Privilege in relation to tax advice

Discussion Paper
April 2011
## CONTENTS

**FOREWORD** ........................................................................................................................................... V

**SUMMARY** ............................................................................................................................................. 1

**BACKGROUND** ....................................................................................................................................... 3
  - Operation of the existing law .................................................................................................................. 3
  - The Australian Law Reform Commission Report .................................................................................. 6

**RATIONALE FOR A TAX ADVICE PRIVILEGE** .................................................................................... 7
  - International precedents ....................................................................................................................... 8

**ARGUMENTS FOR AND AGAINST ESTABLISHING A TAX ADVICE PRIVILEGE** ................................. 11
  - Increased scope for documents to be covered ....................................................................................... 12
  - Professional codes of practice and accountability ............................................................................... 12
  - Potential for delay or abuse .................................................................................................................... 14
  - Mixed practices ...................................................................................................................................... 15
  - ‘Floodgate’ argument .............................................................................................................................. 15
  - International and domestic inter-agency context ................................................................................... 16
  - What sort of regime? ................................................................................................................................. 16
  - Guiding questions ................................................................................................................................... 18
FOREWORD

In so many ways accountants are the keepers of the great domestic secrets of how Australian lives are lived. The consiglieri of suburban prosperity, accountants and tax professionals know the intimacies of kitchen table budgets, of holidays foregone and school fees paid, of the nursing home chosen and the beach house not purchased. It is an expertise of the margins by which a small business prevails, or goes under.

Accounting is a profession of high ethical standards and the Gillard Government firmly believes that accountants did an excellent job during the Global Financial Crisis.

So I am pleased to release this discussion paper which considers the appropriateness of establishing a tax advice privilege.

In a 2007 report, the Australian Law Reform Commission examined the rationale for legal professional privilege in the modern context, and canvassed some circumstances in which privilege might be modified or improved. In this context, the Commission proposed that a privilege should be established to shield certain tax advice documents from the information gathering powers of the Commissioner of Taxation.

This discussion paper considers this recommendation in greater detail by exploring the implications of such a privilege for the tax and accounting profession, as well as the consequences of establishing a limited privilege on the advice and documents prepared by these professionals. I am sure this paper will encourage a robust debate.

This Gillard Government is committed to maintaining an active dialogue with the tax and accounting professions, and we encourage considered industry input on this issue. However, we are also keen to extract the views of other stakeholders. This way we can determine how to best proceed with this matter.

In advance of your input, I thank you for your engagement.

Assistant Treasurer and Minister for Financial Services and Superannuation
The Hon Bill Shorten MP
SUMMARY

The Commissioner of Taxation, along with other statutory bodies such as the Australian Customs and Border Protection Service, and the Australian Crime Commission, has wide-ranging statutory powers to gain access to the information of Australian taxpayers.

These powers are subject to the common law, which protects from disclosure taxpayers’ confidential communications with their lawyers, and communications between their lawyers and third parties for the purposes of obtaining legal advice or with reference to litigation. This is commonly known as ‘legal professional privilege’.

This privilege does not apply in relation to communications with non-lawyer tax advisers. However, the Australian Taxation Office’s administrative arrangement (‘the accountants’ concession’) in practice provides significant protection for advice given by tax agents.

Exceptions and qualifications apply under both the common law and accountants’ concession.

In 2007, the Australian Law Reform Commission (ALRC) conducted an inquiry into the operation of legal professional privilege in relation to the coercive information gathering powers of various Commonwealth bodies (Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies). In that report, the ALRC recommended that a tax advice privilege be established, which would protect tax advice documents provided by independent professional accounting advisers, against the coercive information gathering powers of the Commissioner of Taxation. The ALRC further recommended that claims for ‘tax advice privilege’ be made and resolved in accordance with procedures it recommended for the timely resolution of claims of legal professional privilege. The Government is considering these and other procedural reforms set out in the ALRC report.

This discussion paper seeks your views about the appropriateness of establishing a tax advice privilege and related issues, including:

• What problems, if any, have you experienced with the current arrangements?
  – Are taxpayers or tax advisers experiencing problems with the Australian Taxation Office’s accountants’ concession?
  – Are claims under the accountants’ concession or legal professional privilege causing undue delay to, or frustrating, the functions of the Tax Office or other agencies?
  – Does the rationale underpinning legal professional privilege extend to taxpayers’ confidential communications with an accountant?

If a ‘tax advice privilege’ is established:

– Which model would best serve the policy objectives underpinning a tax advice privilege taking into account international experience and the information requirements necessary to administer the tax system fairly?

– Should a tax advice privilege provide the same protection to communications with tax agents as legal professional privilege does for communications with lawyers?

– To which communications should a tax advice privilege apply, and what exclusions should apply?

– What procedures should be put in place to provide an appropriate balance between protecting client information, and ensuring that the information gathering functions of the Tax Office are not unduly delayed or frustrated?

