

A closer look at the Secrecy Provisions

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Introduction

This article discusses the tax secrecy provisions contained in Division 355 of Schedule 1 (**Secrecy Provisions**) to the *Tax Administration Act 1953* (Cth) (**TAA**), what their objectives are, key issues for tax practitioners and the proposed changes in this area.

The Secrecy Provisions

The Secrecy Provisions are designed to protect the confidentiality of taxpayer information. These provisions are a cornerstone of Australia's taxation and superannuation system. Over recent months, there has been unprecedented attention on the Secrecy Provisions in Australia. This is due in part to developments in the professional services industry and the ensuing Senate [Inquiry into management and assurance of integrity by consulting services](#). Following the Government's [announcement](#) on 6 August 2023 that it would 'oversee the biggest crackdown on tax adviser misconduct in Australian history', the Government released exposure draft legislation on 20 September 2023 that proposes to introduce significant reforms to the:

- [promoter penalty laws](#);
- [powers of the Tax Practitioners Board \(TPB\)](#);
- [Secrecy Provisions](#); and
- [whistleblower protection laws](#).

The Tax Institute has provided guidance on the draft legislation for members which is available [here](#).

However, despite the recent attention on the Secrecy Provisions, many taxpayers and practitioners still do not understand how the provisions apply in practice, particularly as it concerns their obligations. This article specifically deals with the Secrecy Provisions in the TAA. The *Tax Agent Services Act 2009* (Cth) (**TASA**), *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and some of the States have their own secrecy regimes. Each have their own nuances and some are also undergoing reform.

What are the Secrecy Provisions and how do they work?

The Secrecy Provisions apply offences at two levels:

1. the first level applies to a ‘taxation officer’ (the **primary provisions**); and
2. the second level applies to entities that are not taxation officers – that is, any other entity (the **secondary provisions**).

PRIMARY PROVISIONS

Broadly, the primary provisions seek to maintain taxpayer confidentiality and prevent the disclosure of taxpayer information by officers of the Australian Taxation Office (**ATO**), or other entities that are employed by (or providing services for) the ATO, to disclose information that could identify a taxpayer. These provisions specifically apply to a ‘taxation officer’, which, for the purposes of the Secrecy Provisions, means the Commissioner of Taxation, a Second Commissioner or an Australian Public Service employee performing duties in the ATO.

It is an offence for a taxation officer to make a record of, or disclose, ‘protected information’ they receive as a taxation officer to an entity (other than the entity to whom the information relates, a ‘covered entity’), or court or tribunal (**taxation officer offence, or TOO**).

‘Protected information’ is information that:

- was disclosed or obtained under, or for the purposes of, a taxation law (other than the TASA) when the information was disclosed or obtained;
- relates to the affairs of an entity; and
- identifies, or is reasonably capable of being used to identify, the entity.

A ‘covered entity’ includes, but is not limited to, a registered tax agent, BAS agent, a legal practitioner representing the person to whom the information relates or a public officer of the person to whom the information relates and several others.

Further, there are exceptions to the TOO. Those exceptions include, but are not limited to:

- where the taxation officer records or makes the disclosure of protected information in performing their duties as a taxation officer (discussed in further detail below);
- disclosure of publicly availability information or periodic aggregate tax information; and
- certain disclosures to ministers, credit reporting bureaus and types of registrars or for other government or law enforcement purposes.

SECONDARY PROVISIONS

The secondary provisions extend the scope of the Secrecy Provisions to any other entity who receives taxpayer information. This means that the rules also extend to any corporation, partnership, trust or person and may catch out taxpayers and tax practitioners who are unaware.

Currently, the secondary provisions make it an offence (**on-disclosure offence, or ODO**) if:

- an entity who is not a taxation officer makes a record of, or discloses, information to another entity or to a court or tribunal;
- the information was obtained by the entity under an exception in the primary or secondary provisions; and
- the entity did not acquire the information as a taxation officer.

However, an ODO is not committed if the information is provided to the entity to whom the information relates or that entity's agent. Further, there are exceptions to the ODO, including, but not limited to:

- on-disclosure for the original purpose (discussed in further detail below);
- on-disclosure of publicly available information or periodic aggregate tax information;
- certain on-disclosure to ministers, the ombudsman, royal commissions, the Inspector-General of Intelligence and Security, and the Australian Security Intelligence Organisation.

It should be noted that the Secrecy Provisions apply to information and are not limited to documents. This means that a document with protected information could still be provided so long as the relevant protected information is redacted. Further, the TOO and ODO are strict liability offences. This means that consent to share the information from the person to whom the information relates is not a defence to the offences.

Exceptions

There are some exceptions to the disclosure of information under the secrecy provisions. Broadly, these exceptions seek to allow the disclosure of information where it would be reasonable to do so. Below, we analyse some of the key exceptions.

TAXATION OFFICER OFFENCE EXCEPTION – TAXATION OFFICER PERFORMING DUTIES AS A TAXATION OFFICER

The primary exception for taxation officers relates to disclosures made during the performance of their duties. Section 355-50(2) of Schedule 1 to the TAA lists a range of circumstances where disclosures will fall within the scope of this exception and includes, but is not limited to, disclosures that are made for the purpose of:

- administering any taxation law;
- enabling the entity to understand or comply with its obligations under a taxation law; and
- criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a taxation law.

