



THE TAX INSTITUTE

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Dear Mr Antioch

Discussion Paper: Privilege in relation to tax advice

The Tax Institute is pleased to provide our submission in response to Treasury's Discussion Paper entitled "Privilege in relation to tax advice" ("**Discussion Paper**").

Our submission considers the current operation of the Commissioner of Taxation's "Guidelines to accessing professional accounting advisors' papers" and Chapter 7 of the ATO's "Access and Information Gathering Manual" (the "**accountants' concession**") and the potential advantages and disadvantages of implementing a statutory protection for tax advice.

On the basis of these factors we recommend the implementation of a statutory protection for tax advice and have thus set out the broad parameters along which, in our view, the proposed statutory protection should be constructed, as well as the manner in which this protection should interact with legal professional privilege.

Our submission does not address all of the guiding questions posed in the Discussion Paper. However, where specific guiding questions are addressed, we have noted the relevant question for ease of reference.

Should it be determined that a statutory protection for tax advice should be introduced, we envisage that further implementation issues in relation to the operation of this protection will need to be determined. In this regard we recommend that such issues be resolved in partnership with the tax community (including The Tax Institute), akin to the process surrounding this Discussion Paper. The Tax Institute looks forward to participating in any such ongoing consultations on this subject.

Overview

In order for our tax system to function effectively, taxpayers' willing participation in the tax system¹ and compliance with tax obligations must be underpinned by a right to obtain tax advice that is guaranteed not to be against the taxpayer's own interests.

This rationale has been recognised as being relevant in the context of the provision of tax advice by:

- the Australian Law Reform Commission ("**ALRC**") in its report to the Attorney-General entitled "Privilege in Perspective: Client Legal Privilege in Federal Investigations" ("**ALRC report**"); and

¹ As envisaged in the Commissioner's Strategic Statement 2010-15

- the Commissioner of Taxation (the “**Commissioner**”) via the bestowing of the accountants’ concession.

As a result, the central question underpinning the Discussion Paper is not, in our view, whether a protection for tax advice should exist to protect certain documents from the Commissioner’s information gathering powers (as such a protection already exists), but instead whether the accountants’ concession is the best mechanism by which to achieve this goal, or whether a statutory embodiment of the concession would yield a more beneficial balance between the Commissioner’s right to access information and the taxpayer’s right to obtain tax advice in relation to those compliance obligations.

In order to avoid confusion between “legal professional privilege” and “tax advice privilege”, we recommend that the statutory right referred to in the Discussion Paper as “tax advice privilege” be instead referred to as “tax advice protection”. We have referred to the proposed statutory right in this manner throughout the remainder of our submission.

Accountants’ concession

According to the experiences of our members, the accountants’ concession in its current form:

- Provides insufficient guarantees to encourage obtaining tax advice in all circumstances. Our members have repeatedly reported that either due to the actual or perceived capacity of the ATO to pierce the accountants’ concession at will, this administrative guideline provides insufficient protection or guarantees that tax advice will not be accessed by the ATO against the interests of the taxpayer in the context of an audit or dispute;
- In certain circumstances encourages taxpayers to obtain tax advice from lawyers in order to obtain the benefit of legal professional privilege and therefore serves to work against the principle of competitive neutrality; and
- Creates uncertainty for taxpayers in their dealings with the ATO, in some cases resulting in increased costs of compliance when contesting the ATO’s right to access certain information, in some cases due to the need (whether perceived or actual) to retain a separate tax advisor and lawyer.

Statutory tax advice protection

As a result, our view is that:

- The accountants’ concession does not represent the optimal balance of competing interests, and should be replaced by a statutory protection for tax advice;
- Only a statutory tax advice protection will resolve the current problems with the accountants’ concession;
- The resolution of current problems with the accountants’ concession via introduction of a statutory tax advice protection will result in better implementation of the policy underlying the current accountants’ concession and therefore a fuller realisation of the benefits that were intended to flow from that administrative guideline i.e. the better equipment of taxpayers with relevant information in relation to their tax obligations;
- The introduction of a tax advice protection will aid in preventing distortions in the tax advice market and encourage competitive neutrality;
- We recommend that a statutory tax advice protection:
 - be created and applied separately from legal professional privilege and only apply in circumstances where legal professional privilege would not apply;
 - apply to advice provided by (and communications for the dominant purpose of giving or obtaining tax advice with or between) tax agents registered by the Tax Practitioners Board; and

