Federal Court of Australia

Lee v Deputy Commissioner of Taxation [2023] FCAFC 22

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| Appeal from: | *Deputy Commissioner of Taxation v Lee* [2022] FCA 1307 |
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| File number(s): | NSD 984 of 2022 |
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| Judgment of: | **THAWLEY, STEWART and abraham JJ** |
|  |  |
| Date of judgment: | 2 March 2023 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – appeal from orders dismissing application for suppression orders under s 37AF of the *Federal Court of Australia 1976* (Cth) in relation to the entire court file – where a request for non-party access was made by a journalist under r 2.32 of the *Federal Court Rules 2011* (Cth) in relation to affidavits relied upon to obtain freezing orders – where access is opposed by the appellants – whether primary judge should have held that making suppression orders was necessary to prevent prejudice to the proper administration of justice because of asserted commercial and reputational harm being suffered by the appellants – whether the primary judge erred in failing to hold that approval of the non-party access request was inconsistent with the confidentiality regime of the *Tax Administration Act 1953* (Cth) – Held: appeal dismissed. |
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| Legislation: | *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s 3(1) *Federal Court of Australia Act 1976* (Cth) ss 17, 37AE, 37AF, 37AG*Income Tax Assessment Act 1997* (Cth) s 960-100(1)*Taxation Administration Act 1953* (Cth) Sch 1, Div 355, Subdiv 355-A, 355-B, 355-C, 355-D, 355-E; ss 14ZZE, 355-25, 355-30, 355-50, 355-155, 355-170*Federal Court Rules 2011* (Cth) r 2.32Explanatory Memorandum to the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 (Cth)  |
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| Cases cited: | *A v Federal Commissioner of Taxation* [2016] FCA 1307*Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321*Buckeridge v Federal Commissioner of Taxation* [2013] FCA 897; 95 ATR 670*Cargill Australia Ltd v Viterra Malt Pty Ltd (No 23)* [2019] VSC 417; 58 VR 611*DCT v State Grid International Australia Development Company Limited* [2022] FCA 577*Deputy Commissioner of Taxation v Hawkins* [2016] FCA 164; 341 ALR 255 *Deputy Commissioner of Taxation v Shi (No 2****)*** [2019] FCA 503*Ferguson v Tasmanian Cricket Association (trading as Cricket Tasmania)* [2021] FCA 1507*Griffith University v Tang* [2005] HCA 7; 221 CLR 99*Herald & Weekly Times Limited v Williams* [2003] FCAFC 217; 130 FCR 435*Hogan v Hinch* [2011] HCA 4; 243 CLR 506*Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651*Porter v Australian Broadcasting Corporation* [2021] FCA 863  |
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| National Practice Area: | Taxation |
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| Number of paragraphs: | 108 |
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| Date of hearing: | 16 February 2023  |
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| Counsel for the Applicants: | Mr B Walker SC and Mr B Jones SC |
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| Counsel for the Respondent: | Mr M O’Meara SC and Ms K Petch |
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| Counsel for The Age Company Pty Ltd | Mr E J Batrouney |
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| Solicitor for The Age Company Pty Ltd | Mr S White of Nine Entertainment Co |

ORDERS

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|  | NSD 984 of 2022 |
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| BETWEEN: | PHILLIP DONG FANG LEEFirst ApplicantXIAO BEI SHISecond ApplicantBAO LIN PTY LTD ACN 162 411 681 (and others named in the Schedule)Third Applicant |
| AND: | DEPUTY COMMISSIONER OF TAXATIONRespondent |

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| order made by: | THAWLEY, STEWART and abraham JJ |
| DATE OF ORDER: | 2 March 2023 |

THE COURT ORDERS THAT:

1. The applicants be granted leave to appeal.
2. The appeal be dismissed.
3. The applicants pay the respondent’s and The Age Company Pty Ltd’s costs of the application for leave to appeal and the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. This is an application for leave to appeal an interlocutory decision in which the primary judge, amongst other things, refused to make suppression orders in respect of the entirety of affidavits which had been relied upon by the Deputy **Commissioner** of Taxation in an ex parte application for freezing orders: *Deputy Commissioner of Taxation v Lee* [2022] FCA 1307 (**J**). The primary judge also decided to grant access to the affidavits to a journalist, Mr McKenzie of **The Age** Company Pty Ltd, pursuant to his application under r 2.32 of the *Federal Court Rules 2011* (Cth) (**Rules**).
2. The application for leave to appeal and the appeal were heard together. The Commissioner adopted a neutral stance on the application for leave to appeal and as to the orders sought on the appeal, but made submissions as contradictor in relation to the operation of Div 355 of **Sch 1** to the *Taxation Administration Act 1953* (Cth) (**TAA**). The Age opposed all of the relief sought.
3. In circumstances where the arguments raised by the applicants for leave to appeal have sufficient merit and have been fully ventilated, the most efficient course is to grant leave to appeal and proceed to determine the appeal. With the intention of avoiding confusion the eight applicants for leave to appeal, being the eight respondents to the Commissioner’s originating application, will be referred to collectively in the balance of these reasons as the **appellants**.

# BACKGROUND

## Procedural overview

1. On 15 July 2021, the Commissioner commenced proceedings by the filing of an originating application seeking judgment against Mr Phillip Lee (as first respondent) in the amount of almost $280 million, plus general interest charge. The originating application also contained claims for interlocutory relief which included a claim for freezing orders over certain assets of Mr Lee and seven other respondents, being the appellants in this proceeding.
2. The originating application and claims for interlocutory relief were supported by two affidavits of Mr Yi Deng, both sworn on 15 July 2021. The applications for interlocutory relief were heard ex parte by Abraham J, as duty judge, on 15 July 2021. That hearing was conducted on-line. Abraham J made freezing orders.
3. The proceedings were later docketed to the primary judge, Bromwich J.
4. On 27 September 2021, The Age made a request for access to Mr Deng’s affidavits. Access was not immediately granted, Bromwich J deciding to ascertain the position of the parties before deciding whether or not to grant access.
5. Motivated at least in part by The Age’s application for access, the appellants filed an interlocutory application on 2 December 2021 seeking the following orders:

[1] The Court’s file in this matter is to be marked suppressed.

[2] Access to the Electronic Court File within the Court is to be limited to the chambers of Bromwich J and the Senior Co-ordinator responsible for his Honour’s docket.

[3] No access is to be granted to any document filed in this proceeding to any person apart from the parties or those representing them in these proceedings.

[4] The following information is not to be published if it relates to this matter and is:

a information that comprises evidence or information about evidence; or

b information obtained by the process of discovery; or

c information produced under a subpoena; or

d information lodged with or filed in the Court.

[5] The First Respondent to Eighth Respondent are to be identified as ‘A’, ‘B’, ‘C’, ‘D’, ‘E’, ‘F’, ‘G’ and ‘H’ respectively in all court documents including the transcript.

[6] These orders are made because they are necessary to prevent prejudice to the proper administration of justice.