– Should a tax advice privilege apply only in respect of the coercive information gathering powers of the Tax Office, or also to other bodies such as the Australian Crime Commission?

– What would be the appropriate vehicle for a tax advice privilege? For example, should the provisions be in the Taxation Administration Act 1953?

The appropriateness or otherwise of the Tax Office’s information gathering powers is outside the scope of this paper.
BACKGROUND

OPERATION OF THE EXISTING LAW

Common law protection of tax advice

1. Communications made for the purpose of giving tax advice do not enjoy any specific protections under the common law.

2. However, if the adviser is a lawyer, legal professional privilege has been held to protect the confidentiality of the client’s communications with the lawyer (or, in some circumstances, with a third party)\(^2\), provided that these communications have the dominant purpose of:
   • enabling the client to obtain, or the lawyer to give, legal advice (advice privilege); or
   • preparing for actual or contemplated litigation (litigation privilege).

3. The privilege is a right enjoyed by the client. It ‘has nothing to do with the protection or privilege of the lawyer.’\(^3\)

4. Consequently, legal professional privilege may protect the confidentiality of tax advice given by lawyers, and prevent its disclosure in a variety of processes, such as investigations by agencies and in preliminary court procedures (for example, discovery of documents).\(^4\)

5. However, similar protections do not exist at common law for tax advice given by non-lawyers, such as accountants.

6. It was recently argued on appeal before the Court of Appeal in England that tax advice provided by a non-lawyer is in fact protected under the common law doctrine of legal professional privilege. However, the court did not accept this argument, and affirmed the decision of the United Kingdom High Court that legal professional privilege can be claimed only by clients of lawyers and not by clients of accountants, even where an accountant is engaged to provide tax advice.\(^5\)

Statutory protection of tax advice

7. There is also no statutory protection that is specific to tax advice given by non-lawyers.

8. The Commonwealth Evidence Act 1995 has provisions that enshrine the common law legal professional privilege. Part 3.10 of this Act gives statutory expression to the legal advice and litigation limbs of the privilege as well as the circumstances in which this privilege can be lost.

\(^2\) For example, privilege has been held to cover communications between a client and an accountant for the purposes of obtaining advice from a lawyer (see James Hardie (Investigations and Proceedings) Act 2004 (Cth), and the Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010 (NSW)).

\(^3\) Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543 at 87, per Kirby J, quoting the words of Advocate-General Slyn in the European Court of Justice.

\(^4\) Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543.

\(^5\) Regina (Prudential plc and another) v Special Commissioner of Income Tax and another (Institute of Chartered Accountants in England and Wales and others intervening) [2010] EWCACiv 1094; [2010] WLR (D) 252.
To differentiate common law from the statutory privilege, the Act uses the expression ‘client legal privilege’. The client legal privilege provisions in the Evidence Act do not apply to the use of investigative powers such as those of the Commissioner of Taxation. In addition, the Evidence Act only applies to proceedings before a Federal or an Australian Capital Territory court. A similar statutory privilege is contained in the New South Wales, Victorian and Tasmanian Evidence Acts.

9. In addition to client legal privilege, the New South Wales and Tasmanian Evidence Acts also provide for a professional confidential relationship privilege. Such provisions do not yet exist in other Australian jurisdictions. Although labelled a privilege, this privilege is better described as a judicial discretion as it does not automatically apply. Instead, this privilege gives courts the discretion to direct that evidence of a communication made by a person in confidence to another person who is acting in a professional capacity not be adduced, if it is satisfied that:

- it is likely that harm would or might be caused to the person who made the protected confidence; and
- the nature and extent of the harm outweighs the desirability of the evidence being given.

10. The professional confidential relationship privilege could potentially apply to protect the confidentiality of tax advice given by professional tax advisers. Unlike the Federal statutory client legal privilege provisions, this privilege applies in both trial and pre-trial proceedings. However, it would not prevent the Commissioner of Taxation from using statutory information gathering powers in other contexts.

The Tax Office’s accountants’ concession

11. The Tax Office has an administrative practice of allowing a range of documents to remain confidential, despite not being subject to legal professional privilege. This practice is known as the accountants’ concession, and it has been in operation since 1989. This practice is explained in Chapter 7 of the Tax Office’s *Access and Information Gathering Manual*, and in the Commissioner’s guidelines on gaining access to such documents.

12. The policy recognises that taxpayers should be able to comprehensively consult with professional accounting advisers, and have full and frank discussions about their rights and obligations under the tax laws. The Tax Office acknowledges that there is a class of documents which should generally remain within the confidence of taxpayers and their tax advisers. By applying the accountants’ concession, the Tax Office undertakes that it will not use its compulsory power to obtain this class of documents (except in specified cases).

13. The accountants’ concession distinguishes between different classes of documents:

- source documents (records of transactions), to which Tax Office officers will seek full and free access;
- restricted source documents (advice documents shedding light on transactions); and
- non-source documents (other advice documents).

