
The proposed client-accountant tax privilege in Australia: How does it sit with the common law doctrine of legal professional privilege?

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Legal professional privilege protects confidential communications between legal advisors and their clients from compulsory disclosure. In the taxation arena, this will include protection from disclosure to taxation authorities using coercive information-gathering powers. The common law privilege does not apply to the client-accountant relationship or to the tax advisor-client relationship where that tax advisor is not a lawyer. In 2005, New Zealand introduced a legislative regime to grant statutory privilege to confidential communications between accountants and their clients for the main purpose of providing or receiving tax advice. In 2008, the Australian Law Reform Commission (ALRC) recommended that Australia follow the New Zealand model and introduce a similar statutory regime. This article outlines both the ALRC proposal and the New Zealand client-accountant statutory regime. The rationale for the creation of a separate statutory privilege and the reasons for the rejection of the extension of the common law privilege to the client-accountant relationship are also considered. Finally, the article compares statutory privilege with legal professional privilege. This review highlights differences between the two forms of privilege and concludes that the practical level of protection afforded taxpayers claiming this new form of privilege is considerably less than common law privilege.

INTRODUCTION

Taxation law is complex in both Australia and New Zealand.¹ Explanations for this complexity vary, including, for example: “the legislation cannot avoid being as comprehensive and complicated as the subject matter with which it deals”;² the diverse role of the tax system to achieve various economic and social objectives by governments;³ and the fact that tax professionals and revenue authorities have a vested interest in tax law being complex.⁴ The move to self-assessment and the consequent penalties that arise should a taxpayer incorrectly determine his or her tax liability places increased pressure on taxpayers to file accurate tax returns. As a consequence, many taxpayers seek professional advice to ensure they meet their responsibilities under various taxation statutes. In Australia the majority of such

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¹ See, eg Tan LM and Tower G, “The Readability of Tax Laws: An Empirical Study in New Zealand” (1992) 9 ATF 355; Richardson M and Sawyer AJ, “Complexity in the Expression of New Zealand’s Tax Laws: An Empirical Analysis” (1998) 14 ATF 325; Smith D and Richardson G, “The Readability of Australia’s Taxation Laws and Supplementary Materials: An Empirical Investigation” (1999) 20 *Fiscal Studies* 321; McKerchar M, “The Effects of Complexity on Unintentional Noncompliance for Personal Taxpayers in Australia” (2002) 17 ATF 3; McKerchar M, Meyer K and Karlinsky S, “Making Progress in Tax Simplification: A Comparison of the United States, Australia, New Zealand and the United Kingdom” in McKerchar M and Walpole M (eds), *Further Global Challenges in Tax Administration* (Fiscal Publications, 2006); McKerchar M, *Complexity, Fairness and Compliance: A Study of Personal Income Taxpayers in Australia* (Australian Tax Research Foundation, Sydney, 2003); Sawyer AJ, Pau C and Maples AJ, “Complexity of New Zealand’s Tax Laws: An Empirical Study” (2007) 22 ATF 52.

² Richardson I, “The Concept of Income and Policy” (1990) 4 CLR 203 at 203.

³ Richardson and Sawyer, n 1 at 328.

⁴ White M, “Why Are Taxes So Complex and Who Benefits?”, *Tax Notes* (16 April 1990) p 342. See also Sawyer AJ, “Why Are Taxes So Complex, and Who Benefits?”, *Tax Notes* (16 December 1996) p 1337.

advice is not sought from lawyers but accountants and other tax advisors.⁵ Similarly, in New Zealand, accountants “are the biggest single group of tax agents and advisors and are responsible for a very large percentage of the tax returns filed with Inland Revenue”.⁶ However, taxpayers in both Australia and New Zealand also utilise lawyers to obtain tax advice concerning their tax affairs.

This article will critically examine the current move in Australia, as proposed by the Australian Law Reform Commission (ALRC), to extend protection currently enjoyed by taxpayers in the client-lawyer relationship through common law legal professional privilege to taxpayers in the client-accountant relationship by providing a statutory privilege in the tax context. This analysis will include an overview of the New Zealand statutory privilege introduced in 2005 to protect certain client-accountant communications in the tax context, which the ALRC has used as a model for its recommendations.

For the purposes of this article, common law legal professional privilege is referred to either as “common law privilege” or “legal professional privilege”, while the term “statutory privilege” is used to refer to the privilege for the client-accountant relationship proposed by the ALRC and in place in New Zealand. The New Zealand statutory privilege is also referred to as the “non-disclosure right”. This article also uses the term “accountants” in a broad sense to include other tax advisors who are not lawyers.

It is widely accepted that the revenue authorities of Australia and New Zealand, the Australian Taxation Office (ATO) and the Inland Revenue Department (IRD) respectively, have extensive powers to obtain information from taxpayers and their advisors.⁷ The main exception to these information-gathering powers is legal professional privilege, which may attach to, and protect from disclosure, confidential communications between a lawyer and a client. This has been recognised in Australia through the decisions of *FCT v Citibank Ltd*⁸ and *Allen Allen and Hemsley v DFCT*.⁹ The New Zealand Court of Appeal in *CIR v West-Walker*¹⁰ held that the forerunner to s 17 (Information to be furnished on request of Commissioner of Inland Revenue (CIR)) of the *Tax Administration Act 1994* (NZ) (TAA 1994) must be construed as being subject to legal professional privilege. New Zealand subsequently partially codified legal professional privilege in tax matters through the enactment of the predecessor to s 20 of the TAA 1994.¹¹ As noted above, the same right of privilege has not been extended to communications between an accountant and his or her clients in either jurisdiction.

In light of the extensive coercive information-gathering powers of the revenue authorities, there have been administrative protocols issued by the ATO and the IRD to seek information held by accountants. In Australia, the ATO has issued administrative guidelines entitled *Guidelines to Accessing Professional Accounting Adviser's Papers*, also referred to as the “Accountants’ Concession”,¹² which allows certain types of advice prepared by accountants for the purpose of

⁵ Fraser PM and Deards K, “Underprivileged Accountants and Illegitimate Expectations – Part 1” (2007) 42 *Taxation in Australia* 79 at 79.

⁶ Policy Advice Division of the IRD and the Treasury, *Taxation (Base Maintenance and Miscellaneous Provisions) Bill – Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill* (2005) p 99, <http://www.taxpolicy.ird.govt.nz/publications/files/offrep05.doc> viewed 17 October 2009.

⁷ The ATO’s primary information gathering powers are contained in ss 263-264 of the ITAA 1936. The equivalent provisions in New Zealand are contained in ss 16-17 of the TAA 1994.

⁸ *FCT v Citibank Ltd* (1989) 20 FCR 403; 89 ATC 4268.

⁹ *Allen Allen and Hemsley v DFCT* (1989) 20 ATR 321; 20 FCR 576; 88 ATC 4734.

¹⁰ *CIR v West-Walker* [1954] NZLR 191.

¹¹ Section 20 of the TAA 1994 provides that any information or book or document is privileged from disclosure if: (a) it is a confidential communication, whether written or oral, passing directly or indirectly between legal practitioners in their professional capacity or a legal practitioner in his/her professional capacity and a client; (b) it is made or brought into existence for the purpose of obtaining or giving legal advice; and (c) if it is not made for the purpose of committing some illegal or wrongful act. Trust accounts and other financial records are not protected by this privilege.

¹² ATO, *Access and Information Gathering Manual* (2005) Ch 7, <http://www.ato.gov.au/corporate/content.asp?doc=/content/51035.htm> viewed 26 July 2009.

advising clients on taxation matters to remain confidential. In exceptional circumstances, senior ATO officers can authorise the lifting of the concession to permit access to “restricted source”¹³ and “non-source” documents.¹⁴ “Source” documents¹⁵ are not covered by the concession. The non-statutory protection afforded by the Accountants’ Concession is therefore not complete and is clearly inferior to legal professional privilege as shown by the decision in *White Industries Australia Ltd v FCT*¹⁶ discussed later in this article.

In 1993, the IRD issued a policy statement titled *Commissioner’s Policy on Access to Advice and Other Workpapers Prepared by Accountants*.¹⁷ This statement was promulgated as an acknowledgement of the disparity between lawyers and other tax professionals with respect to legal professional privilege.¹⁸ It was similar to the Accountants’ Concession and, like its Australian equivalent, provided only limited administrative protection to accountants from disclosing their advice work papers to Inland Revenue officers. It did not grant any legislative privilege from disclosure.