- protect the advice and communications only from the Commissioner's coercive information gathering powers;
- Disputes that arise as to the applicability of the statutory tax advice protection should be determined by the Courts when the protection is first implemented and in accordance with the general arrangement for the resolution of disputes once such an arrangement is established;
- The Tax Institute recognises that the tax agent population differs significantly from the population of lawyers in many significant respects. As such, we recommend that the scope and application of the statutory tax advice protection be tailored to appropriately reflect those differences (guiding question 95(B)(b))²;
- Specifically, we recommend the introduction of a statutory tax advice protection akin to the model adopted in New Zealand or the United Kingdom (as set out at paragraphs 42 to 47 of the Discussion Paper)³. In our view a widening of the existing legal professional privilege to cover the relationship between tax agent and taxpayer (i.e. the United States model⁴) would not be appropriate in Australia as the relationship between lawyer and client differs significantly from the relationship between tax agent and taxpayer; and
- In so recommending, we do not seek to address the scope or operation of legal professional privilege. In our view this topic has been appropriately considered by both the private sector and the ALRC, and falls outside the purview of this Discussion Paper. This is because, as set out above, in our view the statutory tax advice protection would only apply in circumstances where legal professional privilege would not, and as a result the codifying and slight expansion of the operation of the accountants' concession should not affect the ongoing scope and operation of legal professional privilege.

Rationale for protection of tax advice

As noted above, the rationale for the protection of tax advice has been recognised by the ALRC in the ALRC Report, several overseas jurisdictions as set out in the Discussion Paper as well as by the Commissioner via the accountants' concession.

Specifically, the Commissioner notes in the Guidelines that "it is accepted that there is a class of documents which should, in all but exceptional circumstances, remain within the confidence of taxpayers and their professional accounting advisors. *In respect of such documents the ATO acknowledges that taxpayers should be able to consult with their professional accounting advisors on a confidential basis in respect of their rights and obligations under taxation laws to enable full and frank discussion to take place and for advice to be communicated on that basis.*" (emphasis added)

Thus, it has been recognised that where taxpayers have protected access to tax advice from a qualified tax agent in relation to their rights and obligations under the tax laws, the resulting information gleaned from taxpayers via income tax returns can be expected to be more accurate and complete than if such tax advice had either not been available, or the advice, once obtained, was able to be accessed by the Commissioner at his discretion (as is currently the case under the accountants' concession).

As noted by the ALRC, "Australian taxation law is complex, and the self-assessment system requires taxpayers to have a good understanding of their rights and obligations before they can make an assessment of their tax liability."⁵ As a result, taxpayers will only be able to fully understand and comply with their tax obligations if they have access to tax advice, where such access is guaranteed not to be contrary to the taxpayer's interests i.e. the advice must not be able to be accessed unilaterally by the Commissioner pursuant to his coercive information gathering powers.

² Please also see our further comments below in relation to the interaction that we envisage between legal professional privilege and the separately applied tax advice protection.

³ This recommendation is consistent with the recommendations set out in the ALRC report, as set out in paragraph 28 of the Discussion Paper

⁴ As set out at paragraphs 37 to 41 of the Discussion Paper

⁵ Paragraph 6.276 of the ALRC report

Without such access, Australia's revenue system may be disadvantaged by taxpayers attempting to fulfil their tax obligations without proper appreciation of either the laws or the consequences of their actions. Furthermore, taxpayers that have been encouraged to engage the services of a tax agent (and are therefore more likely to be fully briefed on what constitutes tax avoidance or tax evasion and the consequences) will be better equipped to comply voluntarily with their obligations.

Accordingly, a rationale similar to that underpinning legal professional privilege insofar as it relates to tax advice also applies to tax advice communications with a tax agent (guiding question 95(A)(c)).

Problems with the accountants' concession

In response to guiding question 95(A)(a), in the experience of our members, the Commissioner's current administrative practice i.e. the accountants' concession, does not operate as intended.

