

The primacy of client privilege: designing a statutory tax advice privilege for accredited non–lawyer tax advisors

Nicole Wilson-Rogers^{*}, Annette Morgan^{} and
Dale Pinto^{***}**

Abstract

There are several types of professional groups that provide tax advice in Australia: lawyers, accountants, and financial advisors, many of whom are registered tax agents. In many cases, the type of advice provided is the same; however, currently whilst lawyers can extend to their clients a blanket legal professional privilege (“LPP”) over confidential tax advice, clients of non–lawyer tax advisors (“NLTAs”) are presently only granted an administrative concession by the Australian Taxation Office (“ATO”) and then only over a limited range of documents. This article argues in favour of the enactment of a separate statutory tax advice privilege in Australia for accredited NLTAs and suggests a framework for determining which taxation professionals should be able to offer a tax advice privilege to their clients.

^{*} Nicole Wilson-Rogers, Lecturer, Curtin Law School, Curtin University

^{**} Annette Morgan, Lecturer, Curtin Law School, Curtin University

^{***} Dale Pinto, Professor of Taxation Law, Curtin Law School, Curtin University; Fellow, Taxation Law and Policy Research Group, Monash University.

This paper was accepted for publication on 4 July 2014.

1 Introduction

There are several types of professional groups that provide tax advice in Australia: lawyers, accountants, financial advisors, superannuation providers and registered tax agents. In many cases, the type of advice provided is the same; however, the clients of non-lawyer tax advisors (“NLTAs”) do not enjoy equivalent privileges in receiving such advice. Whilst lawyers can extend to their clients a blanket legal professional privilege (“LPP”) over confidential tax advice, clients of NLTAs are presently only granted an administrative concession by the Australian Taxation Office (“ATO”) and then only over a limited range of documents.

Differential treatment of tax professionals in Australia, based on whether or not they are members of the legal profession, is an issue which has generated controversy. This debate took centre stage in Australia with the release of a Treasury Discussion Paper in April 2011, *Privilege in relation to tax advice* (“the Discussion Paper”).¹

This article argues in favour of the enactment of a separate statutory tax advice privilege in Australia for accredited NLTAs. It is proposed that the suggested regime be integrated with the registration of a tax agent by the Tax Practitioners Board (“TPB”) under the *Tax Agent Services Act 2009* (Cth) (“TASA 2009”). In this way, it would operate as a separate accreditation process to provide appropriately credentialed tax agents with the ability to provide privileged legal taxation advice. A precondition to eligibility for registration to provide privileged tax advice would be the holding of an existing registration as a tax agent. However, three further fundamental pre-requisites would also need to be satisfied. The first pre-requisite is that the individual must hold a further postgraduate qualification in taxation (for example a Masters of Taxation or equivalent) or designation such as a Chartered Tax Adviser (“CTA”), Certified Practising Accountant (“CPA”), Chartered Accountant (“CA”) or be a member of the Institute of Public Accountants (“IPA”). The second pre-requisite entails undertaking comprehensive competency training in the law of privilege. The third condition requires engaging in ongoing continued professional education in the law of privilege.

Part one of this paper briefly outlines the current situation with respect to privilege over taxation advice in Australia. Part two considers the policy justifications for and against the enactment of a tax advice privilege (“TAP”) for NLTAs. Part three looks at the key elements and practical issues that arise in designing a statutory tax advice privilege for NLTAs and suggests a framework for determining which taxation professionals should be able to offer privilege to their clients. Part four makes some concluding observations.

1 Department of Treasury, *Privilege in relation to tax advice* (April 2011) (“Discussion Paper”).

PART ONE

2 The current position in Australia

Legal Professional Privilege (“LPP”) applies in respect of confidential communications between lawyers and their clients where the communication is for the dominant purpose² of obtaining legal advice (legal advice privilege) or preparing for litigation (actual or contemplated).³ LPP can also extend to communications between lawyers and third parties if the purpose of the communication is for actual or contemplated litigation.⁴ In this regard, LPP can provide a powerful shield⁵ against the ATO’s information seeking powers such as those contained in sections 263 and 264 of the *Income Tax Assessment Act 1936* (“ITAA 1936”).⁶

2.1 Accountant’s concession

NLTAs cannot currently extend the same protection in respect of confidential tax advice they provide directly to their clients. Rather, the form of protection provided is an administrative concession extended by the ATO to a limited number of tax advice documents between taxpayers and their professional accounting advisers.⁷ The policy underlying the concession is that there are documents that in “all but exceptional circumstances” should “generally remain within the confidence of taxpayers and their tax advisers.”⁸ This policy recognises that tax advisers and their clients should be able to engage in full and frank discussions regarding their taxation obligations.⁹

The documents that attract the concession are restricted source and non-source documents.¹⁰ Restricted source documents contain advice created prior to, or contemporaneously with, the transaction entered into by a taxpayer. These are documents prepared by external professional accounting advisors solely for the purpose of providing tax advice, where prepared “in connection with the conception, implementation and completion of the transaction or arrangement.”¹¹ Non-source documents contain written advice prepared after a transaction is complete that do not affect the recording of the transaction in the taxpayer’s accounts or tax returns.

2 *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67.

3 The *Evidence Act 1995* (Cth) codifies LPP which applies in proceedings before a Federal Court.

4 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122.

5 For example *FCT v Citibank* (1989)17 ALD 401 confirms that section 236 is subject to LPP.

6 Sections 263 and 264 of the *Income Tax Assessment Act 1936* (“ITAA 1936”) provide the ATO with access powers to obtain various documents and books of a taxpayer.

7 ATO, *Guidelines to accessing professional accounting advisors’ papers*, available at: <http://www.ato.gov.au/General/Gen/Guidelines-to-accessing-professional-accounting-advisors--papers/> at 6 February 2014 .

8 Discussion Paper, above n 1, 4.

9 ATO, above n 7, paragraph 7.1.1, Discussion Paper Ibid.

10 ATO Ibid.

11 Ibid.

The concession does not cover source documents, which are documents that record a transaction or an arrangement

entered into by a taxpayer (such as financial accounts or tax returns). The ATO currently has full access to these documents.¹²

Unlike LPP, the accountant's concession is not self-executing and must be claimed. Further, the concession does not apply to "internal" or "in-house" tax advisors (including employees of the taxpaying entity).¹³

An important limitation of the accountant's concession is that the ATO has complete discretion to lift the concession in "exceptional circumstances" which includes:

- Where the ATO believes fraud, tax avoidance, evasion or another illegal tax offence has taken place; and
- Where the ATO needs the documents to ascertain material facts necessary to determine the taxation consequences of the transaction because the taxpayer or their records cannot be located.¹⁴

Case law has suggested that in certain circumstances a taxpayer may have a "legitimate expectation" that the Commissioner will not depart from the guidelines without giving them an opportunity to state their case (for example arguing that there are no exceptional circumstances).¹⁵ Accordingly, in certain circumstances, a taxpayer could argue that a decision to lift the concession could be set aside on the basis that the rules of procedural fairness were breached.¹⁶

In this regard in the case of *Deloitte Touche Tohmatsu v DCT*,¹⁷ Justice Goldberg stated that the guidelines constituted: "at the least, a relevant consideration to which... officers of the Australian Taxation Office must have regard."

Likewise in *One Tel* the Court stated that:

It seems to me that the formality and detail with which the Guidelines are framed and the nature of their subject matter point strongly in favour of the view that they give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out. I do not think he could depart from the Guidelines, except in such an urgent case as might arise if there were grounds for fearing the destruction of the documents in question, without giving the person concerned an opportunity to make out a case why he should not do so. Of course, provided he does allow the requisite opportunity, it is in the

12 Ibid.

13 Ibid paragraph 7.1.5.

14 Ibid.

15 *ONE.TEL Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548; *White Industries Australia Ltd v Commissioner of Taxation* (2007) 160 FCR 298; *Stewart v Deputy Commissioner of Taxation* (2010) 267 ALR 637.

16 Ibid.

17 [1998] 40 ATR 450.

nature of guidelines that they may be departed from in an individual case for sufficient reason.¹⁸

In practice the protection offered by the concession is limited.¹⁹ For example, in *Stewart*,²⁰ Justice Perram rejected the taxpayers view that the ATO officer could not have reached a view that there was exceptional circumstances without having viewed the document himself.²¹

Likewise, in *Deloitte Touche Tohmatsu v DCT*,²² Justice Goldberg upheld a decision to access documents where the officer in question had not formed a settled view on the potential tax consequences of the transaction.

Hence, given the virtually unfettered discretion of the Commissioner to lift the concession, and the limited scope for judicial review, it is commonly asserted that the accountant's concession is inferior to the protection afforded to lawyers under LPP and is fertile for review.²³ Some of the primary criticisms of the concession include that:

- The exceptional circumstances criteria is “broad and ill-defined,” meaning taxpayers can have little confidence that their communications with accountants would be protected by the concession;²⁴
- The concession works “one way” only and does not provide confidentiality in relation to a clients’ communications to their accountants (e.g. a request for advice) or notes a client makes regarding their discussions with their accountants;²⁵
- The anti-avoidance provisions in Part IVA of the ITAA1936 are frequently invoked by the Commissioner and this means the accountant's concession is frequently lifted because the potential application of Part IVA constitutes an exceptional circumstance;²⁶ and

18 *ONE.TEL Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548.

