

Privilege or concession: the modern tax adviser's challenge

by Donovan Castelyn, Associate Lecturer, Annette Morgan, Lecturer, and Dale Pinto, CTA (Life), Professor of Taxation Law, Curtin University

The gap between legal and non-legal advice, particularly in the context of taxation matters, continues to be truncated through the advent of technological advancements and industrial developments. In the Australian context, a litany of professional advisers and groups are capable of providing taxpayers with tax advice. Broadly, these advisers operate within either the accounting or legal profession and offer similar, if not identical, services. This article explores the relative merits of the privileges or concessions afforded by professional advisers to their clients, and in so doing, advocates for the abrogation of any distinctions in favour of the enactment of a separate statutory tax advice privilege.

Introduction

A litany of professional advisers and groups are capable of providing Australian taxpayers with tax advice.¹ Broadly, these advisers operate within either the accounting or legal profession and offer similar, if not identical, services. Where tax advice is sought from a legal adviser, legal professional privilege (LPP) has been held to protect confidential communications between the lawyer and their client.² In contrast, tax advice acquired from an adviser who is not a lawyer does not receive the equivalent statutory or common law protection. In some circumstances, however, the Commissioner of Taxation allows tax advice provided by a professional non-lawyer to remain confidential through a non-binding, discretionary administrative privilege known as the “accountants’ concession”.³

This article argues for the abrogation of the distinction between the accountants’ concession and LPP and, in doing so, advocates for the enactment of a statutory tax advice privilege for appropriately accredited non-legal tax advisers. Further, the author recommends that the framework proposed by Wilson-Rogers, Morgan and Pinto in their 2014 article, “The primacy of client privilege: designing a statutory

tax advice privilege for accredited non-lawyer tax advisors”, guides the implementation of such a regime.⁴

This article begins by outlining the current situation with respect to privilege over tax advice in Australia and considers the application of LPP in tax disputes. It then examines the distinction between the accountants’ concession and LPP, and advocates for the abrogation of the distinction in favour of the enactment of a separate statutory tax advice privilege. The final section of the article makes some concluding observations and comments on the practical limitations associated with the recommendation.

Legal professional privilege

Legal professional privilege — a right enjoyed exclusively by the clients of lawyers — is both a doctrine of the common law and a matter of statute.⁵

Common law privilege will protect confidential communications⁶ between a person and their legal adviser — or third parties in limited circumstances (ie accountants, experts or other lawyers)⁷ — where the communication was either for the dominant purpose of obtaining legal advice or for use in actual or anticipated litigation.⁸ Statutory client legal privilege available under ss 118 to 126 of the *Evidence Act 1995* (Cth) is broadly similar to the common law privilege in some respects, although with some significant differences.⁹ Notably, the privileges in the latter provisions apply almost exclusively to proceedings in the Federal Court,¹⁰ and do not apply to the audit and investigative powers of the Commissioner.¹¹ Accordingly, much of the discussion below concentrates on the common law privilege.

A concise statement of the doctrine was offered by the joint judgement of Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources v FCT (Esso)*,¹² with their Honours stating that:¹³

“Legal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice [legal advice privilege] or the provision of legal services, including representation in proceedings in a court [litigation privilege].”

The policy rationale of LPP has formed much of the discussion in numerous authoritative Australian cases, including *Baker v Campbell*¹⁴ and *Grant v Downs*.¹⁵ The protection afforded by LPP, in essence, “exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers”.¹⁶ As observed by Deane J in *Baker v Campbell*,¹⁷ a person should be entitled to seek and obtain legal advice in the conduct of their affairs — and legal assistance in or for the purposes of the conduct of actual or anticipated litigation — “without the apprehension of being prejudiced by subsequent disclosure of the communication”.¹⁸ The application of LPP therefore necessitates a balancing of competing public interests, notably, “the public policy reflected in the privilege itself, and the public policy that, in the administration of justice and investigative procedures, there should be unfettered access to relevant information”.¹⁹

The application (and limitations) of LPP is best illustrated by way of reference to decided case law; hence, this article will now discuss this protection in the context of tax disputes as they exist in Australia.²⁰

LPP and tax disputes

Disputes between taxpayers and the federal or state tax authorities are common.²¹ These disputes generally arise where a taxpayer's position is challenged by the revenue authority, with the onus then placed on the taxpayer to rebut the assertions of the government.²²