It is reported by our members that the ATO appears to adhere for the most part to its own administrative practice. However, the potential exclusions from the accountants' concession (such as the circumstances in which "exceptional circumstances" that are considered to arise) render the accountants' concession insufficient to provide adequate guarantees to encourage taxpayers to obtain tax advice as necessary, especially in relation to issues such as the application of the anti-avoidance rules.

In addition, the accountants' concession has in many circumstances proved difficult to apply, partly due to the inexact nature of the guidelines, but mostly as the concession is an administrative guideline in relation to the application of which taxpayers have only limited rights of appeal or review.

As a result of this limitation, our members report a perceived lack of transparency in relation to the determination of when the ATO will consider "exceptional circumstances" to have arisen and will therefore disregard the concession. In addition, the lack of an appeal mechanism or public availability of the reasons for such decisions has resulted in decisions as to the application of the accountants' concession having very little precedential value.

The scope of the accountants' concession has also proved insufficient, even where the meaning of "source", "non-source" and "restricted source" documents can be appropriately ascertained and applied. This is because as documents provided by taxpayers to accounting advisors for the purposes of obtaining the tax advice are typically not protected by the accountants' concession, the concession does not act to encourage taxpayers to provide such information to accountants for the purposes of obtaining tax advice. The "sole" rather than "dominant" purpose test applicable in relation to tax advice is also unnecessarily restrictive, and fails to protect many documents that contain tax advice from the Commissioner's coercive information gathering powers.

Perhaps most significantly, the guidelines refer broadly to the advice of "professional accounting advisors". Such a reference fails to recognise both the inherent difficulty in defining an "accounting advisor" as well as the rationale behind protecting the advice of tax agents who are neither accountants nor lawyers from the Commissioner's coercive information gathering powers.

Nor do the current arrangements overcome these shortcomings when considered in conjunction with the professional confidential relationship privilege provisions of the model Uniform Evidence Bill (which only apply in trial and pre-trial proceedings). That is because these provisions do not provide protection against the Commissioner's coercive information gathering in contexts other than trial and pre-trial proceedings and therefore do not assist in overcoming the deficiencies in the accountants' concession (guiding question 95(A)(g)).

Where taxpayers are incentivised to obtain tax advice, we have anecdotal reports from many members that taxpayers choose in certain circumstances to engage the services of a lawyer (even where the taxpayer's regular tax advisor is not a lawyer, and the taxpayer's tax advisor is also qualified and registered to provide that tax advice) for the purposes of obtaining such advice, in part to secure the benefits of the application of legal professional privilege. As a result, the current arrangements do not encourage competitive neutrality between providers of tax advice, and in some circumstances increase compliance costs for taxpayers.

Necessary improvements to the accountants' concession

As a result, in order to generate the benefits to the tax system and the Australian community that the accountants' concession was designed to provide, the accountants' concession needs to be improved to include the following features:

- Statutory right of appeal and access to an independent arbitrator to determine the application of the protection for tax advice;
- Extension of the current concession to include communications between tax agents, lawyers and taxpayers for the dominant purpose of providing tax advice; and
- A clear definition of the advisors whose advice is protected, and the documents and communications that are protected.

Codifying the accountants' concession

Potential advantages

- The codification of the accountants' concession along with a slight expansion of the scope of its operation (i.e. to include communications for the dominant purpose of obtaining tax advice) will resolve many of the current issues with the accountants' concession as set out above.
- The underlying rationale for the accountants' concession i.e. to allow for a freer exchange between tax advisor and taxpayer in order to secure access to tax advice for taxpayers in a protected environment will be more fully realised if the accountants' concession is codified. This is because codification will provide taxpayers with a positive right (supported by a right of appeal or review) that may be exercised as against the Commissioner in the context of his information gathering activities. As a result, the actual and perceived protection attaching to tax advice and communications for the dominant purpose of obtaining that advice will be significantly bolstered and will therefore permit a freer exchange between tax agent and taxpayer, as envisaged by the Commissioner in formulating the accountants' concession;
- A statutory tax advice protection should result in eventual behavioural change in the taxpayer community away from any disregard or lack of understanding towards voluntary compliance with tax obligations, where voluntary compliance refers to the fulfilment of tax obligations on the basis of the tax agent and taxpayer's opinion on the operation of tax laws; and
- Codification of the accountants' concession will result in increased similarity of the applicable laws governing the manner in which the Commissioner is required to treat tax advice provided by each qualified and registered provider. This will in turn reduce distortions in the tax advice market and therefore work in favour of the principle of competitive neutrality. We submit that this outcome will be an advantage for the following reasons:
 - Due to significant evolution in the tax advice market in the past few decades, there is currently greater similarity between the type of tax advice provided by some tax agents and lawyers than ever before;
 - The current structure of this market suggests that there is a strong basis for similar treatment of tax advice provided by all registered and qualified providers as in relation to the rights of consumers as against the Commissioner; and
 - Our members have provided us with anecdotal evidence that the availability of legal professional privilege for clients of lawyers is causing distortions in the tax advice market.

