252(3). The basic purpose of section 252 is to prevent corporations unfairly taking advantage of their limited liability status. Section 8Y of the Taxation Administration Act also remedies this mischief and it is envisaged that the use of section 8Y will generally be more effective than the institution of proceedings under sub-section 252(4) and should therefore be preferred.

SALES TAX

RETURNS

18.1 Pursuant to section 5 of the Sales Tax Procedure Act any person who is registered or required to be registered and who during a month sells goods, being a manufacturer of goods treats those goods as stock for sale by him by retail, applies goods to his own use or leases goods to a lessee is liable to furnish a return within 21 days of the close of the month. The section does not require a person who had not engaged in any of the above activities during the month to lodge a return. Section 6 of the Sales Tax Procedure Act provides an independent power by which the Commissioner can require a person to furnish a return. However this section has been interpreted as not empowering the Commissioner to require a return from a person who had not engaged in any of the above activities during the month.

18.2 Accordingly, as a first step to obtaining a return from a sales taxpayer, final notices issue pursuant to Regulation 11 of the Sales Tax Procedure Regulations, seeking information which enables the A.T.O. to establish whether or not the sales taxpayer is liable to lodge a return. As a general policy, and subject to paragraph 18.3 below, prosecution action should be taken under section 8C of the Taxation Administration Act in all cases of a failure to comply with a final notice unless the return or information for the relevant month has been furnished by the expiration of the final notice. Exceptional cases where prosecution action should not be taken would include situations where there was a doubt as to whether the final notice was received and situations where the failure to reply was brought about by serious illness or natural disaster (see also paragraph 2.5 above).

18.3 Where the information is received after the expiration of the final notice but before an information or complaint has issued prosecution action should not be taken in respect of the failure to supply the information. If the answers provided indicate that a return should have been lodged and the return is still outstanding an information or complaint should immediately be issued in respect of that default. If the return has been lodged, late lodgment penalty should be imposed for the period that the return was overdue.

18.4 In cases where, from information available, it is clear that the sales taxpayer has a liability to furnish a return and

the return is outstanding (for example where an auditor has called on the sales taxpayer and inspected the books) the sales taxpayer should be warned that unless the outstanding return is furnished within a specified period prosecution action will be instituted. Although it is not necessary that the warning initially be given in writing it is desirable that it be confirmed in writing as soon as practicable. Where the return is not lodged within the specified period prosecution action should be commenced unless there are mitigating circumstances such as illness or natural disaster which would justify the granting of further time to lodge. Where the return is lodged after the specified period but before the information or complaint issues the general policy is not to prosecute but to impose late lodgment penalty.

PRIORITY FOR PROSECUTION ACTION

18.5 PRIORITY 1

Cases where, because of a bad lodgment record and/or other information such as previous involvement in avoidance or evasion or the appointment of a receiver, there are grounds to believe that the revenue is substantially at risk. Examples of such cases would be:

i. a situation where the registered person is a company which is controlled by natural persons who have previously been associated with a company or companies which have gone into liquidation with outstanding taxation debts; and

ii. a situation where a person who was required to be registered had failed to become registered.

PRIORITY 2

Cases involving new registrations where the first one or more returns are outstanding.

PRIORITY 3

Cases where one or more returns are outstanding and the anticipated tax liability is over the specified amount.

PRIORITY 4

Cases where one or more returns are outstanding and the anticipated tax liability is over the specified amount.

PRIORITY 5

Cases where one or more returns are outstanding and the anticipated tax liability is over the specified amount.

PRIORITY 6

Cases where one or more returns are outstanding and the

anticipated tax liability is over the specified amount.

PRIORITY 7

Other cases where returns are outstanding.

COURT ORDERS

18.6 Generally the prosecution will be in respect of a failure to supply information. The obtaining of an order to supply the information will not, of itself, enforce the lodgment of the return. Where the information and the return are still outstanding at the date of the hearing the magistrate should be requested to order that the defendant furnish the information and, pursuant to paragraph 8G(1)(d), further order that if the answers to each of the questions on the final notice is 'yes' that the defendant also furnish a return within a specified time. The policy in respect of prosecutions for failure to comply with a court order is set out at chapter 5 above.