19 J Azzi, “Judicial review of the Accountants’ Concession: a case for improving tax administration and accountability.” (2011) 21(1) *Revenue Law Journal*, Article 8.

20 *Stewart v The Deputy Commissioner* [2011] FCA 336.

21 Notably it was also held in *Stewart v The Deputy Commissioner* [2011] FCA 336 that the accountants’ concession does not apply to documents that are acquired by or provided to the ATO from other agencies such as the Australian Crime Commission.

22 *Deloitte Touche Tohmatsu v DCT* [1998] 40 ATR 450.

23 A Maples and M Blissenden, “The proposed client-accountant tax privilege in Australia: How does it sit with the common law doctrine of legal professional privilege?” (2010) 39 *Australian Tax Review* 20.

24 Institute of Chartered Accountants (“ICAA”), Submission LPP 25 (4 June 2007) in ALRC, *Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies*, Report No 107 (2007). A Maples and R Woellner “Privilege for accountants’ tax advice in Australia – Brave new world, or house of straw?”(2010) 25 *Australian Tax Forum*, 143.

25 ICAA above n 24.

26 Ibid.

- The ATO does not administer and interpret the concession in a transparent and consistent manner.²⁷

For these reasons it is instructive to consider the review of the concession which is undertaken in the next section.

2.2 Review of the concession

In 2008, the Australian Law Reform Commission (“ALRC”) tabled a report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (“ALRC Report”),²⁸ which recommended a statutory tax advice privilege should be created.²⁹ Under this statutory privilege, a taxpayer would not have to disclose a confidential “tax advice document” to the ATO when it was prepared by an independent registered tax agent,³⁰ for the dominant purpose of providing the taxpayer with advice regarding the “operation and effect” of the tax law.³¹ The recommendations were based upon a partial adoption of the New Zealand (“NZ”) statutory model.³²

In April 2011, the Government released a Discussion Paper³³ which considered and sought the public’s view on the establishment and appropriateness of a tax advice privilege for NLTAs. The Discussion Paper considered in further detail the ALRC Report recommendations, exploring the implications of such a privilege for NLTAs. While there have been no major developments since these reports were released, the current Commissioner of Taxation Chris Jordan and the Chair of the Board of Taxation, Teresa Dyson, have both been quoted as arguing that a privilege for tax agents is unnecessary.³⁴

The issues canvassed in the Discussion Paper and recommendations in the ALRC Report will be discussed further throughout this paper.

27 Discussion Paper, above n 1, 5.

28 ALRC, above n 24. The Attorney –General announced the inquiry in November 2006 into LPP as relates to the activities of Commonwealth investigatory agencies.

29 Ibid 11 (Recommendation 6.6).

30 Ibid.

31 Ibid 11.

32 Discussion Paper, above n 1, 7. ALRC, above n 24, para 6.278. The codification of a separate statutory privilege in New Zealand has been considered in a number of articles in the literature including: Keith Kendall, “Privilege and Taxation Advice: New Zealand’s Nondisclosure Right Compared with the Tax Adviser’s Privilege in the United States”, (2011) 24 *NZULR* 337 (“Privilege and Taxation Advice”); Keith Kendall, “The US Tax Adviser’s Privilege: Insights for Australia” (2010) 25 *Australian Tax Forum* 361 (“US Tax Adviser’s Privilege”); Maples and Blissenden, above n 23; and Maples and Woellner, above n 24.

33 Discussion Paper, above n 1.

34 Nasim Khadem, ‘No need for tax advice privilege says ATO’s Chris Jordan’ *Australian Financial Review* (15 March 2013); Nasim Khadem, ‘Accountants don’t need tax advice privilege: Dyson’ *Business Review Weekly* (14 June 2013).

PART TWO

3 Rationalising why NLTAs enjoy privilege over confidential tax advice documents?

Before analysing the practical issues that arise in designing a TAP for NLTAs, it is necessary to explore the policy arguments that arise in relation to whether NLTAs should enjoy a comparable privilege to lawyers.

3.1 Why do lawyers exclusively enjoy LPP?

LPP is the oldest form of privilege in relation to confidential communications, constituting both a legal right and rule of evidence.³⁵

The principal justification underpinning LPP is that it promotes the public interest by encouraging candid discussions between clients and their legal advisers and enhances the administration of justice.³⁶ The extension of LPP to communications with lawyers has been attributed a special significance in Australia, being referred to as “part of the functioning of the law itself”,³⁷ a “human right”³⁸ and a “corollary of the rule of law.”³⁹

A number of justifications have been provided as to why LPP is extended exclusively to communications with lawyers. Since its inception, LPP was seen to extend to lawyers because they were “men” of honour who would keep the confidence of their clients.⁴⁰ This historical justification may no longer have any gravity as whilst LPP was previously viewed as being held by the lawyer, it has now “changed hands”⁴¹ and is firmly the “client’s privilege”.⁴²

Notably the recent UK decision *Regina (Prudential plc and another) v Special Commissioner of Income Tax and another (Institute of Chartered Accountants in England and Wales and others intervening)*⁴³ considered the issue of whether the

35 R Desiatnik, *Legal Professional Privilege in Australia* (Sydney: LexisNexis Butterworths, 2nd edition 2005), *Baker v Campbell* (1983) 153 CLR 52.

36 *Grant v Downs* (1976)135 CLR 674, 685.

37 *Baker v Campbell* (1983) 153 CLR 52.

38 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543. Desiatnik, above n 35.

39 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 (Justice Brennan).

40 P Fraser and K Deards, “Underprivileged Accountants and Illegitimate Expectations – Part 1” (2007) *Taxation in Australia* 79; R Fisher “Confidential tax communication: a right or a privilege?” (2005) 20(4) *Australian Tax Forum* 557, 558, ALRC, above n 24, 286.

41 Desiatnik, above n 35, 12; Fisher above n 40.

42 *Baker v Campbell* (1983) 153 CLR 52, 84 (Justice Murphy).

43 *Regina (Prudential plc and another) v Special Commissioner of Income Tax and another (Institute of Chartered Accountants in England and Wales and others intervening)* [2013] UKSC 1.

Court should extend LPP to the provision of legal taxation advice by accountants. By a majority of 5:2 the Court refused to extend LPP to accountants. In determining this issue Lord Neuberger acknowledged that the current limitations on the extension of LPP to lawyers were explicable by reference to “historical practices or beliefs”.⁴⁴ However, the dissenting Lords in this case considered that the “status” of the advisor had “not been a relevant consideration for 250 years”.⁴⁵

Another justification is that lawyers are subject to rigorous “professional and ethical training”,⁴⁶ not necessarily possessed by other professions. Lawyers are officers of the Court and it is argued that they possess unique duties that impose control upon the process by which LPP claims are made.⁴⁷ For example, lawyers can be personally liable for asserting a claim for LPP without any basis and can be subject to misconduct proceedings.⁴⁸ A lawyer has a duty to fully disclose to the court any criminal convictions and failure to do so can result in a lawyer being struck off the roll.⁴⁹ Likewise, the duty to the Court supersedes the obligation of a lawyer to their client and as a result can conflict with the client’s wishes. In a speech delivered by the Hon. Marilyn Warren AC, she states:

A lawyer therefore carries both a benefit and a burden. The benefit is obvious the opportunity to pursue a career in the law as a member of the legal profession. The burden lies in the lawyers obligation to apply the rule of law and the duty to assist the court in doing of justice according to law.⁵⁰

Her Honour refers to the oath or affirmation taken by a lawyer upon being admitted as being commensurate with an additional level of responsibility that ensures a lawyer cannot be driven or motivated by client wishes alone.

Indeed, the case law affirms that it is the additional qualifications and obligations of being admitted to practice as a lawyer (rather than obtaining a law degree) that is a precondition to the grant of LPP. In *Glengallan Investments Pty Ltd v Arthur Andersen*,⁵¹ advice provided by an accountant who held a degree in law, but was not admitted to practice, was held not to benefit from LPP.

In *Prudential*,⁵² the Court provided a number of reasons for restricting LPP to legal practitioners including:

44 Ibid 14 (paragraph 48).

45 Ibid 36 (paragraph 122).

46 Discussion Paper, above n 1, 12.

47 ALRC, above n 24, (para 6.239 and 6.240).

48 Discussion Paper, above n 1, 13 and ALRC, above n 24 (para 6.240).

49 Discussion Paper Ibid.

50 Marilyn Warren, “The Duty Owed to the Court – Sometimes Forgotten” A speech delivered at the Judicial Conference of Australia Colloquium Melbourne (9 October 2009). www.jca.asn.au/attachments/2009OriginalKeynoteAddress.pdf.

51 (2002) 1 Qd R 233.

52 *Regina (Prudential plc and another) v Special Commissioner of Income Tax and another (Institute of Chartered Accountants in England and Wales and others intervening)* [2013] UKSC 1.