Potential disadvantages

The Discussion Paper canvasses a number of potential disadvantages of introducing a statutory tax advice protection. These are addressed below.

Commissioner's right to access information

The Discussion Paper notes that a statutory protection for tax advice could result in the Commissioner not having “the fullest possible access to the facts relevant to a case”. While we accept that a statutory protection for tax advice will restrict the Commissioner’s ability to access certain documents and communications, such a right should not limit the Commissioner’s access to information on the basis of which the taxpayer’s tax position may be considered.

This is because the statutory tax advice protection will not apply to source documents which the Commissioner can and does utilise to ascertain the relevant facts and circumstances of the taxpayer. Any advice provided by a tax agent or communications made for the purposes of obtaining such advice will relate to either:

- Facts and circumstances that may be evidenced by source documents to which the Commissioner will have unfettered access; or
- The tax agent’s opinion on the application of tax laws to the facts and circumstances of the taxpayer. Such opinion should be irrelevant to the Commissioner when determining his view of the taxpayer’s obligations under applicable tax laws, and should not in any way affect the Commissioner’s administration of our tax laws. In this regard we submit that a tax agent’s opinion on the application of tax laws does not properly constitute “information” as relevant to the Commissioner in making his determination as to the taxpayer’s tax obligations.

Regulation of Lawyers versus Tax Agents

The Discussion Paper canvasses the obligations placed on lawyers as officers of the court to “uphold the law and not to subvert the law” as a relevant distinction between lawyers and tax agents when considering whether the tax profession should be entrusted with the right to claim a statutory protection for tax advice.

In order to appropriately restrict the application of a statutory tax advice protection to advice provided by and communications with advisors who are appropriately regulated and qualified, we suggest that the population of “advisors” could be restricted to tax agents registered by the Tax Practitioners Board (rather than the potentially different and relatively ambiguous population of “professional accounting advisors” as referred to by the Commissioner in the Guidelines).

In response to guiding question 95(A)(f), The Tax Institute acknowledges that the requirements to become a tax agent, and subsequent regulation of the same differs from the requirements and regulation of lawyers. It is considered that these differences arise from differences in the role played by the members of each profession in society, and should be reflected in the scope of the protection applicable in relation to advice provided by and communications with members of either profession.

As noted above, the registration and regulation of tax agents is undertaken by the national regulator of the profession, the Tax Practitioners Board. The Tax Practitioners Board determines a tax agent’s right to hold a registration and therefore licence to practice, so that breaches of the Code of Conduct may result in a tax agent losing his/her registration.

Specifically, the following aspects of the Tax Agent Services Regime indicate that tax agents are sufficiently vetted and regulated to allow taxpayers the right to claim protection over advice provided by and communications with tax agents as against the Commissioner:

- the imposition of entry requirements (in relation to education and experience);
- the requirement for the Board to judge each applicant to be a “fit and proper” person prior to registration as a tax agent (similar to requirements imposed on lawyers); and
- the Board’s ongoing regulation and supervision of professional behaviour via the legislated Code of Conduct, including the obligation to:
 - act honestly and with integrity;
 - have in place adequate arrangements for the management of conflicts of interest;
 - maintain clients’ confidentiality;

- take reasonable care to ensure that *taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client; and
- advise your client of the client's rights and obligations under the *taxation laws that are materially related to the *tax agent services you provide.

As a result, while "not all registered tax agents are qualified accountants or members of professional associations"⁶, all tax agents are subject to the requirements set out above. On this basis, we also suggest that the relevant population of advisors whose advice attracts the protection not be further narrowed, as the requirement to adhere to the Code of Conduct remains both stringent and able to be regulated by a Government organisation acting in the public interest.