To ensure that taxpayers comply with income tax laws, the Commissioner is armed with wide audit and investigative powers.²³ These powers enable the Commissioner to access documents, goods or property,²⁴ or otherwise obtain information,²⁵ in order to investigate instances of suspected non-compliance.²⁶

While communications made for the purpose of giving tax advice do not attract specific protection under either common law or statute,²⁷ if the adviser is a lawyer and the advice sought came into existence for the dominant purpose of seeking legal advice or assistance (legal advice privilege),²⁸ or for the dominant purpose of use in existing or reasonably anticipated proceedings (litigation privilege),²⁹ LPP may consequentially protect the confidentiality of such advice.³⁰ In this regard, LPP can provide formidable protection against the coercive information-gathering powers of the Commissioner,³¹ as well as tax litigation.²

“The application of LPP therefore necessitates a balancing of competing public interests ...”

Application of LPP to the Commissioner's audit and investigation powers

The Commissioner's audit and investigation powers are contained in ss 353-10 and 353-15 of Sch 1 to the *Taxation Administration Act 1953* (Cth). Section 353-10 contains an “information” and “production” power, while s 353-15 contains an “access” and “inspection” power. Section 353-10 replaced former s 264 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) and s 353-15 replaced former s 263 ITAA36 in 2015.³²

The Full Federal Court decision in *FCT v Citibank Ltd*³³ is authority for the position that the doctrine of LPP restricts the Commissioner's powers of access under former s 263. Consequently, any powers that the Commissioner seeks to exercise pursuant to s 353-15 (ie to search or make copies of documents) are subject to the exercise of the privilege.

Further, and despite the adverse outcome for the taxpayer, the Full Federal Court decision in *FCT v Coombes (No. 2)*³⁴ confirms that LPP may also restrict the production of confidential communications, the subject of a former s 264 notice, but does not attach to mere collateral facts which a client tells their legal adviser, or which the adviser happens to observe in the course of acting for the client, such as the address and identity of a client.

Scope of privilege

Legal professional privilege may be dissected into two equally important and interrelated strands: legal advice privilege (LAP) and litigation privilege (LP). Each will be discussed in brief below.

The test for LAP was recently elaborated on by Yates J in *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd*³⁵ and later cited with approval by Edmonds J in *12 Years Juice Foods Australia Pty Ltd v FCT*.³⁶ Having regard to relevant authorities, and the judicial proclamations of Yates J, the following broad observations in respect of the application and limitations of LAP as it relates to tax disputes can be made:

1. LAP will attach to confidential tax communications,³⁷ where the dominant purpose of those communications is to obtain legal advice or assistance.³⁸ The relevant purpose of a communication is determined objectively, by reference to all the surrounding circumstances at the point in time when the communication was created;³⁹
2. this principle is perhaps best illustrated by way of reference to the landmark decision of the High Court in *Esso*.² In this case, the High Court, by majority, held that the dominant purpose test, and not the sole purpose test,⁴⁰ applies when determining whether the privilege attaches to a particular communication. Their Honours stated: “if the most that could be said of [a communication] in question was that the purposes for which they came into existence included a purpose of obtaining legal advice or assistance, then privilege would not apply”;⁴¹
3. accordingly, where there are a number of purposes for the creation of a communication, all of equal or similar weight, the communication will not be protected by LAP.⁴² Nor does LAP attach to communications lodged with a lawyer simply for the purpose of attracting privilege;⁴³ and
4. a communication prepared by a third party (eg an accountant) on the instructions, or with the authority, of the client for the dominant purpose of being communicated to a lawyer in order to obtain legal advice for the client may be protected by LAP. This position was confirmed in the Full Federal Court decision of *Pratt Holdings Pty Ltd v FCT*⁴⁴ where the court further confirmed that an agency relationship is not necessary for LAP to apply.⁴⁵

In respect of LP, the relevant test is whether the document sought to be protected was created for the dominant purpose of use in existing or reasonably anticipated proceedings.⁴⁶ Whether or not litigation is reasonably contemplated is a question of fact to be determined objectively.⁴⁷ When determining whether litigation was reasonably anticipated, the subjective views of the parties may be relevant, but are not determinative; the question is assessed by reference to all of the surrounding circumstances.⁴⁸

Notably, communications made for illegal or improper purposes, even if the legal adviser is not aware of those purposes, will not be protected by either LAP or LP.⁴⁹ This exception extends to a situation where the relevant illegal or improper purpose was that of a third party, even though

the client and lawyer did not harbour the same improper purpose,⁵⁰ as was the position in *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police*.⁵⁰ In that case, no privilege attached to communications from a solicitor in relation to tax avoidance schemes as they formed part of the implementation of fraudulent conduct between a lawyer and an ATO officer.