[7] Orders 1 to 4 expire when the First Respondent commences proceedings under Part IVC of the *Taxation Administration Act 1953* (Cth) in this Court.

1. The Age’s request for access was listed for hearing together with the appellants’ interlocutory application. The matter was heard on 14 February 2022. As mentioned, his Honour refused to make the wide-ranging orders which had been sought and granted access to the affidavits. The access orders have been stayed pending resolution of this application for leave to appeal (and appeal).
2. Before turning in more detail to the application before Bromwich J, it is necessary to say something more about the ex parte application for freezing orders before Abraham J.

## The application before Abraham J

1. On the application before Abraham J, the Commissioner relied upon written submissions which were cross-referenced to the material relied upon, namely Mr Deng’s affidavits and the accompanying exhibits. The exhibits contained over 17,000 pages of material. A significant amount of this material, approximately 13,000 pages, comprised bank statements and bank records. It was submitted by the appellants that the Commissioner only referred to a small proportion of this material on the ex parte application. A number of matters should be noted about this submission:
* The Commissioner, in his written submissions to Abraham J, referred *directly* to a significant amount of the material in the affidavits and exhibits. That does not mean that there was no indirect reference to the supporting material. As is generally the case in such applications, the Commissioner’s reasons for decision formed part of the exhibited material and these were referred to directly. These reasons for decision generally contain a thorough analysis of the underlying facts and reasons for the issuing of assessments or other action taken. The reasons for decision are based on the material in the Commissioner’s possession and make reference to that material.
* The ex parte application involved establishing: (1) a case for the relief sought (namely judgment in the amount of about $280 million plus general interest charge) which was sufficiently strong to support the making of the ex parte freezing orders in the circumstances; and (2) a risk of dissipation of assets. The relief sought was invasive and required that care be taken, both in establishing a proper basis for the relief and in disclosing to the Court what the absent respondents might put against the granting of the relief sought. The degree to which reference is made directly to the material filed in support of the application will vary depending on the course of the hearing. It is often the case, where written submissions have been filed, that it becomes necessary, or is otherwise desirable, to refer to other material during the ex parte hearing.
* The banking material was relevant to showing flows of funds which was relevant to: (a) the Commissioner’s contention that there was a risk of dissipation of assets; and (b) the existence of potential causes of action against third parties is respect of assets transferred under transactions said to be voidable.
* In any event, it was not suggested before Bromwich J that any of the material was irrelevant to the application which had been made to Abraham J. Nor was it established before this Court that any document which had been tendered was irrelevant to the application before Abraham J or was otherwise a document which should not have been included in the material in support of the application.

## The application before Bromwich J

1. Two preliminary observations should be made about the application before Bromwich J:
2. First, the appellants sought suppression orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and, if suppression were refused, they opposed access being granted to Mr McKenzie under r 2.32(4) in reliance on the confidentiality scheme in Div 355 of Sch 1 to the TAA.
3. Secondly, and consistently with the approach just mentioned, Bromwich J was not invited to refuse access to Mr Deng’s affidavits on the basis that they contained information which was “confidential” within the meaning of r 2.32(3)(a) of the Rules. Accordingly, no occasion arises for determining whether, or the extent to which, r 2.32(3)(a) should be read commensurately with the grounds set out in s 37AG read with s 37AE and s 37AF of the FCA Act – see: *Ferguson v Tasmanian Cricket Association (trading as Cricket Tasmania)* [2021] FCA 1507 at [8] (Mortimer J); J[19].
4. In support of the orders which they had sought in their interlocutory application, the appellants relied upon an affidavit of Mr Lee’s wife, Ms Xiao Shi, the second respondent. The substance of the affidavit was summarised by the primary judge in his reasons at [8] in the following way:

(a) she is a director of the third to eighth respondents;

(b) under the heading “reputational damage”, she deposes to:

(i) the commencement of the substantive proceeding on 15 July 2021, and to numerous media reports (copies of which are annexed to her affidavit) that she read from September and October 2021 of the freezing order and Taxation Office (ATO) claims that were made about her and her husband and their assets, business interests and business activities (including aspects that have nothing to do with this proceeding);

(ii) reactions to the media reporting that she experienced, including from friends and business associates;

(iii) her fears about irreparable reputational damage to her, her family and their businesses;

(c) under the heading “financial damage”, she deposes to:

(i) difficulties that had been experienced with one financial institution, which I note was not as a result of media reporting but as a result of debt enforcement steps that were taken by the ATO independently of, and prior to, the commencement of this proceeding;

(ii) concerns about the reaction of other financial institutions if the allegations made by the Deputy Commissioner in this proceeding, that is, as set out in the Deng affidavits, are made public, and the difficulty that may occasion to obtaining funding or making financial investments in Australia

1. Consistently with the case which was advanced before the primary judge, Ms Shi’s evidence was that she was concerned about reputational damage and financial or commercial damage.
2. As to reputational damage, Ms Shi’s evidence was that, since the proceedings had commenced on 15 July 2021, numerous media reports had been published which referred to the freezing order which had been made and the claims which the Australian Taxation Office made about Mr Lee, Ms Shi and “their assets, business interests and business activities (including aspects that have nothing to do with this proceeding)”. Ms Shi deposed to reactions she had observed to the media reporting and that she had fears about reputational damage. All of this centres on existing media reports and the consequences of that reporting. None of the media reporting was said to be inaccurate or misleading.
3. Ms Shi’s only references to the material contained in Mr Deng’s affidavits and reputational harm were at [10] and [11] of her affidavit, where she stated:

… My expectation is that if the nature and details of the Commissioner’s allegations were made public then the publicity would have a substantial negative impact on my personal circumstances.

Based on my experiences with my business associates and friends following the media articles that have already been published, I am also concerned that that release of the material the ATO has to the news media will give rise to further media articles that will result in irreparable reputational damage to me, my family and our businesses.

1. In her evidence, Ms Shi did not make any reference to any specific material in Mr Deng’s affidavits which was said would give rise to adverse reputational consequences. Nor was Bromwich J directed to any such material in submissions. There was no identification of any material not already in the existing media articles to which Ms Shi had referred or in the public domain generally, which was said might give rise to adverse reputational consequences. No application for suppression was made in respect of specific information or documents. This position did not alter before this Court.
2. As to commercial damage, Ms Shi gave evidence that Credit Suisse had closed a loan account as a consequence of having received the freezing orders and garnishee notices. At [20] of her affidavit, Ms Shi stated:

If there further publicity as a result of the material that the ATO has adduced being released to the news media, I am concerned that NAB, Westpac, HSBC and ANZ may also terminate the accounts held by me and my husband referred to … above. I am also concerned that I will be unable to obtain financing from these and other lenders if the details of the allegations made by the Commissioner are made public. This would have a significant adverse impact on my financial and business interests in the future because it would make it difficult to obtain funding or make financial investments in Australia.