---

14. The accountants’ concession is available only for restricted source and non-source documents, as prescribed by the guidelines. Source documents, even if created for the purpose of obtaining tax advice, are not protected by the concession as they would be by legal professional privilege.

15. For the accountants’ concession to apply the documents must be prepared by external professional accounting advisers who are independent of the taxpayer (meaning, the concession does not apply to communications with internal tax advisers). Further, the documents must have been prepared for the sole purpose of providing advice.

16. The policy also allows the Tax Office to gain access to otherwise protected documents in exceptional circumstances, with the written approval of senior tax officers. Examples of such circumstances include: tax avoidance arrangements; cases where there is a reasonable belief that fraud, evasion or some other tax offence has occurred; and where the Tax Office is unable to gain access to the taxpayer’s source documents and cannot obtain sufficient information from another source to verify the taxpayer’s affairs. While some of these circumstances broadly reflect the common law exceptions to legal professional privilege, the third effectively provides the Tax Office with an exception to privilege that is beyond these common law exceptions.

17. The Tax Office considers that obtaining access to relevant information is the key ingredient in its deterrence strategies which aim to support honest taxpayers. The Tax Office believes that alternative models may deprive it of information vital to the administration of the tax laws. Other agencies have also expressed concerns to the ALRC that claims of privilege can be used to frustrate or delay important investigations.

18. Practitioners have expressed concerns about the accountants’ concession, in particular in relation to:

- the fact that the concession is not enshrined in law and that the Commissioner expressly permits departures from it in exceptional circumstances;
- whether there is consistency of interpretation and administration of the concession by Tax Office Audit staff;
- the escalation procedures where parties disagree with Tax Office audit staff decisions or approaches; and
- the practicalities of claiming the concession (that is, the forms involved).

19. The ALRC found no evidence that the accountants’ concession was not working appropriately.

---

7 ibid [7.1.5].
8 Although the Federal Court has stated that the concession could engender a legitimate expectation in the taxpayer that it would be applied (One.Tel Ltd v Commissioner of Taxation [2000] FCA 270), the Commissioner must still discharge his public obligations under the Income Tax Assessment Act 1936, and as such, may depart from the concession (Stewart v The Deputy Commissioner of Taxation [2010] FCA 402).
9 National Tax Liaison Group Meeting Agenda, 23 June 2010 Item 6.
10 ibid.
11 ibid.
20. In November 2006, the then Attorney-General, the Hon Philip Ruddock MP, announced a reference to the ALRC to inquire into legal professional privilege, and how it affects Commonwealth bodies with coercive information gathering or associated powers.


22. The report is primarily focused on the contemporary rationale for maintaining legal professional privilege, and the competing public interests in effective law enforcement. It also makes significant recommendations about the procedures for handling claims of privilege. For example, it recommends a procedural framework that would require claimants to provide particulars of their privilege claims (including a description of the documents, relevant supporting facts and the grounds for the claim) within a specified time (see Recommendations 8-3 to 8-15 of the ALRC report).

23. The Attorney-General’s Department is considering these recommendations insofar as they relate to a Commonwealth-wide procedural framework for making and resolving claims of legal professional privilege.

24. The report also considers whether legal professional privilege should be expanded to cover tax advice provided by tax practitioners who are not lawyers, and concludes that the modern rationale for legal professional privilege (that confidentiality encourages people to seek professional advice and so supports compliance with the law) also applies to such advice. Accordingly, the ALRC recommended the establishment of a tax advice privilege to protect the confidentiality of tax advice given by independent professional accounting advisers from the information gathering powers of the Commissioner of Taxation (Recommendation 6-6).

25. The ‘tax advice privilege’ contemplated in Recommendation 6-6 would effectively formalise—and to some extent extend—the existing accountants’ concession. The privilege would only apply to information sought by the Tax Office (and not other agencies).

26. The proposed ‘tax advice privilege’ would include the following features:

   • The privilege would apply to tax advice documents created by an independent professional adviser who is a registered tax agent, or by such an agent’s nominee or employee.

   • An advice document would be protected if its *dominant purpose* was to provide tax advice (as opposed to the *sole purpose* used in the Tax Office’s accountants’ concession).

   • The privilege would not apply where a tax advice document is created in relation to the commission of a fraud or offence or the commission of an act that renders a person liable to a civil penalty; or where the person or the accounting adviser knew or ought reasonably to have known that the document was prepared in furtherance of a deliberate abuse of power.
• The privilege would not extend to documents that have not been kept confidential.

• The privilege would not extend to a ‘source’ document (for example, a ledger or a contract), even if it was given to a tax agent for the purpose of obtaining advice.

• The privilege would not extend to documents, or parts of documents, that provide ‘contextual information’ (that is, facts or assumptions that have occurred or are postulated, or descriptions of steps in transactions that have occurred or are postulated, or advice that does not concern the tax laws).