The following section will briefly discuss claims for privilege. References to LPP will include both LAP and LP as discussed above.

Claiming privilege

A claim of LPP must be supported by sufficient evidence, with the party claiming privilege bearing the onus of proving its privilege claim on the basis of that evidence.⁵¹ Beach J commented on this position in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 4)*,⁵² stating:⁵³

“... the applicants bear the onus of establishing the claims, including each factual element necessary to establish the requisite dominant purpose. In that respect, focused and specific evidence is required in respect of each communication, rather than mere generalised assertion let alone opaque and repetitious verbal formulae. There should be sufficient evidence which proves directly or by inference that the dominant purpose for the communication was for the relevant client to be given or to obtain legal advice. The communication also has to be confidential.”

It is important to note that the privilege belongs to the client. However, it is the lawyer's duty to claim.⁵⁴ Moreover, a communication will only be privileged while it remains confidential.⁵⁵

As the defence of LPP applies to the Commissioner's audit and investigative powers,⁵⁶ the Commissioner (or his delegates) must ensure that occupiers or other custodians of tax communication have an adequate opportunity to claim LPP.⁵⁷ However, it has been held that officers of the Commissioner can briefly view a communication for which privilege has been claimed, provided that the communication could reasonably be suspected as having relevance to the investigation and the perusal is done purely to determine whether or not the material might be privileged (a “lawful violation”).⁵⁸

Waiver of privilege

While a comprehensive discussion associated with the waiver of privilege is beyond the scope of this article, it is important to note that a person's claim to LPP can be waived.

Waiver may be express or implied. Waiver will be implied where the privilege holder's conduct is inconsistent with the confidentiality which the privilege is intended to protect.⁵⁹ In *Krok v FCT*,⁶⁰ the court concluded that the partial disclosure of legal advice was inconsistent with the maintenance of the privilege and that the disclosure had been undertaken to achieve some “forensic advantage”, contrary to the maintenance of privilege.⁶¹

Accountants' concession

Professional non-legal tax advisers are not afforded the same protections as their legal counterparts in respect of the confidential tax communications they provide to their clients.⁶² Rather, the form of protection provided

is a discretionary administrative concession extended by the Commissioner to a limited number of tax advice documents.⁶³ Termed the “accountants' concession” (concession), the administrative procedures which underscore the application and availability of the concession are provided for in the ATO's “Guidelines to accessing professional accounting advisers' papers” (guidelines).

The policy underlying the concession is in recognition of the volume of tax advice that is provided by non-legal tax advisers, and identifies that non-legal tax advisers and their clients should be able to engage in full and frank discussions regarding their taxation obligations.⁶⁴

To this end, the guidelines restrict, in all but exceptional circumstances,⁶⁵ access to certain communications that relate to transactions and other tax-related advice known, respectively, as “restricted source documents” and “non-source documents”.

Restricted source documents contain advice created prior to, or contemporaneously with, the transaction entered into by a taxpayer.⁶⁶ These are generally documents prepared by non-legal advisers for the purpose of providing tax advice in respect of the structure or ambit of a transaction.⁶⁷ Non-source documents include advice provided after a transaction has been completed which do not materially contribute to a tax strategy, or which relate to unimplemented transactions, as well as working papers in a current audit or assurance file.⁶⁸

The utility of the concession has formed the discussion of much judicial and academic commentary. In *One Tel Ltd v DCT*,⁶⁹ the court observed that: “the Guidelines ... give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out”.⁷⁰ Accordingly, the Commissioner now accepts that an affected person has a “legitimate expectation” or is entitled to a reasonable and adequate opportunity to argue that there are no exceptional circumstances.³

However, the guidelines, unlike LPP, in no way curtail the coercive information-gathering powers of the Commissioner as they do not have legislative force.⁷¹ Therefore, in abrogating the protections afforded by the concession, it has been held sufficient for the Commissioner or their agent to speculate on the relevance of the information regardless of whether that inference was based on findings of fact supported by logical grounds.⁷²

Hence, given the near unfettered discretion of the Commissioner to abrogate the concession,⁷³ it is commonly asserted that the accountants' concession is inferior to the protection afforded to lawyers under LPP and is fertile for review.⁷⁴

The great divide

Differential treatment of tax professionals in Australia, based on whether or not they are members of the legal profession, is an issue which continues to generate controversy.