FAILURE TO DULY REMIT SALES TAX

18.7 It is an offence against section 14 of Sales Tax Assessment Act to contravene any condition attaching to the grant of a certificate of registration. Pursuant to sub-section 11(6) of Sales Tax Assessment Act (No. 1) one of the conditions attaching to the grant of a certificate is that the registered person will duly remit sales tax. Prosecution action for failure to duly remit should be undertaken in the following cases:

a. where a sales taxpayer is a company which is insolvent and has outstanding sales tax and it appears that natural persons associated with the company have profited from the offences. The appropriate officers of the company should be prosecuted under section 14 (by virtue of the operation of section 8Y of the Taxation Administration Act) in respect of each month the sales tax is outstanding and the court asked to make an order for reparation pursuant to section 21B of the Crimes Act.

b. cases where sales tax for a specified number of months is outstanding, the amount outstanding is over a specified amount and the sales taxpayer has the capacity to pay but has used the sales tax to finance other activities.

INCORRECT RETURNS

18.8 The furnishing of a return which contains false or misleading information gives rise to a liability for additional tax under section 45 of Sales Tax Assessment Act (No. 1) or to prosecution action under sections 8K, 8N or 8P of the Taxation Administration Act. Common examples of incorrect returns are:

a. omission of taxable sales;

b. understatements of sale value;

c. misdescriptions of goods to attach a lower rate of sales tax; and

d. incorrect claims for rebates and credits.

18.9 In deciding whether to impose penalty under section 45 or to prosecute regard should be had to the general criteria at paragraph 6.1 above. Specific situations where prosecution would be the preferred option would include:

a. where there were clear indications that the false or misleading statement was made knowingly or recklessly (as to the meaning of these terms see paragraphs 6.12-6.15 above);

b. where the maker of the statement had a previous history of breaching any of the taxation laws. An example would be a case where the person has previously been prosecuted or had a penalty imposed for this type of default; and

c. where the amount of sales tax involved exceeds a specified amount.

18.10 As a broad guide, it is envisaged that only a specified percentage of detected return form cases would probably warrant prosecution having regard to the above criteria.

18.11 Preference generally should be given to the prosecution of cases where the evidence indicates an offence against section 8N or 8P. However an exception would be a situation where multiple offences have been committed, some of which would be against sections 8N or 8P and others against section 8K. In such a case it would be desirable to prosecute the section 8K offences at the same time as the section 8N or 8P offences so that the court would have before it all of the relevant circumstances for sentencing purposes. The question of the use of the power to elect pursuant to section 8S is dealt with at paragraph 6.26 above.

QUOTATION OF CERTIFICATES OTHER THAN AS PRESCRIBED

18.12 Where a registered person contravenes section 12 of Sales Tax Assessment Act (No. 1) and it is clear that the registered person did so for the purpose, or for purposes which include the purpose, of defeating the purposes of the sales tax law then prosecution action should be instituted unless it is considered that the offence is too trifling to warrant such action (for example the tax involved is less than the specified amount, the registered person has an otherwise unblemished record and full restitution has been made). In such cases where prosecution is not considered appropriate the offender should be served with advice in writing warning that a repetition of the

conduct would result in the institution of prosecution action.

REFUSAL OR FAILURE TO REGISTER

18.13 A person who is required to be registered pursuant to section 11 of Sales Tax Assessment Act (No. 1) and who refuses or fails to apply for registration within the time prescribed by sub-section 11(3F) of Sales Tax Assessment Act (No. 1) commits an offence against section 13 of Sales Tax Assessment Act (No. 1) in respect of each day the person is in default. As a general rule prosecution action should be instituted in the following situations:

a. where the refusal or failure to register appears to form part of a scheme to defeat or obstruct the operation of the taxation laws (for example cash economy cases). Prosecution action should be commenced in all such cases where the person is in default for a specified period; and

b. where the person, despite having been given a written warning, has continued to refuse or fail to become registered. Prosecution action should be taken in all such cases where the person remains in default for a further specified period after the expiration of the period of grace given in the warning notice.

Although there may be cases apart from those referred to in (a) and (b) above where prosecution action may be justified, prosecution action should not be instituted in cases where the failure to register has been due to ignorance or inadvertance and the person concerned has made amends by the prompt payment of any tax and penalty that may be due in respect of late lodgment of returns or late payment of tax.