In 2005, following a number of reports¹⁹ (and much debate) in New Zealand considering the role of legal professional privilege generally and the extension of some form of privilege to tax advice provided by non-lawyers, a statutory privilege for accountants was enacted. The regime was principally justified on the basis of the “compliance” rationale.

In the Australian context, the ALRC Report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, was tabled in the Federal Parliament on 13 February 2008. The key recommendations of the ALRC Report include the creation of a privilege for accountants.²⁰ The ALRC rejected extending legal professional privilege to the client-accountant relationship. At this stage there has been no indication whether this proposal will be adopted by the Federal Parliament.

The rationale for the creation of a separate statutory privilege and the reasons for the rejection of the extension of the common law privilege to the client-accountant relationship are considered in this article. The article compares the statutory privilege with legal professional privilege. This review includes early consideration of the application of the statutory privilege in New Zealand and highlights significant differences between the two forms of privilege. The article concludes that the practical level of protection afforded taxpayers claiming this new form of privilege is considerably less than common law privilege.

¹³ “Restricted source” documents are “advice papers which are created contemporaneously with a relevant transaction or arrangement [and which] may themselves represent a record of what has actually occurred because they shed light on the transaction or arrangement”: ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) at [6.227]. See also ATO, *Guidelines to Accessing Professional Accounting Advisors’ Papers* at [2.2], <http://www.ato.gov.au/corporate/content.asp?doc=/content/51665.htm> viewed 13 July 2009 (ATO Guidelines).

¹⁴ “Non-source” documents include various advice papers. “For example, these may include advisings provided after a transaction has been completed where the advisings did not affect the recording of the transaction or arrangement in the books of account or tax return”: ATO Guidelines, n 13 at [2.3].

¹⁵ “Source” documents are documents which record transactions or arrangements entered into by a person and include ledgers, journals, working papers for financial statements, profit and loss accounts, balance sheets and documents comprising a permanent audit file: ATO Guidelines, n 13 at [2.1].

¹⁶ *White Industries Australia Ltd v FCT* (2007) 66 ATR 306; 160 FCR 298.

¹⁷ IRD, *Commissioner’s Policy on Access to Advice and Other Workpapers Prepared by Accountants* (1993).

¹⁸ McGill R, “Legal Professional Privilege and Tax” (2002) 8 NZJTLPL 341 at 343.

¹⁹ Law Commission, *Evidence Law: Privilege*, Preliminary Paper No 23 (1994), <http://www.lawcom.govt.nz/ProjectPreliminaryPaper.aspx?ProjectID=58> accessed 23 October 2009; Organisational Review Committee, *Report on the Organisational Review of the Inland Revenue Department* (1994); Commission of Inquiry into Certain Matters Relating to Taxation, *Report of the Winebox Enquiry* (1997); Committee of Experts on Tax Compliance, *Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (1998), <http://www.executive.govt.nz/96-99/compliance/index.html> accessed 23 October 2009; Law Commission, *Tax and Privilege – Legal Professional Privilege and the Commissioner of Inland Revenue’s Powers to Obtain Information*, Report No 67 (2000), <http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=74> accessed 23 October 2009; IRD, *Tax and Privilege: A Proposed New Structure – Government Discussion Document* (2002), <http://www.taxpolicy.ird.govt.nz/publications/files/html/tax&privdd/index.html> accessed 23 October 2009 (2002 discussion document).

²⁰ ALRC, n 13 at [6.288].

THE CONCEPT AND RATIONALE FOR LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege has been described as “a fundamental and general principle of the common law”²¹ and “the oldest of the privileges for confidential information known to the common law”.²² The doctrine can be traced back to the 16th century²³ “as an ethical obligation of confidentiality imposed on barristers and attorneys”.²⁴

Fraser and Deards observed that: “The earliest rationale for the doctrine, often referred to as the ‘honour theory’, is that solicitors were men of honour and a man of honour would not betray a confidence, nor would judges as men of honour themselves require him to do so.”²⁵ Thus, initially, the privilege belonged to the lawyer, not the client. However, by the late 18th century, the honour theory was displaced with the privilege being ascribed to the client who could waive or lose the protection²⁶ and was protected by the privilege,²⁷ the advisor’s duty being to claim the privilege.²⁸

Initially, legal professional privilege was restricted to communications made for the purpose of litigation and did not apply to advice outside this context.²⁹ During the 19th century, the privilege was extended to communications between client and lawyer even though no litigation was contemplated. In what may be the earliest case,³⁰ the extension was justified by Lord Chancellor Brougham in *Greenough v Gaskell*³¹ on the basis that any transaction can end up being the subject of court proceedings: “If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.”³² The doctrine is now not a rule of evidence but “a rule of substantive law”,³³ and “a fundamental and general principle of the common law”.³⁴

Until 1999 in Australia, legal professional privilege could be claimed at common law where the “sole purpose” for which a communication was created was either for obtaining legal advice or for use

²¹ Deane J in *Baker v Campbell* (1983) 153 CLR 52 at 116-117. In Australia, the doctrine has been given effect in statutory form in the Uniform Evidence Acts. Section 118 of the *Evidence Act 1995* (Cth) provides protection for legal professional privilege once a matter reaches court. Section 119 provides a “litigation privilege” to protect evidence which would result in disclosure of a confidential communication where the dominant purpose was to provide the client with professional legal services relating to litigation which involves the client. Similarly, protections are provided in New Zealand in Subpart 8 of the *Evidence Act 2006* (NZ).

²² *Upjohn Company v United States* 449 US 383 (1981) at 389 and *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 at 487 (Mason and Brennan JJ). See also Wigmore J, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, Little, Brown & Company, 1940) at [2290].

²³ *R v Derby Magistrates Court; Ex parte B* [1996] 1 AC 487 at 504; *Baker v Campbell* (1983) 153 CLR 52 at 84. See also Holdsworth WS, *Holdsworth’s History of English Law* (Little, Brown & Company, 1932) pp 201-202.

²⁴ Italia M, “Legal Professional Privilege and Accountant-client Confidentiality” (2006) 2 NZJTL 75 at 75.

²⁵ Fraser and Deards, n 5 at 80, citing Wigmore, n 22 at [2290]. See also *R v Derby Magistrates Court; Ex parte B* [1996] 1 AC 487 at 504.

²⁶ New South Wales Bar Association, *Submission in response to ALRC Issues Paper 33* (6 June 2007) citing *Duchess of Kingston’s Case* (1776) 20 St Tr 355; *Hill’s Trial* (1777) 20 How St Tr 1362.

²⁷ *Minuet v Morgan* (1873) LR 8 Ch App 361.

²⁸ Murphy J in *Baker v Campbell* (1983) 153 CLR 52 at 85 observed: “The privilege is commonly described as legal professional privilege, which is unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client’s privilege, so that it may be waived by the client, but not by the lawyer.”

²⁹ Stone J in *Pratt Holdings Pty Ltd v FCT* (2004) 56 ATR 128 at [73]; 136 FCR 357: “As late as 1828, in *Broad v Pitt* (1828) 3 Car & P 518, Best CJ was forthright that ‘[a] man is not acting as an attorney when he is consulted about a deed’.”

³⁰ Law Commission (2000), n 19, p 6.

³¹ *Greenough v Gaskell* (1833) 1 My & K 98.

³² *Greenough v Gaskell* (1833) 1 My & K 98 at 103.

³³ *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543 at [9].

³⁴ *Baker v Campbell* (1983) 153 CLR 52 at 116-117 (Deane J).

in pending or anticipated litigation. In 1999, the High Court in *Eso Australia Resources Ltd v FCT*³⁵ overruled *Grant v Downs*,³⁶ deciding that the common law test for legal professional privilege was the “dominant purpose” test – in line with the *Evidence Act 1995* (Cth). The “dominant purpose” test is also the accepted common law test for legal professional privilege in New Zealand as shown in *Guardian Royal Exchange v Stuart*³⁷ and for s 20 of the TAA 1994 in the tax context.³⁸

Both confidential written and oral communications may be protected from disclosure. Legal professional privilege is not automatic but must be claimed in order to be applied. While the privilege is that of the client, normally the lawyer will assert the claim on the client’s behalf. The party asserting common law privilege must provide the party seeking disclosure with sufficient facts to make a decision about whether the privilege claim can be supported.³⁹ The courts can test the evidence of the purpose of a communication where there is a dispute over whether such communication is privileged. Common law privilege may be waived by either express or implied waiver, ie in each case a positive act is required by the client or his or her advisor.⁴⁰

In the tax context, decisions of the Full Federal Court⁴¹ in Australia and inferences which can be drawn from the decision of the Full High Court in *Daniels Corp v ACCC*⁴² suggest that legal professional privilege does apply with respect to tax investigations – a view recognised by the ATO.⁴³ In New Zealand, legal professional privilege in the tax context is recognised in s 20 of the TAA 1994.