- the close connection lawyers have to the Court, including duties that lawyers owe to the Court as part of their professional obligations and the powers the Court has in relation to the disciplinary procedures of lawyers;
- the uncertainty that may prevail from extending LPP to other professional groups. At first instance the Court in *Prudential* noted that LPP must be abundantly “clear and certain in its application” as any grant of LPP too broadly could compromise the information available to run a fair trial and the administrator’s ability to enforce the tax legislation. Given these overriding considerations, the Court suggested an extension of LPP to accountants could be detrimental to ensuring certainty and clarity and could lead to “serious questions” about LPP’s “scope and application”. At first instance, the Court noted that the term “accountant” does not denote membership to any particular body or the obligation to comply with any particular professional obligations and that this led to difficult policy questions such as: to which accountants, and to what areas of law, would it apply? The Court noted:

Furthermore such an extension could open the floodgates to a much wider claim for LPP from other professional groups including town planners, engineers, pension advisers, actuaries, auditors, architects and surveyors.⁵³

Lord Mance stated that such an extension would require a “careful distinction” to be made disentangling legal and non-legal advice.⁵⁴

- That the Court in *Prudential* concluded that the extension of LPP was a matter for the Parliament to determine and not a decision to be made by the Courts.⁵⁵

3.2 Justifications for extending privilege to NLTAs

There is a substantial body of literature that considers why privilege should be extended to confidential communications made by NLTAs,⁵⁶ which is discussed and evaluated below.

3.2.1 Both NLTAs and lawyers provide legal advice in the taxation context

One of the principal justifications for extending privilege to NLTAs is the practical reality that both lawyers and NLTAs provide legal advice in the taxation context. As such, it is argued that irrespective of their professional designations, in many areas of taxation law both NLTAs and lawyers provide equivalent legal advice. This is given explicit recognition in section 90-5 of TASA 2009 where it provides that a:

53 Ibid 15 (paragraph 55).

54 Ibid 17 (paragraph 60).

55 Ibid 27 (paragraph 101).

56 See for example Keith Kendall, “Privilege and Taxation Advice”, above n 32; Maples and Blissenden, above n 23 and Andrew J Maples and Robin Woellner, “Privilege for accountants’ tax advice in Australia – Brave new world, or house of straw?” (2010) 25 *Australian Tax Forum* 143.

tax agent service is any service:

- (a) 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 dealing with the Commissioner; ...

(emphasis added)

Notably, a taxation law is any of the Acts over which the Commissioner has general administration.⁵⁷

The terms in section 90-5 explicitly contemplate that tax agents are providing “advice” in relation to the taxation law. It is acknowledged that lawyers provide different advocacy services to taxpayers in relation to litigation. However, in relation to tax planning and advice, in many cases the services provided by NLTAs and lawyers do not differ. Notably the decision of *Prudential* acknowledges that the restriction of LPP to lawyers providing taxation advice was incongruent with the modern realities of the provision of taxation advice.⁵⁸

Interestingly however, some proponents argue that tax agents and lawyers do not necessarily play an equivalent role in the tax system.⁵⁹ For example, the Law Council argues that the primary role of a tax agent is “administrative” thereby, justifying the exclusive grant of LPP to lawyers over legal advice.

The Administrative Appeals Tribunal (“AAT”) decision in *Sinclair and Commissioner of Taxation*⁶⁰ provided support for the view that lawyers and accountants play different roles in the provision of tax advice. In *Sinclair*, the AAT was reviewing penalties and suggested that the taxpayer had not taken reasonable care claiming a deduction because he did not seek advice from a taxation lawyer but instead had sought advice from an accountant. The decision implies that lawyers and accountants perform different functions in the taxation profession and that lawyers can more appropriately provide “legal” advice in relation to certain tax matters.

57 This includes the ITAA 1936 and 1997, the *Fringe Benefits Tax Assessment Act 1986*, *A New Tax System (Goods and Services Tax) Act 1999* and *TASA 2009*.

58 *Regina (Prudential plc and another) v Special Commissioner of Income Tax and another (Institute of Chartered Accountants in England and Wales and others intervening)* [2013] UKSC 1, 14 (Paragraph 43).

59 Law Council, “response to ALRC Report no. 107” <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/clpsubmar2008.pdf> at 7 February 2014.

60 [2010] AATA 902.

This decision generated considerable controversy and it is suggested this decision advances an argument that is very difficult to sustain, given a large proportion of taxation advisory work is being performed by NLTAs.⁶¹ In fact, NLTAs also provide other legal services such as preparing objections and representing taxpayers in the AAT. Further, there are areas of the tax law where, arguably NLTAs such as accountants may possess more suitable skills to provide legal advice. One such area is the Taxation of Financial Arrangements (“TOFA”),⁶² which aims to align the taxation and financial accounting treatment of certain financial arrangements.

3.2.2 *Candour between taxpayers and their NLTAs*

As noted, one of the fundamental principles underlying LPP is to encourage full disclosure and candour between lawyers and their clients, helping to ensure accurate legal advice and enhancing the administration of justice.⁶³ The policy underlying the accountant’s concession reflects this rationale, but provides a significantly compromised protection.⁶⁴ Arguably, to give primacy to the client’s privilege and to allow open communications to be effectively encouraged between NLTAs and their clients, NLTAs should have a privilege equivalent to legal advice privilege in relation to tax advice that they provide. Given the limitations of NLTAs in relation to providing other types of legal advice, extension of litigation privilege would not be appropriate or necessary. Therefore any reference to an extension of privilege to NLTAs throughout this paper refers to TAP.

Candour between taxpayers and their NLTAs is imperative given the complexity of the tax law and the pivotal role tax agents and other NLTAs play in Australia, where the majority of Australian taxpayers seek tax advice from tax agents.⁶⁵

Australian taxpayers operate in a complex self-assessment system, which is defended by a harsh penalty regime and carry the onus of proving a tax assessment is excessive in any disagreement with the ATO. Therefore, it is critical a taxpayer prepares their return correctly and to ensure that NLTAs should be fully apprised of a taxpayer’s affairs in order to provide accurate advice.

61 Maples and Blissenenden, above n 23. National Tax Liaison Group, NTLG Minutes March 2011 <http://www.ato.gov.au/taxprofessionals/content.aspx?menuid=0&doc=/content/00286400.htm&page=1&H1>.

62 See Division 230 of the ITAA 1997.

63 *Grant v Downs* (1976) 135 CLR 674, 685.

64 J Tse and J Roberts, “The accountant’s concession time for a rethink? (2010) 45(4) *Taxation in Australia* 205.

65 Commonwealth Treasury, Australia’s Future Tax System Review Overview, (2010) states that 72% of Australian taxpayers seek advice from a tax agent in respect of their tax affairs. The ATO Tax Statistics (2008/2009) state tax agents submitted 8.8 million tax returns in Australia (71.2%).

It has also been argued that providing privilege over certain communications could promote voluntary compliance.⁶⁶ In this respect, the ALRC Report states:

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.⁶⁷

Another reason for the importance of ensuring that NLTAs have an open and candid relationship with their clients is that tax agents are under an obligation pursuant to section 30-10(9) of TASA 2009 to take reasonable care in ascertaining a client's "state of affairs" to the extent that ascertaining those affairs is relevant to a statement the agent is making or a "thing" the agent is doing on behalf of the client. Creating an environment where a client can feel any information they share with their tax agent will remain confidential would make it easier and more conducive for tax agents to ascertain to the greatest degree a client's true state of affairs and would therefore make it easier for them to comply with their professional obligations.

Conversely, whilst extending privilege to NLTAs may serve one public interest by encouraging full and frank disclosure, it arguably compromises another important public policy goal of ensuring the ATO has sufficient information to administer and enforce the tax law and this may actually reduce compliance with the law. A grant of privilege over communications with NLTAs would also limit the materials available to a decision maker in a tax dispute.⁶⁸ However, where the materials in question would not have been liable to disclosure if they had been created by a lawyer, there does

66 Analogously Justice Wilson stated in *Baker v Campbell* (1983) 153 CLR 52, 95 that confidentiality between lawyers and their clients: "will make its own contribution to the general level of respect for and observance of the law within the community." ALRC, above n 24, [Chapter 2 and para 6.212].

67 ALRC above n 24.

68 Discussion Paper, above n 1, *Baker v Campbell* (1983) 153 CLR 52, *Grant v Downs* (1976) 11 ALR 577. This policy issue was also addressed in the Officials Report (Policy Advice Division of the Inland Revenue Department and the Treasury, Taxation (Base Maintenance and Miscellaneous Provisions) Bill - Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill, (2 May 2005)

<http://taxpolicy.ird.govt.nz/sites/default/files/2005-or-bmmp.pdf> accessed 18 June 2014. The Report noted that:

Officials do not support extending legal professional privilege to non-lawyers because it could harm the tax base. For example, much relevant and useful documentation about taxpayers' affairs is held by accountants because of the very central and important role that accountants play in the administration of the tax system and in the conduct of their clients' business affairs. Accountants are the largest single group of tax agents and advisors and are responsible for a very large percentage of tax returns filed with Inland Revenue. If the scope of the proposed accountants' privilege is extended in the manner suggested, more information would be protected by privilege and the effect could be a significant loss of government revenue.

not appear to be a more compelling reason to disclose them simply because they are created by an NLTA.

3.2.3 Reduce inequity and compliance costs

Extending LPP exclusively to lawyers may impact upon taxpayer's compliance costs⁶⁹ and have an inequitable impact on small to medium enterprises ("SMEs") as SMEs may be more likely to engage accountants than lawyers due to cost and greater access considerations.

3.2.4 Equivalent penalties and obligations

Australian taxation law holds lawyers and NLTAs to a largely equivalent professional standard. For example, the promoter penalty regime⁷⁰ applies similarly to promoters of tax schemes whether they are lawyers or NLTAs. In this context, it is therefore arguable that some NLTAs and lawyers are subject to the same professional standards, taxpayers should benefit from the same protection over the legal advice that they receive.