Proposals to extend the ambit of LPP have, in the past, recommended the introduction of a statutory protection for tax advice and communications provided by non-lawyer advisers from the coercive information-gathering powers of

the Commissioner.⁷⁵ However, to date, no legislative reform has occurred.⁷⁶

The clearest explanation for the restriction of LPP to legal practitioners, in recent years, comes from the decision of *R (on the application of Prudential plc) v Special Commissioner of Income Tax*⁷⁷ heard in the UK Supreme Court, where their Honours noted the reasons for this position as:⁷⁸

“(i) the close connection between members of the legal profession and the court, (ii) historical observations and relics (albeit important relics), such as the involvement of the court in disciplinary procedures of solicitors and barristers, (iii) the duties to the court owed by members of their profession, and (iv) the view that solicitors and barristers are in a ‘special position’, in that they are held by the courts to higher standards than members of other professions.”

However, there is a substantial body of literature that considers why privilege should be extended to confidential communications made by non-legal tax advisers.⁷⁹ It is with reference to these observations that this article advocates for the abrogation of the distinction in favour of the enactment of a separate statutory tax advice privilege.

Provision of legal advice

Fundamentally, and irrespective of professional designation, both lawyers and non-legal tax advisers provide equivalent legal advice in respect of many areas of taxation law. Notably, this position is given explicit recognition by virtue of s 90-5 of the *Tax Agent Services Act 2009* (Cth), which states:⁸⁰

“... **tax agent service** is any service:

- (a) that relates to:
 - ...
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or...

Notwithstanding the advocacy services offered by lawyers to taxpayers in relation to litigation, insofar as tax planning and advice are concerned, the services provided by lawyers and non-legal advisers is, in many cases, substantially the same.⁸¹

Some proponents argue that the role of non-legal tax advisers in the tax system is distinct from that of lawyers and thereby justifies the exclusive grant of LPP to legal advisers. This view was promulgated by the members of the Administrative Appeals Tribunal in the decision of *Sinclair and FCT*.⁸² In this case, the role of the non-legal tax adviser was construed as more administrative as members opined that lawyers could more appropriately provide legal advice.⁸³

This view has generated considerable controversy and has been rebutted by a great number of commentators.⁸⁴ A notable point of contention was argued by Italia, who noted that:⁸⁵

“Taxation law does not exist in a vacuum; the transactions entered into by taxpayers will necessarily involve other areas of law, especially contract law, property law, and corporations’ law. These are all areas of law with which [non-legal tax advisers] are familiar. The line between: giving *tax advice*; *legal advice* and engaging in *legal practice* is far from clear.”

The amalgamation of expertise required in the provision of tax advice supports the abrogation of the distinction between the advice of lawyers and non-legal tax advisers, as well as the argument for the enactment of a separate tax advice privilege. Reform in this way would also align Australia with many comparable jurisdictions that have chosen to adopt this view.⁸⁶

Candour and the court

As articulated by the Law Council of Australia, a lawyer’s duty to the court is:⁸⁷

“... fundamental to the rationale for client legal privilege because it serves to emphasise that the lawyer’s duty is first and foremost to protect the administration of justice and to act as an officer of the Court. That duty is an important check and balance in the system. No other profession is subject to the same duties.”

In contrast, Lord Neuberger in *Prudential* noted:⁸⁸

“It is also true that solicitors and barristers owe a formal duty to the court, but (i) that duty only would be relevant in connection with litigation, whereas LAP goes much wider, and (ii) every professional person involved in litigation can fairly be said to have a duty to the court.”

It may therefore be argued that this duty alone should not justify lawyers being able to provide privileged advice. Indeed, the courts have stated that LPP is the client’s privilege⁸⁹ and therefore the dominant reason for the existence of this privilege appears to be so that clients have candour when seeking advice from their advisers.⁹⁰ The policy underlying the accountants’ concession reflects this rationale but provides a considerably compromised protection.⁹¹ In this way, the argument to remove the distinction is advanced further.

Equivalent penalties and obligations

Australian taxation law holds lawyers and non-legal tax advisers to a largely equivalent professional standard.⁹² For example, the promoter penalty regime applies similarly to promoters of tax schemes regardless of professional designation.⁹³ In this context, it is therefore arguable that, as lawyers and non-legal tax advisers are subject to the same professional standards, taxpayers should benefit from the same protection over the advice that they receive.⁹⁴

Conclusion

The latter part of this article briefly considered arguments for and against abrogation of the distinction between the advice provided by lawyers and non-legal tax advisers. A number of the justifications can be counterbalanced by arguments to the contrary. However, it is the position of this article that, on balance, the justifications for removing the distinction in favour of enacting a statutory privilege are compelling and timely.