The underlying rationale for the doctrine of legal professional privilege has been explained in a number of cases, including *Grant v Downs*⁴⁴ where Stephen, Mason and Murphy JJ observed:

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.

Legal professional privilege therefore exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers. Their Honours’, however, also observed that it is the product of a balancing exercise between competing public interests, encouraging full and frank disclosure between client and lawyer on the one hand, and on the other hand, in the interest of promoting a fair trial, encouraging the disclosure of all information necessary for the litigant to present their case.⁴⁵ This conflict is similarly noted in *Eso Australia*.⁴⁶

³⁵ *Eso Australia Resources Ltd v FCT* (1999) 201 CLR 49; 43 ATR 506.

³⁶ *Grant v Downs* (1976) 135 CLR 674.

³⁷ *Guardian Royal Exchange v Stuart* [1985] 1 NZLR 596.

³⁸ *Dinsdale v CIR* (1998) 18 NZTC 13,583.

³⁹ *National Crime Authority v S* (1991) FCR 203 at 211.

⁴⁰ Woellner R, Barkoczy S, Murphy S and Evans C, *Australian Taxation Law* (18th ed, CCH Australia Ltd, 2008) at [29-215].

⁴¹ 41 See, eg *FCT v Citibank Ltd* (1989) 20 ATR 292; 20 FCR 403; 89 ATC 4268; *Allen Allen & Hemsley v DFCT* (1989) 20 ATR 321; (1989) 20 FCR 576; 89 ATC 4294; *Fieldhouse v FCT* (1980) 25 FCR 187; 20 ATR 1299; *Pratt Holdings Ltd v FCT* (2004) 56 ATR 128; 136 FCR 357; *JMA Accounting Pty Ltd v Carmody* (2004) 56 ATR 327; 2004 ATC 4736.

⁴² *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543.

⁴³ Woellner et al, n 40 at [29-210].

⁴⁴ *Grant v Downs* (1976) 135 CLR 675 at 685 (emphasis added).

⁴⁵ See also *Waterford v Commonwealth* (1987) 163 CLR 54 at 64-65 (Mason and Wilson JJ); *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 128 (Brennan J), 134 (Deane J), 147 (Toohey J), 163 (McHugh J).

⁴⁶ *Eso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at [35]; (1999) 43 ATR 506.

THE PROPOSAL FOR REFORM – ALRC REPORT

In late 2007, the Attorney-General of Australia tasked the ALRC with reporting on “matters relating to the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies [including the ATO]”.⁴⁷ This led to the publication by the ALRC of two consultation papers in 2007⁴⁸ and the final report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) (ALRC Report). The key recommendations of the ALRC are based on the “compliance” rationale and include the creation of a privilege for tax advisors.⁴⁹

The ALRC Report acknowledges the incomplete protection afforded by the Accountants’ Concession which can, in exceptional circumstances, be lifted to permit access to “restricted source” and “non-source” documents. The concession does not cover “source documents”. In *Deloitte Touche Tohmatsu v DFCT*,⁵⁰ the Commissioner of Taxation (the Commissioner) issued s 264 notices requesting certain information relating to New Zealand non-complying superannuation funds. In the course of issuing such notices, the ATO considered that the information sought was classified as “source documents” and fell within the Accountants’ Concession. The affected applicant argued that the ATO had failed to have adequate regard to the guidelines and had misunderstood them. The court accepted, without needing to decide that the concession did create a legitimate expectation to taxpayers and their advisors, that such administrative guidelines would be taken into account. The ATO accepted that the guidelines were a relevant consideration to be taken into account when contemplating the issue of a s 264 notice.

In *One.Tel Ltd v DFCT*,⁵¹ the Commissioner issued notices under the sales tax legislation requesting that the taxpayer provide certain information. The notices were issued by reference to the concession. The taxpayer argued that the guidelines created a legitimate expectation that the ATO would follow them and that the taxpayer would be given an opportunity to be heard as to whether a notice should be issued. The court held that the Accountants’ Concession did create a legitimate expectation but there was no need for a full hearing to determine whether special circumstances existed for the notice to be issued. Dealings between the parties and the issues concerned were sufficient to satisfy any legitimate expectation arising from the implementation of the concession.

Examples of when the concession can be lifted include when the ATO is “unable to ascertain from the documents which have been provided the facts necessary to determine the taxation consequences of the particular transactions or arrangements”⁵² or where there are reasonable grounds to believe fraud or evasion has taken place.⁵³ With the exception of the fraud/evasion exclusion, the concession therefore provides taxpayers with less protection than common law privilege because that form of privilege applies irrespective of the circumstances.

The ALRC Report observes that a decision made under the ATO guidelines is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁵⁴ This is itself a major flaw in the current system. This view stems from the *White Industries* case. Even though the guidelines create an expectation that they will be adhered to by the ATO, this does not mean that a decision by the ATO to lift the concession can be judicially reviewed. In this context, this means that taxpayers and their advisors have a legitimate expectation that the guidelines will be followed but they do not by

⁴⁷ ALRC, n 13 at [5] (Terms of Reference).

⁴⁸ ALRC, *Client Legal Privilege in Federal Investigatory Bodies*, Issues Paper No 33 (2007), <http://www.austlii.edu.au/au/other/alrc/publications/issues/33> viewed 16 October 2009; ALRC, *Client Legal Privilege in Federal Investigatory Bodies*, Discussion Paper No 73 (2007), <http://www.austlii.edu.au/au/other/alrc/publications/dp/73> viewed 16 October 2009.

⁴⁹ ALRC, n 13 at [6.288].

⁵⁰ *Deloitte Touche Tohmatsu v DFCT* (1998) 40 ATR 435.

⁵¹ *One.Tel Ltd v DFCT* (2000) 44 ATR 52; 101 FCR 548.

⁵² ATO, n 12 at [7.2.3].

⁵³ ALRC, n 13 at [6.230].

⁵⁴ ALRC, n 13 at [6.230].

themselves create any substantive rights, which would render the decision to lift the concession a decision under an enactment, namely the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936).⁵⁵ Lindgren J in *White Industries* was of the view that the guidelines were made by the Commissioner under the general power of administration in s 8 of the ITAA 1936. On this basis, the granting of the concession and the discretion to exclude particular documents from it were only attributable to that general power of administration.⁵⁶ Kendall has also observed that because the concession does not have statutory backing, the guidelines do not provide additional legal rights to taxpayers.⁵⁷

The ALRC proposes that a taxpayer who is required to disclose information under a coercive information-gathering power of the Commissioner will not be required to disclose a tax advice document prepared for the taxpayer. Under the proposal, a “tax advice document” is defined as: “a confidential document created by an independent professional accounting advisor for the dominant purpose of providing that person with advice about the operation and effect of tax laws”.⁵⁸

An independent professional accounting advisor must be a registered “tax agent” for the purpose of s 251A of the ITAA 1936, or a nominee or employee of a registered tax agent who is a qualified tax accountant. In this context, it should be noted that a new legislative regime for tax agent services has been introduced into Australia.⁵⁹ This legislative regime has repealed the existing provisions in Pt VIIA of the ITAA 1936, including s 251A. The definition of a tax agent will be an entity that is registered under Pt 5-90 as a tax agent. For the statutory privilege to apply, accounting advisors will need to be registered as a tax agent under the new tax agent provisions.

