Australia: Privacy of corporate taxpayer information in the Australian tax system

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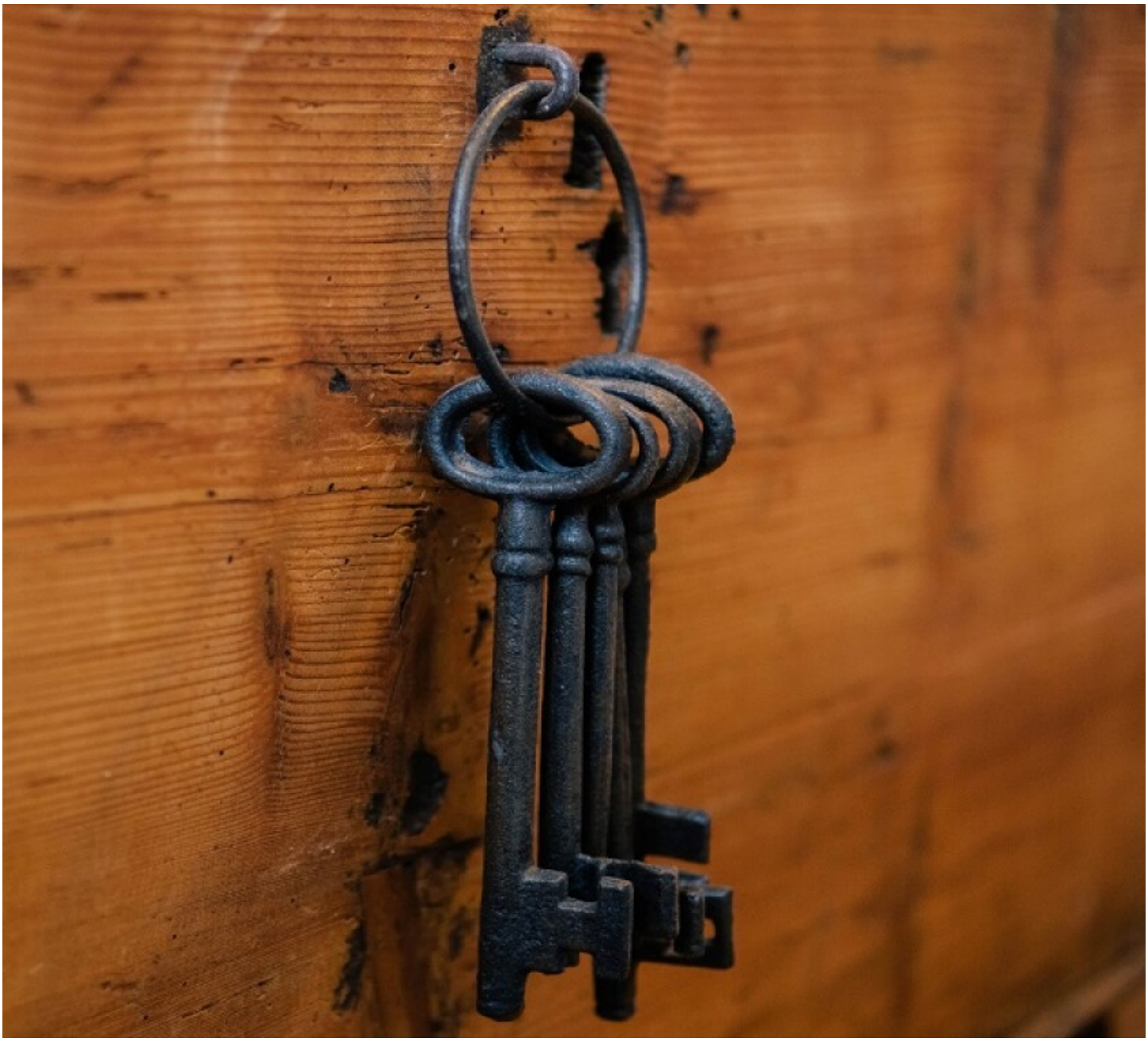
By Paul McNab December 21, 2021



Paul McNab of DLA Piper describes how sensitive information provided to the Australian Taxation Office is generally protected.

Multinational enterprises often possess commercially sensitive information, the public disclosure of which could damage them competitively. This may range from contract terms to client names. Often this information is specific to a particular jurisdiction, or even more commonly said to not be directly relevant to a particular jurisdiction. The Australian Taxation Office (ATO), however, often demands global information from groups when reviewing the operations of their Australian entities.

Many groups are reluctant to share data that does not directly relate to Australia with the ATO, and this creates difficult relationship issues for the parties. The rights and ability of the ATO to coercively gather such information will not be considered. Strategies that might be adopted by the parties to resolve disputes over such access to information where they arise will also not be considered.

T icle will set out briefly how sensitive information which is provided to the A pr ed. This will be done by reference to the legislative rules and also to recent pu ts

on the topic. In the final analysis, this should give multinationals some comfort that, with care, a high level of privacy may be expected in relation to information shared with the ATO. Although at the end of the article one concerning development is discussed on which at taxpayer representatives should push for a change of public policy.

Legislative framework

Division 355 of Schedule 1 to the Tax Administration Act prohibits disclosure of a taxpayer's 'protected information' by an ATO officer. An officer who breaches these provisions is liable to imprisonment for two years. There are exceptions to this rule, including exceptions related to the administration of the taxation laws and related litigation. Disclosure to courts is permitted, and to certain other Federal Government agencies (chiefly related to criminal investigations).