The practical design issues that arise when creating a statutory tax advice privilege are numerous.⁹⁵ It is, however, the recommendation of this article that the model devised by Wilson-Rogers, Morgan and Pinto (which advocates for an extension of privilege to align lawyers and non-legal tax advisers with respect to tax advice, subject to the non-legal adviser meeting certain pre-requisites and accreditation

requirements (see the Appendix to this article))⁹⁶ inform the introduction of such a regime.⁹⁶

It is acknowledged that, in forgoing the distinction and extending privilege to non-legal tax advisers, one public interest — encouraging full and frank disclosure — arguably compromises another, that is, ensuring that the Commissioner has sufficient information to administer and enforce the tax law and, in this way, the abrogation of the distinction may actually reduce compliance with the law.

It is submitted, however, that a formulation of the privilege based on the work of Wilson-Rogers, Morgan and Pinto would ensure that ambit of such a privilege strikes the right balance between legal and non-legal advisers. This approach would recognise the importance of taxpayers having full and frank discussions in relation to their tax affairs with non-legal tax advisers and ensure that an appropriate level of information is still available to the Commissioner and that the privilege is administered correctly.

Donovan Castelyn

Associate Lecturer
Curtin University
Clinic Supervisor
Curtin Tax Clinic

Annette Morgan

Lecturer
Curtin University
Clinic Director
Curtin Tax Clinic

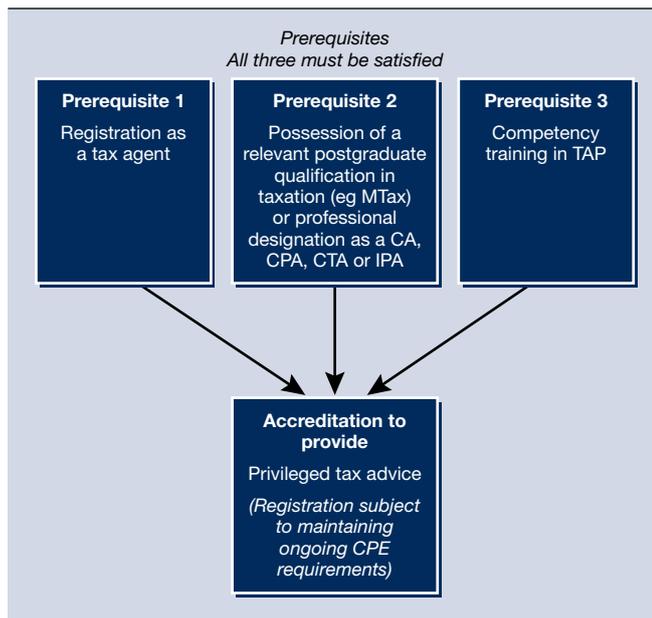
Dale Pinto, CTA (Life)