The ALRC proposal does not protect from disclosure all information contained in or related to a confidential communication – “tax contextual information” must be disclosed. Tax contextual information includes information about a fact or assumption that has occurred or is postulated by the person creating the tax advice document, as well as a description of the steps involved in the performance of a transaction. Advice that does not concern the operation and effect of tax laws is also tax contextual information. This exclusion emphasises the narrower protection offered by the ALRC proposal: “It should be very clear in the operation of this privilege that only the advice itself will be protected, and not any other information that may form part of the accountant’s file or briefing.”⁶⁰

The statutory privilege would not apply where a tax advice document is (a) created in respect of the commission of a fraud or offence or an act rendering a person liable to a civil penalty; or (b) where the person or the accounting advisor knew or ought reasonably to have known that the document was prepared for the furtherance of a deliberate abuse of power. The ALRC Report outlines procedures to be followed for claiming the privilege.⁶¹

The ALRC proposal has, not unexpectedly, received mixed support. The Institute of Chartered Accountants in Australia, Corporate Tax Association and the Australian Financial Markets Association are in favour of the proposal,⁶² while other stakeholders, including the Australian Securities and Investments Commission, the Australian Institute of Company Directors and the Law Council of Australia, have either rejected the extension of the legal professional privilege beyond lawyers or raised concerns about such an extension.⁶³

⁵⁵ Blissenden M, “Information Gathering by the Commissioner: Does it Matter Whether Your Advisor is a Lawyer or Accountant? The Impact of the White Industries Case” (2008) 1-2 JALTA 345.

⁵⁶ *White Industries Australia Ltd v FCT* (2007) 66 ATR 306 at [68]; 160 FCT 298.

⁵⁷ Kendall K, “Prospects for a Tax Advisors’ Privilege in Australia” (2005) 1 JATTA 46 at 54.

⁵⁸ ALRC, n 13 at [6.288].

⁵⁹ See *Tax Agent Services Act 2009* (Cth) and the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

⁶⁰ ALRC, n 13 at [6.281].

⁶¹ ALRC, n 13, Recommendations 8-3 to 8-5.

⁶² ALRC, n 13 at [6.235]-[6.237].

⁶³ ALRC, n 13 at [6.239].

STATUTORY PRIVILEGE IN NEW ZEALAND

The non-disclosure right is contained in ss 20B-20G of the TAA 1994 and protects “tax advice documents” from disclosure to the IRD. These provisions apply to formal information requests made by the IRD on or after 22 June 2005 and protect documents created both before and after this date.

A book or document⁶⁴ is a tax advice document if:⁶⁵

- (a) it is *eligible* to be a tax advice document;⁶⁶ and
- (b) the taxpayer or their authorised tax advisor makes a *claim* that the document is a tax advice document;⁶⁷ and
- (c) the taxpayer or his or her tax advisor provides a description of any *tax contextual information* contained within the tax advice document the subject of the claim of the statutory privilege as well as providing any documents or parts of documents attached to a tax advice document but which are ineligible themselves to be tax advice documents.⁶⁸

A book or document is eligible to be a tax advice document if it is confidential and created either by a taxpayer for the main purpose of seeking advice on tax laws, or by a tax advisor (or his or her employee) for the main purpose of giving advice on tax laws.⁶⁹ Any book or document created “for the purpose of committing or promoting or assisting the committing of, an illegal or wrongful act” will not be eligible to be a tax advice document.⁷⁰

A claim that a book or document is a tax advice document can only be made once the IRD has made a request for access or disclosure of information under ss 16-19 of the TAA 1994.⁷¹ The claim must be made within the prescribed timeframe, otherwise the book or document will not be a tax advice document.⁷²

In addition, a book or document will only constitute a tax advice document where tax contextual information within the tax advice document is disclosed to the IRD, if requested, by way of statutory declaration made by a tax advisor. Tax contextual information includes facts and assumptions relating to transactions entered into by the taxpayer, non-tax advice and advice relating to the collection of debts payable to the CIR.⁷³

Documents which simply record decisions or transactions, set out calculations or summarise facts must be disclosed if requested by the IRD. Documents or forms completed for the main purpose of meeting tax compliance obligations are also ineligible to be tax advice documents.

The non-disclosure right, including the entitlement of a taxpayer to claim the privilege, is contingent on the person from whom advice was sought being a “tax advisor”. A tax advisor is a natural person who is subject to the code of conduct and disciplinary process of an “approved advisor group”.⁷⁴ The definition covers tax advisors in public practice and also professionals holding in-house

⁶⁴ The term “book or document” is defined in s 3(1) of the TAA 1994.

⁶⁵ TAA 1994, s 20B(3).

⁶⁶ TAA 1994, s 20B(2).

⁶⁷ TAA 1994, s 20D.

⁶⁸ TAA 1994, ss 20E-20F.

⁶⁹ TAA 1994, s 20B(2).

⁷⁰ TAA 1994, s 20B(2)(c).

⁷¹ Section 16 of the TAA 1994 provides the CIR with broad powers of access to taxpayers’ premises to obtain information and also permits the removal of such information for inspection. Section 17 confers similarly wide powers on the CIR to request any person to furnish information in writing (including books and documents) which the CIR considers “necessary or relevant” for any purpose relating to the administration or enforcement of the Inland Revenue Acts, or any other function lawfully conferred on the CIR. Sections 18 and 19 respectively give power to either a district court judge or the CIR to hold an inquiry for the purpose of obtaining any information with respect to the tax liability of a person.

⁷² The contents of the claim are outlined in ss 20D(2) and 20D(3) of the TAA 1994.

⁷³ TAA 1994, s 20F(3).

⁷⁴ TAA 1994, s 20B(4).

positions who are involved in tax advisory or planning work for their employers. An approved advisor group is a group that includes natural persons who (a) have a significant function of giving advice on the operation of tax laws; (b) are subject to the code of conduct in giving that advice; and (c) are subject to a disciplinary process that enforces compliance with the code of conduct.⁷⁵ The tax advisor must be a member of the approved advisor group at the time the tax advice document was created. The approved advisor group must be approved by the CIR in order for the statutory privilege to be claimed.⁷⁶

The non-disclosure right only protects advice concerning “the operation and effect of tax laws”.⁷⁷ Advice on other areas of the law is therefore not protected and neither is tax advice concerning the application of tax laws in another jurisdiction. The statutory privilege did not initially apply to discovery and the production of documents in litigation. The regime was extended in 2009 to prevent disclosure of documents during the litigation process.

Ultimately, the regime adopted in New Zealand was a compromise reflecting competing needs. On the one hand, there were the needs of taxpayers and their advisors and the desire for accountants to “be able to give candid and independent advice to their clients, as lawyers do”,⁷⁸ and on the other hand, the IRD’s ability to be able to access sufficient information to administer the Revenue Acts. As a result, the statutory privilege enacted is not as broad in its coverage as common law privilege.⁷⁹

The legal professional privilege in tax matters provided for in s 20 of the TAA 1994 remains unaffected by the creation of the statutory privilege. A competitive advantage for lawyers over accountants providing tax advice remains, albeit a narrowed advantage. In addition, the statutory privilege also has no impact on communications made between a lawyer and a third party for the purpose of preparing for existing or contemplated proceedings (ie litigation privilege).

The introduction of the non-disclosure right was welcomed by accountants and business groups in New Zealand on the basis of addressing an inconsistency in the law between tax advice provided by a lawyer and non-lawyer.⁸⁰

RATIONALE FOR THE CREATION OF A STATUTORY PRIVILEGE

Two policy reasons are presented for creating the statutory privilege. The first justification, which relates to the client, is that the move will encourage voluntary compliance on behalf of the client, referred to here as the “compliance” rationale. The second justification, which relates to the advisor, is that accountants will be able to give their clients candid and independent advice. This justification is discussed as the “candid and independent advice” rationale.

The “compliance” rationale

The ALRC recommendation for the introduction of a statutory privilege is stated in the following language:

that clients can obtain the fullest legal advice only where the lawyer is in possession of all relevant facts, so the protection of communications *encourages greater compliance with the law* as the client is in the best position to be informed about what does (and does not) amount to complying conduct.⁸¹

⁷⁵ TAA 1994, s 20B(5).

⁷⁶ The New Zealand Institute of Chartered Accountants (NZICA) and the Tax Agents’ Institute of New Zealand (Inc) currently have approved advisor group status.

⁷⁷ TAA 1994, s 20B(2).

⁷⁸ IRD, *Taxation (Base Maintenance and Miscellaneous Provisions) Bill; Commentary on the Bill* (2004) p 44, <http://www.taxpolicy.ird.govt.nz/publications/files/novbill04comm.doc>.

⁷⁹ IRD, n 78, p 44.

⁸⁰ IRD and the Treasury, n 6, p 98.

