

By Michael Hines, member of the Victorian Bar:

‘Drawing the veil over taxation advice given by accountants: legal professional privilege and the ATO’s guidelines on “Access to Professional Accounting Advisors’ Papers.”’

A topic of burgeoning importance

1. In a barrage of public announcements over the last year, the Commissioner and other representatives of the Australian Taxation Office (‘the ATO’) have stated that the ATO is substantially increasing its audit focus. As the ATO recognizes, the effective exercise by the Commissioner of his powers to gather and to gain access to information about taxpayers, is an important part of the process of investigation, re-assessment, and enforcement. So, for example, when investigating clients of tax advisers or promoters who take a leading role in so-called aggressive tax planning, the Commissioner can use his access and information gathering powers to compel the promoter to hand over the necessary information to determine whether the clients participated in aggressive arrangements.¹
2. *Deloitte Touche Tohmatsu & Ors v DFCT*² provides a good illustration of this. In that case, representatives of a disaffected financial services company told an ATO officer that a scheme was being marketed by Deloitte and gave the officer a copy of an advice from Deloitte relating to the scheme. The scheme involved the promotion to employers in Australia of New Zealand non-complying employer-sponsored superannuation funds. The officer knew from the Australian Transaction Reports and Analysis Centre that a significant volume of money was moving between Australia and New Zealand. By means of issuing information notices under s264(1)(a) of the *Income Tax Assessment Act 1936* (ITAA36), the Commissioner was able to require information about the identity of participants in and middlemen involved in substantially similar schemes, the types of services provided by Deloitte to participants, and the basis on which Deloitte charged fees and disbursements to clients participating in the schemes.
3. Perhaps more than ever before, it has become a matter of concern to taxpayers, their advisors, and the Commissioner to know when taxpayers and their advisors are entitled to resist a demand for disclosure of information, or the production of documents. Naturally, the Commissioner wishes to be as fully informed as possible about possible non-compliance, and taxpayers and their service providers need to be prepared for any requests or demands for information or documents. Taxpayers and their service providers may also have an interest in knowing how to compile and disseminate potentially sensitive information and documents in such a way as not unnecessarily to expose such information and documents to the risk of unwelcome scrutiny.
4. When accountants may be privy to such information or documents, two important issues are the extent to which legal professional privilege can apply, and the degree of protection available under the Commissioner’s Guidelines on Access to Professional Accounting Advisors’ Papers.

Legal professional privilege

5. Under the common law, legal professional privilege is a rule of substantive law³ that may be availed of to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice⁴ (this can be referred to as ‘advice privilege’), or the provision of legal services,

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‘Drawing the veil over taxation advice given by accountants: legal professional privilege and the ATO’s guidelines on “Access to Professional Accounting Advisors’ Papers.”’ including representation in legal proceedings⁵ (this can be referred to as ‘litigation privilege.’) The privilege is that of the client.⁶

6. A document attracts the privilege if it was prepared with the dominant purpose of its being used as a communication with a legal adviser to obtain legal advice notwithstanding that it has not in fact been, and may never be, so used.⁷ The privilege extends to any document prepared by a lawyer or client from which there might be inferred the nature of the advice sought or given.⁸
7. It is the principles of the common law privilege which apply to pre-trial proceedings such as the discovery and inspection of documents, and when claims to privilege are made upon the exercise by the Commissioner of his powers of full and free access under s263 of the ITAA36, and to require information, evidence, or the production of documents under s264 of the ITAA36.⁹
8. The privilege has important limitations. Thus, the privilege may not be availed of to resist the production of title deeds or other documents giving effect to transactions. Disclosure of the nature of a transaction or matter in respect of which legal advice is sought or given is not privileged unless the disclosure reveals the communication itself.¹⁰ The privilege does not entitle a lawyer to refuse to provide the name and address of a client except in particular circumstances, and generally does not protect from disclosure the fact that a privileged communication was made, as distinct from its contents.¹¹ Nor does the privilege prevent the revelation of communications made in furtherance of crime or fraud.¹² For the privilege to apply, the communication must be confidential.¹³ Finally, the privilege may be waived.¹⁴
9. The Commissioner’s powers under s263 (Commissioner’s full and free access to places and documents) do not override the privilege.¹⁵ Nor, it would seem, do his powers under s264.¹⁶ Under this section, the Commissioner can require any person to furnish him with such information as he may require, to attend and give evidence concerning his or any other person’s income or assessment, and to produce all documents whatever in his custody or under his control relating thereto. It is standard practice for notices issued under s264 to notify the recipient of the notice of his entitlement to claim the privilege.
10. In more than one instance, the privilege has been affected by statute. In Federal Court hearings, the rules governing claims of privilege where evidence is being adduced are contained in Division 1 of Part 3.10 of the *Evidence Act 1995* (C’th.)¹⁷ There are some important differences between legal professional privilege at common law and client legal privilege, the name given to the privilege under this statute.¹⁸