1. Of course, media articles had already been published and freezing orders made and garnishee notices issued. Again, Ms Shi did not make any reference in her evidence to any specific material in Mr Deng’s affidavits which was said would give rise to adverse commercial consequences. Nor was Bromwich J directed to any such material in submissions. There was no identification of any material not already in the existing media articles to which Ms Shi had referred or in the public domain generally, which was said might give rise to adverse commercial consequences. No application for suppression was made in respect of specific information or documents. This position did not alter before this court.
2. Justice Bromwich recorded that he was not taken to Mr Deng’s affidavits and that no issue was taken with the general description of them given by Ms Yi in her affidavit: at [16]. As noted earlier, the appellants did not contend that particular parts of Mr Deng’s affidavits should be the subject of a suppression order. The primary judge stated at [16]:

Whatever the reasons for that stance, which likely included the time and difficulty in isolating parts of concern from material that was not of concern, the application is therefore all or nothing.

1. It is relevant to note:
2. The appellants (as respondents below) sought suppression over the entire court file, including as to their identity. In relation to the identity of the respondents, Bromwich J noted that this order would in any event not be justified in light of the media reporting on the making of the freezing orders that had already taken place. In particular, his Honour noted that the identity of Mr Lee and Ms Shi was already in the public domain: at [52].
3. Although before this Court the appellants no longer seek to have their identities suppressed, they maintain the stance that suppression orders should have been made over the entire court file. That is, the appellants seek on appeal each of the orders in the interlocutory application before Bromwich J, with the exception of Order 5 – see: [8] above.
4. The appellants submitted to this Court that Bromwich J should have drawn a distinction between those documents to which Abraham J had been (directly) referred and those to which no (direct) reference was made. That case was not put to Bromwich J.
5. By orders made on 3 November 2022, the primary judge dismissed the interlocutory application and granted access to Mr Deng’s affidavits to The Age. As mentioned, those access orders have been stayed pending the resolution of this appeal.

## The application for leave to appeal and the appeal

1. The appellants filed an application for leave to appeal from the primary judge’s orders on 16 November 2022.
2. By their draft notice of appeal, the appellants raised eight grounds of appeal. During oral argument it was confirmed that Grounds 4 to 7 were not pressed. Grounds 1 to 3 and 8 may be summarised as follows:
* The primary judge should have held that making the orders sought was necessary to prevent commercial and reputational harm being suffered by the appellants which would result in prejudice to the proper administration of justice and erred in not so holding and in not making orders under s 37AF of the FCA Act: Grounds 1 and 2.
* The primary judge erred in failing to hold that the fact that Mr Deng’s affidavits adduced evidence of protected information for the purpose of Div 355 of Sch 1 supported the making of orders under s 37AF as being necessary to prevent prejudice to the proper administration of justice by ensuring that the statutory objects of Div 355 would not be defeated: Ground 3.
* The primary judge erred in holding, in the alternative, that the exception in s 355-170 applied to negate the operation of s 355-155 because the protected information “was already available to the public”: Ground 8.
1. The appellants confirmed that the application for leave to appeal and appeal could be conducted by reference solely to Grounds 1 to 3 and 8 of the draft notice of appeal and that reference to the grounds in the application for leave to appeal was unnecessary.
2. The appellants identified the application as giving rise to two issues:
3. First, whether the confidential information contained in the Deng affidavits that is also “protected information” displaces the principal of “open justice” such that access to the affidavits should be denied under r 2.32(3) or (4) (**Issue 1**).
4. Second, whether suppression orders concerning confidential and “protected information” are necessary to prevent prejudice to the proper administration of justice (**Issue 2**).
5. It is convenient to address Grounds 1 to 3 and 8 of the draft notice of appeal and the above two issues by looking first at Div 355 and then at the issue of suppression orders, in accordance with the way the parties’ submissions were structured.

# CONSIDERATION

## Issue 1 and Div 355 of Sch 1

1. In relation to the first issue, the appellants submitted that: (a) The Age would be subject to a disclosure prohibition under s 355-155 of Sch 1 in respect of any “protected information” disclosed to him by the Court; and (b) breach of the prohibition would result in the commission of offences. It followed, so it was submitted, that the principle of “open justice” is directly contradicted not only by the inherently confidential nature of the material but by both the purpose and text of Div 355 of Sch 1 to the TAA.

### The relevant provisions

1. Div 355 of Sch 1 is entitled “Confidentiality of taxpayer information”. The “Guide to Division 355”, contains s 355-1, which states:

**355-1 What this division is about**

The disclosure of information about the tax affairs of a particular entity is prohibited, except in certain specified circumstances.

Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity’s privacy.

1. Div 355 is divided into the following Subdivisions:
* Subdivision 355-A – Objects and application of Division
* Subdivision 355-B – Disclosure of protected information by taxation officers
* Subdivision 355-C – On-disclosure of protected information by other people
* Subdivision 355-D – Disclosure of protected information that has been unlawfully acquired
* Subdivision 355-E – Other matters
1. The objects of Div 355 are expressed in s 355-10 in Subdiv 355-A in the following way:

The objects of this Division are:

(a) to protect the confidentiality of taxpayers’ affairs by imposing strict obligations on \*taxation officers (and others who acquire protected tax information), and so encourage taxpayers to provide correct information to the Commissioner; and

(b) to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.

1. In respect of the objects of Div 355, the appellants referred to the **Explanatory Memorandum** to the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 (Cth) at [1.15] and [1.16] which provides (appellants’ emphasis):

[1.15] The primary objective of the new framework is to protect the confidentiality of taxpayer information. **Compliance with taxation laws could be adversely affected if taxpayers thought that their information could be readily disclosed**.

[1.16] The new framework gives effect to this primary objective by placing a general prohibition on the disclosure of taxpayer information. However, in recognition of the importance that taxpayer information can play in facilitating efficient and effective government administration and law enforcement, disclosures of taxpayer information are permitted in certain specified circumstances. As a guide for future policy consideration, the disclosure of taxpayer information should be permitted only where the public benefit associated with the disclosure clearly outweighs the need for taxpayer privacy.

1. Subdivision 355-B concerns what the Commissioner referred to as “original disclosure”, namely disclosure of “protected information” by (an entity such as) a “taxation officer”. These two terms are defined in s 355-30 as follows:

(1) ***Protected information*** means information that:

(a) was disclosed or obtained under or for the purposes of a law that was a \*taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; and

(b) relates to the affairs of an entity; and

(c) identifies, or is reasonably capable of being used to identify, the entity.

Note: Tax file numbers do not constitute protected information because they are not, by themselves, reasonably capable of being used to identify an entity. For offences relating to tax file numbers, see Subdivision BA of Division 2 of Part III.

(2) ***Taxation officer*** means:

(a) the Commissioner or a \*Second Commissioner; or

(b) an individual appointed or engaged under the *Public Service Act 1999* and performing duties in the Australian Taxation Office.

Note: This Division applies to certain other entities as if they were taxation officers: see section 355‑15.