⁸¹ ALRC, n 13 at [2.64], [6.275]. This is discussed in Ch 1 of the ALRC Report 107 (emphasis added).

In the tax context, it followed “that where legal advice is lawfully being given in a similar context by a non-lawyer, then the privilege should extend to the provision of that advice as well”.⁸²

The policymakers in New Zealand justified the creation of the non-disclosure right on a similar basis:

Accountants should ... also be able to give candid and independent advice to their clients, as lawyers do, without the need to disclose that advice to Inland Revenue. The benefit of enabling this to occur is that the advice can *promote voluntary compliance by taxpayers* with the tax system and give rise to a consequent reduction in compliance and administrative costs.⁸³

Kendall comments that this “compliance” rationale is:

[in line] with the (modern) justification for common law legal professional privilege. As with legal professional privilege, the expectation is that if clients disclose all relevant information to their advisers, their advisers are in as strong a position as possible to direct their clients’ actions in accordance with the law.⁸⁴

Neither the ALRC proposal nor the various documents promulgated in New Zealand prior to the enactment of the non-disclosure right provisions⁸⁵ provide any evidence that the lack of protection for accountants’ advice has impacted on voluntary compliance. An underlying assumption in these statements is that taxpayers have not sought advice from accountants (and implicitly not from lawyers in the alternative) on their tax affairs due to there being no protection from disclosure for confidential communications. The authors question how significant such protection is in the minds of most taxpayers when seeking tax advice. For many taxpayers, the decision about consulting an accountant or lawyer will be a function of the complexity and nature of their affairs and not whether the information they will communicate is protected from disclosure to the revenue authority.

A large component of the tax work undertaken by accountants is tax compliance and of a routine nature (as distinct from tax planning and structuring, for example). Fraser and Deards observe that “legal advice is rarely sought by taxpayers or their tax agents prior to the entry into transactions or lodging tax returns unless it is apparent that complex tax issues and/or significant amounts of tax are involved”.⁸⁶ For tax returns of a more routine nature, privilege will never be an issue. The Law Council of Australia also suggests that “the primary role of tax agents is an administrative one in terms of preparation and filing of tax returns”⁸⁷ and that “the provision of advice on tax laws may be incidental to this role”.⁸⁸ This may be the case for smaller practices but clearly does not reflect the nature of tax planning and tax opinion work performed by larger practices. In the authors’ view, if the confidential nature of communications is an issue, then, arguably, a taxpayer will have utilised a lawyer in the past – hence the competitive advantage afforded to lawyers. This does not impact on voluntary compliance – it does potentially impact on compliance costs because it may mean that a taxpayer who is normally advised by an accountant may also need to engage the services of a lawyer to gain common law privilege. In the future some taxpayers who previously may have sought advice from a lawyer due to privilege may choose only to consult an accountant, therefore reducing their compliance costs.

The Law Council of Australia⁸⁹ queries the extent to which the ALRC proposal will improve compliance, particularly given that source documents will continue to be available to the ATO. This clearly restricts the protection provided by the statutory privilege compared with legal professional

⁸² ALRC, n 13 at [6.275].

⁸³ IRD, n 78, p 44 (emphasis added).

⁸⁴ Kendall K, *A Tax Advisers’ Privilege for Australia*, Draft PhD thesis (University of Sydney), Ch 7, p 8.

⁸⁵ IRD, n 78; IRD and the Treasury, n 6.

⁸⁶ Fraser and Deards, n 5 at 79.

⁸⁷ Law Council of Australia, *Response to the Australian Law Reform Commission Report No 107 – “Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies”* (2008) p 10.

⁸⁸ Law Council of Australia, n 87, p 10.

⁸⁹ Law Council of Australia, n 87, p 11.

privilege since such documents are protected by legal professional privilege. On this basis, taxpayers with complex affairs may continue to seek advice from their lawyers. Geldenhuys and Trombitas similarly observe (in the New Zealand context): “Providing confidentiality in a narrow set of circumstances will not promote the stated objectives of the legislation: to promote voluntary compliance.”⁹⁰

The Law Council of Australia also does not believe that the compliance rationale is a sufficient justification for the creation of the statutory privilege for accountants because “the fundamental basis for client legal privilege ... is to protect the administration of justice. All other rationale flow from this single principle”.⁹¹ The answer to the Law Council of Australia appears to lie in the level of generality used to describe the doctrine of legal professional privilege and how closely that description is tied in to litigation privilege. McHugh J, in *Carter v Northmore Hale Davy & Leake*,⁹² commented that the rationale behind litigation privilege “hardly seems applicable to non-litigious communications between legal advisor and client unless the concepts of ‘the legal system’ and ‘the administration of justice’ are given extended and artificial meanings”.⁹³ His Honour continued:

Now that this Court has held that legal professional privilege is not a rule of evidence but a substantive rule of law, *the best explanation of the doctrine is that it is “a practical guarantee of fundamental, constitutional or human rights”* ... By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons ... by *ensuring unreserved freedom of communication* with professional lawyers who can advise them of their rights under the law and, where necessary take action on their behalf to defend or enforce those rights.⁹⁴

When legal professional privilege is viewed at this level, as “a practical guarantee of fundamental, constitutional or human rights” protecting the individual, particularly from intrusion into their private affairs by the state (including the extensive coercive powers of the revenue authority), and ensuring “unreserved freedom of communication”, the extension of a form of privilege applying in the client-accountant relationship is justified.

Kendall also observes that, unlike most other areas of legal practice, it is not necessary to be a member of the legal profession to provide advice on taxation law.⁹⁵ Qualification for registration as a tax agent in Australia is largely determined by experience and relevant level of education, rather than being a member of the legal profession:

[E]xtending legal professional privilege only to members of the legal profession and not other persons qualified to advise on taxation law, even where the advice would be identical, is anomalous. In being able to provide tax advice, tax agents that are not members of the legal profession play just as much of a role in the administration of justice as do lawyers.⁹⁶

Mr Graham Tubb (then the National Manager of Technical Standards at the IRD) shed some light on the compliance aspect behind the New Zealand statutory privilege, observing how essential it is:

[T]hat taxpayers can seek and obtain candid and confidential advice from competent and experienced professional tax advisors. To accept anything less will result inevitably in a *weakening of the perceived and actual integrity of the tax system*, which the [CIR] is charged with upholding.⁹⁷

Tubb did not elaborate on how the integrity of the tax system is potentially weakened in the absence of a form of privilege for clients of accountants. An aspect of the integrity of the tax system

⁹⁰ Geldenhuys R and Trombitas E, “Blakeley v CIR and the Non-Disclosure Right: A Decision Out of Context” (2008) 14 NZJTL 303 at 308.

⁹¹ Law Council of Australia, n 87, p 11.

⁹² *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.

⁹³ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161.

⁹⁴ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161 (emphasis added).

⁹⁵ Kendall, n 57 at 53.

⁹⁶ Kendall, n 57 at 53.

⁹⁷ Tubb G, *Inland Revenue’s Perspective on Non-Disclosure Rights*, Paper presented at the New Zealand Institute of Chartered Accountants’ Conference (Rotorua, October 2005) p 22 (emphasis added).

relates to how fair the tax system is perceived to be. On the basis of the 2002 discussion document,⁹⁸ the authors believe this is the context in which Tubb used the word “integrity”. In that document, which proposed to reform privilege in New Zealand by extending it to tax advisors and limiting its application to tax opinions only, the objective of that reform was stated as being to “help to maintain the integrity of the tax system by ... *increasing perceptions of fairness*”.⁹⁹

There is a body of literature which has researched the link between perceptions of fairness of the tax system with compliance behaviour.¹⁰⁰ Richardson and Sawyer observed that “[t]he majority of studies find a significant positive relationship between the two, but a large number again find no evidence of fairness perceptions influencing taxpayer compliance”.¹⁰¹ They commented that this uncertainty may be due to a number of factors including the multi-dimensional nature of fairness as a compliance variable and that there may be directions of causality, ie an unfair tax system may act as a rationalisation for tax evasion rather than a cause.¹⁰²

The authors are unaware of any studies linking or comparing the non-availability and availability of privilege with perceptions of the fairness of the tax system (and tax compliance). Irrespective of whether there is any such discernible link, Richardson and Sawyer made the following general observation: “[F]avourable taxpayer perceptions of the fairness of the tax system are certainly preferable to negative assessments.”¹⁰³ In this broad context, the creation of a statutory privilege is supported.

