Australian Government
Australian Law Reform Commission

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Langton Crescent
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Dear General Manager,

Discussion Paper on Privilege for Tax Advice

The Australian Law Reform Commission (ALRC) welcomes the opportunity to provide a submission in response to the Discussion Paper on *Privilege in relation to Tax Advice*, released by the Assistant Treasurer, Bill Shorten, on 15 April 2011. In this submission I will refer to prior work undertaken by the ALRC that may be of relevance to the inquiry. Directly relevant in this respect is the report, *Privilege in Perspective—Client Legal Privilege and Federal Investigations* (ALRC 107, 2007) and the recommendation in that report for a specific protection for tax advice in certain circumstances.[1] I will not repeat all the analysis in *Privilege in Perspective*, but draw upon it to respond to matters raised in the Discussion Paper.

In this submission I will focus, in broad terms, on questions 95.A(c), 95.B(d),(e), (g), (h), (i) and (j).

95A.(c) Does the rationale for legal professional privilege also apply to tax advice communications with an accountant?

This question goes to the heart of the ALRC's conclusion to recommend a limited client privilege with respect to taxation advice. I consider it helpful, therefore, to explain that thinking for the purposes of the inquiry.

The ALRC's recommendation in 2007 for the creation of a 'tax advice privilege' was a targeted one, designed to protect the confidentiality of tax advice given by independent professional accounting advisers from the information-gathering powers of the Commissioner of Taxation. This recommendation was made in the context of the Terms of Reference for the inquiry, which concerned the application of legal professional privilege to the coercive information-gathering powers of Commonwealth bodies. Within that constraint, the ALRC did not make recommendations on the extension of the privilege in other areas, but did look at client legal privilege in the particular context of federal investigations, and whether that privilege logically should be extended to clients who receive legal advice from other professionals.

1 Recommendation, 6–6.

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The logic of the recommendation was that, because registered tax advisers are *authorised to give advice with respect to taxation law*—advice that might be considered as coming within the ambit of 'legal work'—clients ought to have the benefit of privilege with respect to such communications. State and territory legislation traditionally has restricted 'legal work' or 'legal practice' to qualified lawyers holding a current practising certificate.[2] Indeed, unauthorised legal practice amounts to an offence.[3] However, there are express exceptions to this rule, including 'legal practice engaged in under the authority of a law of ... the Commonwealth'. There are limited examples of such laws that permit the giving of advice with respect to certain Commonwealth laws—for example, work of a legal nature performed by registered patent attorneys and the giving of advice about taxation law by registered tax agents.

Patent attorneys are allowed a specific privilege under the *Patents Act 1990* (Cth), s 200(2) of which provides that:

> A communication between a registered patent attorney and the attorney's client in intellectual property matters, and any record or document made for the purposes of such a communication, are privileged to the same extent as a communication between a solicitor and his or her client.

'Intellectual property matters' are defined in s 200(4) as meaning:

> (a) matters relating to patents; or
> (b) matters relating to trade marks; or
> (c) matters relating to designs; or
> (d) any related matters.

While the privilege accorded to the communication between the registered patent attorney and the attorney's client is to the 'same extent' as client legal privilege in relation to relevant communications, it is only to that extent. Section 200(3) makes it clear that:

> Nothing in this section authorises a registered patent attorney to prepare a document to be issued from or filed in a court or to transact business, or conduct proceedings, in a court.

A further example is found in the *Migration Act 1958* (Cth), which makes provision for the registration of migration agents. The Act distinguishes between 'immigration assistance' and 'immigration *legal* assistance' for the purpose of marking out the limits of permissible conduct for registered migration agents who are not qualified lawyers.[4]

Since the completion of *Privilege in Perspective*, the legislative framework for taxation agents has changed. The *Tax Agent Services Act 2009* (Cth) superseded the provisions that were formerly in the *Income Tax Assessment Act 1936* (Cth)—in particular, s 251L, which covered the 'privileges and duties of registered tax agents' and formed the basis of the consideration of tax advice privilege in the ALRC's report.