1. Section 355-25 makes it an offence for a taxation officer to disclose, including to a court, “protected information” acquired by the officer in that capacity, unless an exception applies:

(1) An entity commits an offence if:

(a) the entity is or was a \*taxation officer; and

(b) the entity:

(i) makes a record of information; or

(ii) discloses information to another entity (other than the entity to whom the information relates or an entity covered by subsection (2)) or to a court or tribunal; and

(c) the information is \*protected information; and

(d) the information was acquired by the first‑mentioned entity as a taxation officer.

Penalty: Imprisonment for 2 years.

1. The word “entity” is exhaustively defined by s 960-100(1) in the *Income Tax Assessment Act 1997* (Cth) (see s 3AA(2) of the TAA):

***Entity*** means any of the following:

(a) an individual;

(b) a body corporate;

(c) a body politic;

(d) a partnership;

(e) any other unincorporated association or body of persons;

(f) a trust;

(g) a \*superannuation fund;

(h) an \*approved deposit fund.

1. A “court or tribunal” is not an “entity” as s 355-25(1)(b)(ii), the table in s 355-50 and other provisions in Div 355 make clear. Although it was at issue before Bromwich J, it was accepted on appeal that a “court or tribunal” is not an “entity”.
2. There are exceptions to the offence created by s 355-25 – see: s 355-45 to s 355-72. Section 355-50 provides an exception where the disclosure was made by an entity who is a taxation officer in the course of performing duties. Section 355-50 includes:

**355-50 Exception - disclosure in performing duties**

(1) Section 355-25 does not apply if:

(a) the entity is a \* taxation officer; and

(b) the record or disclosure is made in performing the entity’s duties as a taxation officer.

Note 1: A defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3) of the Criminal Code.

Note 2: An example of a duty mentioned in paragraph (b) is the duty to make available information under sections 3C, 3E and 3H.

(2) Without limiting subsection (1), records or disclosures made in performing duties as a \* taxation officer include those mentioned in the following table:

| **Records or disclosures in performing duties** |
| --- |
| **Item** | **The record is made for or the disclosure is to ...** | **and the record or disclosure ...** |
| 1 | any entity, court or tribunal | is for the purpose of administering any \*taxation law. |
| 2 | … | … |
| 3 | any entity, court or tribunal | is for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a \*taxation law. |
| … | … | … |

1. It was common ground that Mr Deng’s affidavits included “protected information”. The appellants submitted that Mr Deng’s affidavits were entirely constituted by protected information, leaving aside various formal statements in the affidavit such as those deposing to Mr Deng’s position within the ATO.
2. The Commissioner did not concede that the affidavits and accompanying material was entirely constituted by “protected information”. This issue does not need to be resolved and, indeed, cannot. The appellants did not put before this Court the material needed to resolve the issue.
3. It was common ground that the protected information was disclosed by a taxation officer to the court by the affidavits for the purposes of administering a taxation law and for the purpose of civil proceedings that are related to a taxation law: at J[67]. It follows that the disclosure to the court was not an offence.
4. Subdivision 355-C concerns “on-disclosure of protected information by other people”. The parties referred to this as “second-level disclosure”. Section 355-155 creates the following offence:

**355‑155 Offence—on‑disclosure of protected information by other people**

An entity commits an offence if:

(a) the entity:

(i) makes a record of information; or

(ii) discloses information to another entity (other than the entity to whom the information relates or that entity’s agent in relation to the information) or to a court or tribunal; and

(b) the information was acquired by the first‑mentioned entity under an exception in this Subdivision or in Subdivision 355‑B (except subsection 355‑65(1) operating in relation to item 7 in the table in subsection 355‑65(4)); and

(c) the first‑mentioned entity did not acquire the information as a \*taxation officer.

Penalty: Imprisonment for 2 years.

1. The offence in s 355-155 is subject to the exceptions in ss 355-170 to 355-200 and 355-215 in Subdiv 355-C. The exception in s 355-170 applies if the information “was already available to the public” otherwise than as a result of a contravention of Div 355. The phrase “already available to the public” is not defined in the TAA. However, the Commissioner referred to the Explanatory Memorandumat [4.35] which states:

A publicly available source would include things such as the electoral roll, open court records, books, the Internet, newspapers and other material that is generally available to the public. The information does not cease to be 'publicly available' if a member of the public has to pay a fee to access that information.

1. In relation to this offence, the appellants referred to the following parts of the Explanatory Memorandum (appellants’ emphasis):

**Relating to non-taxation officers**

[3.32] Taxpayer information continues to be protected even when that information has been disclosed to a non-taxation officer. The new framework makes it an offence for a non-taxation officer who has received taxpayer information, either lawfully or unlawfully, to on-disclose that information.

…

**Non-taxation officers in lawful receipt of taxpayer information**

[3.34] **It is an offence for a non-taxation officer who has received taxpayer information lawfully (that is, under one of the disclosure provisions in the new framework) to on-disclose that information (unless a relevant exception applies).**

…

[3.35] The on-disclosure of taxpayer information will continue to be subject to this offence even if that information has been on-disclosed by non-taxation officers on numerous occasions. Regardless of how many on-disclosures there are in the chain, any protected information originally disclosed by a taxation officer remains protected.

1. Subdivision 355-D is concerned with disclosure of protected information that has been unlawfully acquired. Section 355-265 creates an offence for an entity to make a record of protected information, or to disclose it to another entity (other than the taxpayer or their agent) or to a court or tribunal, where the information “was acquired by the entity in breach of a provision of a taxation law” and the information was not acquired by the entity as a taxation officer. This is subject to the exceptions in s 355-270 (publicly available information) and s 355-275 (records or disclosures required or permitted by a taxation law or to a taxation officer for purposes connected with the administering a taxation law).

### The primary judge’s rejection of the appellants’ arguments

1. Justice Bromwich rejected the various arguments which had been put by the appellants to the effect that Div 355 required or supported the making of the orders which the appellants had sought. His Honour held, correctly, that the court was not an “entity”. As mentioned, the appellants did not take issue with this conclusion.
2. His Honour also held that any on-disclosure of the affidavits by a person obtaining them from the court as a result of a disclosure after a request under r 2.32 would not engage s 355-155 of Sch 1 because that person would not have acquired the information “under an exception” in Subdiv 355-B or Subdiv 355-C, but pursuant to an order or direction of the court.
3. Justice Bromwich also addressed an alternative argument which the Commissioner had advanced, that even if s 355-155 did apply, s 355-170 created an exception for the on-disclosure of information that is already available to the public otherwise than as a result of a contravention of Div 355:

**355-170** **Exception—on‑disclosure of publicly available information**

Section 355-155 does not apply if the information was already available to the public (otherwise than as a result of a contravention of Div 355).

### The meaning of “under” in s 355-155(b)

1. As to the meaning of “under” and the operation of s 355-155, the appellants submitted:

[I]f the protected information was made available to Mr McKenzie, the relevant exception under which it would be made available to him is s 355-50, with respect to disclosure to the Court. To give effect to the object of Division 355, the word “under” in s 355-155 should be construed broadly so as to include receipt of the protected information by persons who receive it from the Court. So much is revealed by the EM, which recognises that where there has been a lawful receipt of protected information that will have occurred “under” a disclosure provision.