The “candid and independent advice” rationale

The second stated justification for creating the statutory privilege is that accountants will be able to “give candid and independent advice to their clients”.¹⁰⁴ Underlying this rationale is the implication, in the absence of statutory privilege, that accountants may withhold candid advice (or be economical with their recording of advice or may not record advice in writing) in the knowledge that such communications (subject to any protection afforded by the Accountants’ Concession and the New Zealand equivalent) may have to be disclosed to the revenue authority if requested. This is a potential risk. It is also clear in this situation that legal professional privilege cannot be artificially attracted by channelling non-privileged communications through a legal practitioner.¹⁰⁵ The statutory privilege may therefore have a positive impact on the extent of advice provided and in particular its form (in writing).

This rationale is noteworthy because it focuses on the advisor (and his or her ability to be candid) compared with the usual focus of the client (and his or her ability to provide full and frank disclosure). In the authors’ view, this rationale is justified on the basis of a broad interpretation of what is meant by the efficient administration of justice (ie the basis for legal professional privilege).

THE DECISION TO CREATE A STATUTORY RIGHT AND NOT TO EXTEND PRIVILEGE

New Zealand and Australia have both taken the approach of not extending the common law concept of legal professional privilege to accountants. In the first reading of the *Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004* (NZ), introducing the statutory privilege in New Zealand, the Hon Dr Michael Cullen clearly indicated that statutory privilege is not equivalent to legal professional

⁹⁸ IRD 2002 discussion document, n 19 at [2.4].

⁹⁹ IRD 2002 discussion document, n 19 at [3] (emphasis added).

¹⁰⁰ See, eg Jackson BR and Milliron VC, “Tax Compliance Research: Findings, Problems and Prospects” (1986) 5 JAL 125; Richardson M and Sawyer AJ, “A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects” (2001) 16 ATF 137; Tan LM, “Taxpayers’ Perceptions of Fairness of the Tax System – A Preliminary Study” (1998) 4 NZJTL 59.

¹⁰¹ Richardson and Sawyer, n 100 at 181.

¹⁰² Richardson and Sawyer, n 100 at 181-182.

¹⁰³ Richardson and Sawyer, n 100 at 183.

¹⁰⁴ IRD, n 78, p 44.

¹⁰⁵ *Brambles Holdings Ltd (t/as Oldfield & General Transport Co) v WMC Engineering Services Pty Ltd* (1995) 14 WAR 239.

privilege: “Although it will be subject to a number of exclusions, it will place the status of communications from non-legal advisors, such as accountants, *closer* to that of the tax advice provided by lawyers, who do not have to disclose advice to the Inland Revenue Department.”¹⁰⁶

The ALRC takes the view that a separate statutory privilege “will allow Parliament greater control over the operation and scope of the tax advice privilege”.¹⁰⁷ Legal professional privilege, under the common law, is a dynamic doctrine that has adapted and extended over time.¹⁰⁸ This creation of separate statutory privilege will arguably mean that developments in the common law will not necessarily affect the application of the statutory privilege. Over time, this may mean a divergence between common law privilege and the statutory privilege. This outcome is accepted by the ALRC who observed: “Linking an accountants’ advice to client legal privilege could lead to extensions of the protection afforded to the advice provided by tax accountants that are inconsistent with its rationale.”¹⁰⁹

These statements may be of some significance when the judiciary consider the application of these rules, especially if a scheme and purpose approach is adopted as in the New Zealand High Court decision of *Blakeley v CIR*.¹¹⁰ In this case, while Hansen J did not refer specifically to extrinsic materials in his judgement, his Honour adopted a scheme and purpose approach and, after noting the differences between common law privilege and the statutory privilege, concluded that “[t]he right of non-disclosure ... is much more confined than legal professional privilege ... It is ... a creature of statute. It protects defined parts of a limited category of written communications”.¹¹¹ A practical implication of this, at least in the New Zealand context, is that his Honour accordingly relied on the plain words of the legislation and not principles of legal professional privilege in reaching his decision.¹¹²

The New Zealand government also made it very clear in the Explanatory Note that there is no intention for the non-disclosure right to affect common law privilege.¹¹³ Kendall stated “[t]his is an important aspect of the [statutory privilege], since experience in other jurisdictions has illustrated that legislative reforms can substantially influence the development of the common law”.¹¹⁴ Kendall cites as an example the High Court of Australia in *Eso Australia*¹¹⁵ which used the dominant purpose test in the *Evidence Act 1995* (Cth) as a justification for moving from a sole to dominant purpose test for legal professional privilege.

¹⁰⁶ New Zealand Parliament, “Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004”, *Hansard*, Cullen M (2004) Vol 622, p 18,054. The Explanatory Note to the *Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004* (NZ) similarly states that the non-disclosure right would “provide a degree of consistency” with common law privilege, again clearly signalling that the statutory privilege is similar but not identical or equivalent to common law privilege: IRD, *Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004 – Explanatory Note* (November 2004) p 10, <http://www.taxpolicy.ird.govt.nz/publications/files/bills/231bar1.pdf> viewed 26 July 2009 (emphasis added).

¹⁰⁷ ALRC, n 13 at [6.278].

¹⁰⁸ ALRC, n 13 at [6.278].

¹⁰⁹ ALRC, n 13 at [6.278].

¹¹⁰ *Blakeley v CIR* (2008) 23 NZTC 21,865. For a discussion of the case see Geldenhuys and Trombitas, n 90; Maples AJ, “The Non-disclosure Right in New Zealand – Lessons for Australia?” (2008) 1-2 JALTA 351 at 358.

¹¹¹ *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,869.

¹¹² *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,870.

¹¹³ IRD, n 106, p 10.

¹¹⁴ Kendall, n 84, p 9.

¹¹⁵ *Eso Australia Resources Ltd v FCT* (1999) 201 CLR 49; 43 ATR 506.

LEGAL PROFESSIONAL PRIVILEGE AND STATUTORY PRIVILEGE COMPARED – A ROSE BY ANY OTHER NAME?

The statutory privilege has a number of similarities to its common law cousin. For example, these privileges apply in both directions to confidential written communications generated by the client and by the lawyer/accountant (provided the necessary purpose of seeking or providing advice existed at the time of the document's creation).

However, while modelled in part on principles of common law privilege, the statutory privilege is a more limited statutory right. Table 1 illustrates a number of differences between common law privilege and statutory privilege. Although the ALRC proposal has not as yet been legislated, the authors' discussion is based on the expectation that the Australian version will be similar to the New Zealand statutory privilege. This review also considers relevant aspects from two recent New Zealand cases on the non-disclosure right, *Blakeley* and *ANZ National Bank Ltd v CIR (No 2)*,¹¹⁶ which provide an early indication of the approach of the courts in New Zealand to the right. This comparison also highlights a difference between the New Zealand statutory privilege and the ALRC proposal which may prove significant in the future.

TABLE 1 Common law privilege and statutory privilege compared

	Common law privilege	Statutory privilege
Basis of right	Common law.	Statute.
Who does the right belong to?	Client.	Taxpayer to whom the information being sought relates (normally the client of the tax advisor).
Who does it apply to?	Legal practitioners.	Independent professional accounting advisors/tax advisors who are registered "tax agents"/part of an approved advisor group.
What does it apply to?	Confidential legal communications brought into existence for the dominant purpose of obtaining or giving legal advice.	Confidential tax advice documents created for the dominant/main purpose of obtaining or giving advice about the operation and effect of tax laws.
What types of communications are protected?	Written or oral communications, includes information, books and documents.	Books and documents.
Process required to claim	Onus on person (claimant) to establish the claim.	Procedure specified. Ability to claim privilege is lost if procedure and time limits specified are not adhered to.
Waiver	Privilege continues until lost by either express or implied waiver.	Cannot be waived (per Hansen J in <i>Blakeley v CIR</i> (2008) 23 NZTC 21,865).
Requirements to disclose certain information?	No requirements to disclose information: advice, facts and assumptions are protected. Advice on other areas of law, eg trust law or company law, is also covered.	"Tax contextual information" must be disclosed including facts, assumptions, and diagrams of transactions and advice that does not concern the operation and effect of tax laws.
	Documents such as trust account ledgers, timesheets, and evidence of transactions such as conveyancing are not protected.	Documents recording transactions, setting out calculations and completed to meet tax compliance obligations are not protected.