Furthermore, whilst NLTAs may not have identical ethical and legal training to lawyers, many NLTAs have similar professional obligations, are subject to ongoing monitoring by their professional body and may also have legal training. Registered Tax agents are bound by a legislated Code of Professional Conduct in Pt 3 of TASA 2009.⁷¹ The purpose of the Code of Conduct is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct.⁷²

Some of the fundamental tenets of the Code include the maintenance of confidentiality, to act with honesty, integrity, independence, to ascertain the true state of a client's affairs and competence. Where a tax agent fails to comply with the Code the Tax Practitioners Board has a range of sanctions that they can apply ranging from a written caution, an order requiring the agent to undertake additional training or restricting the services that can be provided⁷³ to suspension⁷⁴ or termination⁷⁵ of the agents registration.

Notably, tax agents who are also Chartered Accountants ("CAs"), Certified Practising Accountants ("CPAs"), Certified Taxation Advisors ("CTAs") or Institute of Public Accountant members ("IPAs") are subject to additional ethical responsibilities and

69 Maples and Blissenden, above n 23.

70 Division 290 of the *Taxation Administration Act 1953*.

71 Division 30 of TASA 2009.

72 See Explanatory paper Tax Practitioners Board 01/2010 *Code of Professional Conduct*, 4 at http://www.tpb.gov.au/TPB/Publications_and_legislation/EP/0402_TPB_EP_01_2010_Code_of_Professional_Conduct.aspx on 7 February 2014.

73 Section 30-20 of TASA 2009.

74 Section 30-25 of TASA 2009.

75 Section 30-30 of TASA 2009.

ongoing professional monitoring as part of their professional obligations to their respective professional bodies.⁷⁶ Central to the accounting profession is a responsibility to act in the public interest which includes obligations including ethical practice, underpinned by the principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. Chartered Accountants in Australia, for example, is committed to ethical practice in the Institute by-laws and in their professional standards, including *APES110 Code of Ethics for Professional Accountants*. Similar obligations apply to the other professional accounting bodies in Australia, including CPA Australia and the IPA.

It should be noted that the Accounting Professional and Ethical Standards Board (APESB) has proposed amendments to *APES 110 Code of Ethics for Professional Accountants* in response to revisions made by the International Ethics Standards Board for Accountants (IESBA) to its Code of Ethics for Professional Accountants. The APESB said among other things, it proposes to strengthen the breaches of a Code requirement in the Standard. The proposed amendments will be effective from 1 July 2014 with early adoption permitted.

Despite this, the Discussion Paper questions whether “the degree of oversight and discipline” the TPB exercises over tax agents can be “equated” with a lawyer’s obligation to the Court.⁷⁷ The purpose of the Code is protection of the public and the Board has powers of oversight and discipline of tax agents.⁷⁸ Whilst analogies can be drawn between other professional obligations of lawyers and some NLTAs, the paper argues it is difficult to draw a direct comparison to the lawyer’s duty to the Court.

One similarity that does exist however is that like lawyers NLTAs are obliged to ensure that they act honestly and with integrity and must not knowingly obstruct the proper administration of the taxation laws⁷⁹ and therefore tax agents do have a duty that supersedes their duty to the client to ensure the tax laws are administered correctly.

Conversely, the Discussion Paper also acknowledges that differentiation on the grounds of training in ethics or professional codes of conducts is not always accurate and should be treated with realistic skepticism.⁸⁰

3.2.5. Reduce the competitive advantage enjoyed by lawyers

In the taxation profession, lawyers and NLTAs often compete for the same business.⁸¹

However, it can be argued that lawyers have a competitive advantage as their advice can be subject to what some commentators have labeled as the “opaque curtain” of

76 Ibid.

77 Discussion Paper, above n 1, 13.

78 Subdivision 30-B of TASA 2009.

79 Section 30-10(11) of TASA 2009.

80 Discussion Paper, above n 1, 14.

81 Discussion Paper, above n 1, 12. R Desiatnik above, n 35.

LPP.⁸² The Discussion Paper suggests that “competitive neutrality” demands that similar confidential communications with NLTAs or lawyers should be treated equally.⁸³

However, other commentators have queried the actual significance a grant of privilege over tax advice would hold for many taxpayers in relation to the choice of tax advisor. They argue that it is the nature and complexity of the advice that largely drives the choice between a lawyer and other NLTAs.⁸⁴

Whilst it is acknowledged that there are several factors that influence whether a lawyer or accountant is chosen for tax advice purposes, where all other factors are equal, arguably the ability of lawyers to extend privilege over confidential tax advice could nevertheless provide them with a competitive advantage, other things being equal.

3.3 Summary

This part of the paper considered arguments for and against extending privilege over confidential communications between taxpayers and their NLTAs. As discussed, a number of the justifications can be counterbalanced by arguments to the contrary. However, it is argued in this paper that on balance the justifications for enacting a statutory privilege are compelling and many of the perceived disadvantages can be minimised by appropriate legislative safeguards in relation to prescribing specific qualifications that those accredited to provide privileged advice should possess and the types of documents over which privilege can apply. The main point of differentiation, in relation to why lawyers can offer privileged advice and NLTAs cannot is that lawyers have a duty to the Court.

However, it is argued that this alone should not justify lawyers being able to provide privileged advice. The Courts have stated that LPP is the client’s privilege⁸⁵ and therefore the dominant reason for the existence of this privilege appears to be so that clients have candour when seeking advice from their advisors. Tax agents and those NLTAs with other professional designations such as CAs, CPAs, IPAs and CTAs do have substantial professional obligations in relation to confidentiality, due diligence, competence and must not knowingly obstruct the proper administration of the taxation law. Likewise, pursuant to section 8K of the *Taxation Administration Act 1953* a person is guilty of an offence if the person makes a statement to a taxation officer that is false or misleading. Thus NLTAs must ensure that statements made by them to or on behalf of the ATO are not false or misleading, which essentially equates to a higher duty to administer the tax law in an honest and accurate manner.

82 R Desiatnik Ibid.

83 L Lobenhofer, “The New Tax Practitioner Privilege: Limited Privilege and Significant Disruption.” (2000) 26 *Ohio N.U.L.R. Rev.*

84 Maples and Blissenden, above n 23, 29.

85 *Baker v Campbell* (1983) 153 CLR 52.

PART THREE

4 Practical design issues that arise in creating a statutory tax advice privilege for NLTAs

This section considers the key elements of designing a statutory privilege, including a “licensing model” which could be made available only to certain qualified tax agents, who undertake competency training in the law of privilege and who have appropriate postgraduate qualifications.

4.1 Scope

The first essential design consideration is determining which group of NLTAs the privilege should extend to? This involves difficult issues such as should the privilege be extended to all NLTAs or a sub-set of NLTAs such as registered tax agents, CAs, CTAs, IPAs or CPAs?

The ALRC Report recommended that a statutory privilege should apply to communications with independent registered tax agents.⁸⁶ Whilst superficially this appears to limit the privilege to a relatively homogenous group, given all tax agents are accredited by the TPB⁸⁷, in practice the designation as a tax agent encompasses professionals with a diverse range of qualifications and experience. To be registered as a tax agent requirements in relation to age,⁸⁸ being a fit and proper person,⁸⁹ qualifications and experience requirements, must be satisfied. However, there are various education requirements which are linked to the work experience of the applicant. For example, if an applicant has a tertiary degree in accounting they need 12 months employment experience⁹⁰. Whereas, a person can be accredited by being a voting member of a professional association but they must have 8 years full-time employment experience⁹¹ – the greater experience requirement acts as a proxy for not relying on an educational qualification for registration under this category. There are also accredited BAS Agents and tax agents that have been registered via the transitional provisions⁹² within the tax agent regime. These agents may satisfy a different (and reduced) set of requirements and in the case of BAS agents can only provide limited advice.

86 ALRC, above n 24, 11. The ALRC report referred to registration pursuant to the now superseded section 251A of the ITAA 1936.

87 Section 50-5 of TASA 2009. Sections 50-10 and 90-5 provide that a person cannot advertise a tax agent or BAS Services unless they are registered. This excludes lawyers.

88 Must be over 18 (section 20-5(1) of TASA.)

89 Section 20-5(1) involves looking at if the person is of good fame, integrity or character.

90 In the last five years.

91 In the last ten years.

92 For example a tax agent that was registered before 1 March 2010 will continue to be taken to be a registered tax agent for the unexpired registration period.

Given the diverse educational qualifications of tax agents, some registered tax agents may not have received any tertiary or formal training on the law of LPP (or more particularly legal advice privilege) or even may not have received any training in relation to the application of basic legal principles. On this ground it is argued that privilege should not be extended merely on the basis of registration as a tax agent alone. It is however accepted that the first precondition for being eligible to become registered to provide privilege tax advice is that the NLTA must be a registered tax agent. The advantages of linking in such a regime to the registration of tax agents are as follows:

- Logically accreditation would be handled by the TPB and administered as part of TASA 2009. This would prevent burdening tax agents with the need to register under multiple regimes and would overall create a more streamlined process.
- It ensures that the statutory privilege draws on the experience and qualifications requirements already prescribed by TASA 2009, setting this as a pre-requisite to registration.
- It reaffirms the primacy of the TPB as the relevant regulator to determine which NLTAs can provide taxation advice in Australia and the scope of the advice that can be provided.