REFUSAL OR FAILURE TO GIVE SECURITY

18.14 A person who is required to give security pursuant to sub-sections 11(8A) or 11(11) of Sales Tax Assessment Act (No. 1) and who refuses or fails to give security within the time allowed commits an offence against section 13 of Sales Tax Assessment Act (No. 1). Additionally the refusal or failure by the person empowers the Commissioner to revoke the person's certificate pursuant to sub-section 16(3) of Sales Tax Assessment Act (No. 1). Generally use of the power to revoke a defaulting person's certificate would be a sufficient sanction. Prosecution action should generally be confined to the following situations:

a. where the refusal or failure to give security appears to form part of a scheme to defeat or obstruct the operation of the taxation laws (for example cash economy cases). Prosecution action should be commenced in all such cases where the person is in default for a specified period; and

b. other cases where the person refuses or fails to

give security despite having the financial capacity to do so. Prosecution action should be taken in such cases where the person remains in default for a further specified period.

In cases of the type referred to in (a) above which involve impecunious corporations consideration should be given to proceeding against the relevant officers of the corporations pursuant to section 8Y of the Taxation Administration Act (see further chapter 10, above).

INCORRECT CLAIMS FOR SALES TAX EXEMPTION OR REFUND

18.15 Where a person incorrectly claims an exemption or a refund pursuant to the Sales Tax (Exemptions and Classifications) Act the completion of the appropriate certificate ('A', 'AA', 'B', 'BB', 'D' or 'DD') would usually constitute the making of a false or misleading statement to a taxation officer. Unless the offence is trifling, prosecution action should be initiated provided that on the information available it is more likely than not that the prosecution will result in a conviction. In deciding this question it would, for example, be necessary to have regard to any explanation given by the person claiming exemption as to why the goods were used in circumstances which were at variance with those outlined in the application.

WRONGFUL QUOTATION OF A CERTIFICATE

18.16 A person who falsely represents that the person is a registered person or who falsely quotes a certificate contravenes both section 15 of Sales Tax Assessment Act (No. 1) and either section 8K, 8N or 8P of the Taxation Administration Act. As pointed out in paragraph 15.1 above sub-section 30(1) of the Acts Interpretation Act provides that in circumstances such as this an offender may be prosecuted and punished under the provisions of either Act. As a matter of policy offenders should be charged under either section 8K, 8N or 8P of the Taxation Administration Act in preference to section 15 of Sales Tax Assessment Act (No. 1) for the reason that section 8K, 8N and 8P provide a more effective range of penalties, especially in the case of repeated offences. Generally it could be expected that the facts would be such as to justify a charge under section 8P. This question is dealt with earlier at paragraphs 6.2-6.3 above.

REFUSAL OR FAILURE TO SURRENDER A CERTIFICATE

18.17 Pursuant to sub-section 15A(1) of Sales Tax Assessment Act (No. 1) the Commissioner may, in certain circumstances, prohibit a person from quoting a certificate and that person is then required, pursuant to sub-section 15A(3) to surrender the person's certificate within 7 days of being notified of the prohibition. A failure so to do is a contravention of both sub-section 15A(3) and paragraph 8C(e) of the Taxation Administration Act. For reasons set out in paragraph 14.1 above prosecution action may be taken under either section. A conviction under paragraph 8C(e) provides not only for the possibility of a higher penalty but also for the making of an

order for compliance with the requirement contained in sub-section 15A(3), pursuant to section 8G of the Taxation Administration Act. As a matter of policy a person who does not surrender certificate within a specified period should be prosecuted under paragraph 8C(e) and an order obtained under section 8G. Additionally, pursuant to sub-section 11(3C) and sub-sections 16(2) and 16(3) of Sales Tax Assessment Act (No. 1) the Commissioner may revoke a person's registration in certain circumstances. Upon being notified of the revocation the registered person is required, pursuant to sub-section 16(4), to surrender the certificate within 7 days. As a matter of policy a person who does not surrender a certificate within a specified period should be prosecuted under paragraph 8C(e) and an order obtained under section 8G.