The scope of this exception has been considered in several cases including [McEwan v Office of Australian Information Commissioner](#) [2023] FCAFC 137, [Frangieh v Deputy Commissioner of Taxation](#) [2018] NSWCA 337, and [Commonwealth of Australia v Kupang Resources Pty Ltd](#) [2022] NSWCA 77. These cases have a running theme that take a broader view of what a taxation officer's duties entail, often covering aspects that are related to but not strictly limited to specific administrative functions (such as the filling of forms). [JXO Note; Will call to discuss – Frangieh for example also dealt with issue of “related to a tax law” which is also quite broad]

The case of [Jordan, Commissioner of Taxation v Second Commissioner of Taxation](#) [2019] FCA 1602 (**Jordan's case**) explains in detail the underlying rationale for adopting a broader approach to the interpretation of a taxation officer's duties. Jordan's case states that the Commissioner's duties take on a wide meaning and also encompass incidental functions, including the proper administration of the taxation law or the promotion of public confidence in the system.

Although this may seem to be too broad an exception, the cases noted above arguably did not contain factual circumstances where sensitive information was made available outside what one may consider to be reasonable. Further, the ATO and the tax profession have a strong culture of respecting the importance of the privacy of taxpayer information. It is important to maintain this culture and ensure there is sufficient public scrutiny over proposals that seek to disclose larger amounts of sensitive taxpayer information in unreasonable circumstances.

ON-DISCLOSURE OFFENCE EXCEPTION – DISCLOSURE FOR THE ORIGINAL PURPOSE

In many instances, when a taxpayer or their adviser receives information from the ATO, it will be:

- information in relation to the taxpayer – in which case the TOO does not apply; or
- provided in the course of the taxation officer performing their duties as a taxation officer – in which case an exception to the TOO applies.

Where a taxpayer or adviser receives information from a taxation officer under the exception relating to the taxation officer's performance of duties (or any other exception), then the taxpayer or adviser will commit an ODO if they make a record of, or disclose, that information to another entity (other than to the entity to whom the information relates or their agent), subject to the limited exceptions.

The most important exception to the ODO is where the disclosure is made for the original purpose of the disclosure, or in connection with the original purpose. That is, any further disclosure of information received by an entity will not be an ODO if that disclosure was for the same purpose or reason (or a connected purpose or reason) as the taxation officer when that officer first made the disclosure.

Audits and the Secrecy Provisions – examples

The applications of the Secrecy Provisions are factually dependent. Below, we analyse practical scenarios to better demonstrate the impact of the Secrecy Provisions.

EXAMPLE A

John is the registered tax agent for Emily. John receives a position paper from the ATO that contains information relating solely to the affairs of Emily. Emily meets with John and brings along her spouse for support to discuss the position paper.

On those facts, the provision of the position paper will contain protected information in relation to Emily. The tax officer's provision of that information to John will not constitute a TOO because the information was provided to a covered entity, being John (as tax agent for Emily). In other words, it was not necessary for the tax officer to rely on an exception.

Accordingly, John will not be subject to the ODO in relation to the provision of that information to Emily or her spouse. That is because the ODO applies only if that information has been obtained under an exception to the TOO.

EXAMPLE B

John is also a registered tax agent for Gabrielle. John receives a position paper from the ATO that contains information relating to the affairs of Gabrielle. However, the position paper also refers to a withdrawal of funds from the bank account of a third party, Brian, and the corresponding deposit into Gabrielle's bank account.

The information relating to the withdrawal from Brian's bank account is protected information because it has been obtained for the purposes of a taxation law, it relates to the affairs of a third party and is reasonably capable of being used to identify that third party. It is arguably not protected information in relation to Gabrielle. In those circumstances, the provision of the information relating to the transactions on Brian's bank account would constitute a TOO when that information is provided to John. However, the exception in relation to the disclosure in performing duties as a taxation officer would apply.

Gabrielle meets with John and brings along her spouse for support to discuss the position paper.

On those facts, the provision of the third-party information to Gabrielle would constitute an ODO but for the defence for on-disclosure for the original purpose.

The concern, however, is that Gabrielle's spouse is present at the meeting. Arguably, a disclosure of the third-party information to Gabrielle's spouse may constitute an ODO to which no exception applies (as the disclosure to someone's spouse may not be a disclosure for the original purpose or in connection for the original purpose).

If Gabrielle's spouse was not present at that meeting, Gabrielle must still exercise care in relation to that third-party information contained in the position paper. If, after the meeting with John finishes, Gabrielle sent a copy of the position paper to her spouse, it may still constitute an ODO.

EXAMPLE C

Following on from Example B, let's assume that after the meeting, John and Gabrielle meet with Brian to discuss the transaction on his account. John and Gabrielle would not commit an ODO if they provided that information to Brian, or indeed to Brian's agent.

Closing comments

The TOO and ODO provisions are complicated and difficult to apply in practice, and the consequences are significant – the penalty for a breach is imprisonment for up to two years. While not dealt with in this article, other provisions deal with the disclosure of protected information that has been unlawfully acquired.

The biggest challenge for advisers is that taxpayers are rarely aware of the Secrecy Provisions. Accordingly, where third-party information is obtained from the ATO, advisers must make sure that their clients are aware of the nature and scope of the Secrecy Provisions – unknowingly committing an ODO is not a defence!

Further guidance and information

Further guidance and information are available from the [ATO website](#).

If you have any specific concerns that have not been outlined above, please email taxpolicy@taxinstitute.com.au.

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