1. As a matter of substance, the appellant put its case in two ways in this respect:
2. First, the words in s 355-155(b) “acquired by the first mentioned entity [ie, The Age] under an exception in this subdivision or subdivision 355-B” were wide enough to capture or include Mr Deng’s disclosure which engaged the exception in s 355-50 and one ignores the separate disclosure by the court to The Age. The Age still received the documents under the exception in s 355-50.
3. Secondly, the disclosure by the court to The Age was impliedly authorised by the exception in s 355-50 and The Age’s acquisition of the information would therefore be an acquisition under Subdiv 355-B, namely under the implied authorisation in s 355-50.
4. These submissions must be rejected.
5. The offence in s 355-155 requires the offending entity (The Age on the appellants’ hypothesis) to have “acquired” information under an exception in Subdiv 355-C or Subdiv 355-B. The legislative scheme contemplates that the acquisition of information to which the provision refers is a lawful acquisition. That is so for two reasons: first, s 355-155 contemplates that the acquisition is “under” an exception in Subdiv 355-C or Subdiv 355-B with the necessary result that the information has been acquired in circumstances which are carved out from an offence (s 355-155 in the case of Subdiv 355-C and s 355-25 in the case of Subdiv 355-B); and, secondly, unlawfully acquired information is the subject of Subdiv 355-D.
6. The offence in Subdiv 355-B (s 355-25) applies only to disclosures by entities being and acting as taxation officers. The offence in Subdiv 355-C (s 355-155) applies to disclosures by entities who did not receive information as taxation officers – see: s 355-155(c). It applies to information which had been disclosed lawfully to the (non-taxation officer), namely information:
* lawfully provided by an entity (acting as a taxation officer) under an exception in Subdiv 355-B (“original disclosures” by taxation officers); or
* lawfully provided by an entity (not acting as a taxation officer) under Subdiv 355-C. Subdiv 355-C addresses repeat “on-disclosures” as well as first “on-disclosures” – see: s 355-175.
1. The fact that s 355-155 operates by reference to information which has been obtained lawfully under a specific exception and creates a criminal offence for the “on-disclosure” of protected information which is not disclosed under an exception, makes it contextually clear that the word “under” is to be understood as contemplating a direct connection, consistent with its ordinary meaning. As the Commissioner submitted, this is consistent with the construction given in other statutory contexts such as “under an enactment” in s 3(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and its state equivalents – see: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 at 377 (Toohey and Gaudron JJ), *Griffith University v Tang* [2005] HCA 7; 221 CLR 99 at [78]-[88] (Gummow, Callinan and Heydon JJ).
2. Nor is it correct to say that s 355-50 contains an implied authorisation for the court to disclose information which it has received. The appellant’s submission that s 355-50 impliedly “authorises” conduct by the court misunderstands the statutory scheme. Section 355-25 creates an offence *applicable to entities acting as taxation officers*. Section 355-50 creates an exception to that offence with the result that what would otherwise be an unlawful disclosure is lawful. The purpose of s 355-50 is to create a specific exception. As senior counsel for the Commissioner put it, the only real purpose of s 355-50 is to dis-apply s 355-25. In any event, the exception plainly relates to entities acting as taxation officers. Even if it were possible to create an offence applicable to the court, the language of s 355-25 cannot be read as purporting to do so. It only applies to “entities” and it only applies to entities “as taxation officers”. Section 355-50 cannot be read as containing an implied authorisation for the court to do something for which it needs no authorisation.
3. Both the offence in s 355-25 and that in s 355-155 only apply to “entities”. Information could not be acquired “under” an exception in Subdiv 355-B or Subdiv 355-C unless the entity receiving the information is an entity as defined. The exceptions can only apply to entities. It follows that, contrary to the appellants’ submission, s 355-155 cannot apply because the court is not an entity; s 355-155 does not apply to the acquiring entity when the protected information is acquired by that entity from the court pursuant to a court order. Bromwich J was correct so to conclude at J[72].
4. If “protected information” was made available to The Age in accordance with the order made by Bromwich J (presently stayed), it would have been made available to him by the court pursuant to powers furnished by the FCA Act and Rules. The “protected information” would not have been provided to The Age “under an exception” in either Subdiv 355-C or Subdiv 355-B for the purposes of s 355-155. The word “under” and the phrase “under an exception” are not relevantly ambiguous. The “protected information” was disclosed by Mr Deng to the court “under an exception in … Subdivision 355-B”, namely in accordance with s 355-50. That fact does not mean that the “protected information” was also provided to The Age “under” s 355-50 or “under an exception” in any other provision in Subdiv 355-C or Subdiv 355-B.

### Was the information “available to the public”?

1. In relation to the appellants’ alternative argument, the primary judge concluded that, because the affidavits had been read in open court, they should generally be available for inspection unless the interests of justice required otherwise, referring to *Deputy Commissioner of Taxation v Hawkins* [2016] FCA 164; 341 ALR 255 and *Deputy Commissioner of Taxation v Shi (No 2)* [2019] FCA 503 – see: J[81] to [87].
2. The appellants contended that the affidavits were not “already available to the public” within the meaning of s 355-170, submitting that (appellants’ emphasis):
* the terms of r 2.32(4) reveal that the affidavits are within the custody and control of the District Registrar and cannot be disclosed to the public absent an order of the court such that, if an affidavit is referred to in open court, that does not make it “publicly *available*”;
* if the affidavits were already available, “The Age would have no reason to seek access to the Deng affidavits”;
* the primary judge incorrectly conflated the concept of a document being *referred* to “in open court” with information being “publicly available”.
1. The better construction of s 355-170 is that it applies to information which is “*available* to the public” irrespective of whether it is already in the public domain. The appellants’ construction contains an unstated assumption that “information … already available to the public” in s 355-170 does not cover information where there is a barrier to access or a condition which must be fulfilled before a member of the public can gain access to the available information.
2. There are many examples of documents which are publicly available but which require some step or steps to be taken to gain access. The payment of a fee for access to documents on a public register provides an example. One would not ordinarily say that, because documents contained on a pubic register can only be accessed after payment of a fee, those documents are not “available to the public”; to the contrary, they are available to the public upon payment of a fee.
3. It is true that the barrier to access in the present case is different to a fee (although a fee might also apply), but it is not of a kind which results in documents tendered into evidence or affidavits read in open court being documents and affidavits which are not “available to the public”. The present argument would not have arisen if Mr Deng’s affidavit had been read aloud in open court as was once, and in some courts even recently, the practice. Even though an ex parte hearing is held without notice to a party, it is still held in open court absent some contrary order. Although more modern practice does not usually involve the reading out loud of affidavit material for the consumption of any person who might happen to be observing a hearing, the statement in open court that an affidavit is read, or the tendering of an affidavit in open court, has essentially the same effect.
4. Open justice – a principle discussed further below – can only properly be achieved by permitting (subject to contrary orders as discussed below) public access to material relied upon in open court. Absent exceptional circumstances the public is granted access to such material. Such material is, accordingly, appropriately described as “available to the public”. Rule 2.32 includes rules under which access is granted to publicly available documents. There is no sound reason to impute to the legislature an intention that such material not fall within the concept of material “available to the public” within the meaning of s 355-170 of Sch 1.
5. Mr Deng’s affidavits were not merely referred to in open court, they were read in open court and it was on the basis of that evidence that the court exercised an invasive power. The primary judge correctly observed at [42]:

[T]he freezing order is an exercise of a most invasive judicial power. There is a particularly strong interest of open justice of the kind identified by Jagot J in *Porter* [*Porter v Australian Broadcasting Corporation* [2021] FCA 863 at [83] to [86]] of enabling public scrutiny of the way in which it was decided to make such an order, and to enable the public to understand how the justice system works in this respect and why that decision was made. There being no balancing of competing interests involved, it was for the respondents to establish that it was necessary in the proper administration of justice that this interest be overridden.