The *Tax Agent Services Act 2009* provides the basis upon which registered taxation agents and, in addition, registered BAS agents may give advice about taxation law in certain respects—BAS agents having a more limited area of authorised advice. The object of the Act, set out in s 2–5, is

2 See, eg, *Legal Profession Act 2004* (NSW) s 14. See also Standing Committee of Attorneys-General, *National Legal Profession Model Bill* (2006) Law Council of Australia, s 2.2.2(1).
3 *Legal Profession Act 2004* (NSW) s 14(1).
4 *Migration Act 1958* (Cth), ss 276, 277, 280.

> to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. This is to be achieved by (among other things):
>
> (a) establishing an independent national board to register tax agents and BAS agents; and
>
> (b) introducing a Code of Professional Conduct for registered tax agents and BAS agents; and
>
> (c) providing for sanctions to discipline registered tax agents and BAS agents.

Under this Act, only registered taxation agents and registered BAS agents may provide a 'tax agent service' or a 'BAS service', respectively.[5] A 'tax agent service' is defined in s 90–5 as one that relates to:

> (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
>
> (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
>
> (iii) representing an entity in their dealings with the Commissioner.

The service must also be provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

> (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
>
> (ii) to claim entitlements that arise, or could arise, under a taxation law.

Section 90–10 defines 'BAS service'. Further, s 70–50 states that the Act 'does not affect the law relating to legal professional privilege'.

The summary above therefore updates the ALRC's earlier analysis of the kinds of professionals who may, by virtue of specific authorisation under Commonwealth law, undertake work that may be considered, within its limited extent, legal work.

As 'lawyers' work', in the nature of advice on legal matters, is now performed by others, in the privilege inquiry the ALRC asked whether client legal privilege should apply in such circumstances and, if so, to what extent.

As the ALRC discussed in Chapter 2 of *Privilege in Perspective*, the basis of client legal privilege is the promotion of full and frank disclosure for the purpose of obtaining legal advice, and a key aspect of which is promoting compliance with the law. As clients can obtain the fullest legal advice only where the lawyer is in possession of all relevant facts, the protection of communications is said to encourage greater compliance with the law, as the client is in the best position to be informed as to what amounts to complying conduct. The argument is that, where clients feel secure that their communications with their lawyers will be kept confidential, it is likely to promote the disclosure of all relevant information and thus permit lawyers to provide legal advice that encourages the greatest compliance with the law. Dr Jonathan Auburn notes the broader social impact of the doctrine in stating that:

> The rationale is concerned with many benefits beyond those accruing to the client. Society benefits through, for example, increased compliance with the law, greater efficiency for attorneys in the adversary system, an easing of the burden on courts and, arguably, greater accuracy of fact-finding.[6]

5 *Tax Agent Services Act 2009* (Cth), s 50–5.

The ALRC considered this 'compliance rationale' to be a significant part of the modern basis for the doctrine of client legal privilege in serving the administration of justice. It follows from this reasoning that, where legal advice is lawfully being given in a similar context by a non-lawyer, then the privilege should also extend to the provision of that advice. As with client legal privilege, the privilege belongs to the client, and relates to protection of the legal advice supplied to them—not the profession of the person providing the advice.

In the context of Australian taxation law, the ALRC pointed to its complexity, and that the self-assessment system requires tax payers to have a good understanding of their rights and obligations before being able to make an assessment of their tax liability. This justifies why the tax legislation—formerly the *Income Tax Assessment Act 1936* and now the *Tax Agent Services Act 2008*—makes allowance for registered tax agents (and now, to a lesser extent, BAS agents) to give legal advice on taxation law and why the ATO has provided an administrative concession to tax accountants. In this regard, it is instructive to observe that the Explanatory Memorandum for the Bill that became the 2008 Act identified, as the very first point in the 'background' to the Act, a compliance rationale:

> The current regime for regulating tax agents appears in Part VIIA of the *Income Tax Assessment Act 1936* and was originally introduced in 1943. Since then the tax environment has changed and a much larger proportion of taxpayers use tax agents to lodge their returns and **help them comply with their tax obligations**. In recent years, approximately 74 per cent of individuals and over 95 per cent of business used a tax agent to prepare and lodge their tax returns.[7]

In considering whether to recommend some form of client protection with respect to advice about taxation law, the ALRC was also influenced by the fact that tax advice is covered by a privilege under US, UK and New Zealand legislation.