Cases at the edge: How does this work in practice?

There have been several recent situations where these rules have been explored.

Public attacks on the ATO or its officers

In Jordan v. Second Commissioner of Taxation [2019] FCA 1602, the Federal Commissioner of Taxation, Mr Chris Jordan, made statements about litigation concerning a Mr Gould and a related entity Hua Wang Bank. Mr Gould sued Mr Jordan for defamation. Mr Jordan sued the ATO (yes, his own office) for access to ATO material that he wished to use publicly in mounting his defence. The court permitted the access on the basis that the disclosure was authorised as being for the purpose of civil proceedings related to a taxation law.

It appears Mr Gould and the ATO had been in dispute for many years. The public dispute between the parties appears to have been prompted (among other things) by statements by Mr Gould's lawyer that 'the ATO is like the Gestapo'.

Mr Jordan at a public lunch referred to these claims and said that a court had found the taxpayer group's behaviour involved "money-laundering, tax fraud and insider trading of Australian shares".

In the subsequent defamation trail (*Gould v. Jordan (No 2)* 2021 FCA 1289) the court found that although Mr Jordan had defamed Mr Gould, Mr Jordan's response was protected by a qualified privilege entitling him to "inform those whose judgment of (him) may be affected by the attack of (his) response to it in order that (he) may vindicate (himself)".

It is clear that a taxpayer and their advisors may, through public attacks on the ATO's, open themselves to public disclosure of aspects of their tax affairs by the ATO in more.

Another exception, mentioned earlier, was the ability to disclose protected information in the course of court proceedings. While this is logical, it can create apprehension among taxpayers. Will the presentation of information in court lead to it being publicly available?

Again, there is much comfort to be taken from the court rules. The Rules of the Federal Court of Australia are those most commonly relevant to multinational tax matters. Division 2 of Part VAA of the Federal Court Act provides for suppression and non-publication orders, subject to a "primary objective of the administration of justice" being the safeguarding the public interest in open justice.

Orders can be made for a number of reasons including where "the order is necessary to prevent prejudice to the proper administration of justice" (Section 37AG(1)(a)). These include:

- To ensure "that obligations of confidence be not lightly overruled and the legitim ate expectations of confidentiality as to private and confidential transactions and affairs be not lightly disregarded" (*ABC v. Parish* (1980) 43 FLR 129;
- To prevent the 'revelation" or "leaking of trade secrets to competitors" (*ACCC v. Air New Zealand Ltd (No. 4)* [2021 FCA 1439; and
- To prevent the "[disclosure of] market-sensitive information which would be of significant value to trade rivals" (*ACCC v. Cement Australia Pty Ltd (No 2)* [2010] FCA 1082.

The public interest in open justice means that taxpayers must carefully consider the basis on which they will seek such orders.

Court cases regarding claims for legal professional privilege

There are two relevant situations currently being explored by the Australian courts.

The first involves disputes with the ATO over claims to legal professional privilege over advice. Two current claims involve advice given by PricewaterhouseCoopers in Australia, where the ATO has sought the documents (*C of T v. PricewaterhouseCoopers (re JBS*) VID364/2020; and *CUB Australia Holding Pty Ltd v. C of T* [2021] FCA 43).

In these two matters the ATO has sought certain documents that the taxpayer asserts are subject to legal professional privilege, and therefore do not need to be produced in response to formal information gathering notices (or 'statutory subpoenas' as they are known in some jurisdictions).

The appropriate place for such a dispute to be resolved is the court. But the court will need to review the relevant documents (or at least a sample of them). They will need to be placed in evidence. But the taxpayer will not want them to be seen by the ATO, or members of the public who might attend the hearings or look at the court file.

The court in both of those matters has gone to quite some trouble to ensure that the proceedings are conducted in such a manner that the confidentiality of the evidence is protected, including having non-parties excluded from certain parts of the proceedings, and many documents redacted when placed in the public court file.

Court cases regarding TP disputes

The second situation where these issues play out is in TP disputes. Where evidence about pricing and business processes may be commercially sensitive. The recent nine-day hearing in *Singapore Telecom Australia Investments Pty Ltd v. C of T*, VID1231/2019 is a case in point. Parts of the evidence were given while non-parties were absent from the court. And some evidence will not be generally available for public review.

Public disclosure in parliament

The final category is a newly developing one. The Senate of the Australian Parliament has demanded Mr Jordan (the Commissioner of Taxation) provide them with certain information about the tax affairs of corporate taxpayers who benefited from the Australian government's 'Jobkeeper' programme (an economic support initiative for the COVID-19 epidemic). Mr Jordan has refused, claiming "public interest immunity". The situation is perilous. If successful, the Senate's position will open taxpayer data to public disclosure in the Parliament of Australia. This will potentially undermine the administration of the tax system.

It will make foreign taxpayers less willing to share sensitive data with the ATO and may even increase the level of tax litigation in Australia. Since taxpayers may be reluctant to enter into a settlement to resolve a dispute, for fear of disclosure of the settlement and the information disclosed in the process. Settlements in Australia may be used to agree future year treatments, in the manner of an APA. Without attracting the obligation to report the settlement to other tax authorities that often comes with an APA.

On the other hand, parliament argues that it has an important duty, and the power, to review the proper operation of the executive arm of government. It is easy to imagine it wishing to review the terms of settlements, especially in TP disputes.

The Tax Administration Act may not protect taxpayers' interests in this dispute between the legislature and the executive.

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