In addition to these requirements, this paper further argues that three additional pre-requisites should be introduced for a tax agent to be able to gain accreditation to provide privileged advice.

4.1.1 Pre-requisite one: relevant postgraduate qualifications or professional affiliations

The first pre-requisite is that the tax agent must possess an additional relevant postgraduate qualification in tax such as Masters of Taxation (or equivalent) or a professional designation as a CA, CPA, CTA or IPA. The purpose of this requirement is not to provide preferential treatment to certain professional designations but rather to ensure that the individual has an appropriate academic background or educational preparation (including in professional responsibilities and ethics) against which to apply the law of privilege. A course in ethics can (and with the advent of the Tax Agent Services regime) commonly will be embedded in a Masters of Taxation course and if not, could be covered separately as a standalone module, which is consistent with the TPB's views on this matter).⁹³ This in turn will help ensure that the agent has a comprehensive understanding of the ethical obligations and multiple considerations that apply in relation to a claim of privilege. The secondary advantages of limiting it to

93 See, eg TPB Information Sheet TPB (I) 10/2011, *Required knowledge of the Tax Agent Services Act 2009 including the Code of Professional Conduct*, paragraphs 9 and 25, available at <http://www.tpb.gov.au>.

such a group is that they have a more uniform set of qualifications and are also subject to additional regulatory frameworks in terms of their professional conduct.

For example, to become a CA an individual must satisfy certain prerequisites including a “recognised degree level qualification” with passes in core knowledge areas that include Australian corporations law, taxation law, introduction to law and commercial law. Furthermore, once an individual is within the CA program they complete an Ethics and Business Application module as part of the Graduate Diploma on Chartered Accounting that includes looking at some of the core ethics and values of being a CA. Given CAs have undertaken all these law subjects and training in relation to ethics and values it is arguable that they would accordingly have a strong foundation to be trained in claiming and maintaining privilege. Correspondingly, CAs, CPAs, CTAs and IPAs undertake similar subjects and training and therefore, would have a comparable foundation from which to work. For example, CPA Australia mandates Ethics and Governance as a compulsory module in their CPA Professional level program.

It is acknowledged that the difficulty with limiting privilege to this particular sub-set of tax agents is that it may be interpreted as implying or inferring that this particular group has superior qualifications relative to other tax agents. Furthermore, it may be perceived to erode or usurp the competence of the TPB to determine which individuals are equally qualified to provide taxation advice in Australia. However, as stated, the policy underlying such a choice is to ensure that individuals that wish to undertake training in privilege have the sufficient educational pre-requisites to engage in such a course of study. Furthermore, it is not only open to those with a Masters of Taxation (or equivalent) but extends to qualified members of professional bodies.⁹⁴ This clearly signals that the purpose of this condition is not preferential treatment on the basis of professional affiliation but rather differentiation on the basis of necessary educational pre-requisites (including in the study of professional responsibilities and ethics) for a focused course of study in privilege.

Likewise, differentiation on the basis of holding a certain type of postgraduate qualification in taxation or professional designation is not without precedent. In this regard the proposed regime is analogous to two recently introduced regimes, namely the Australian Financial Services License (“AFSL”) Scheme and the Self Managed Superannuation Fund (“SMSF”) Auditor Registration Scheme. Under these regimes only license holders are able to provide additional specialised services to their clients.

For example those accountants that hold SMSF Auditor Registration Schemes can provide specialised SMSF audits. From 31 January 2013 SMSF auditors have been required to be registered by the Australian Securities and Investments Commission (“ASIC”). The registration process is described in the Explanatory Memorandum (“EM”) to the enabling legislation as being:

94 Note that section 20B(5) of the *Tax Administration Act 1994* (NZ) only applies to a “tax advisor” and this includes a person subject to a professional code of conduct or an approved advisor group.

Intended to ensure that auditors of SMSFs have a minimum standard of competency and knowledge of relevant laws and are able to detect and report contraventions by SMSF trustees.⁹⁵

The EM further states that the objective of registration is to:

Raise the standard of SMSF auditor competency and ensure there are minimum standards across the sector. Registration will identify, formally recognise and enable the provision of tailored support to SMSF auditors that are currently producing high quality audits.⁹⁶

This rationale firmly reflects the policy reasoning put forward for stringent registration requirements for those allowed to provide privileged advice.

Likewise to be registered as an SMSF auditor an individual must meet additional requirements including:

- Holding a tertiary accounting qualification that includes an audit component or successfully completing audit as part of a professional body program;
- Meeting the fit and proper person test;
- Obtaining professional indemnity insurance;
- 300 hours of relevant SMSF audit experience in the three years preceding registration; and
- Passing a competency examination.⁹⁷

Accountants that are holders of an AFSL license can provide a broader range of financial advice to their clients. The license is only available to accountants who hold a public practice certificate from one of three professional accounting bodies (CPA, the ICAA and the IPA).

4.1.2 Pre-requisite two: legal professional privilege training

The second pre-requisite is that there should be specific additional training undertaken on the law of privilege as a precondition to allowing accredited tax agents to offer privilege over tax advice. Whilst an exhaustive analysis of the content of the course is beyond the scope of this paper, it should entail a thorough analysis of the law of privilege (both statutory and case law), when it can be applied and what types of documents it covers. The course could be designed in consultation with the Law Council, professional bodies (for example the Tax Institute, ICAA, CPA Australia and the IPA) and the TPB. It is contemplated that the course would be administered by

95 Explanatory Memorandum to the Superannuation Laws Amendment (Capital Gains Relief and Other Efficiency Measures Bill 2012 (Assented to on 28 November 2012 as Act No 158 of 2012). Fees are imposed for registration and this is enabled by the *Superannuation Auditor Registration Imposition Act 2012* (Act No 161 of 2012, assented to on 28 November 2012).

96 Ibid, paragraph 2.11, p 23.

97 Ibid para 4.13, 59-60.

legal practitioners who are experienced in the intricacies of the laws of privilege and at the conclusion of the course the tax agent would sit a competency examination. Notably, the obligation to sit a competency examination in order to provide specialised services is also mirrored in the provisions of the *Superannuation Industry (Supervision) Act 1993* (“SIS Act 1993”) for becoming an SMSF Auditor.⁹⁸

4.1.3 Condition three: continuing professional education programme

A third requirement is that the individual must meet Continuing Professional Education (“CPE”) requirements to maintain their right to offer privileged advice. This will ensure the individual retains a current knowledge of any developments in the law of privilege. Again, it is contemplated that such a program would be monitored by the TPB and administered as part of the existing requirements for tax agents to maintain CPE as contained in TPB (EP) 04/2012: Continuing Professional Education.⁹⁹ On 30 June 2013, CPE became a requirement for renewal of registration with the TPB. This means that when renewing their registration, registered agents must demonstrate that they have completed CPE that meets the Board’s requirements.¹⁰⁰ Further, under s 128 (1)(b)(ii) SIS Act 1993, ASIC must also be satisfied that an SMSF auditor is unlikely to contravene the obligations of an approved SMSF auditor under Subdivision B of the Act which includes undertaking ongoing CPE requirements to maintain their registration.

98 The *Superannuation Laws Amendment (Capital Gains Relief and Other Efficiency Measures) Act 2012* inserted Div 1A specifying requirements to be satisfied to be regarded as an approved SMSF auditor. Subdiv A deals with the registration of approved auditors, including s 128B SIS Act 1993 which provides that in order to register an applicant must have passed a competency examination in accordance with s 128C SIS Act 1993.

99 Tax Practitioners Board, Continuing Professional Education http://www.tpb.gov.au/TPB/Subsidiary_Content/0283_Continuing_professional_education.aspx at 23 July 2012.

100 Section 20-5(1) (d) in the case of a renewal of registration—the individual has completed continuing professional education that meets the Board’s requirements.

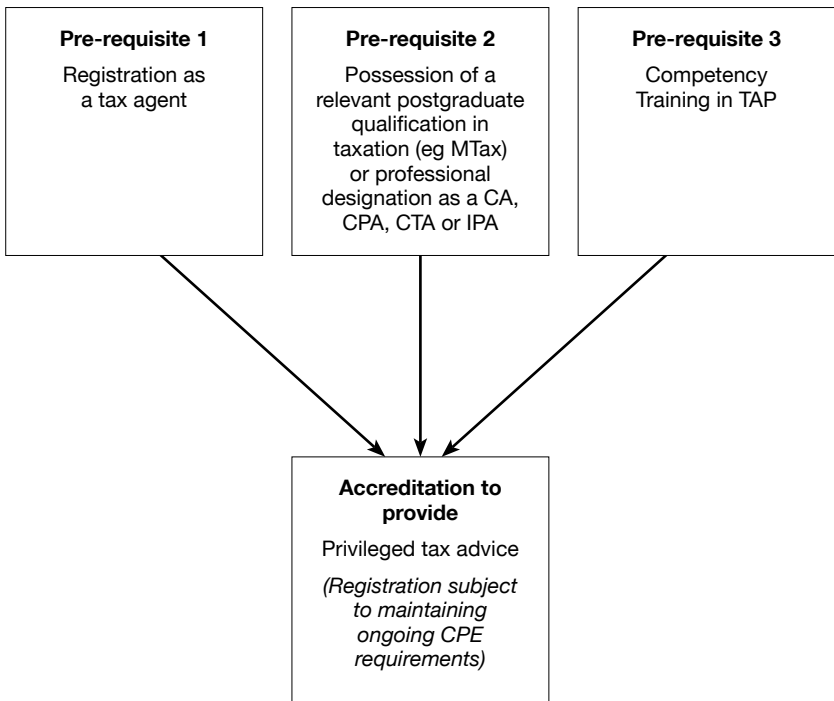
This was inserted by *Tax Laws Amendment (2013 Measures No. 3) Act 2013* (assented to on 29 June 2013 as Act 120 of 2013).

