



Commissioner of Taxation

Senator the Hon Scott Ryan
President of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr President

I write with regard to the Order for the Production of Documents No 1196, '*Senator Patrick—Order for production of documents—Commissioner of Taxation—JobKeeper payments*'.

It is acknowledged that Parliament has the power (upon following relevant processes) to require production of the documents and information despite important and long-standing statutory secrecy and confidentiality provisions. However, it is extremely rare that this type of material is sought and received by Parliament and discussed in public or in the political arena. It is of the utmost importance to the future integrity and effectiveness of taxation administration that the public have confidence that confidentiality will be maintained over their taxation and personal information when it is provided to the ATO under taxation laws.

Accordingly, the Commissioner respectfully claims public interest immunity (PII) over the information requested in that OPD, being 'the list of all employers with an annual turnover of greater than \$10 million that were paid a JobKeeper payment, and the number of employees paid, the total amount paid and any amount returned'.

We note that in the ordinary course taxation officers are subject to the strict confidentiality laws contained in the *Taxation Administration Act 1953* (TAA), which make it an offence for a taxation officer to disclose 'protected information' to anyone, unless a specific exception applies to authorise the disclosure.

Broader public interest considerations in taxpayer secrecy

The Commissioner holds concerns about the provision of taxpayer information to the Parliament contrary to the policy of the taxation confidentiality laws, unless there are exceptional circumstances that justify it.

Taxpayer protected information held by the Commissioner includes highly confidential and sensitive personal and commercial information that is obtained by the Commissioner solely for the purposes of taxation administration, either voluntarily from taxpayers, or required by law. Taxpayers must have confidence that such information will only be used for taxation administration by the Commissioner and will otherwise remain confidential. This applies across the range of taxpayers including individuals, companies, trusts and partnerships, and Australian residents and non-residents, (in respect of whom sovereign risk concerns may arise), and in the case of business taxpayers, regardless of whether they are classified as small, medium or large.

Taxation confidentiality ensures effective administration of the taxation system by encouraging taxpayers to disclose information voluntarily in a system that is dependent on self-assessment for its efficient operation. In the absence of taxpayer confidentiality, the effective and efficient administration of the taxation system would be undermined by taxpayer reluctance to disclose information voluntarily. Where taxpayers are required to produce information, taxpayers expect their information will remain confidential and only be used for taxation administration purposes.

Public interest considerations specific to JobKeeper information

The information requested was obtained by the Commissioner under or for the purposes of a taxation law, that relates to the affairs of a taxpayer or taxpayers and identifies a taxpayer or taxpayers. The Commissioner has general administration of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* and *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, making them 'taxation laws.'

The grounds for claiming PII over this information are that such information is subject to a statutory secrecy provision which is a key element of Australia's self-assessment tax system, being an element directed to the public interest in ensuring disclosure of information necessary to the effective operation of that system. Requiring disclosure of protected taxpayer information to the Parliament will harm the public interest by undermining public confidence in the Commissioner's ability to keep taxation information confidential and the administration of the tax system beyond the administration of the Coronavirus Economic response package more generally. That is, it has the clear capacity to discourage the open and full disclosure of information to the Commissioner which is necessary for the effective administration of the tax system. We further note the following specific considerations relating to this information.

Confirmation of entities that are or have been receiving JobKeeper reveals whether or not the entity experienced decline as a result of the COVID-19 pandemic when compared against a relevant comparison period. Information provided by employers to the Commissioner at the time of their enrolment for JobKeeper and in relation to their ongoing eligibility for JobKeeper is given with the expectation that potentially sensitive financial information will only be used for the purposes of the Commissioner's administration of the relevant coronavirus economic response measures. It will also provide details of entities which, as a consequence of not being identified, have less than \$10 million in turnover.

Parliament has already specifically considered taxpayer secrecy in relation to these measures and has deliberately chosen to enact only a very limited range of specific exceptions for information obtained by the Commissioner in administering the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* to be disclosed. This is reflected in Division 355 of the *Taxation Administration Act 1953*, which sets out the framework for the confidentiality of taxpayer information. It is only in limited circumstances that a disclosure of JobKeeper related data, that is otherwise taxpayer protected information, is permitted under law. This is not a circumstance where the question of taxpayer secrecy was not previously considered.

For example, one exception to the general prohibition on disclosing taxpayer information is where the protected information relates to the JobKeeper scheme, the disclosure is to an Australian government agency and where that disclosure is necessary for the administration of a law for a purpose relating to COVID-19.

It is in this context that participants in the scheme provided information to the Commissioner having regard to the existing framework at the time and the unique challenges faced. To make this information publicly available has the potential to impact on the behaviour of taxpayers by reducing confidence in the Commissioner's ability to keep potentially sensitive financial information out of the public domain therefore discouraging the essential flow of information needed for the efficient and effective administration of a self-assessment tax system. That harm outweighs any public interest in disclosing the information in a public forum, including through Parliamentary processes.

We anticipate that compliance with the OPD will involve disclosure of information relating to the taxation and financial affairs of approximately 10,000 taxpayers, across a range of entities, including public and private companies, individuals/sole traders, partnerships and trusts, and a diverse range of industries. We note that by identifying employers based on their turnover will bring in businesses that may have high turnover but, due to their costs, may have much smaller profit margins (or taxable incomes for income tax purposes). We also note that the timeframe for the request does not provide time for the Commissioner to advise the employers that their information is going to be disclosed, especially given the likely large number of employers involved.

We are mindful of the gravity of an order of the Senate. However, we are concerned to ensure that the Senate is fully cognisant of the potential and serious implications for taxpayer confidentiality and confidence in providing information to the Commissioner, not just in the immediate case but as a general precedent, in making such an order.

It is due to the significant consequences for ongoing confidence in the Commissioner's ability to keep information confidential that the Commissioner claims PII. This is the case for any matters that require the disclosure of protected taxpayer information contrary to tax officers' obligations of confidentiality. These obligations of confidentiality are those that the Commissioner undertakes to the community consistently with the taxpayer confidentiality laws that would ordinarily apply to taxation officers.

Yours sincerely

Chris Jordan AO
Commissioner of Taxation
12 August 2021