27. The report notes that a statutory privilege for tax practitioners currently exists in the United States, the United Kingdom and New Zealand.

28. The ALRC report supports the New Zealand model of creating a separate ‘tax advice privilege’, rather than simply extending legal professional privilege to accountants giving tax advice, because it would allow Parliament greater control over the operation and scope of the privilege. It recommends that claims of tax advice privilege be dealt with under the general procedure it proposed for dealing with other claims of privilege.

RATIONAL FOR A TAX ADVICE PRIVILEGE

29. The ALRC considered the rationale for the creation of a tax advice privilege by comparing it with the rationale for legal professional privilege.

30. The High Court in Grant v Downs set out the principle that has become the basis of any explanation of the rationale for legal professional privilege in this country:

‘The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exercised by judicial decision. None the less there are powerful considerations which suggest that the privilege should be confined within strict limits.

31. Deane J in Baker v Campbell stated that:

12 ALRC, op.cit., [6.278].
13 ALRC, op.cit., [6.286].
15 ibid 586.
16 (1983) 49 ALR 385.
‘If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part.’

32. In Baker v Campbell, Dawson J justified the restriction of legal professional privilege to members of the legal profession in these terms:

‘The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.’

33. The common theme of any statement of the rationale for legal professional privilege is that it exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyer. Where legal professional privilege applies, it is because this public interest outweighs the competing public interest in having all relevant information available to facilitate a proceeding in court, or an investigative process.

34. Submissions to the ALRC described many ways in which legal professional privilege facilitates the administration of justice. Some apply only to the particular role of the lawyer, while it could be argued that others may have application to other professionals, including tax advisers. For example:

- facilitating compliance with the law and thus reducing the likelihood of future litigation;
- facilitating early settlement; and
- minimising unrepresented litigants.

35. The argument has been made in many forums that the public and private interest in confidentiality that is the basis for legal professional privilege also applies to legal advice provided by professional accounting advisers on the operation of the tax law. The ALRC accepted this argument.

INTERNATIONAL PRECEDENTS

36. Several jurisdictions have taken legislative action to protect the confidentiality of advice provided by tax advisers. These jurisdictions provide a potential model for a tax advice privilege in Australia, as well as case studies for examination of the benefits and problems of such an extension.

17 ibid 445.
18 ibid 443.
19 ‘It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist “a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.”’ Baker v Campbell (1983) 49 ALR 385, 393.
20 ALRC, op.cit., [6.275].
United States

37. In 1998, the United States legislated to extend the common law attorney-client privilege (as legal professional privilege is known there). Any communications between a taxpayer and a federally authorised tax practitioner that would have been privileged had they been with an attorney (including in investigatory processes) are covered by this extended privilege.21

38. The United States tax advice privilege only applies in non-criminal matters before the Internal Revenue Service (IRS), and non-criminal tax proceedings brought by or against the United States.22

39. It does not apply to communications which promote participation in tax shelters.23

40. However, since the Internal Revenue Service (IRS) can choose to initiate criminal or civil actions, there have been concerns about whether the availability of this privilege could influence the IRS’s choice.24

41. Further, because the privilege is limited to non-criminal matters, tax practitioners may be inclined to refer many clients to lawyers instead to ensure information pertaining to criminal activity would be protected.25

United Kingdom

42. The United Kingdom provides a limited statutory privilege for documents and communications with tax advisers. This exempts, in certain circumstances, a tax adviser from the requirement to provide information or documents in response to a tax authority information notice.26

43. ‘Tax adviser’ is defined as ‘a person appointed to give advice about the tax affairs of another person’. The communications must be between the tax adviser and either the client or another tax adviser of the client, for the purpose of giving or obtaining advice about the person’s tax affairs.27

44. It does not protect information that simply explains other information, tax returns, accounts or other documents prepared by the tax adviser.28

New Zealand

45. In 2005, New Zealand introduced a statutory privilege for confidential tax advice documents made for, or in the course of, communications with a registered tax adviser about the operation and effect of tax laws.29

22 ibid § 7525(a)(2).
23 ibid § 7525(b).
25 ibid.
26 Her Majesty’s Revenue and Customs may require certain information from persons generally or from taxpayers under its power to inquire into the tax liability of any person — Chapter 9 and Schedule 36 of the Finance Act 2008 (UK).
27 Section 25 of Schedule 36 to the Finance Act 2008; previously the Taxes Management Act 1970 (UK) c 9, ss 20B(9)-(14).
28 ibid s 26(1).
29 Tax Administration Act 1994 (NZ) s 20B.
46. This privilege applies to information which the Inland Revenue Department may require to be furnished so it can administer or enforce their functions, as well as other information which is subject to a discovery obligation.

47. This privilege does not protect tax advice documents created for the purpose of committing, or promoting or assisting the committing of an illegal or wrongful act.