Legal professional privilege and communications with accountants

11. Although the relationship between a client and his or her accountant will not as such attract privilege to any exchanges made in it,¹⁹ the privilege applies not only to information or documents which reveal communications between lawyers and their clients made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.
12. The privilege applies also to information and documents which reveal confidential communications passing between a client, the client’s legal adviser or third parties, for the dominant purpose of use in or in relation to litigation, which is

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- existing,²⁰ pending or in contemplation.²¹ It is clear on the authorities that documents emanating from or prepared by third parties (including employees of a client) are covered by litigation privilege if prepared with the dominant purpose of use in existing or contemplated litigation.²²
13. In addition, the privilege applies to information and documents that reveal confidential communications which are made for the dominant purpose of giving or obtaining legal advice, and proceed to or from agents for certain purposes. Where the client, in communicating with his or her solicitor, uses as the medium of communication either the solicitor’s agent or his or her own agent, the agent is an agent for the relevant purpose.²³ A legal advisor can communicate through a clerk or subordinate who acts in his or her place and under his or her direction,²⁴ an agent who he or she uses as his or her medium of communication.²⁵
 14. More controversial is whether and if so, in what circumstances, the privilege applies to information and documents which reveal confidential communications passing between a client and a third party, or the client’s legal adviser and a third party, for the dominant purpose of giving or obtaining legal advice, where the third party is not an agent for the purposes of communication, as explained in the previous paragraph.²⁶
 15. According to the English cases,²⁷ in the absence of litigation in progress or in contemplation, an agency for the required purpose does not arise when the third party provides information collected by him or her to the solicitor.²⁸ These authorities hold that in this situation, no advice privilege attaches.²⁹ If the High Court were to hold that this narrow view of the privilege represents the law in Australia, communications by an accountant to a lawyer would not be privileged if they do much more (or perhaps any more) than pass on information from the client, and difficulties would arise if the accountant were more than a mere conduit.³⁰
 16. Furthermore, where the accountant is the agent of the client (rather than of the lawyer), the requirement that the accountant be the agent of the client for the purpose of the communication could mean that, in the absence of pending or contemplated litigation, the privilege would not attach to a communication from an accountant (who was a third party) to a solicitor, unless the communication passed directly between the accountant and the solicitor, rather than via the medium of the client.³¹ Recently, the Full Court of the Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation*,³² besides rejecting the narrow view of the privilege expressed in the English cases, held explicitly that there was no such requirement or consequence.³³
 17. The primary principle, according to the Full Court in *Pratt*,³⁴ is that a document is privileged where the document was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect.³⁵ According to the Court, this is a principle of advice privilege as it applies to documents.³⁶