CONTRAVENTION OF A PROHIBITION ORDER

18.18 A person who continues to quote a certificate in spite of service of a prohibition order contravenes both sub-section 15A(6) of Sales Tax Assessment Act (No. 1) and section 8P of the Taxation Administration Act. For reasons set out in paragraph 12.14 above prosecution action may be taken under either section. Generally, prosecution action should be taken under section 8P rather than sub-section 15A(6) since section 8P carries with it a higher maximum penalty (especially for second and subsequent offences). However there will be cases where a conviction under sub-section 15A(6) would give rise to a further penalty under sub-section 15A(8) whilst a conviction under section 8P may not give rise to a further penalty under section 8W of the Taxation Administration Act. In such situations it would be a matter of judgment as to which prosecution provision should be used having regard to the following factors:

a. the level of monetary penalty (the fine) available under the respective provisions;

b. the level of further monetary penalty available under either sub-section 15A(8) or section 8W;

c. the administrative objectives being sought; and

d. the desirability of a custodial sentence (in respect of a natural person).

FAILURE TO ADVISE VENDOR OF PROHIBITION

18.19 Where a person contravenes sub-section 15A(7) of Sales Tax Assessment Act (No. 1) prosecution action should be taken in all cases where it appears that the contravention was deliberate and the revenue involved is not less than a specified amount.

FAILURE TO NOTIFY CESSATION OF BUSINESS

18.20 A registered person who ceases to be a manufacturer or wholesale merchant is required to notify the Commissioner of that fact within 7 days. A failure to do so is a contravention of

both section 16 of Sales Tax Assessment Act (No. 1) and paragraph 8C(d) of the Taxation Administration Act. For reasons given in paragraph 17.14 above prosecution action can be taken under either section. As a general policy it would be inappropriate to prosecute in respect of such a contravention unless there had been a continued use of the certificate (either by the registered person or some other person) for the purpose of defeating the taxation laws. In such circumstances prosecution action should be taken under paragraph 8C(d) of the Taxation Administration Act.

FAILURE TO FURNISH INFORMATION OR TO ATTEND AND GIVE EVIDENCE AND/OR TO PRODUCE RECORDS ETC.

18.21 The relevant policy considerations are set out at paragraphs 2.6 - 3.3 above in respect of the furnishing of information etc. pursuant to statutory notices. Where an officer is exercising the officer's powers of access under section 12E of the Sales Tax Procedure Act the officer is entitled, pursuant to sub-section 12E(3), to orally require the occupier of the land or premises to provide information to enable the officer to effectively discharge his powers of access. Such information would include, for example, the whereabouts of a key to locked doors or cabinets or the whereabouts of certain documents believed to be in the premises. A refusal or failure to furnish such information would constitute an offence against both paragraph 8C(a) and section 8X of the Taxation Administration Act and also sub-section 12E(3) of the Sales Tax Procedure Act. As a matter of policy where prosecution action is instituted the proceedings should be taken under paragraph 8C(a) so that if necessary an order for compliance under section 8G can be obtained. In each case it will be a matter for judgment as to whether the offence is sufficiently serious to warrant prosecution or whether the offence can be seen as too trifling to justify such action. The following factors should be taken into account in this regard:

a. the length of the delay in furnishing the information (and especially whether the information is still outstanding);

b. the importance of obtaining the information;

c. the feasibility of obtaining the information from some other source;

d. the degree of culpability of the person having particular regard to any reasons offered for refusal; and

e. the previous history of the relevant person and the extent to which the person has made amends for the default (e.g. by co-operating over and above the minimum requirements of the law)

OBSTRUCTION ETC OF OFFICERS

18.22 In cases, other than those referred to in paragraph 12.18 above, where an officer is not provided with reasonable facilities or assistance the occupier of the land or premises will have contravened both sub-section 12E(3) of the Sales Tax Procedure Act, section 8X of the Taxation Administration Act and section 76 of the Crimes Act. As a matter of policy where prosecution action is instituted the proceedings generally should be taken under section 8X rather than under the other provisions mentioned. In each case it will be a matter for judgment as to whether the offence is sufficiently serious to warrant prosecution or whether the offence can be seen as too trifling to justify such action. The following factors should be taken into account in this regard:

a. the seriousness of the obstruction (e.g. whether threats were made to officers);

b. the duration of the obstruction;

c. the importance of obtaining access;

d. the feasibility of obtaining the information etc from some other source; and

e. the previous history of the relevant person and the extent to which the person has voluntarily made amends for the actions taken (e.g. by co-operating over and above the minimum requirements of the law).

18.23 In cases where the offender by violence, or threats, or intimidation obstructs or hinders an officer the case should be referred to the D.P.P. for consideration as to whether action should be taken under section 76 of the Crimes Act.

