

[1273] Time for a statutory tax advice privilege - RoLIA

On 15 April 2011, the Assistant Treasurer released a [discussion paper](#) which explores the appropriateness of establishing a tax advice privilege - reported at 2011 WTB 15 [524]. The paper considers an Australian Law Reform Commission recommendation to shield certain tax advice documents from the information-gathering powers of the Commissioner of Taxation, and comprehensively canvasses the implications of establishing such a privilege.

The so-called "Accountants' Concession" began in 1989 and is an ATO administrative arrangement about ATO access to communications between accountants and their clients (it is explained in Chapter 7 of the ATO's *Access and Information Gathering Manual*). It is designed to provide protection for advice given by tax agents. It essentially allows a range of documents to remain confidential, despite not being subject to legal professional privilege.

The Accountants' Concession distinguishes between different classes of documents:

- source documents (records of transactions), to which ATO officers will seek full and free access;
- restricted source documents (advice documents shedding light on transactions); and
- non-source documents (other advice documents).

The Concession is available only for restricted source and non source documents, as prescribed by the guidelines. Source documents, even if created for the purpose of obtaining tax advice, are not protected by the concession as they would be by legal professional privilege. The Concession has however, caused some ongoing concern for practitioners - see 2011 WTB 32 [1222].

The Rule of Law Institute of Australia (RoLIA) has lodged a submission on the privilege paper, signed by RoLIA Vice President **Malcolm Stewart**, calling for the Accountants' Concession to be replaced with a statutory tax advice privilege. The Institute argues that tax advice privilege should extend to both written and oral communications, in the same way that client legal privilege applies to written and oral communications. It considers that tax advice is legal advice and should enjoy the same protection as legal advice.

Specifically, RoLIA has recommended that:

- Federal legislation should provide for a new privilege called "client tax privilege".
- The privilege should extend to confidential communications and confidential documents made for the dominant purpose of the tax adviser providing tax advice to the client.
- The dominant purpose test (not the sole purpose test ie that the advice be prepared solely for providing advice on tax matters) should apply.
- Client tax privilege should expressly:
 - not extend to source documents even when given to a tax adviser for the purpose of obtaining tax advice;
 - not apply to a communication in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or a communication or the contents of the document that the client or tax adviser (or both) knew or would reasonably to have know was made or prepared in furtherance of a deliberate abuse of a power.
- Tax advice privilege could only be claimed if the adviser is a registered tax agent for the purposes of s 20-25 of the *Tax Agent Services Act 2009* or a nominee or employee of a registered tax agent who is a qualified tax accountant.
- The legal onus should be on the client to establish that a communication or document is subject to the privilege.
- Claims that a communication or document is subject to client tax privilege should be required to be certified by a legal practitioner if requested by the ATO or any other regulator in the same way for claims for client legal privilege.
- The ATO should develop guidelines for the making of claims for the privilege and for the resolution of disputes, including the commencement of court proceedings by a taxpayer in the event the ATO disputes any claim for the privilege.

by Terry Hayes

LTA.TaxNewsroom@thomsonreuters.com