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18. The Court held³⁷ that advice privilege extends to a documentary communication written by an accountant if the function of the accountant performed for the client in bringing the document into existence, was to enable the client to make the communication necessary to obtain legal advice the client requires.
19. In an unequivocal departure from the English cases and several Australian cases, the Court held³⁸ that it mattered not whether the accountant was the client’s agent for the purposes of communicating with the lawyer.³⁹ This decision of the Court in *Pratt* is good news for taxpayers and their advisers, as (provided that the dominant purpose test is satisfied) it significantly extends the reach of advice privilege. Indeed, if the decision of the Court continues to stand as good law, the reach of privilege over third party communications now seems to be more extensive in Australia, than in the England, New Zealand, Canada, and the United States.
20. What of advice which is given by an accountant to solicitors who take it upon themselves to engage the accountant for the purposes of enabling the solicitors to provide legal advice to their client?⁴⁰ According to Finn J (with whose reasons Merkel J agreed) in *Pratt*, an appropriate limitation on advice privilege is that the privilege should not be given such rein as would allow the legal advisor unilaterally to bring third party communications (eg, communications between an accountant and a lawyer) under the umbrella of lawyer-client communications notwithstanding that the third party (eg, the accountant) was not the client’s agent for the purpose.⁴¹ Hence, no privilege would attach to advice given by an accountant to lawyers who unilaterally engaged the accountant for the purposes of enabling the lawyers to provide legal advice to their client. It seems that in such cases, the Court would characterize the purpose of the accountant or lawyer as being one of using the communication or document or its contents in order to give legal advice, rather than to obtain it.
21. The court might infer the opposite if the accountant were retained by or at the request of a client.⁴²
22. According to a wider view expressed by Allsop J sitting as the Federal Court in *DSE v Intertan Inc & Anor* (2003) 203 ALR 348, it would seem that privilege would attach to advice given by an accountant to solicitors who engaged the accountant for the purposes of enabling the solicitors to provide legal advice to their client.⁴³ This is contrary to the more recently expressed views of the Full Court in *Pratt*, and seems to be contrary to the English view that documents are not protected merely because they are produced by a third person in answer to an inquiry made by the solicitor.⁴⁴
23. It remains to be seen which, if any, of these various views are upheld by the High Court. At the time of writing, it is not known whether or not the Commissioner intends applying for special leave to appeal to the High Court from the Judgment of the Full Court of the Federal Court in *Pratt*. For the time being, at least in the Federal Court and in taxation appeals and reviews, the Judgments of the Full Court in *Pratt* represent the most authoritative of the various views.
24. In Federal Court hearings, advice privilege is not confined to the client in person and the solicitor in person: ‘client’ includes the employee or agent of a client, and ‘lawyer’ includes the employee or agent of the lawyer.⁴⁵ It seems to be an open

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question whether the ‘agent’ referred to in s117(1) of the *Evidence Act 1995* has to be an agent for the purpose of the communication.⁴⁶

25. Despite the various difficulties, it is possible to state a number of conclusions in general terms.
26. In the first place, if the client retains a lawyer, it may be (if the Full Court’s decision in *Pratt* is not upheld) that advice privilege is more likely to attach to communications to or from an accountant, if the accountant confines his role to that of acting as the medium of communication between client and lawyer, and does little more than pass on information coming from one or other of those persons. It is arguable that a finding that an accountant has acted as a medium of communication between a client and a lawyer is more likely to be made if the accountant communicates to the client’s lawyer direct, rather than communicating via the medium of the client: see *Pratt* (at 1st instance) 728 referring to *Macedonia Pty Ltd v FCT* (1987) 87 ATC 4565.
27. In the second place, the client of a lawyer who is in need of technical assistance with the law in order to advise the client, is more likely to be able to avail himself of the privilege if his or her lawyer consults another lawyer rather than an accountant.⁴⁷ If the lawyer does consult an accountant, he or she should not do so unilaterally, without the direction of the client. The accountant should be retained by or at the request of the client.
28. In fact in all cases where litigation is not in prospect, it is preferable for the client, rather than the lawyer, to retain the accountant. At the very least, if the accountant is formally retained by the solicitor, the retainer should probably be at the explicit instruction of the client.⁴⁸
29. Thirdly, in general, a communication between a client and the client’s lawyer does not lose its privileged status merely by being disclosed in confidence to the client’s accountant.⁴⁹
30. Finally, where no lawyer is retained, there will be no advice privilege, and for analogous protection, recourse will have to be had to the Commissioner’s Access Guidelines referred to below. This will not matter, except in a case where the protection afforded under the Guidelines may fall short of what would be available if a lawyer were retained. In such a case, it is not out of the question that an accountant may owe his or her client a duty of care to point out the risk of there being no privilege if a lawyer is not retained. Of course, the retainer of a lawyer would be to no avail if the retainer were a sham,⁵⁰ or if the dominant purpose test is not satisfied.
31. In *Pratt*,⁵¹ the Court cautioned that the difficulties in proving the relevant purpose should not be underestimated, and that particular care needs to be taken in evaluating evidence of purpose in a setting in which the accountant performs a professional function for a principal in a non-litigation setting but in a matter in which legal advice is to be or is being sought by that principal. According to the Court, advice as to commercially advantageous ways to structure a transaction are extremely unlikely to attract privilege because the purpose in putting the advice together will, in most cases, be quite independent of the need for legal advice. Even if the parties have in mind that the advice will be submitted to a lawyer for