The ALRC therefore recommended that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation should not be required to disclose a document that is a tax advice document prepared for that person.

The ALRC supported the New Zealand model of creating a separate 'tax advice privilege', rather than simply extending client legal privilege to accountants giving tax advice. The logic of this was to allow Parliament greater control over the operation and scope of the tax advice privilege. Under the common law, client legal privilege is a dynamic doctrine that has adapted and extended over time. 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.

95B.(d) Should a codified privilege extend only to registered tax agents (and their nominees or employees) or should it also cover the advice provided by BAS agents, and by the employees and nominees of tax agents and BAS agents.

The ALRC notes that the logic for recommending the creation of a 'tax advice privilege'—based on the fact that registered tax agents are authorised under Commonwealth law to give certain advice with respect to taxation law—may also extend to BAS agents, within the limits of their power to provide limited advice with respect to aspects of taxation law under s 90–10 of the *Tax Agent Services Act 2008*. As the authorisation of BAS agents to provide certain legal advice was created after the ALRC concluded its work in *Privilege in Perspective*, I make no further comment.

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6 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 13–14 (notes omitted). Reinforcing responsible corporate practice through a culture of compliance has also been identified by Professor R Baxt in the context of an assessment of penalties for breach of continuous disclosure obligations: R Baxt, 'Compliance Will Reduce Penalties for Non-Disclosure' (2006) 2(5) *Baxt Report* 6; and see *Australian Securities and Investments Commission; Re Chemeq Ltd v Chemeq Ltd* (2006) 234 ALR 511.

7 Explanatory Memorandum, *Tax Agent Services Bill 2008*, [1.6] (emphasis added).

95B.(e) Should a codified privilege apply to other financial advisers who provide tax advice, economists advising in respect of transfer pricing, or accountants providing asset and liability valuations in thin capitalisation cases?

The ALRC received a number OF submissions arguing that privilege should be extended to other professions as well as tax accountants. For example, the Australasian Compliance Institute expressed the view that records of compliance systems required special protection:

> An essential feature of compliance programs is often the preparation of compliance reports in respect of compliance failures. In order for these reports to be effective, it is necessary that they deal with compliance failures fully and frankly. The Institute notes that a difficulty with this is the potential for self-incrimination, as currently these kinds of reports are not subject to legal professional privilege. Given the public benefits of effective compliance programs, the Institute proposes that there should be a rebuttable presumption of privilege protecting an organisation from production to a Commonwealth body or a court of reports made by a person for legitimate compliance purposes.[8]

The ACTU and CFMEU submitted that client legal privilege should be expanded to include union industrial officers.[9]

The ALRC considers that the purpose of client legal privilege is different from that of other confidential relationships. It is not the protection of confidences that creates a public interest rationale for client legal privilege, but the effect that the protection of legal advice has on the operation of the legal system. However, as discussed in Chapter 2 of *Privilege in Perspective*, the basis of the protection is the promotion of full and frank disclosure for the purpose of obtaining legal advice (and legal services in litigation).

While noting these submissions, the ALRC was not persuaded that a case had then been made to create a privilege for industrial officers: while they might represent clients and give information on the law, but industrial officers are not permitted to give legal advice in the same manner as registered tax advisers.[10] The fact that the same advice can be given by registered tax agents and lawyers on taxation law is the crucial factor in extending the privilege to tax advice. Similarly, the ALRC did not consider that a case had been made out to protect the advice of compliance professionals, especially when a considerable part of that advice could involve non-legal considerations.

The ALRC makes no specific comment with respect to the professionals identified in the question. In general however, it is the lawful provision of advice with respect to particular laws that provides the foundation for applying the rationale to other professionals.

95B.(g) To which communications or documents should a tax privilege apply? For instance, should it extend to the same material that is covered by legal professional privilege, or should it only cover the advice parts of documents as the ALRC has recommended.