4.1.4 Summary

The proposed process for granting privilege to NLTAs as discussed above is summarised in the diagram below.

PROPOSED PROCESS FOR GRANTING OF A TAX ADVICE PRIVILEGE (TAP) TO NLTAs

Pre-requisites
All three must be satisfied



4.2 Stand-alone or linked privilege

Once it is determined who should be eligible for the privilege, the next fundamental consideration is whether the privilege should be linked to common law LPP (specifically on legal advice privilege) or enacted as a discrete statutory stand-alone privilege. Maples and Woellner emphasise the significance of this choice as:

These two approaches produce very different outcomes (with LPP providing a much wider protection) and the choice of creating a separate and much more limited separate privilege therefore represents a conscious and significant policy choice with substantial legal and other impacts.¹⁰¹

The US and NZ provide examples of two different models. The US model links the tax practitioner's privilege to common law attorney's privilege. Section 7525 of the *Internal Revenue Code* provides:

with respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorised tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

Conversely, the NZ model creates a discrete stand-alone privilege separate from the common law LPP.¹⁰² The ALRC Report recommended the adoption of the NZ model and reasons for and against this approach will now be examined.

Whilst a separate stand-alone privilege will provide the Parliament with greater control over the design, development and moderation of the privilege¹⁰³ it also creates two distinct privileges for lawyers and NLTAs. In order to ensure a degree of equivalence between the two the statutory privilege would need to be continually amended to mirror developments in common law legal advice privilege. Such a process would be very complicated and time consuming, given speedy legislative amendment is difficult. Accordingly, if the intention is to maintain parity between the two privileges, a linked model would provide a less onerous and more direct link because as the Discussion Paper notes a linked model can “easily and simultaneously” evolve under the common law.¹⁰⁴

To the extent that the TAP for NLTAs is narrower than legal advice privilege it would perpetuate the issues that currently exist, such as the competitive advantage afforded to lawyers in the taxation field.¹⁰⁵ Two different privileges may also result in complexity for taxpayers, leaving them uncertain as to the scope of the two different

101 Maples and Woellner, above n 24, 150.

102 Section 20B of the *Tax Administration Act 1994 (NZ)*.

103 ALRC, above n 24, para 6.278.

104 Discussion Paper, above n 1, 10.

105 Discussion Paper, above n 1; Maples and Woellner above n 24, 143.

privileges or creating false confidence that all communications with NLTAs will be privileged.

The issues in relation to the different levels of protection afforded by a separate statutory privilege were exposed in the case of *Blakeley v CIR*.¹⁰⁶ Mr Blakeley, a partner of a large accounting firm, was provided with a notice by the Commissioner of Inland Revenue to provide the names and IRD numbers of clients who had participated in a particular type of transaction previously determined to be a tax avoidance scheme.¹⁰⁷

Mr Blakeley argued that disclosure of these documents was protected by the NZ statutory advice privilege in s 20B of the *Tax Administration Act 1994* (NZ). It was held in this case that given the separate statutory nature of section 20B the law underlying LPP was of no assistance in construing the width of privilege this section afforded. The Court stated that it was not “a new substantive right of equivalent utility to legal professional privilege” and argued that it should be interpreted on “orthodox principles” applying to a “limited category of written communications.”¹⁰⁸ In this regard the Court stated that:

there is no reason why the statute should be construed as if
it were an extension to legal professional privilege with the constraints
that entails.
Sections 20B-20G provide taxpayers with a new but strictly circumscribed
right to
resist the exercise by the Commissioner of wide ranging information
gathering
powers. It should be construed on orthodox principles.

Some commentators have argued that the courts are showing a greater propensity to lift the veil of LPP in taxation investigations.¹⁰⁹ Therefore, if two separate privileges were adopted and the common law put greater restrictions on legal advice privilege than the statutory TAP it could result in NLTAs being accorded a privilege that covered a wider scope than lawyers under legal advice privilege. It is likely that such an anomaly would be remedied by legislative amendment to the statutory privilege, but in the lead time between identification of the issue and amendment could create controversies in the reverse to that which currently exists with the differential treatment of NLTAs and lawyers. Another implication of linking the privileges may be that judicial interpretations of the statutory privilege for NLTAs could have an effect

106 (2008) 23 NZTC 21,865.

107 Ibid.

108 In *Blakeley v CIR* Ibid the Court further stated:

The right of non-disclosure created by ss 20B – F is much more confined than legal professional privilege. Unlike legal professional privilege, it is not a response to public interest considerations. It is, as Ms Ellis submitted, a creature of statute. It protects defined parts of a limited category of written communications.

109 R Fisher “Whither the common law privileges: vale client privilege in tax investigations?” (2002) 28(2) *Monash University Law Review*, 327 at 14 June 2011.

on the interpretation given to legal advice privilege as it applies to lawyers. In the US context, Pease-Wingenter states:

...because the FATP privilege requires the interpretation of preexisting attorney-client privilege principles, courts could view the interpretation as a two-way street, relying on section 7525 case law to discern the appropriate contours of the attorney client privilege. Indeed, even when attorneys were not involved, erroneous interpretations of section 7525 have already begun to infect applications of the attorney-client privilege. If followed more frequently in the future, that approach could lead to significant erosion of the scope of the attorney-client privilege.¹¹⁰

Arguably, the major drivers for the creation of a privilege would be better advanced by adopting a model that links the statutory privilege for NLTAs to common law legal advice privilege.¹¹¹ This would mean that, for a communication between a taxpayer and an NLTA to attract the privilege, the basic conditions to satisfy common law legal advice privilege such as confidentiality and the dominant purpose test would need to be satisfied. Even if the privilege that is ultimately enacted for NLTAs is narrower, than that protected by legal advice privilege a linked model will still facilitate greater uniformity between the two privileges.

A linked model will also provide the judiciary with a greater role in moderating the parameters and development of the privilege. The judiciary has a long history with the development of legal advice privilege (and more generally LPP) and is acutely aware of the delicate balance needed between balancing confidentiality and appropriate disclosure of important information to administrators and the Courts. The Law Council states that: “balancing this tension is the central theme of all significant judgments involving the questions of LPP”¹¹² Accordingly, it is argued that the Courts are better equipped to regulate and develop the doctrine than the Parliament.

A linked approach may also be more consistent with the recent trend towards a principles-based drafting approach. Lovric defines a principles-based drafting approach as: “a broad and operative principle” that is often accompanied by “surrounding provisions” that contain “clarifications, add-ons” or “carve-outs”.¹¹³

110 C Pease-Wingenter, “Lemons from Lemonade: The Courts Fumble the FATP Privilege” (2010) *Tax Notes* 977 states section 7525 is a “statutory analogue” to the attorney client privilege.

111 Keith Kendall “Designing Privilege for the Tax Profession: Comparing I.R.C. ss7525 with New Zealand’s Non-Disclosure Right” (2011) 11 *Houston Business & Tax Journal* 74 provides that if the purpose of the enactment of a statutory privilege is to achieve parity between groups of tax advisers then the US model is the most appropriate.

K Kendall, “The US Tax Adviser’s Privilege: Insights for Australia” (2010) 25 *Australian Tax Forum*, 361, 395.

112 Law Council, above n 59, 7.

113 D Lovric, “Principles-based drafting experiences from tax drafting.” (2010) 3 *The Loophole – Journal of the Commonwealth Association of Legislative Counsel*, http://www.opc.gov.au/calc/docs/Loophole_Dec10.pdf at 21 June 2011.

Like section 7525 of the *Internal Revenue Code* in the US context, if a linked model was drafted using a principles-based drafting approach, the central principle would be that the common law protection pursuant to legal advice privilege which applies between a lawyer and taxpayer would apply to communications between accredited NLTAs and taxpayers, such that if the NLTA was a lawyer then TAP would apply. Related provisions could then provide any necessary carve-outs or limitations from this general principle.

Lovric states that one of the advantages of principles-based drafting is that it: “allows many rules to be compressed into one principle.” Indeed, if a statutory privilege for NLTAs is linked to common law legal advice privilege, all the case law precedents could be relied upon and this may assist in the determination of difficult issues, by drawing on established case law, for issues such as:

- should privilege apply to in-house or foreign NLTAs?
- how will copies of confidential documents prepared by NLTAs be treated?
- can the privilege be waived and when will a waiver be implied?

If all these issues were dealt with in a stand-alone privilege this may result in the provision becoming extremely complicated and unwieldy. While specific attention would need to be given to the resolution of these issues, this is beyond the scope of this paper.