OFFENCES IN RELATION TO THE KEEPING OF RECORDS

18.24 Registered persons are obliged to keep proper records for 5 years pursuant to sub-section 11(6) and section 70E of Sales Tax Assessment Act (No. 1). The penalty for a contravention of these provisions is $2000. Additionally sections 8L, 8Q and 8T of the Taxation Administration Act also prohibit the incorrect keeping of records. Where the facts disclose an offence against any of the above provisions of the Taxation Administration Act as a matter of policy, prosecution action should be taken under the appropriate provision rather than under the Sales Tax Assessment Act (No. 1). Generally speaking where the facts fall short of disclosing an offence under the above provisions of the Taxation Administration Act prosecution action would not be appropriate. For example if records were inadvertently destroyed prosecution action should not be taken under the Sales Tax Assessment Act (No. 1). Alternatively, though, if records were destroyed with the intention of hindering or obstructing the administration of the Sales Tax laws prosecution action would be justified and the appropriate offence provision would be section 8T of the Taxation Administration Act.

FAILURE TO APPOINT A PUBLIC OFFICER

18.25 Pursuant to section 68 of Sales Tax Assessment Act (No. 1) every corporation which is a manufacturer or wholesale merchant in Australia is required to appoint a public officer who complies with the requirements of sub-section 68(2). The basic purpose of section 68 is to prevent corporations unfairly taking advantage of their limited liability status. Section 8Y of the Taxation Administration Act also remedies this mischief and it is envisaged that the use of section 8Y will generally be more effective than the institution of proceedings under sub-section 68(3) and should therefore be preferred.

FAILURE TO SPECIFY SALES TAX ON AN INVOICE

18.26 Pursuant to section 70C a sales taxpayer is obliged to state upon the invoice delivered by him to the purchaser the amount of sales tax payable in respect of the transaction. The failure of a sales taxpayer to comply with section 70C should be considered in terms of culpability in the context of failure to duly remit sales tax. Where there are indications that the offences have been committed as part of an attempt to defeat the operation of the taxation law or to defraud the revenue prosecution action should be taken in respect of a representative number of the offences. In situations where a previous A.T.O. warning has been given and ignored prosecution action should also be instituted. On the other hand there will be situations where the offence will be due to inadvertance and the tax involved will have been recovered. In those circumstances prosecution action should generally not be taken.

FALSE PRETENCE AS TO SALES TAX

18.27 Section 70D of Sales Tax Administration Act (No. 1) prohibits persons from dishonestly seeking to recover excess sales tax from purchasers of goods. As such activity is a threat to the proper functioning of the sales tax system all detected offences should be prosecuted.

FAILURE TO COMPLY WITH A GARNISHEE NOTICE - SECTION 218 OF INCOME TAX ASSESSMENT ACT, SECTION 38 OF SALES TAX ASSESSMENT ACT (NO 1)

19.1 Where a person refuses or fails to comply with a notice under section 218 or section 38 prosecution action should be taken unless there are substantial mitigating circumstances. An example of a case where there would be sufficient mitigating circumstance to justify a decision not to prosecute would be a situation where, although an addressee of a notice had taken all reasonable steps to ensure that the notice was complied with, due to staff error the money had been remitted to the taxpayer but ultimately had been recovered by the ATO without an undue demand on the resources of the ATO.

19.2 Where a notice which is not complied with involves an amount of tax which exceeds the maximum primary penalty available ($1,000) and the tax has not been recovered from the taxpayer and there are indications that such recovery is unlikely then it

would be desirable to delay prosecution action until there is sufficient evidence to ensure that there are reasonable prospects of a court making an order for reparation pursuant to subsection 218(3) or subsection 38(3) (as the case may be). As a matter of practice where a large amount of tax is involved the steps which should be taken to provide evidence to support a reparation order would be greater than those which would be appropriate where the amount of tax was substantially less. Usually it would be preferable to have instituted recovery proceedings against the taxpayer so that evidence of an unsatisfied judgment could be put before the court. However there will be other cases where there is clear independent evidence of insolvency, or evidence that the taxpayer cannot be located which would render it unnecessary to delay prosecution action until a civil judgment has been obtained against the taxpayer. In each case this question would be a matter for individual judgment and where practicable advice from the Director of Public Prosecutions should be obtained before prosecution action is instituted.

COMMISSIONER OF TAXATION
6 February 1986