Professor of Taxation Law
Curtin University

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- 1 *Tax Agent Services Act 2009* (Cth) (TASA); Sch 1 (Requirements to become a recognised association) and Sch 2 (Eligibility for registration as BAS agent, tax agent or tax (financial) adviser: prescribed requirements) to the *Tax Agent Services Regulations 2009* (Cth).
- 2 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49.
- 3 ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018.
- 4 N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507.
- 5 See, generally, R Desiatnik, *Legal professional privilege in Australia*, Prospect Media Pty Ltd, 1999. The privilege is a substantive principle of the common law, and not merely a rule of evidence. See *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J. It protects any communication which would allow a reader to infer the content or substance of a privileged communication. See *AWB Ltd v Cole* (No. 5) [2006] FCA 1234 at [46] per Young J.
- 6 The privilege attaches to the communication rather than any document containing it. See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ; Dawson and Toohey JJ dissenting).
- 7 *Pratt Holdings Pty Ltd v FCT* [2004] FCAFC 122; [2005] FCA 1247; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd* (No. 4) [2014] FCA 796.
- 8 That is, where there is a reasonable likelihood that proceedings will be commenced. See *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526 at 538 per Goldberg J.
- 9 Discussion associated with the distinctions between common law legal professional privilege and statutory client legal privilege is beyond the scope of this work. For a comprehensive assessment of this topic, see K Smark, "Privilege under the Evidence Acts" (1995) *UNSW Law Journal* 95.
- 10 S 4(1) of the *Evidence Act 1995* (Cth). See also s 79 of the *Judiciary Act 1903* (Cth).
- 11 Ss 353-10 and 353-15 of the *Taxation Administration Act 1953* (TAA). Compare *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [12] per Edmonds J. See also *Esso Australia Resources Ltd v FCT* 201 CLR 49 at 59-63; *Adamas v O'Connor* 282 ALR 302 at [7].
- 12 *Esso Australia Resources v FCT* (1999) 201 CLR 49.
- 13 *Ibid* at [35]; *Pratt Holdings Pty Ltd v FCT* [2004] FCAFC 122.
- 14 *Baker v Campbell* [1983] HCA 39.
- 15 *Grant v Downs* [1976] HCA 63. See also *Waterford v The Commonwealth of Australia* [1987] HCA 25, *Carter v Northmore Hale Davy & Leake* [1995] HCA 33, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.
- 16 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at [35]. See also *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 685.
- 17 *Baker v Campbell* (1983) 153 CLR 52 per Deane J.
- 18 *Baker v Campbell* (1983) 153 CLR 52. Compare *Esso Australia Resources v FCT* (1999) 201 CLR 49 at [35] per Gleeson CJ, Gaudron and Gummow JJ.
- 19 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at [57] per Gleeson CJ, Gaudron and Gummow JJ. See also *Baker v Campbell* (1983) 153 CLR 52 at 106; *Grant v Downs* (1976) 135 CLR 674.
- 20 For the purposes of this article, the scope of this discussion is limited to claims for LPP in response to attempts by the Commissioner to exercise his information-gathering powers.
- 21 T Frost and C Hanson, "Australia", in S Whitehead (ed), *The tax disputes and litigation review*, Law Business Research, 2015, p 19. See also ATO, "Commissioner of Taxation: annual report 2016-17", 30 October 2017, p 66; J Leek, "Tax dispute resolution in the modern era", (2017) 21(2) *The Tax Specialist* 50.
- 22 *Ibid*. See also ss 14ZZK(b)(i) and 14ZZO(b)(i) TAA.
- 23 Div 353, Sch 1 TAA.

Appendix. Proposed process for the granting of a tax advice privilege to non-lawyer tax advisers⁹⁷