**Comparison**

48. Each of the jurisdictions introduced changes through legislation and not through any judicial intervention.

49. The United States model applies the common law attorney-client privilege to authorised tax practitioners, unlike the United Kingdom and New Zealand, which have codified a separate privilege for tax advisers.

50. Therefore, the United States model arguably has the advantage of ensuring that the advice of both lawyers and tax practitioners is treated in the same way, thereby promoting competition principles. This also means that the United States concept of privilege for lawyers and tax practitioners can easily and simultaneously evolve under the common law.

51. In contrast, future modification and evolution of the United Kingdom and New Zealand models are ultimately at the behest of their respective Parliaments, and they did not seek to affect the existing common law legal professional privilege. The ALRC endorses this feature, believing that it would be preferable to give the Australian Parliament control over the operation and scope of this new privilege. The United States, United Kingdom and New Zealand models each limit the scope of the tax advice privilege to those communications sought by their respective tax authorities under general information gathering powers. The ALRC also supports this feature, because restricting the privilege to the information gathering powers of the Commissioner of Taxation would appropriately limit the privilege, and would not interfere with the investigative powers of other agencies.

52. While both the United Kingdom and New Zealand models codify their tax advice privilege, the United Kingdom privilege is more limited, and does not reflect the current scope of legal professional privilege. For instance, the United Kingdom privilege does not apply to documentary communications that are the property of the client. Further, the United Kingdom privilege does not extend to advice that merely explains information provided to HM Revenue and Customs.

53. The United Kingdom and New Zealand privileges are not limited to communications concerning non-criminal matters, unlike the United States model.

54. The New Zealand model appears most closely to resemble the current administrative practice in Australia.

---

30 ibid ss 16-19, 208.
31 ibid s 208.
32 ibid.
ARGUMENTS FOR AND AGAINST ESTABLISHING A TAX ADVICE PRIVILEGE

55. The arguments for and against the creation of a tax advice privilege lie in competing public policy issues. Arguments for such a privilege derive from the public policy of allowing full and frank communications between client and adviser. Those against stem from the desirability, in the interests of justice, of ensuring the fullest possible access to the facts relevant to a case. This balancing exercise has been discussed by commentators, academics and by the High Court of Australia with respect to legal professional privilege. The ALRC report canvasses the competing arguments comprehensively. This discussion paper does so only in summary form.

56. The competing arguments regarding the scope and exercise of legal professional privilege in relation to a revenue authority’s powers to obtain information were canvassed by the New Zealand Law Commission in 2000. The Commission considered whether a compelling need had been established to abolish non-litigation privilege (that is, advice privilege) in tax matters. The majority report commenced by citing the observations of the Privy Council and Court of Appeal respectively that:

‘The whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if the Commissioner had no power to obtain confidential information about taxpayers who may be negligent or dishonest.’

‘For obvious reasons the Commissioner cannot be totally reliant on a taxpayer’s willingness to comply honestly and accurately with the reporting requirements of the legislation and will often have regard to “other information” obtained from third parties.’

57. The New Zealand Law Commission rejected arguments to the effect that privilege should apply in tax matters in the same way it does to other matters, noting that the existence of a solid tax base is essential to the efficient functioning of a developed state. The Commission’s Report considered that ‘[it] is all too easy for a foreign-owned corporation so to manipulate its accounts as to diminish tax liability to a particular state in which it operates’, and said ‘[t]he Commissioner of Inland Revenue needs all the help he can get’.

58. The New Zealand Report also emphasised the importance of perceptions of fairness to a taxation system that relies on voluntary compliance:

‘It is important that taxpayers A to Y should not be discouraged from voluntary compliance by the belief that taxpayer Z is assisted in concealing his non-compliance by a rule as to privilege initially devised for an entirely different purpose (the proper functioning of the courts), and having as its principal relevant effect an interference with the performance by the appropriate officer of state of his duty to enquire and to investigate.’

---

33 For instance, see Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 168 ALR 123, 132-139.
35 New Zealand Stock Exchange v CIR [1992] 3 NZLR 1, 4, as cited by LCNZ, above n 50, [1].
36 New Zealand Stock Exchange v CIR [1990] 3 NZLR 333, 336 (Richardson J), also cited by LCNZ, op.cit., [1].
38 ibid [12].
59. Where a tax advice privilege applies, it may inhibit or prevent access by the Commissioner of Taxation to information that is potentially relevant to the exercise of his or her statutory duties.

60. A good case may be made that there is insufficient justification for changing the current arrangements in the short term.

61. In particular, despite concerns that the Tax Office could disregard the accountants’ concession whenever it chose, the ALRC did not make any findings that the concession was not working appropriately.

62. On the other hand, it can be argued that as tax lawyers and tax accountants are competing for the same business, competitive neutrality requires that communications in respect of their advice should be treated equally. Under the present arrangements, for instance, some legal firms have stated on their websites that their clients’ documents are better protected than they would be if an accounting firm were consulted. A tax advice privilege would mitigate this bias.