This matter was canvassed fully in *Privilege in Perpective.*

The ALRC supported drawing a distinction between source and advice documents, as is presently the case under the current ATO accountants' concession. This is consistent with the principles of client legal privilege, under which privilege does not generally attach to evidence of transactions—such as contracts or conveyances—even where these are provided to a lawyer for advice or for use in litigation.[11] The ALRC agreed with the submission of the ATO, that the legislation should clarify that source documents, will not be protected in any circumstances, even where they are given to a tax agent for the purpose of obtaining advice.

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8 Australasian Compliance Institute, *Submission LPP 79*, 26 October 2007.

9 Construction Forestry Mining and Energy Union (Construction and General Division), *Submission LPP 90*, 1 November 2007; Australian Council of Trade Unions, *Submission LPP 88*, 1 November 2007; referring to the *Workplace Relations Act 1996* (Cth) s 854.

10 It should also be noted that many industrial officers are, in fact, legally trained.

11 *Baker v Campbell* (1983) 153 CLR 52, 86; R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 29.

The ALRC also supported the provision in the New Zealand legislation, which does not apply the privilege to contextual information provided for the purpose of giving tax advice. 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 tax agent's file or briefing. The legislation should state that no privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' should be defined as information about:

- a fact or assumption that has occurred or is postulated by the person creating the tax advice document;
- a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document; or
- advice that does not concern the operation and effect of tax laws.

95.B(i) Should a tax advice privilege apply only for the coercive information gathering powers of the Tax Office, or also to other bodies such as the Australian Crime Commission? ...

The ALRC noted the concerns expressed in the privilege inquiry: by the Insolvency and Trustee Service Australia—that privilege could be claimed over an accountant's advice that would assist in the investigation of bankruptcy offences; and by the ACC—regarding the difference between regulatory matters and the types of very serious crime it investigates. As outlined above, the ALRC's recommendation for the creation of a privilege for taxation advice is consistent with the compliance rationale for client legal privilege and can be justified given the complexity of taxation law. The ALRC was, however, keen not to replicate the much broader protection offered by client legal privilege and did not wish to create barriers to the investigation of offences *outside the areas of general compliance with taxation laws*. The ALRC pointed to the fact that the US, UK and New Zealand models apply the privilege to the information-gathering powers of the Internal Revenue Service (US) and the Inland Revenue Departments (UK and NZ) respectively. The ALRC similarly recommended that the tax advice privilege should be available only against the information-gathering powers of the Commissioner of Taxation. The object in this respect was to serve as an appropriate limitation on the operation of the privilege and not affect the investigatory powers of other agencies.

95B.(h) What exclusions or exceptions should apply? For instance, should the common law exclusions be imported, or is a wider or narrower set of exceptions appropriate?

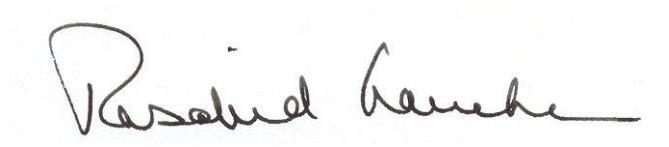
Following the New Zealand model, the ALRC recommended that the 'dominant purpose test' should apply with respect to the proposed tax advice privilege. This means that communications that are made for the dominant purpose of providing tax advice will be protected. What constitutes the 'dominant purpose' of the advice should be determined in accordance with the definition applied in client legal privilege matters.[12] The ALRC also considered that there should be an exception for advice given in furtherance of a crime or fraud, adopting the position in the *Evidence Act*. The tax advice must be confidential. As is the case with client legal privilege, the ALRC considers that a taxpayer should not be able to claim privilege over advice that he or she has not kept confidential.

12 See Ch 3.

95B.(j) What would be the appropriate instrument for enactment of a tax advice privilege? For instance, should the provisions be contained in the *Taxation Administration Act 1953*?

Given that a principal recommendation made by the ALRC concerned the enactment of federal client legal privilege legislation—to clarify the existing scattered federal provisions on the application of privilege to federal coercive information-gathering powers and to inject greater consistency with respect to procedures for privilege claims—the ALRC recommended that the privilege in relation to tax advice be included in that statute.

Yours sincerely,



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