Furthermore, while transitional arrangements excuse some registered tax agents from fulfilling the requirements of the new regime until 2012, regard should be had to the proximity of the date by which all such transitional registrants must fulfil the requirements of the new regime (1 March 2012) to the present day, and also to the time frame in which the tax advice protection will likely become operational.

We also note that over time, the tax agent population will likely also be required to undertake ethical training as a requirement to admission⁷. The Board has noted in its Proposed Guideline in respect of an approved course in Australian taxation law that such a course should cover at a minimum a number of key areas, including "ethical and professional responsibilities of tax agents including obligations under the TASA [Tax Agent Services Act 2009] and TASR [Tax Agent Services Regime]" and is currently exploring ways in which to build education on these responsibilities into the requirement for tax agents to undertake continuing professional education.

Potential for delay or abuse

Delays

In our view, the introduction of a tax advice protection will not impact significantly on the audit and review functions of the ATO, including in relation to the ATO's capacity to obtain information for the purposes of such audit/review work in a timely fashion.

This is because, in response to guiding question 95(A)(b) and paragraphs 74 to 77 of the Discussion Paper, our members report that it is not the claims of legal professional privilege or the accountants' concession that cause undue delay to, or frustrate the functions of the ATO. Rather, it is ultimately the ATO's efforts to challenge the validity of claims of legal professional privilege or the accountants' concession, and the subsequent time and effort required to resolve such challenges that leads to delays.

Consequently, delays are not in our view sufficient rationale against the introduction of a tax advice protection. Such concerns are best addressed by establishing a mandatory and mutually agreeable procedure by which to resolve disputes in relation to the merits of a claim for either legal professional privilege or tax advice protection (as recommended by the ALRC).

Abuse

In response to guiding question 95(B)(a), tax agents who make spurious claims for tax advice protection on behalf of their clients may be taken to have breached the requirement of the Code of Conduct to act honestly and with integrity. The applicable sanction could then be determined by the Tax Practitioners Board in light of the circumstances but should range from requirements to undertake further education to deregistration (as is currently the case in respect of breaches of the Code of Conduct). As a result of the possibility of such sanctions, potential abuses will be minimised or punished.

Recommendation

⁶ Paragraph 71 of the Discussion Paper

⁷ As recommended by the Australian Law Reform Commission (paragraph 72 of the Discussion Paper)

On the basis of the potential advantages and disadvantages of codifying the accountants' concession set out above, we recommend that the accountants' concession be codified and slightly expanded in the manner and along the parameters set out below.

In our view, a codification in this manner represents a better balance between competing interests, especially as in comparison to the current accountants' concession.

While our recommendation does not accord perfectly with any of the models set out in the Discussion Paper, it is closest in operation to the model adopted in New Zealand or the United Kingdom (as set out at paragraphs 42 to 47 of the Discussion Paper)⁸, rather than a widening of the existing legal professional privilege to cover the relationship between tax agent and taxpayer (i.e. the United States model⁹). Our reasons for this recommendation are explained below in the section entitled "Interaction with Legal Professional Privilege".

Proposed operation and scope of the tax advice protection

Who should "own" the statutory tax advice protection?

As the statutory tax advice protection will be introduced for the benefit of taxpayers, the protection should appropriately belong to the taxpayer in question. As a result, it is the taxpayer (not the tax agent) that claims the protection in response to a request for information by the Commissioner and the protection cannot be waived except by the taxpayer to whom it relates. Where tax agents claim the protection on behalf of their clients, the tax agents should be required to do so in the interests of the taxpayer only, and any inappropriate dealings in relation to claims for protection by tax agents should be sanctioned by the Tax Practitioners Board (as set out above).

Notably, the rights and obligations of tax agents in relation to any claims of the statutory tax advice protection (on behalf of clients) will need to be ascertained in light of the Code of Conduct in order to avoid confusion within the tax agent community. In this regard we envisage that while tax agents will have obligations under the Tax Agent Services Regime to "act honestly and with integrity" (see above), this obligation would extend only to providing the taxpayer with full and frank advice about their tax obligations in the view and opinion of the tax agent (rather than the ATO), rather than specific advice about the application of the statutory tax advice protection.

To which advisors' advice should the statutory tax advice protection extend?