63. However, to ensure neutrality, it would be important that a tax advice privilege did not go beyond the operation currently enjoyed by legal professional privilege. For example, it would be important to ensure that the exceptions to legal professional privilege apply equally to any established tax advice privilege.

**INCREASED SCOPE FOR DOCUMENTS TO BE COVERED**

64. In contrast to a client’s communications with a lawyer, which are by their nature characterised as for the purpose of obtaining legal advice, an accountant may also be providing advice or performing non-tax advice roles for the client (for example, auditing, registration of a company or preparation of traditional accounting statements). If a ‘tax advice privilege’ were established, it might be problematic to isolate communications regarding one professional function from another. Moreover, the communications may be made for dual or multiple purposes. This may have the potential to give rise to claims of privilege for a broader range of documents than can be now done under both the accountants’ concession and legal professional privilege.

65. This risk might be particularly evident if a tax advice privilege were to extend to the advice of in-house accountants.

**PROFESSIONAL CODES OF PRACTICE AND ACCOUNTABILITY**

66. Another relevant distinction may arise from the unique duties lawyers have to the both the law and the court, as well as the strict professional and ethical training required to enter legal practice.

---

39 For instance, see Taxation Institute of Australia, Submission LPP 54, 15 June 2007, as cited by ALRC, op.cit., [6.242].
40 The boundary between tax advice and legal advice may not always be clear. For example, the recent AAT decision *Sinclair v FCT* [2010] AATA 902 drew a distinction between legal advice on the construction of a contract and taxation advice concerning the implications stemming from the contract.
67. Lawyers have a unique relationship with the law. As a result, a legal practitioner has a duty to ‘uphold the law and not to subvert the law’.\(^{41}\) Further, as an officer of the court, a lawyer’s duty to the court overrides the duties owed to a client or to other persons.\(^{42}\) *Halsbury’s Laws of Australia* explains that the duties to the court ‘include responsibilities in respect of legal processes and proceedings and duties of candour and fairness’.\(^{43}\) For example:

‘A lawyer owes a duty to the court not to abuse the court’s processes by the improper initiation or maintenance of court proceedings. Further, a lawyer owes a duty to the court to refrain from conduct which may tend to defeat justice and must not consciously mislead the court’.\(^{44}\)

68. The Law Society of New South Wales has argued that these unique duties ‘impose a degree of control upon the processes by which claims of privilege are made’.\(^{45}\) For example, the Law Society of New South Wales explained that,

‘lawyers can be personally liable for costs incurred in mounting applications without any basis for doing so and also subject to professional misconduct procedures. These potential threats impose a degree of care and restraint upon lawyers in relation to making claims for privilege. Similar care may not be exercised by other categories of advisors’.\(^{46}\)

69. Further, before being admitted to practice, barristers and solicitors are required to make full disclosure to the court of any criminal convictions and other matters relevant to fitness for admission. This duty ‘to place before the Court any matter that might reasonably be regarded by the Court as touching on the question of fitness to practise’\(^{47}\) is an onerous one, and any failure to disclose can result in the lawyer being struck off the court roll.

70. This distinction may not be as compelling since the *Tax Agent Services Act 2009* was enacted, establishing a code of conduct for tax agents and the Tax Practitioners Board to supervise their professional behaviour. The Board is a statutory body established under the Tax Agent Services Act, to supervise registration and professional standards of tax advisers, and to administer a code of conduct similar to that which applies to legal practitioners.

71. However, it is questionable whether the degree of oversight and discipline the Tax Practitioners Board has over tax agents can be equated with a lawyer’s obligations to the court. For example, not all registered tax agents are qualified accountants or members of professional associations. Further, some tax agents who were not registered under the previous regime will now be registered until 2012, without going through the full registration process, under the transitional arrangements for the new regime.\(^{48}\)

72. The ALRC examined the different professional requirements and obligations of legal and accountant tax advisers. In apparent recognition of the lesser requirements for accountants, one of its recommendations was for ethical training as a requirement to admission (as it currently is for admission to practice of lawyers) and continuing ethical education.

\(^{41}\) *Halsbury’s Laws of Australia*, 2002 [250-380].
\(^{42}\) *Giannarelli v Wraith* (1988) 165 CLR 543 at 555-6 per Mason CJ, 586-7 per Brennan J.
\(^{43}\) *Halsbury op.cit.*, [250-385].
\(^{44}\) ibid [250-390].
\(^{46}\) ibid.
73. Moreover, as Justice O’Connor of the Supreme Court of the United States has noted, entry requirements, the role of professional associations, strict rules about conflicts of interest, restrictions on advertising and solicitation are not guaranteed to succeed, and must be subject to review and what her Honour called ‘skeptical criticism’:

‘Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms length manner that may be appropriate when buying an automobile or choosing a drycleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are heeded because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonising is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in a narrow economic sense) among members of the profession’.  