- 24 S 353-15 TAA.
- 25 S 353-10 TAA.
- 26 R Woellner, S Barkoczy, S Murphy, C Evans and D Pinto, *Australian taxation law*, Oxford University Press, 27th ed, 2017, paras 29 to 130.
- 27 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011, p 3.
- 28 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66; compare *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [13] per Edmonds J.
- 29 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66; compare *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [14] per Edmonds J. See also *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FCA 282.
- 30 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011, p 3. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
- 31 Div 353, Sch 1 TAA; *FCT v Citibank Ltd* (1989) 20 FCR 403.
- 32 *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth). While the new and old provisions are drafted in slightly different terms, they are intended to operate in essentially the same manner: see paras 2.26 to 2.27 of the explanatory memorandum to the Treasury Legislation Amendment (Repeal Day) Bill 2014 (Cth). The case law dealing with the former provisions therefore generally continues to be relevant for the purposes of the interpretation of the new provisions.
- 33 (1989) 20 FCR 403.
- 34 (1999) 92 FCR 240.
- 35 [2015] FCA 282 at [18].
- 36 [2015] FCA 741 at [13].
- 37 Confidentiality is the most important prerequisite since it is that quality that privilege aims to preserve. Private communications between a lawyer and a client are presumed to be confidential, see also s 117 of the *Evidence Act 1995*.
- 38 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66. Privilege only applies if the legal adviser is admitted to practice — see *Glengallan Investments Pty Ltd v Arthur Andersen* [2001] QCA 115 — and is acting in her or his professional legal capacity. See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 163 CLR 54.
- 39 A dominant purpose is to be understood in the sense of "the ruling, prevailing, paramount or most influential purpose". Compare *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FCA 282 at [18]. See also *FCT v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at [30]; *AWB Limited v Cole* (2006) 152 FCR 382 at [105]; *Wingecarribee Shire Council v Lehman Brothers Australia Limited (in liq) (No. 5)* [2011] FCA 245 at [18]; *Barnes v FCT* [2007] FCAFC 88 at [5].
- 40 As espoused by the majority in the earlier decision of *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ. Barwick CJ expressing a different view in his separate judgment.
- 41 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65.
- 42 *AWB Limited v Cole* (2006) 152 FCR 382 at [107]; *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FCA 282 at [18]; *FCT v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at [30].
- 43 *Baker v Campbell* (1983) 153 CLR 52; *Smorgon v FCT* (1979) 9 ATR 483.
- 44 [2004] FCAFC 122 per Finn, Merkel and Stone JJ. See also *Quality Publications Australia Pty Ltd v FCT* [2009] FCA 1293. In addition, communications between a client's legal advisers and third parties, with a view to obtaining evidence, may also be covered by legal professional privilege.
- 45 Where a communication contains both privileged and non-privileged matter, it may be possible, in an appropriate case, to order disclosure of that part of the communication which contains non-privileged matter, while simultaneously retaining the confidentiality of the privileged matter. See *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 at 66, 87 and 103; *Grofam Pty Limited v Australia and New Zealand Banking Group Limited* (1993) 43 FCR 408 at 414-417.
- 46 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66; *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [14].
- 47 *Grant v Downs* 135 CLR 674 at 682.
- 48 *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* [2007] FCAFC 147. There must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not. See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* 4 VR 332 at [19]. *Ensham Resources Pty Ltd v ALOL Insurance Company Ltd* 209 FCR 1 at [57].
- 49 *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 35 ATR 130.
- 50 *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 48 ATR 650.
- 51 *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [14]; *Kennedy v Wallace* [2004] FCAFC 337.
- 52 [2014] FCA 796.
- 53 *Ibid* at [29].
- 54 *Citibank Ltd v FCT* (1988) 83 ALR 144.
- 55 *FCT v Donoghue* [2015] FCAFC 183.
- 56 See, generally, *Citibank Ltd v FCT* (1988) 83 ALR 144; *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916.
- 57 *FCT v Citibank Ltd* (1989) 20 ATR 292.
- 58 *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916 at 4920-4924.
- 59 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487; *Mann v Carnell* (1999) 201 CLR 1 at 13; *FCT v Rio Tinto Ltd* (2006) 63 ATR 79 at 93.
- 60 [2015] FCA 51.
- 61 Importantly, compliance with procedural obligations in taxation litigation would not normally result in a waiver of privilege. See *FCT v Rio Tinto Ltd* (2006) 63 ATR 79 at 97; *RCI Pty Ltd v FCT* (2009) 76 ATR 591.
- 62 *Baker v Campbell* 83 ATC 4606 at 4649 (Dawson J).
- 63 ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018; *White Industries Australia Ltd v FCT* (2007) 160 FCR 298 at 94 (Lindgren J).
- 64 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011, p 11; Australian Law Reform Commission (ALRC), *Privilege in perspective: client legal privilege in federal investigations*, ALRC report 107, 13 February 2008; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8.
- 65 ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018, 7.1.8. Exceptional circumstances have been broadly construed to include: where the Commissioner believes fraud, tax avoidance, evasion or another illegal tax offence has taken place; and where the Commissioner requires the documents to ascertain material facts necessary to determine the taxation consequences of the transaction because the taxpayer or their records cannot be located.
- 66 *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192 at 5203-5211. See also ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018; N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507 at 509.
- 67 *Ibid*; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability" (2011) 21(1) *Revenue Law Journal* 8 at 5.
- 68 *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192 at 5205-5206 (Goldberg J); *White Industries Australia Ltd v FCT* 2007 ATC 4441 at 4444 (Lindgren J).
- 69 *ONE.TEL Ltd v DCT* [2000] FCA 270 (Burchett J); see also *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192 where Goldberg J held that the guidelines constitute a relevant consideration to which ATO officers must have regard.
- 70 *ONE.TEL Ltd v DCT* [2000] FCA 270 at [37].
- 71 J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8 at 12; *Deloitte Touche Tohmatsu v DCT* (1998) 40 ATR 435.