4.3 Type of advice

A further critical element of establishing a privilege for NLTAs is determining what type of advice should be covered. The ALRC recommended that privilege be extended to confidential “tax advice documents” created by a tax advisor for the dominant purpose of giving advice on tax laws.¹¹⁴ Notably, even if a linked model were adopted, the dominant purpose test would apply as this is the current test for determining legal advice privilege. It was contemplated by the ALRC that a tax advice document would not include source documents.¹¹⁵

4.3.1 *Should tax contextual information be excluded?*

A threshold issue is whether tax contextual information should be excluded. Tax contextual information includes information about a fact or assumption that has occurred or assumed or a description of the steps involved in an arrangement. It also includes advice that does not concern the operation and effect of the tax laws.

114 ALRC, above n 24, 11.

115 As defined above for the accountant’s concession at section 2.1 of this paper.

The ALRC recommended that tax contextual information should be excluded from a statutory privilege.¹¹⁶ There are robust policy reasons why it is in the public interest to exclude tax contextual information. Excluding tax contextual information will provide the ATO with access to additional taxpayer materials to audit and enforce the taxation legislation and providing the judiciary with all relevant information when making a decision in a tax dispute. The Discussion Paper also asserts that not excluding certain source documents from disclosure would undermine the record keeping provisions that are a fundamental part of the Australian tax regime.¹¹⁷

However, excluding tax contextual information will mean the privilege for accredited tax agents is narrower than legal advice privilege.¹¹⁸ If this means that in practice the privilege is rarely enforceable, it will fail to deliver the policy goals that were the impetus for its introduction. This will also erode taxpayer confidence in the privilege. In this respect, the Court in *Attorney General for the Northern Territory v Maurice*¹¹⁹ noted in relation to LPP that: 'Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced.'

It may also cause undesirable distortions such as NLTAs not stating facts or assumptions in their advice, to ensure that privilege over a document is not compromised. Alternatively, it may lead to legal disputes in relation to what falls within the definition of a tax advice document.¹²⁰

However, the carve-outs (such as limiting the documents to which the privilege applies) may be the key to maintaining an appropriate balance to the privilege and this would need to be a focal point on the competency training undertaken by the tax agents.

Arguably, even with the carve outs suggested by the ALRC, the privilege would be significantly enhanced (from the existing accountant's concession) and it is arguable that some of the documents excluded would not attract a claim for legal advice privilege in any case.

4.3.2 Fraud/abuse of power

The ALRC proposes that a statutory privilege would not apply to documents where the advisor knew (or ought reasonably to have known) that the document was prepared to further:

- commission of a crime or fraud;
- an abuse of power;

116 ALRC, above n 24, 11 (para 6.281). Notably, in relation to the NZ statutory privilege section 20F of the *Tax Administration Act 1994* states that tax contextual information from a "tax advice document" must be disclosed.

117 Discussion Paper, above n 1.

118 Maples and Woellner, above n 24.

119 (1986) 161 CLR 475, 490.

120 Maples and Woellner, above n 24.

- an offence;
- an act that renders a person liable to civil penalty;
- committing of an illegal or wrongful act.¹²¹

These exceptions appear to mirror the law of legal advice privilege and if a linked privilege were adopted they may not need to be codified.

A further question arises when looking at these exceptions, as to whether this excludes advice promoting tax avoidance.¹²² Notably, the ATO argued in favour of inserting a tax avoidance exception for NLTAs but this idea was rejected by the ALRC. Indeed, if a tax avoidance exclusion did apply to a statutory privilege for NLTAs it would be subject to the limitations of the “exceptional circumstances” exception to the accountant’s concession. However, if such advice is privileged it may corrode the deterrent effect of the promoter penalty regime, that aims to penalise promoters of tax avoidance schemes, as it may be difficult to access the advice that promotes the schemes.¹²³

Interestingly, if a linked model were adopted there may still be an argument that advice obtained in furtherance of tax avoidance may not be covered by legal advice privilege. In *Clements Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police*,¹²⁴ Justice North determined that advice received to further tax avoidance was in “furtherance of an illegal or improper purpose.” It was held that LPP would not protect such communications.

In the US context, section 7525 of the IRC contains an exception for advice made in the promotion of a tax shelter¹²⁵ and the privilege is limited to non-criminal proceedings. This has led to criticisms that the privilege is significantly narrower than the attorney-client privilege, is uncertain, compromised and provides more limited protection for taxpayers.¹²⁶ Petroni argues that it is a “half loaf privilege” that is in “reality no loaf at all.” The tax shelter exception in the US has been particularly controversial and the subject of major litigation. Likewise in the New Zealand context a document will not be a “tax advice document” and therefore will be ineligible for protection as a result of the statutory privilege where it is “created for purposes” that include “a purpose

121 ALRC, above n 24, Recommendation 6-6.

122 Maples and Woellner, above n 24, 159.

123 Division 230 of the ITAA 1997.

124 [2001] FCA 1858.

125 Section 7525(b) of the IRC.

126 A Petroni, “Unpacking the Accountant Client Privilege under I.R.C. Section 7525” (1998/99) 18 *Virginia Tax Review* 844. M Hindelang, “The Disappearing Tax Adviser Privilege” (2003) 49 *Wayne Law Rev* 861.

states that the IRS has filed three suits in California, Illinois demanding documents from KPMG and BDO Seidman and disputing the application of section 7525. See also the discussion in 4.3.2 in relation to the difficulties in the US context in relation to the tax shelter exemption.

of committing or promoting or assisting the committing of , an illegal or wrongful act.”¹²⁷

Analogously, a statutory tax avoidance exception in Australia is also likely to cause significant litigation and substantially weaken the privilege; however, a further and detailed consideration of this issue is beyond the scope of this paper.

4.3.3 *Business, oral and advice on international laws*

The statutory privilege would need to clarify whether business advice by NLTAs is covered by the privilege and attempt to draw parameters in relation to when taxation advice becomes business advice.

Given one of the fundamental bases for suggesting privilege be extended to tax agents is the regulatory framework of TASA 2009 and the explicit recognition that such agents are providing legal advice, that privilege should not cover general business advice.

This however leads to difficulties in defining what constitutes “general business advice” as opposed to what constitutes “advice” on the taxation law. For example, is advice provided on the most tax effective business vehicle to be utilised (company/trust/partnership) business advice? The Discussion Paper acknowledges the difficulty in isolating communications made for multiple purposes, particularly because, unlike a lawyer, an accountant may also be providing non-tax advice roles like auditing or preparing accounting statements. These may potentially give rise to privilege claims for a broader range of advice documents than are now available under the accountant’s concession and LPP.¹²⁸ Again this is an issue that could be covered comprehensively by any competency training.

The difficulties in delineating tax advice and general business advice have been covered by commentators in relation to the section 7525 US privilege. Notably, Kendall states:

The peculiar problem for tax advisers or, more specifically, FATPs, is that the line between tax advice and business advice is even blurrier than it is between legal advice and business advice. Making this task more difficult for the taxpayer, who must prove that a communication is protected, is the fact that the courts have exhibited a tendency to begin an inquiry from a default premise that advice from a non-lawyer FATP is business advice. This comes about due to the broader nature of services provided by accounting firms compared with law firms and the greater likelihood that a particular document will contain unprivileged communications.¹²⁹

127 Section 20B(2)(c) of the *Tax Administration Act 1994*.

128 Discussion Paper, above n 1, 12.

129 K Kendall “Designing Privilege for the Tax Profession: Comparing I.R.C. ss7525 with New Zealand’s Non-Disclosure Right” (2011) 11 *Houston Business & Tax Journal* 74, 84-85. Ibid 87.

Another issue is whether the privilege should apply to oral advice.¹³⁰ This could be significant because, pursuant to section 264 of the ITAA 1936, the ATO can compel a person to attend and give evidence.¹³¹ The ALRC proposes that privilege would not apply to oral advice. However, legal advice privilege applies to oral and written confidential communications. Therefore, if a linked TAP was adopted, oral communications should arguably be covered. There does not appear to be any compelling reason why the choice of format the advice takes should dictate a claim of privilege. On the contrary, the exclusion of oral advice would lead to the anomalous situation that advice in relation to the same content could be either privileged or non-privileged depending on the communication medium used. It is contended that the message and not the medium should be the central determinant to establishing privilege.

It should also be clarified whether the TAP for NLTAs could apply to international tax advice. Notably, the NZ statutory privilege does not apply to tax laws in any other jurisdiction. However, an argument can be sustained that advice provided on foreign tax laws should not be excluded (for example this may be relevant in providing advice on the taxation laws in a country with which Australia has a Double Tax Agreement), where an accredited tax agent has special knowledge of a foreign jurisdiction's tax law and also as the interaction of foreign tax laws can impact on an Australian residents tax position.

4.4 Procedural issues

Several procedural issues arise in designing a privilege for NLTAs, including whether:

- the privilege should only be triggered by a request;
- a time limit should be imposed on when the privilege can be claimed;
- the privilege should be susceptible to waiver; and
- privilege be claimed by the NLTA or the client.

The adoption of a linked model would address a number of these issues. If the privilege was linked to legal advice privilege it would arise as of right and there would not be a time limit on the claim. Furthermore, the privilege would be the client's privilege and could accordingly only be claimed by the taxpayer,¹³² but would be maintained by the NLTA until the taxpayer chose to waive the privilege. The adoption of a linked model would also mean the privilege could be subject to express or implied waiver and that waiver could be unintentional.¹³³

130 Maples and Woellner, above n 24, 148.

131 Ibid 154.

132 Ibid 143.

133 *Mann v Carnell* [1999] HCA 66 at [29]. Here the Court stated that a waiver will occur where the conduct of a party "is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect".