The comments in this section should be read in light of the section above entitled "Regulation of Lawyers versus Tax Agents".

Owing to the gap in required educational qualifications between tax agents and BAS agents, only advice provided by and communications between the taxpayer and tax agents registered by the Tax Practitioners Board should be subject to the tax agent protection (guiding question 95(B)(d)).

Whether advice provided by and communications between taxpayer and "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" is subject to the tax advice protection should be determined with respect to whether the practitioner in question holds a full tax agent registration i.e. only tax practitioners that are subject to vetting, oversight and regulation by the Tax Practitioners Board, required to undertake continuing professional education and comply with the whole of the legislated Code of Conduct should be entrusted with the right to have the statutory tax advice protection claimed over advice provided (guiding question 95(B)(e)).

This restriction is fundamental to the integrity of operation of the tax advice protection as we have submitted, that is, it is essential that advisors whose advice attracts the tax advice protection be tax agents registered by the Tax Practitioners Board, as it is essential that the Board (via application of the Code of Conduct) be able to sanction tax agents that misuse the tax advice protection.

⁸ This recommendation is consistent with the recommendations set out in the ALRC report, as set out in paragraph 28 of the Discussion Paper

⁹ As set out at paragraphs 37 to 41 of the Discussion Paper

In this regard, we envisage that tax advice provided by conditional registrants who are required to comply fully with the education and experience entry requirements for tax agents, Code of Conduct and the Tax Practitioners Board's continuing professional education requirements (such as tax agents specialising in research and development) should be covered by the tax advice protection. Conversely, advice provided by practitioners that are not required to comply fully with these requirements (especially compliance with the Code of Conduct) as is currently envisaged in relation to financial planners should not be covered by the tax advice protection.

For the reasons set out above, tax advice provided by in-house tax advisors should only be protected by the tax advice protection if the advisor in question is a registered tax agent, and providing the advice in that capacity. As in-house tax advisors may not be required to register with the Tax Practitioners Board, it is unlikely that many such advisors will choose to register and seek to claim the tax advice protection (guiding question 95(B)(f)).

What should be covered by the statutory tax advice protection?

While in our view, the rationale underpinning the need for a statutory tax advice protection applies equally to all tax laws, it is likely to be most relevant and necessary in the context of advice obtained where the relevant tax liability is determined partly with reference to the taxpayer's thoughts and intentions.

This is because, unlike source documents which are produced in the course of the taxpayer's affairs or business, advice received in respect of such issues is likely to contain information which is not produced other than for the purposes of obtaining advice. As such, without the benefit of a tax advice protection that cannot be pierced unilaterally by the Commissioner, taxpayers are not likely to seek advice on such issues for fear that doing so may generate evidence against their own interests.

On this basis, we recommend that communications between a tax agent and either the taxpayer or another tax agent (or lawyer) for the dominant purpose of giving or obtaining tax advice (including the tax advice provided by a tax agent, but excluding source documents¹⁰) should be covered by the tax advice protection (guiding question 95(B)(g)). This scope is similar to the scope of operation of the system currently applying in the United Kingdom.¹¹

In this regard, the scope of what constitutes "tax advice" should be determined with reference to the definition of "tax agent services" in section 90-5 of the *Tax Agent Services Act 2009*¹².

Specifically, in our view, tax advice should be defined as advice that relates to:

- ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law¹³; or
- advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
- representing an entity in their dealings with the Commissioner.

Notably, this definition will include documents currently covered by the accountants' concession but will also expand the scope of operation of this administrative practice.

Specifically, in our view:

- Source documents¹⁴ should not be protected by the tax advice protection, as these documents are typically not produced for the purposes of obtaining tax advice, but constitute part of the functioning of the taxpayer's affairs or business.

¹⁰ See further below for our definition of this term.

¹¹ As set out at paragraph 43 of the Discussion Paper.

¹² As a person must generally be a registered tax agent in order to provide a tax agent service; subdivision 50-A of the *Tax Agent Services Act 2009*

¹³ As defined: section 3-5 of the *Tax Agent Services Act 2009* and section 995-1 of the *Income Tax Assessment Act 1997*

- However, restricted source documents and non-source documents that are currently protected by the accountants' concession should be covered by the tax advice protection.