1. Division 355 does not provide a basis in the way contended by the appellants for interfering with the primary judge’s orders, although it may be accepted that Div 355, together with other statutory provisions, may be relevant as part of the context in which to decide whether in any given case it is appropriate to make a suppression order. That question is addressed below. More specifically, if The Age is granted non-party access to Mr Deng’s affidavits (which he has been subject to the stay) he would not commit an offence under s 355-155 of Sch 1 if he were to “on-disclose” the information.

## Suppression and non-publication orders

### The relevant statutory provisions

1. The grounds for making a suppression or non-publication order under s 37AF(1) of the FCA Act are found in s 37AG:

**37AG** Grounds for making an order

(1) The Court may make a suppression order or non‑publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;

(c) the order is necessary to protect the safety of any person;

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non‑publication order must specify the ground or grounds on which the order is made.

1. The appellants relied only upon the ground in s 37AG(1)(a).
2. Section 37AE provides:

37AE**Safeguarding public interest in open justice**

In deciding whether to make a suppression order or non‑publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

### Summary of the appellants’ submissions

1. The appellants contended that the primary judge erred in concluding the orders sought were not “necessary to prevent prejudice to the proper administration of justice” within the meaning of s 37AG(1)(a).
2. The appellants referred to *A v Federal Commissioner of Taxation* [2016] FCA 1307 (***A v FCT***), in which Perram J made suppression orders in circumstances where disclosure of information would have adversely impacted the reputation and commercial interests of the taxpayer. That case involved the following circumstances, similar to the present:
* allegations that the taxpayer had engaged in fraud and evasion, being allegations which would be likely to have a negative impact on the taxpayer’s reputation;
* the taxpayer had not had an opportunity to respond, and was unlikely in those proceedings to have an opportunity to respond to allegations of misconduct and thus there was a real risk of commercial damage to the taxpayer;
* the dispute between the taxpayer and the Commissioner was at a stage (the objection process) where it was required by statute to be conducted in private.
1. The appellants submitted that the harm that the taxpayer in *A v FCT* would suffer gives rise to the prejudice to the administration of justice and that reputational and commercial damage were identified as the matters which would result in prejudice to the proper administration of justice.
2. The appellants submitted that this approach was consistent with the observations of Jagot J in *Porter v Australian Broadcasting Corporation* [2021] FCA 863 at [84] and [85]. It is convenient to set out [83] to [86] (appellants’ emphasis):

[83] It is also appropriate to say something about the interactions of the various Court Rules and the Court Act [*Federal Court of Australia 1976* (Cth)]. The Court Act is clear – a primary objective of the administration of justice is to safeguard the public interest in open justice: s 37AE. The fact that this is “a” not “the” primary objective of the administration of justice reflects the fact that there are other primary objectives, including those in s 37M of the Court Act to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

[84] Sections 37AE-37AL of the Court Act recognise that in order to do justice it is sometimes necessary that information filed or given in a proceeding not be disclosed or published. This is because justice will be undermined if people are not free to seek the exercise of judicial power confident that, amongst other things, their safety and the safety of others will not be compromised, that national or international security will not be prejudiced, and that the administration of justice will not itself be prejudiced: s 37AG(1). **The administration of justice may be prejudiced in a variety of ways. If, for example, people cannot come to a court confident that some kinds of information can be protected from disclosure if necessary (such as commercially confidential information valuable to a person or a third party, or sensitive information about a person’s health, or personal information about parties or third parties of no more than prurient interest to others) then public confidence in and access to justice may itself be undermined**.

[85] The purpose of the principle of open justice has been said to be at least two-fold, to “enable public scrutiny of the way in which courts decide cases” and “to enable the public to understand how the justice system works and why decisions are taken”: ***Dring*** *v Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] AC 629 at [42]-[43]. That said, **there are well-recognised cases in which the overall administration of justice requires the suppression of some information from the public**, reflected in s 37AG(1) of the Court Act. In *Dring* at [46] these well-recognised categories were said to include “national security, **the protection of the interests of children** or mentally disabled adults, **the protection of privacy interests more generally**, and the protection of trade secrets and commercial confidentiality”.

[86] While “mere embarrassment, inconvenience or annoyance will not suffice to ground an application for suppression or non-publication” (*Keyzer* at [29]) and the principle of open justice, that justice must not only be done but be seen to be done, is fundamental (*Scott v Scott* [1913] UKHL 2; [1913] AC 417), the principle has never been absolute. The principle has always yielded to contrary necessity (an appropriately high bar specified in s 37AG(1), in contrast to the mere convenience or preference of parties). The requirement of “necessity” was explained in *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 at [31] by contrast to the notion that such an order would be “convenient, reasonable or sensible, or [would] serve some notion of the public interest, still less that, as the result of some ‘balancing exercise’, the order appears to have one or more of those characteristics”. This approach may be contrasted with that in the United Kingdom where the person seeking access to documents must “show a good reason why [access] will advance the open justice principle”: *Dring* at [47]. Rule 2.32(2) of the Court Rules, in contrast, assumes that the principle of open justice is advanced by public access to the nominated document, subject to contrary order as identified in r 2.32(3).

1. The appellants also relied upon *DCT v* ***State Grid*** *International Australia Development Company Limited* [2022] FCA 577, in which Thawley J made a non-publication order in respect of the bank account details of a party and over limited commercially sensitive information to prevent prejudice to the proper administration of justice. The confined pieces of information over which a non-publication order were granted were considered to be of no benefit to an understanding of the court’s reasoning and there was a perceived risk that the information could be misused.
2. The appellants submitted that Mr Deng’s affidavit included:
* serious allegations of misconduct against Mr Lee;
* details of all the assets of the appellants including their values;
* details of the appellants’ bank accounts, including account numbers and balances;
* bank statements of the appellants produced by banks under compulsory notices issued by the Commissioner; and
* private personal information concerning Mr Lee’s medical conditions.
1. The appellants submitted that there was no obvious public interest in disclosing these details, referring to *Buckeridge v FCT* [2013] FCA 897; 95 ATR 670 at [11].
2. The appellants also submitted that public confidence would “be undermined where disclosure of affidavit material would result in loss of a person’s statutory rights to have a dispute determined in private and a statutory obligation to keep protected information private”.