Conversely, the ALRC recommends a framework that requires particulars of the privilege claim within a certain period of time.¹³⁴

It is argued that regardless of whether a separate or linked model is adopted, a statutory privilege for NLTAs should at least be subject to express waiver. A taxpayer may wish to waive the privilege so that they can provide the advice thereby demonstrating that they have taken reasonable care in preparing their tax return as this may impact penalties.

Interestingly, in the case of *Blakeley v CIR*¹³⁵ the Court argued that the NZ statutory advice privilege was not open to waiver. Specifically Hansen J argued:

More to the point, however, the protection against disclosure provided by ss 20B – F is not susceptible to waiver. As earlier discussed, tax advice documents are not automatically protected, even if eligible. The right to non-disclosure must be claimed by following the detailed procedure set out in s 20D.

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. Waiver simply does not arise under ss 20B – 20G.

What may become an acute issue if a privilege is extended to NLTAs is when a waiver will be implied. An implied waiver occurs when LPP is waived even though there was no intention to do so (for example inadvertently disclosing a confidential document to a third party). Certainly, where an accounting firm provides different services such as tax, audit and business services, there is a risk that privilege could be waived where there is a disclosure between different departments (e.g. a document shared between the tax and audit partners) or confidential information is placed on a firm's intranet.¹³⁶ This may mean that accounting firms have to erect "Chinese walls" to prevent waiver of the privilege through inadvertent communication of confidential tax information between departments and may lead to the need for separate engagement letter for tax matters that could be covered by the privilege.¹³⁷

Interestingly, the US statutory privilege on section 7525 contains no express reference to whether the privilege is subject to waiver. Kendall states in this regard:

Finally section 7525 is silent as to waiver. On one level this causes no major difficulties because the general rule is explicitly based on common law attorney client privilege, so the rules associated with common law waiver are also imported.¹³⁸

134 ALRC, above n 24, 8.3 to 8.15.

135 (2008) 23 NZTC 21,865.

136 Petroni, above n 126; Wilson, above n 66.

137 Petroni, above n 126.

138 Keith Kendall "Designing Privilege for the Tax Profession: Comparing I.R.C. ss7525 with New Zealand's Non-Disclosure Right" (2011) 11 *Houston Business & Tax Journal* 74, 86.

However, Kendall goes on to note that difficulties arise in relation to “compulsory waiver” where the document is disclosed to another agency. He outlines the potential for the operation of the waiver rules to be circumvented by the revenue authority (IRS):

coordinating with another government agency to require disclosure as part of a standard investigation before any tax investigation takes place.¹³⁹

4.5.3 Safeguards

A further issue is what safeguards should be enacted to prevent possible abuses of the privilege? Arguably if, as it is suggested, accreditation to provide privileged advice is administered by the TPB, it would be necessary to further provide the TPB with further sanctions to ensure the privilege is not misused by deliberately claiming privilege to prevent access or making unfounded privilege claims.

The law of privilege is complicated and dynamic, described by the ALRC as “a highly complex body of law which is arcane even to most lawyers”.¹⁴⁰ Whilst lawyers are trained specifically in LPP, NLTAs may not be. Therefore, one potential safeguard is to require a lawyer to certify a NLTAs claim of privilege. The ALRC suggests that some claims of privilege should be certified¹⁴¹ by a lawyer stating:

Whether advice meets the dominant purpose test is often a matter of some complexity and should be determined and certified by a lawyer rather than an accountant. This additional protection also removes the difficulty of whether accounting professional bodies have sufficient sanctions to address improper claims by placing the responsibility for certifying there are reasonable grounds for the making of a claim on a lawyer.¹⁴²

Critics argue that requiring certification creates additional compliance costs for taxpayers and that this would mean the NLTAs privilege would not be on an equal footing with LPP.¹⁴³ In fact, some commentators have remarked that ironically extending privilege to NLTAs but requiring certification may increase work for lawyers who would then need to clarify the scope of the privilege or certify the claims for privilege that are made.¹⁴⁴

The model advocated in this paper involves competency training in legal advice privilege and ongoing CPE requirements and therefore would mean certification would not be required, as the tax agents who are accredited to provide such advice would already have received substantial training on the intricacies of the law of privilege.

139 Ibid 88.

140 ALRC, Discussion Paper No. 23, Evidence Law Reform Stage 2, (1985) [http://www.alrc.gov.au/sites/default/files/pdfs/publications/Discussion Paper23.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/Discussion%20Paper23.pdf) at 14 June 2011.

141 ALRC, above n 24, Chapter 8.

142 ALRC, above n 24, 12 (Recommendations 8-3 to 8-5, paragraph 6.286).

143 Maples and Woellner, above n 24.

144 Lobenhofer, above n 83.

4.6 What agencies should the privilege apply against?

Another consideration is that it must also be determined whether the coercive information-seeking powers of regulatory bodies other than the ATO should be subject to a privilege extended to accredited tax agents. This could include bodies such as the Australian Securities and Investment Commission (“ASIC”), Australian Crime Commission (“ACC”) or the various State Revenue Offices or private litigants. The Discussion Paper states that the ALRC supports restricting the privilege to the ATO because this would: “appropriately limit the privilege, and would not interfere with the investigative powers of other agencies.” However, the ATO works extensively with other agencies to cross-match and exchange information. As an example, Project Wickenby is a “cross agency” taskforce that consists of eight Commonwealth agencies including the ACC, Australian Federal Policy and ASIC.¹⁴⁵ The Discussion Paper¹⁴⁶ and ALRC Report¹⁴⁷ provides that a privilege for NLTAs would need to be considered in the context of the ATO’s ability to participate in taskforces, joint investigations and the information exchange articles in Australia’s Double Tax Agreements.

If a statutory privilege for accredited tax agents did not apply against these bodies its effectiveness would be substantially compromised. The ATO would be able to obtain information from these agencies directly where they were both part of the same taskforce or indirectly through mutual information exchange agreements¹⁴⁸ and therefore circumvent the privilege.

This also raises the question of whether privilege would be waived for Commonwealth tax purposes if confidential legal advice between an accredited tax agent and client was utilised in a proceeding by another Commonwealth agency. Certainly if a linked model were utilised it would appear that if a document was waived for one purpose it would be waived for all purposes.

It is argued that for the privilege to be effective it would need to apply in relation to any Commonwealth or State regulatory agency and this would be an area where there would be significant advantages in harmonisation or relevant rules between States, Territories and the Commonwealth.¹⁴⁹ However, it is acknowledged harmonisation of a uniform privilege for NLTAs in relation to all of these bodies may be unattainable, at least in the short term, as it would need to be debated in the context of each agency’s objectives and circumstances.¹⁵⁰

145 Australian Taxation Office, Project Wickenby <http://www.ato.gov.au/corporate/content.aspx?menuid=0&doc=/content/00220075.htm&page=2&H2> at 13 June 2011.

146 Discussion Paper, above n 1, 16.

147 ALRC, above n 24, para 6.284.

148 For example, the Office of NSW can exchange information with the ATO on taxpayers pursuant to Part 9 of the *Taxation Administration Act 1996* (NSW). There are also provisions to allow ASIC and the ATO to exchange confidential taxpayer information see section 127 of the *Australian Securities and Investments Commission Act 2001* (Cth).

149 Note in NZ the statutory privilege applies against all bodies.

150 ALRC, above n 24, para 6.284.

The potential for a statutory privilege to be eroded by limiting the privilege exclusively to the revenue authority in tax matters was dealt with by Kendall (in the context of the US regime) and discussed above in this paper under section 4.4.

PART FOUR

5 Conclusions

This paper has examined the rationale for extending TAP over confidential legal tax advice prepared by accredited NLTAs. Several justifications have been detailed in this paper which include encouraging candid discussions between taxpayers and their NLTAs, reducing the competitive advantage currently afforded to lawyers and providing equivalent protection for equivalent services, obligations and penalties.

However, counterbalancing these policy justifications is the important policy goals that a statutory TAP straddles; namely the need for the ATO to be able to protect and enforce the integrity of the revenue base and for the judiciary to have all necessary information before making a decision in a tax dispute. Given NLTAs (which include tax agents) control a substantial amount of vital information in the taxation system, it is essential that an appropriate balance between these two goals is maintained.

Accordingly, to ensure the TAP is only claimed in appropriate circumstances, this article has suggested extending privilege to registered tax agents that not only meet the requirements currently provided for under the tax agent services regime but who also have an additional postgraduate qualification in taxation, who have undertaken an additional competency training in relation to privilege and who meet ongoing continued professional educational standards.

It is further argued that a linked model should be adopted as this will ensure the privilege for accredited NLTAs and lawyers remain aligned to a greater degree and the development and moderation of the privilege will be left to the judiciary. However, to maintain a workable balance between these competing policy goals, the privilege should exclude protection of tax contextual documentation.

It is submitted that such a formulation strikes the right balance between ensuring that primacy is given to the client's privilege, by allowing taxpayers to have full and frank discussions in relation to their tax affairs with accredited tax agents and ensuring that an appropriate level of information is still available to administrators and the privilege is administered correctly.