¹¹⁶ *ANZ National Bank Ltd v CIR (No 2)* (2008) 23 NZTC 21,918.

TABLE 1 *continued*

	Common law privilege	Statutory privilege
Validation of privilege claim?	Challenge in court.	Challenge in court. ALRC Report 107 proposes claims that a document is a tax advice document may be required to be certified by a lawyer (Recommendation 8-3). In New Zealand, the CIR can refer issues concerning a tax advisor's actions or omissions to the approved advisor group for censure.
Proceedings in court	Basis to resist discovery and production of documents in court.	Initially the privilege did not apply to discovery in litigation proceedings in New Zealand. Amendment in 2009 to extend coverage of privilege. Not dealt with in ALRC Report 107.
This Table is based on one outlined in Tubb G, <i>Inland Revenue's Perspective on Non-Disclosure Rights</i> , Paper presented at the New Zealand Institute of Chartered Accountants' Conference (Rotorua, October 2005) p 8 but with modification and significant material added.		

The claim for privilege

Legal professional privilege and the statutory equivalent belong to the client, although they are asserted by the lawyer or accountant (or the taxpayer) respectively. In both cases the person claiming the privilege bears the onus of establishing the claim. However, in respect of the New Zealand statutory privilege, there is a specific process prescribed to claim this privilege.¹¹⁷ The failure to follow the process in a timely manner will result in the inability to claim the privilege.

In the New Zealand *Blakeley case*, Hansen J stated that legal professional privilege “does not need to be claimed. Privilege attaches to a qualifying communication and remains unless waived by the client”.¹¹⁸ By contrast, “tax advice documents are not automatically protected, even if eligible”.¹¹⁹ This statement is correct in the sense that, as noted, a strict procedure is required for a tax advice document to be protected by the statutory right. If this process is not followed, the document is not protected. No such strict procedure is required or prescribed for legal privilege; rather, if the particular communication satisfies the requirement that it was created for the dominant purpose of obtaining or giving legal advice, then the legal professional privilege attaches to the document. However, legal professional privilege is not automatic – it still must be asserted.¹²⁰ Geldenhuys and Trombitas similarly comment that:

Practically, legal professional privilege also has to be claimed (or must not be waived) to be effective. If it is not claimed and the document is produced to Inland Revenue, then the privilege may be deemed to be waived. Once the [non-disclosure] right is claimed the effect is the same, at least to the extent of the document and the tax advice it contains.¹²¹

The comments in *Blakeley* may therefore indicate a level of uncertainty in the courts as to the actual nature and scope of the statutory privilege compared with common law privilege.

¹¹⁷ TAA 1994, s 20D.

¹¹⁸ *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,869.

¹¹⁹ *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,870.

¹²⁰ See ALRC, n 13 at [3.51].

¹²¹ Geldenhuys and Trombitas, n 90 at 314.

Application of the privilege

Legal professional privilege applies to confidential communications created for the dominant purpose of obtaining or giving advice.¹²² The ALRC proposal also adopts a “dominant purpose” test in its definition of a “tax advice document” (which is protected from disclosure).¹²³ The New Zealand provision, s 20B(2) of the TAA 1994, protects a book or document created for the “main purpose” of giving or receiving advice on tax laws. This raises the issue of whether the words “dominant” and “main” are to be interpreted as synonymous. Does the choice of the word “main” indicate an intention by the New Zealand Parliament to create a different test from common law privilege (and now the ALRC proposal), especially given the explicit rejection of submissions by the New Zealand government to extend legal professional privilege to accountants? If a different interpretation is adopted for the words, there is the potential not only for divergence between case law on legal professional privilege and the non-disclosure right in New Zealand, but also for divergence in the case law (and revenue authority practice) on the statutory privilege between Australia and New Zealand with respect to this issue.

There is some indication that there may be a difference, albeit a subtle one, between the words. In *Waugh v British Railways Board*,¹²⁴ the House of Lords rejected the adoption of a sole purpose test for privilege in the United Kingdom. Lord Simon considered various terms to describe the necessary purpose and arguably drew a distinction between “mainly” and “dominant”, believing the latter to be “less quantitative than ‘mainly’” and easier to apply.¹²⁵

In *FCT v Spotless*,¹²⁶ the High Court of Australia, when considering the meaning of “the purpose” under s 177D of Pt IVA of the ITAA 1936, as the dominant purpose, defined “dominant” as follows: “In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose.”¹²⁷ The court did not mention the word “main” in its definition. Of particular significance is the fact that the High Court used the term “most influential”, which implies that there can be an influential purpose, which might include a main purpose, but that “dominant purpose” means a more influential purpose. In this context, dominant purpose may in fact mean a major purpose rather than just a main purpose.¹²⁸

It is not entirely clear why the drafters of the New Zealand legislation used the word “main” instead of “dominant”. The Explanatory Note uses the term “dominant purpose” stating “[t]he non-disclosure right will apply to communications between a tax advisor and a client for the *dominant purpose* of providing or receiving tax advice”.¹²⁹ On this basis, it may be that the use of the word

¹²² See *Esso Australia Resources v FCT* (1999) 201 CLR 49; 43 ATR 506 in Australia and *Guardian Royal Exchange v Stuart* [1985] 1 NZLR 596 in New Zealand. The New Zealand courts have also interpreted s 20 of the TAA 1994 as a “dominant purpose” test (*Dinsdale v CIR* (1998) 18 NZTC 13,583). The “dominant purpose” test is also the accepted test for legal privilege in both the United Kingdom (*Waugh v British Railways Board* [1980] AC 521) and Ireland (*Silver Hill Duckling Ltd v Minister for Agriculture* [1987] IR 289).

¹²³ ALRC, n 13 at [6.288].

¹²⁴ *Waugh v British Railways Board* [1980] AC 521.

¹²⁵ *Waugh v British Railways Board* [1980] AC 521 at 537. Lord Edmund-Davies in *Waugh* similarly preferred the “dominant purpose” test over the test of “mainly” because the latter “lacks the element of *clear paramountcy* which should, as I think, be the touchstone” of the test (at 542-543).

¹²⁶ *FCT v Spotless* (1996) 186 CLR 404; 34 ATR 183.

¹²⁷ *FCT v Spotless* (1996) 186 CLR 404 at 414; 34 ATR 183.

¹²⁸ Alston raises similar concerns in the context of cases concerning the taxation of personal property gains: Alston A, “Taxation of Profits from the Sale of Personal Property” [1981] OLR 114 at 136.

¹²⁹ IRD, n 106, p 10 (emphasis added).

“main” is due to the plain English drafting adopted in the rewrite¹³⁰ of the New Zealand Income Tax Act rather than indicating an intention on the part of the New Zealand Parliament to adopt a different test to that of “dominant purpose”.

The “dominant purpose” test is found in New Zealand¹³¹ and Australian¹³² case law concerning the taxation of personal property. In this context, there are examples where the courts in both jurisdictions¹³³ have used the phrase “the main or dominant purpose”, indicating that the terms are synonymous and therefore interchangeable. For these reasons, ultimately, any difference may not be of great significance.

The protection of confidential communications

While both legal professional privilege and statutory privilege apply to written confidential communications created for the purpose of giving or obtaining legal or tax advice, with respect to the latter, “[t]he protection applies *only* in response to the exercise by the Crown of powers under the [TAA 1994]”.¹³⁴ This raises a very practical issue. A formal request for information under the particular coercive information-gathering powers normally will be made by the revenue authority at the later stages of the audit of a taxpayer. This means revenue officers could have ample opportunity to view documents over which the taxpayer may (later) wish to claim statutory privilege but cannot due to the phase of the audit. The revenue authority therefore needs to ensure it has practices in place to acknowledge and respect the confidential nature of potential tax advice documents from the commencement of the investigation process. This issue does not arise with respect to legal professional privilege because such privilege can be asserted at the start of the information-gathering stage. This represents a significant limitation of the statutory privilege and potentially places the taxpayer at the “mercy” of the revenue authority and its procedures.