### Consideration

#### The appellants’ case before the primary judge

1. It is first necessary to make some observations about the way in which the appellants ran their case before the primary judge.
2. The appellants chose to run their case on an all or nothing basis. The appellants did not submit to the primary judge that suppression orders should be made with respect to particular parts of the evidence. The appellants’ case was that the whole court file be suppressed, including all of the evidence. The corollary of its argument was that access to Mr Deng’s affidavits should not be granted to The Age. There was no case, for example, that the publication of the appellants’ bank account details might facilitate wrongdoing such that those details should be the subject of a suppression order under s 37AG(1)(a) in circumstances where that kind of detail was wholly irrelevant to the public interest in open justice.
3. Indeed, the orders the appellants sought extended well beyond that, by seeking suppression of documents to be filed in the future.
4. Notwithstanding oral submissions made to this Court to the contrary, the appellants did not run a case before Bromwich J that his Honour should treat differently documents which had specifically been drawn to the attention of Abraham J and those which had not.
5. The primary judge stated at [9]:

Neither by the second respondent’s affidavit, nor by submissions made by the respondents, was there any overt link or nexus advanced between the asserted reputational harm and any consequent harm and thereby the asserted need for a suppression order on the one hand, and the prevention of prejudice to the proper administration of justice on the other. Yet that was the ground for the making of a suppression order in s 37AG(1)(a) of the *FCA Act*, relied upon, as identified in [6] of the orders sought as set out at [1] above. The case advanced by the respondents was that such harm was of itself, and without more, necessary to prevent prejudice to the proper administration of justice. How and why that was so was never made clear except by reference to the reasons given in [*A v FCT*], which I discuss further below, and which, read only on its face, may suggest that is sufficient.

1. The point which Bromwich J was making in the paragraph just set out was that he considered that the appellants did not explain how or why an order of the scope contended for was “necessary to prevent prejudice to the proper administration of justice” beyond the assertion of harm. This needed to be explained because an order under s 37AF must be based on a ground in s 37AG.
2. The point the appellants make on appeal is that there may be circumstances where reputational damage and commercial damage are such that a suppression order should be made because the fact of that harm might be sufficient in the circumstances to warrant a suppression order on the basis that it is “necessary to prevent prejudice to the proper administration of justice”.

#### Open justice

1. It is next necessary to say something about open justice. As mentioned, s 37AE provides that “the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice”. In *Porter* at [83], Jagot J observed that open justice is “a” primary consideration, not “the” primary consideration.
2. Open justice facilitates public scrutiny of the way in which courts decide cases and enables the public to understand how the justice system works and why decisions are taken. Counsel for The Age referred to *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 23)* [2019] VSC 417; 58 VR 611 at [63], in which Elliott J stated (citations omitted):

The rationale of the principle of open justice is to expose court proceedings, and the evidence in court proceedings, to “public and professional scrutiny”. Such scrutiny informs the public as to how judicial power is exercised, and on what evidential basis. Relatedly, it helps ensure courts are held accountable, and so guards against the possibility of the misuse of judicial power. As a result, it aids in maintaining public confidence in the integrity and independence of the courts.

1. The ex parte orders were made on the basis of Mr Deng’s affidavits. These affidavits constituted the evidence on which the court based its decision. Section 17 of the FCA Act required the court to exercise its jurisdiction in “open court”. Section 17 is qualified by s 37AF which empowers the Court in certain circumstances to forbid or restrict the publication of evidence – see, in relation to the operation of former s 50 of the FCA Act: *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 (**Hogan 1**); *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [89] (**Hogan 2**).
2. Absent the exercise of power under s 37AF (the appellants did not rely on any inherent power), the open justice principle required the disclosure of Mr Deng’s affidavits in so far as they were deployed in “open court”. There was an obvious public interest in disclosing the material, namely the public interest in understanding the evidentiary basis on which the court exercised an invasive power.

#### Section 37AG(1)(a)

1. The issue required by the statute to be addressed was whether the making of a suppression order (a non-publication order was not sought) was, in the proved circumstances, “necessary to prevent prejudice to the proper administration of justice”: s 37AG(1)(a).
2. If it is established that a suppression order is “necessary to prevent prejudice to the proper administration of justice”, then it would be erroneous not to make it: *Hogan 1* at [33]. If it is not “necessary”, then it cannot be made. The word “necessary” in s 37AG(1)(a) is a strong word, not dealing with trivialities: *Hogan 1* at [30].
3. As the primary judge noted at [28], all five justices of the High Court (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) in *Hogan 1* stated at [31] (footnotes omitted):

It is insufficient that the making or continuation of an order under s 50 [of the FCA Act] appears to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some “balancing exercise”, the order appears to have one or more of those characteristics.

1. It follows from the statutory language that it is necessary to identify the contended prejudice to the proper administration of justice that would result if the order is not made. The fact that a person will suffer reputational or commercial harm from publication of evidence relied upon in open court does not have the necessary consequence that the proper administration of justice is or will be prejudiced. Such harm can be an inevitable part of open justice.
2. That is not to deny that there might be circumstances where likely reputational or commercial harm from the publication of particular information might be such that an order is “necessary to prevent prejudice to the proper administration of justice”. There are numerous examples of when that might occur. The publication of bank account numbers which might be misused if published and which are wholly irrelevant to understanding the work of the court or the reasons for a decision furnishes an example. One would justifiably think less of the justice system if there was no way of suppressing the publication and dissemination of harmful information which was unnecessary to achieving an object informing the open justice principle.
3. The primary judge stated at [35]:

The reasoning in *Oreb Full Court* [*Oreb v ASIC* (2016) 247 FCR 316] casts substantial doubt upon the approach taken by Perram J in *A v FCT* of apparently relying upon no more than reputational harm and the economic consequences flowing from that in circumstances in which there was no apparent suggestion of this impeding the bringing of proceedings then or in a future case, nor any other link to the proper administration of justice identified.

1. At [40], the primary judge stated that it was “critical that a connection be made between the asserted necessity, and the prevention of prejudice to the proper administration of justice”. At [41], his Honour observed:

A possible example of a situation meeting the requirements of s 37AG(1)(a) referred to in the authorities quoted above is when a failure to make such an order will adversely affect the willingness of litigants in a like position to be candid in the future, so as to justify suppressing commercial in confidence material that collaterally protects the administration of justice in that way, noting that this was never a feature of the present case. The concern is with adverse allegations and the effect that them becoming public might produce.