POTENTIAL FOR DELAY OR ABUSE

74. Any benefits of a tax advice privilege when used properly need to be weighed against the disadvantages which arise if it is abused. Abuses could include deliberately creating privilege over vital source documents to prevent access to them, and making unfounded privilege claims to delay investigations. Further, the establishment of a tax advice privilege without first resolving the procedural issues around the resolution of privilege claims (which was the focus of the majority of the ALRC’s recommendations) could encourage such conduct and would be likely to give rise to additional delay and uncertainty.

75. The question of abuse was considered by the ALRC with respect to legal professional privilege. Various agencies submitted to the ALRC that improper claims of legal professional privilege are discovered from time to time.  
The Australian National Audit Office reported that in conducting a review of tax penalties it was informed that:

‘legal professional privilege is being used as a tactical tool to impede and frustrate both the progress and ultimate outcomes of taxation audits (in terms of restricting the auditor’s ability to access factual information about transactions and arrangements).’

76. The Cole Royal Commission into certain activities of the Australian Wheat Board also expressed concerns regarding inappropriate claims of legal professional privilege in relation to

50 For example, see ALRC, op.cit., [6.34-6.39].
clearly unprivileged documents, and the resultant greatly increased time and expense of the Royal Commission.52

77. Claims relating to legal professional privilege have been the subject of numerous proceedings in the Federal and High Courts in relation to the Operation Wickenby Cross Agency Taskforce investigations, resulting in delays and considerable cost. In the absence of clarification of the principles, and development of procedures, it is likely that the establishment of a tax advice privilege will result in additional delays and difficulties.

**MIXED PRACTICES**

78. The minority view in the New Zealand Law Commission report53 noted that there had been, at the time, ‘an increased interest in the establishment of multidisciplinary practices’ in New Zealand — these are practices with both lawyers and accountants. The minority report commented that many questions about legal professional privilege could arise from these new types of entities. However, it deferred making any recommendations about how New Zealand could best accommodate these developments, believing that it was the New Zealand Parliament’s responsibility to address the privilege when there was more information about these firms.54 To date, there have not been any developments in this area.

79. In contrast, as previously mentioned, the United States has extended its common law legal privilege, allowing it to be enjoyed by clients of ‘alternative business structures’. This simple approach recognises the increasing incidence of multi-disciplinary enterprises, and affords professional non-lawyers the same treatment as lawyers who provide similar services.

80. On the other hand, smaller accounting firms are arguably disadvantaged under the current system in Australia. Employing a lawyer may be perceived to be an easy way for a large accounting or mixed firm to gain access to common law legal professional privilege — a solution not readily available to smaller practices.

**‘FLOODGATE’ ARGUMENT**

81. Another difficulty is that establishing a tax advice privilege to apply to communications with and by non-lawyers is likely to lead to calls by other professionals to have their own privilege. In the tax field, advisers other than registered tax agents such as financial advisers are providing the same kinds of services as lawyers and tax agents. While the competitive neutrality argument arguably applies equally to these advisers, they are not subject to the strict codes of practice and disciplinary procedures of lawyers and, to a lesser extent, registered tax agents.

82. More broadly, specialist advisers in non-tax areas who are performing similar functions to lawyers (for example, in the area of occupational health and safety) could justifiably claim that the principles justifying a tax advice privilege apply equally to them.

53 LCNZ op.cit., [64].
54 ibid [66].
INTERNATIONAL AND DOMESTIC INTER-AGENCY CONTEXT

83. The question of extending privilege to tax advice documents should also be considered in the context of multinational corporate groups and increasing cooperation between tax enforcement and regulatory bodies using cross-border information and intelligence sharing.

84. If privilege is extended, it would be necessary to guard against unexpected or uncertain outcomes when, for example, the Tax Office is requesting or providing information in relation to a member of a multinational group under information sharing agreements or tax treaties.

85. Similarly, it would be necessary to ensure that the creation of a tax advice privilege would not affect the ability of the Tax Office to participate in taskforces and joint investigations and to share information with law enforcement agencies domestically.

WHAT SORT OF REGIME?

86. If a tax advice privilege is to be established, consideration will need to be given to the model that would best serve the policy objectives for doing so, taking into account international experience and the information requirements necessary to administer the tax system fairly.

87. The potential models provided by international regimes should be considered in the light of Australian experience. However, the form ultimately adopted would depend on the approach taken to the various policy and rationale issues discussed above.

88. For instance, in light of the rationale for legal professional privilege, there is an argument for implementing a regime that covers both lawyers and accountants who provide tax advice.

89. A regime that is common between the two professions is also supported by competition principles. A separate regime applying to accountants would not address the current inequality of treatment for clients who seek tax advice from accountants compared with those who use legal firms.