In addition, communications between tax agent and taxpayer, or tax agent and another tax agent for this purpose, as well as documents produced for this dominant (but not sole) purpose should also be covered by the statutory tax advice protection, effectively expanding the scope of the accountants' concession.

Where documents are created for more than one purpose (such as accounting work-papers), such documents should be covered by the statutory tax advice protection if the dominant purpose of producing the document is obtaining tax advice. Where possible, the dual purpose document should be severed to remove the parts of the document that are covered by the statutory tax advice protection i.e. contain "tax advice". In this manner, only those communications that are covered by the tax advice protection will be protected from the Commissioner's coercive information gathering powers.

Disputes in relation to the application of the statutory tax advice privilege

Once implemented, any disputes that arise in relation to the application of the statutory tax advice privilege should be determined in accordance with the general arrangement for the resolution of disputes once established (see above) (guiding question 95(A)(d)).

In our view, such procedures should be consistent (if possible) between the tax advice protection and legal professional privilege, as while the applicable law will be different, the issues arising from application will be sufficiently similar.

However, the introduction of a tax advice protection should not be delayed until such a general arrangement is implemented as there are urgent reasons for the introduction of a legislated tax advice protection (guiding question 95(B)(k)), as noted above.

Any disputes in relation to the application of the right that arise between the date of introduction of the statutory tax advice protection and the general arrangement for the resolution of disputes should be resolved by determination by the Courts, as is currently the case in relation to disputes over the application of legal professional privilege.

Interaction with Legal Professional Privilege

In our view, the scope of the tax advice confidentiality should be narrower than that of legal professional privilege, in recognition of the fact that legal professional privilege will continue to have a role far beyond compliance with tax obligations.

Specifically, we envisage that the tax advice protection will only apply where legal professional privilege does not, and will be narrower than legal professional privilege in these respects:

- Tax advice protection will only apply against the Commissioner's powers;
- Tax advice protection will not protect legal advice that is not tax advice; and
- Source documents are unlikely to attract the application of the tax advice protection.

This narrower formulation of tax advice protection recognises that legal professional privilege embraces matters much wider than tax advice and has very significant precedential history.

As noted above, we do not seek to make any comments on the scope or operation of legal professional privilege, as it falls outside the scope of the Discussion Paper. However, we note that if the statutory tax advice protection is formulated as set out in this submission, the application of and developments in relation to tax advice protection should not encroach upon or alter the client's right to obtain legal advice that is protected by legal professional privilege as the tax advice protection will only apply in circumstances where legal professional privilege is inapplicable (because for example the tax advice provider is not a lawyer).

¹⁴ As defined in the Commissioner's "Guidelines to accessing professional accounting advisors' papers", and paragraphs 13 and 14 of the Discussion Paper.

Education of tax agents

The Tax Institute acknowledges that unlike lawyers, who are trained in the theory underpinning and application of legal professional privilege from a very early stage of their education and experience, tax agents will need to be educated on their own (as well as their clients') rights and obligations in relation to any statutory tax advice protection.

This is partly because the relationship between tax agent/taxpayer and the ATO differs in many respects to the relationship that lawyers have with their clients, but is also owing to the fact that the Tax Agent Services Regime and the Tax Practitioners Board are currently in their formative years.

The introduction of a tax advice protection will create additional responsibilities for tax agents. As a result, any misunderstandings in the tax agent community as to obligations under the Code of Conduct are likely to be compounded by the introduction of a tax advice protection unless a substantial education campaign is embarked upon that encompasses both the tax agent's obligations to his/her client as well as the ATO, as well as any potential consequences to the tax agent as a result of misuse or abuse of the tax advice protection (whether inadvertent or deliberate - see our comments on this issue above). The Tax Institute is confident in the Tax Practitioners Board's ability to work with the tax profession to ensure that tax agents are appropriately educated in this regard.

We also recommend that the obligations of tax agents already registered in relation to the tax advice protection be phased in, so that tax agents have a period of time in which to adjust to and understand the application of the statutory tax advice protection before any mistakes result in serious consequences.

* * * *

Should you have any queries with respect to any of the matters raised above, please do not hesitate to contact me on (02) 8223 0011 or The Tax Institute's Tax Counsel, Deepti Paton on (02) 8223 0044.

Yours sincerely



Peter Murray
President