- 72 *Deloitte Touche Tohmatsu v DCT* (1998) 40 ATR 435; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALD 224 at 232 (Gummow and Hayne JJ); *Stewart v FCT* [2010] FCA 402.
- 73 N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507 at 509; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8; J Dunne, "Legislating the accountants' concession – considering the New Zealand experience", (2011) 46(1) *Taxation in Australia* 727; J Dunne, "Legislating the accountants' concession: considering the UK and US experience", (2011) 46(2) *Taxation in Australia* 43.
- 74 N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507 at 509; A Maples and M Blissenden, "The proposed client-accountant tax privilege in Australia: how does it sit with the common law doctrine of legal professional privilege", (2010) 39 *Australian Tax Review* 20.
- 75 Australian Law Reform Commission, *Privilege in perspective: client legal privilege in federal investigations*, ALRC report 107, 13 February 2008, recommendation 6-6; see also The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011.
- 76 See ALRC, "Annual report of the Integrity Commissioner 2011-2012", 25 October 2012, p 56, where Phillip Moss, the Integrity Commissioner, notes that the issue is still under consideration by Treasury. Note also that subsequent annual reports published by the Integrity Commissioner's office make no further mention on the progress of this matter.
- 77 [2013] UKSC 1, where, by a majority of 5:2, the court refused to extend LPP to accountants. In Australia, the common law position is similar to the UK in that privilege may be claimed for confidential communications made by a lawyer for the dominant purpose of providing legal advice.
- 78 *Ibid* at [42]. For a comprehensive assessment of why LLP has historically extended exclusively to communications with lawyers, see: ALRC, *Privilege in perspective: client legal privilege in federal investigations*, ALRC report 107, 13 February 2008; M Italia, "A taxpayer privilege for Australia", PhD thesis, Victoria University, 2015.
- 79 See, generally, N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507; A Maples and M Blissenden, "The proposed client-accountant tax privilege in Australia: how does it sit with the common law doctrine of legal professional privilege", (2010) 39 *Australian Tax Review* 20; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8; A Maples and R Woellner, "Privilege for accountants' tax advice in Australia – brave new world, or house of straw?", (2010) 25 *Australian Tax Forum* 143; J Dunne, "Legislating the accountants' concession – considering the New Zealand experience", (2011) 46(1) *Taxation in Australia* 727; J Dunne, "Legislating the accountants' concession: considering the UK and US experience", (2011) 46(2) *Taxation in Australia* 43.
- 80 S 90-5 TASA.
- 81 *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1 at 14. Notably, the comments of Lord Neuberger acknowledge that the restriction of LPP to lawyers providing taxation advice was incongruent with the modern realities of the provision of taxation advice.
- 82 [2010] AATA 902.
- 83 *Ibid* at [92]. This was also the position taken by the Law Council of Australia. See the Hon. Robert McClelland MP, "Response to the Australian Law Reform Commission report no. 107 – 'Privilege in perspective: client legal privilege and federal investigatory bodies'", Law Council of Australia, 28 March 2008. See further C Wallis, "Accountants cannot give legal advice: what that means for them, their clients and the lawyers", (2011) 45(10) *Taxation in Australia* 601 at 602.
- 84 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011; N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507; A Maples and M Blissenden, "The proposed client-accountant tax privilege in Australia: how does it sit with the common law doctrine of legal professional privilege", (2010) 39 *Australian Tax Review* 20; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8; A Maples and R Woellner, "Privilege for accountants' tax advice in Australia – brave new world, or house of straw?", (2010) 25 *Australian Tax Forum* 143; J Dunne, "Legislating the accountants' concession – considering the New Zealand experience", (2011) 46(1) *Taxation in Australia* 727; J Dunne, "Legislating the accountants' concession: considering the UK and US experience", (2011) 46(2) *Taxation in Australia* 43. See further *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1.
- 85 M Italia, "A taxpayer privilege for Australia", PhD thesis, Victoria University, 2015, p 253.
- 86 J Dunne, "Legislating the accountants' concession – considering the New Zealand experience", (2011) 46(1) *Taxation in Australia* 727; J Dunne, "Legislating the accountants' concession: considering the UK and US experience", (2011) 46(2) *Taxation in Australia* 43; Sch 36 to the *Finance Act 2008* (UK); s 7525 of the *Internal Revenue Code 1986* (US); s 20B-20G of the *Tax Administration Act 1994* (NZ).
- 87 The Hon. Robert McClelland MP, "Response to the Australian Law Reform Commission report no. 107 – 'Privilege in perspective: client legal privilege and federal investigatory bodies'", Law Council of Australia, 28 March 2008, p 10.
- 88 *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1 at [44].
- 89 *Baker v Campbell* (1983) 153 CLR 52.
- 90 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011; N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507.
- 91 J Tse and J Roberts, "The accountant's concession time for a rethink?", (2010) 45(4) *Taxation in Australia* 205.
- 92 See, for example, Div 30 TASA; *Legal Profession Conduct Rules 2010* (WA).
- 93 Div 290 TAA.
- 94 N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507.
- 95 *Ibid* p 522.
- 96 *Ibid* p 527.
- 97 N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507 at 527.