90. Such a regime could expressly codify the common law ‘advice’ privilege in respect of tax advice, and provide a code governing the operation of that privilege applying to the information gathering powers of the Tax Office. The types of documents that would be covered and excluded from the operation of the privilege could be set out. For example, it is difficult to see how source documents could be sensibly covered by privilege, as this undermines the operation of the record keeping provisions that are essential to the integrity of the tax law. The Tax Office accountants’ concession could provide a model for which documents should be covered by the privilege.

91. Another possibility would be to extend the common law legal professional privilege to tax advice provided by registered tax practitioners, along the lines of the United States model. This would have the advantage of providing equality of treatment for the advice of tax professionals. However, for such an option to be functionally equivalent, further consideration would be needed of how the different duties and ethical standards of lawyers and other tax advisers could be harmonised. Further, problems identified by the ALRC under the current system would be unresolved and could even expand.

92. The system recommended by the ALRC would apply only to a ‘tax advice document’ created by an independent professional accounting adviser.
93. A regime based on this recommendation could be located in the *Taxation Administration Act 1953*. Doing so would also clearly differentiate it from the wider common law legal professional privilege, which also protects communications so far as they relate to anticipated or current litigation.

94. Under any model that limits the application of tax advice privilege to the information gathering powers of the Tax Office (as opposed to those of other agencies), it would be necessary to address the issue of exchange of information between the Tax Office and other agencies. For example, if the Australian Crime Commission had privileged documents sought by the Commissioner, could the Tax Office obtain them from that agency or not? It would also need to consider how information obtained through independent means (such as from a third party) that the client might have a claim of privilege over would be dealt with in court proceedings. Should this power only apply to documents requested from the client or tax adviser as part of an investigation, or should it extend to protect these documents in any later court proceedings?
GUIDING QUESTIONS

95. The Government is interested in your views on the following questions:

A. What problems, if any, are being experienced with the current arrangements?
   
   (a) Are you experiencing any problems with the Tax Office’s accountants’ concession? If not, what specific problems do you believe exist?
   
   (b) Are claims of legal professional privilege or under the accountants’ concession causing undue delay to, or frustrating, the functions of the Tax Office or other agencies?
   
   (c) Does the rationale for legal professional privilege also apply to tax advice communications with an accountant?
   
   (d) Do you think that the current arrangements should be changed by amending the law to provide a privilege for tax law advice given by tax agents?
   
   (e) Would it be preferable to develop the principles and procedures in conjunction with the Attorney-General’s Department on a Commonwealth-wide basis, or does the nature of tax advice suggest that it should be developed separately?
   
   (f) Are the Tax Practitioners Board requirements equivalent to those imposed on lawyers, as officers of the court? Are any differences relevant in this context?
   
   (g) Would the professional confidential relationship privilege provisions of the model Uniform Evidence Bill, combined with the accountants’ concession, provide adequate protection for tax advice provided by non-lawyers?

B. If a tax advice privilege is established:
   
   (a) What procedures should there be to ensure client information is protected, while also ensuring that the proper investigative functions of the Tax Office are not unduly delayed or frustrated? For instance, what penalties should apply for spurious claims? Should the protection extend beyond investigations to protect privileged information in court proceedings?
   
   (b) What model would best serve the policy objectives, taking into account international experience? For instance, should Australia codify a privilege for tax law advice provided by tax agents (as in the New Zealand model) or should it simply extend the application of legal professional privilege to tax law advice provided by tax agents (as in the United States model)?
   
   (c) Should a codified privilege apply equally to communications with lawyers as well as with tax agents, replacing the common law legal professional privilege for tax matters?
   
   (d) Should a codified privilege extend only to registered tax agents (and their nominees or employees) or should it also cover the advice provided by Business Activity Statement (BAS) agents, and by the employees and nominees of tax agents and BAS agents?
(e) Should a codified privilege apply to other financial advisers who provide tax advice, economists advising in respect of transfer pricing, or accountants providing asset and liability valuations in thin capitalisation cases?

(f) Should a codified privilege apply to in-house accountants?

(g) To which communications or documents should a tax advice privilege apply? For instance, should it extend to the same material that is covered by legal professional privilege, or should it only cover the advice parts of documents as the ALRC has recommended?

(h) What exclusions or exceptions should apply? For instance, should the common law exclusions be imported, or is a wider or narrower set of exceptions appropriate?

(i) Should a tax advice privilege apply only for the coercive information gathering powers of the Tax Office, or also to other bodies such as the Australian Crime Commission? If it should only apply to access attempts by the Tax Office:

- how should the law deal with cases where another agency holds the information the Tax Office seeks access to?
- how would this affect the ability of other law enforcement agencies to access information from the Tax Office?

(j) What would be the appropriate instrument for enactment of a tax advice privilege? For instance, should the provisions be contained in the Taxation Administration Act 1953?

(k) Should any changes to current arrangements be brought into effect as soon as possible, or should they be delayed until the Government is ready to implement a general arrangement for resolving claims of privilege along the lines recommended by the ALRC?