The scope of the protection afforded by the statutory privilege is also narrower. Section 264 of the ITAA 1936 and its New Zealand equivalent, s 17 of the TAA 1994, give the Commissioner or CIR the power to request a person to furnish him with any *information* the Commissioner or CIR may require as well as to produce for inspection any books or documents. Legal professional privilege applies to protect information (including oral communications) as well as a book or document and therefore can protect the entire range of materials that may be requested under s 264 of the ITAA 1936 or s 17 of the TAA 1994. Statutory privilege, by comparison, does not provide such wide protection against the exercise of revenue powers because it is simply limited to books and documents. In addition, for a book or document, the protection under statutory privilege is only partial. Tax contextual information must be disclosed under the statutory privilege whereas facts and assumptions are protected by common law privilege. Further, unlike the statutory privilege, legal professional privilege is not simply limited to advice on taxation laws; advice on other areas of the law is also protected.

¹³⁰ In the early 1990s, New Zealand embarked on a project to rewrite (using “plain English” drafting techniques) and restructure the then *Income Tax Act 1976* (NZ) (ITA 1976) (and its companion the *Inland Revenue Department Act 1974* (NZ)). This process culminated in the enactment of the current *Income Tax Act 2007* (NZ). See Sawyer AJ, “New Zealand’s Tax Rewrite Programme – in Pursuit of the (Elusive) Goal of Simplicity” (2007) 4 BTR 405.

¹³¹ See, eg *Bedford Investments Ltd v CIR* [1955] NZLR 978; *CIR v Walker* [1963] NZLR 339; *CIR v Hunter* [1970] NZLR 116; *Holden v CIR* [1974] 2 NZLR 52; *National Distributors Ltd v CIR* (1987) 9 NZTC 6,135 applying s 88(1)(c) of the *Land and Income Tax Act 1954* (NZ) or the equivalent provision, s 65(2)(e) of the . These provisions taxed profits or gains derived from property acquired for the purpose of sale or as a result of the carrying on or carrying out of an undertaking or scheme entered into or devised to make a profit. The equivalent section in the Australian legislation is s 25A of the ITAA 1936.

¹³² *London Australia Investment Co Ltd v FCT* (1977) 138 CLR 106; 7 ATR 757, applying s 26(a) of the ITAA 1936.

¹³³ See, eg cases applying the now repealed s 26(a) of the ITAA 1936: Dixon J in *Premier Automatic Ticket Issuers Ltd v FCT* (1933) 50 CLR 268 at 298; *FCT v Williams* (1972) 127 CLR 226 at 248; Windeyer J in *Buckland v FCT* (1960) 12 ATD 166 at 168; Gibbs J in both *Steinberg v FCT* (1975) 134 CLR 640 at 695; 5 ATR 565; *Jacob v FCT* (1971) 45 ALJR 568 at 689. For New Zealand cases, see *CIR v National Distributors* (1989) 11 NZTC 6,346 at 6,355 (Casey J) concerning s 65(2)(e) of the ITA 1976.

¹³⁴ Hansen J in *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,869 (emphasis added).

Waiver of privilege

Common law privilege may be waived by either express or implied waiver, ie in both cases a positive act is required by the client or his or her advisor.¹³⁵ The question of waiver in the context of the New Zealand statutory privilege arose in *Blakeley*. Hansen J stated “the protection against disclosure provided by s 20B-F is *not* susceptible to waiver ... Waiver simply does not arise under [these provisions]”.¹³⁶ These comments are obiter and were made on the basis that no specific provision for waiver is made in the New Zealand statutory privilege legislation. In particular, his Honour observed, concerning the effect of s 20D of the TAA 1994, which outlines the process for claiming the right: “If the claim is not asserted by the means and within the time limits specified, with the authority of the client, there will be no right to non-disclosure.”¹³⁷ Therefore, if the client does not want to have a document protected by the statutory privilege, no action is necessary. In the authors’ view, s 20C(2) of the TAA 1994 does implicitly provide a limited form of waiver because it provides that a book or document will be treated as a tax advice document from the time an information request is made until inter alia the taxpayer or his or her accountant informs the CIR that he/she is not claiming that the book or document is a tax advice document. Further, a book or document will be a tax advice document from the time the claim is made until the taxpayer or his or her accountant “withdraws in writing the claim” under s 20C(3) of the TAA 1994.

At this stage it is not entirely clear which approach Australia will adopt regarding waiver of the statutory privilege, assuming the ALRC proposal itself is adopted. Recommendation 8-3 of ALRC Report 107 provides for the claiming of statutory privilege. Recommendation 8-4 clarifies that the provision of a description of documents, if requested by a federal body, will not amount to a waiver of the privilege.

Court proceedings

Legal professional privilege can be asserted to resist discovery and production of documents in court. When originally enacted in New Zealand, the non-disclosure right did not apply to discovery in litigation proceedings.¹³⁸ The *Taxation (International Taxation, Life Insurance, and Remedial Matters) Act 2009* (NZ) now extends the right to prevent disclosure of these documents by the IRD during litigation. If the ALRC proposal is implemented, it should also include similar protection for tax advice documents – not to do so would significantly reduce the effectiveness of the statutory privilege and allow the protection provided by the privilege to be bypassed by the ATO in a tax dispute.

CONCLUSION

Legal professional privilege is at the heart of the client-lawyer relationship. This common law privilege, which has developed over time, provides a strong foundation for the provision of privileged information between client and lawyer. In a tax context, both lawyers and accountants provide advice and act for their clients, but only the client-lawyer relationship can utilise the protection of legal professional privilege. The ALRC, in line with the New Zealand model, has rejected the extension of legal professional privilege to the accountant-client relationship but instead has proposed a statutory privilege. The authors support the introduction of a form of privilege for accountants on the basis that at least it will enhance perceptions of the fairness of the tax system and potentially positively impact on tax compliance. However, it is unfortunate that a separate privilege to legal professional privilege has been selected as the route to be established in Australia. In essence, having a dual system in place will mean that the statutory privilege will evolve separately from legal professional privilege, which, as a common law right entrenched in the legal system, has developed over centuries. This differing

¹³⁵ Woellner et al, n 40 at [29-215].

¹³⁶ *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,870 (emphasis added).

¹³⁷ *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,870.

¹³⁸ See *ANZ National Bank Ltd v CIR (No 2)* (2008) 23 NZTC 21,918. In this case, which concerned whether the ANZ National Bank, in litigation with the IRD, was required to discover opinions provided to it by its tax adviser, the court held that the statutory privilege had no relevance once challenge proceedings had been commenced and the parties were involved in litigation.

approach has been adopted in New Zealand, with the New Zealand courts clearly indicating that the two privileges are not identical and orthodox principles of interpretation will be used to interpret the statutory privilege – “the statute should not be construed as if it were an extension to legal professional privilege”.¹³⁹ The potential divergence between the two privileges is likely to cause uncertainty, particularly as to the scope of the statutory privilege.

The difference in wording between the ALRC Report and non-disclosure right with respect to “dominant purpose” and “main purpose” may also cause interpretative issues in the future. It is unfortunate that the New Zealand regime has used the word “main” when the term “dominant” is well understood in case law. The authors recommend that, if and when the ALRC proposal is legislated, the drafters use the phrase “dominant purpose”.

The statutory privilege clearly offers less protection than its common law equivalent. It does not protect tax contextual information or advice concerning the operation and effect of other areas of the law. In the New Zealand statutory privilege, a strict process (with timelines) is prescribed for privilege to be claimed – a failure to adhere to these will lead to an inability to claim the privilege. The statutory privilege can only be claimed once a formal request for information is made which will usually be some time after the investigation has commenced. Documents which will be subject to a claim of statutory privilege may therefore have already been viewed by the revenue authority officers. This is unacceptable when compared to the common law privilege and reduces the protection afforded by the statutory privilege.

The ability to waive the statutory privilege is unclear in the New Zealand context with no specific provision for waiver included in the New Zealand legislation. For the sake of certainty, any Australian legislation should specifically state when the privilege can be waived. In addition, to avoid the situation where, effectively, the statutory privilege can be circumvented by using discovery in litigation proceedings, any future Australian legislation must clearly extend the privilege to discovery.

At this stage, the ALRC proposal has not been put into legislative form. This article is therefore limited in that respect and it has been assumed that the ultimate form of the statutory privilege will closely resemble the regime operating in New Zealand. In addition, this article has not considered the potential impact the statutory right will have for tax administration, particularly whether the revenue authority’s ability to gather information and therefore to collect tax will be impeded by the statutory right.

Only time will tell if the new statutory privilege will provide an appropriate and sufficient protection for clients of accountants or will be, as the authors fear, legal professional privilege’s “poor cousin”.

¹³⁹ *Blakeley v CIR* (2008) 23 NZTC 21,865 at 21,869.