1. Justice Perram in *A v FCT* concluded that reputational and commercial harm which might ensue if no suppression order was made (and his Honour appears to have been appropriately restrained in setting out facts to avoid aggravating the problem) was, in the circumstances identified by his Honour, such that a suppression order was “necessary” to prevent prejudice to the proper administration of justice. There is something wrong with the administration of justice if disclosure of information which will cause significant harm is the necessary corollary of the tender of material, in the ex parte circumstances of that case, when that disclosure does not advance the open justice principle. This appears to be the conclusion Perram J reached. His Honour expressly linked the reputational and commercial harm to s 37AG(1)(a).
2. Justice Bromwich’s reference to the necessity for a link between the contended harm and s 37AG(1)(a) is correct. That link can be established by evidence or made through argument in various ways. There are “categories” of situations which arise more regularly than others, but there is no set of closed “categories”. In *Porter* at [85], Jagot J gave as an example the protection of trade secrets and commercial confidentiality, together with numerous others – see: [71] above. In *State Grid*, Thawley J stated at [16] that “commercial sensitivity can provide a proper basis for the making of a suppression or non-publication order provided it is properly linked to a ground in s [37AG(1)](https://jade.io/article/218757/section/231145)”.
3. In *Hogan 2* at [21], French CJ gave examples of where a suppression order might be necessary to prevent prejudice to the proper administration of justice. One wasa proceeding involving a secret technical process where a public hearing of evidence of the secret process could “cause an entire destruction of the whole matter in dispute”. A further example given was:

In the prosecution of a blackmailer, the name of the blackmailer’s victim, called as a prosecution witness, may be suppressed because of the “keen public interest in getting blackmailers convicted and sentenced” and the difficulties that may be encountered in getting complainants to come forward “unless they are given this kind of protection”.

1. A suppression order might be shown to be “necessary to prevent prejudice to the proper administration of justice”, for example, where it is made in respect of particular information which could be misused or cause significant harm, being information which is not germane to securing the objective of open justice. If the principle of open justice is not advanced by publication of particular information in the evidence (such as bank account details or passwords), the publication of which might reasonably be expected to facilitate wrongdoing, it might reasonably be concluded that a suppression order is “necessary to prevent prejudice to the proper administration of justice”. No such case was advanced by the appellants. Rather, the appellants contended for expansive orders suppressing all evidence, without advancing any alternative narrow case.
2. There was no proper basis for the primary judge to conclude that the entirety of the evidence should be the subject of a suppression order because there was no proper basis to conclude that such an order was “necessary to prevent prejudice to the proper administration of justice”. No specific material was identified which would cause any harm. The existence of the freezing orders had been published in the media. All of the harm identified by the appellants was caused by the freezing orders and the media articles.
3. None of this is altered by adding to the relevant considerations the fact that Div 355 of Sch 1 contains a statutory regime aimed at preserving the secrecy of “protected information”. Those provisions operate according to their terms. They do not directly address the present circumstances. The terms of that regime cannot dictate the answer in a separate statutory regime – see, by analogy: *Herald & Weekly Times Limited v Williams* [2003] FCAFC 217; 130 FCR 435. As noted earlier, that is not to say that the existence of the regime is irrelevant in considering whether a suppression order is “necessary” in any given case. The existence of the regime, and its application (or non-application), is a part of what falls to be considered in deciding whether a suppression order is “necessary to prevent prejudice to the proper administration of justice”.

#### The arguments concerning the right to a private hearing in other proceedings

1. The appellants’ submission that public confidence would “be undermined where disclosure of affidavit material would result in loss of a person’s statutory rights to have a dispute determined in private and a statutory obligation to keep protected information private” should also be rejected.
2. First, the disclosure of the material does not result in the loss of any statutory right to have a dispute determined in private. On the other hand, it is to be accepted that – depending on the specific circumstances – the practical utility of the statutory right might be diminished. That will not always or even generally be the case and, as is explained below, is not likely to be the case here.
3. A taxpayer may bring Part IVC proceedings in the AAT or the Court: s 14ZZ(1) of the TAA. If the taxpayer brings a Part IVC “appeal” in this Court, there is no relevant statutory right to have the hearing held in private. If a taxpayer applies to the AAT for “review”, then the taxpayer has the right conferred by s 14ZZE which provides:

**14ZZE Hearings before Tribunal to be held in private if applicant so requests**

Despite section 35 of the AAT Act, the hearing of a proceeding before the Tribunal for:

(a) a review of a reviewable objection decision; or

(b) a review of an extension of time refusal decision; or

(c) an AAT extension application;

is to be in private if the party who made the application requests that it be in private.

1. The disclosure of material relied upon in open court in proceedings in the Federal Court does not alter the statutory right conferred by s 14ZZE in any legal sense. The mere fact that a taxpayer has a right to seek review of an objection decision in the AAT and that the hearing can be held in private cannot have the automatic consequence that any information deployed in open court in other proceedings should be the subject of a suppression order, even where those proceedings are related in some way.
2. Secondly, it is to be accepted that the fact that a taxpayer has a right to request that a hearing be held in private might be relevant to the question whether a suppression order is “necessary” within the meaning of s 37AG(1)(a), but its relevance depends on the circumstances of the case.
3. The appellants did not articulate a particular reason why *the blanket suppression orders* sought by the appellants were “necessary to prevent prejudice to the proper administration of justice” in connection with the statutory right in s 14ZZE apart from the submission that it would rob the appellants of the practical utility of that right. This submission cannot be accepted. The Part IVC proceedings, should such proceedings ever be instituted, are likely to include a substantial amount of different evidence to that adduced on the ex parte application before Abraham J. That evidence is likely to include evidence going to the Commissioner’s evasion finding in addition to extensive evidence about the relevant transactions and circumstances relevant to the contested assessments. The statutory right under s 14ZZE (assuming it is exercised) preserves the confidentiality of all of this and the existence of the Part IVC proceedings will be confidential.

# CONCLUSION

1. Leave to appeal should be granted. The appeal should be dismissed. The appellants should be ordered to pay the costs of the application for leave to appeal and the appeal and of The Age.
2. Notwithstanding the stance adopted by the appellants both before Bromwich J and on appeal, the Court would have been inclined to make a suppression or non-publication order in respect of the bank account numbers contained in Mr Deng’s affidavits. The appellants did not seek such an order and the Counsel for The Age has consistently indicated that such material will not be published. There is therefore, no immediate necessity for such an order.
3. Any application for a suppression or non-publication order in respect of bank account numbers can be dealt with by the docket judge if and when such an application is made. It is unlikely to be controversial.

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| I certify that the preceding one hundred and eight (108) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Thawley, Stewart and Abraham. |

Associate:

Dated: 2 March 2023

SCHEDULE OF PARTIES

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| --- | --- |
|  |  |
| Applicants |  |
| Fourth Applicant: | LANE COVE WEST DEVELOPMENT PTY LTD ACN 095 268 330 |
| Fifth Applicant: | TEA GARDEN FARMS PTY LTD ACN 121 160 503 |
| Sixth Applicant: | AUSTRALIAN PINE PRODUCTS PTY LTD ACN 617 399 158 |
| Seventh Applicant: | MINGZE PTY LTD ACN 630 719 176 |
| Eighth Applicant: | LANDMARK DEVELOPMENT & FINANCE GROUP PTY LTD ACN 101 469 372 |