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comment, the purpose is unlikely to be the dominant purpose. Thus Finn J (with whose reasons Merkel J agreed) said,⁵²

‘the matter or transaction in respect of which legal advice is sought may well be one in which the principal considers it necessary or appropriate to obtain advice as well from other professional and business sources. In determining the preferred structure of a business transaction, for example, a person might consult not only a lawyer, but also one or more of an accountant, a financial planner and a merchant banker for advice... The advices given by such other advisers will rarely be capable of attracting privilege for the reason that they will almost invariably have the character of discrete advices to the principal as such, with each advice, along with the lawyer’s advice, having a distinctive function and purpose in the principal’s decision making – albeit all of the advices may be interrelated in the sense of providing collectively a basis for informed decision by the principal. Those other advices will not later acquire the character of privileged documents in the respective adviser’s hands: cf *Propend*; merely because the principal subsequently makes the advices available to his or her lawyer when obtaining legal advice. Importantly, as Deane J observed in *Baker v Campbell* at 112, privilege does not "extend to protect things lodged with a legal adviser for the purpose of obtaining immunity from production". Neither does it extend to third party advices to the principal simply because they are then "routed" to the legal adviser...’

32. There is a difficulty with the example given (determining the preferred structure of a business transaction). The difficulty is that the structure of the type of transaction which is likely to give rise to a case in which privilege may be claimed, will frequently be determined by legal considerations (such as whether the transaction constitutes a scheme under Part IVA of the ITAA36) as well as commercial considerations. In such a case, an advice may well take both factors into consideration. How can it be determined which, in a given case, is the paramount consideration?

33. Finn J continued,⁵³

‘ [N]otwithstanding the principal’s stated purpose in having a documentary communication brought into existence, the principal may have so conducted himself or herself in the matter as to indicate that the intended use of the document authored by the third party was not its communication to the legal adviser as the principal’s communication, but rather it was to advise and inform the principal concerning its subject matter, with the principal then determining (a) in what manner, if at all, the whole or part of the document would be used by the principal in making its own communication or (b) the purpose(s) for which the document could or should be used. The less the principal performs the function of a conduit of the documentary information to the legal adviser, the more he or she filters, adapts or exercises independent judgment in relation to what of the third party’s document is to be communicated to the

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legal adviser, the less likely it is that that document will be found to be privileged in the third party’s hands. This will be because the intended use of the document is more likely to be found to be to advise and inform the principal in making the principal’s communication to the lawyer (whether or not that communication embodied wholly or substantially the content of the document) and not to record the communication to be made.’

34. Plainly there will be cases where irrespective of the retainer of a lawyer, communications made or documents produced by an accountant will not be privileged. It is with these cases that the remainder of this Paper is concerned.

Access to documents prepared by independent external accountants: the Commissioner’s administrative concession

Existence and rationale of concession

35. A copy of the Commissioner’s guidelines on “Access to Professional Accounting Advisors’ Papers: Guidelines for the Exercise of Access Powers” was published as an addendum to Chapter 8 (Legal Professional Privilege) to the Commissioner’s manual on Access and Information Gathering Powers. Chapter 8 is being rewritten in the light of cases decided after it had been written and changes in ATO policy. The most important of these cases was *Esso Australia Resources Limited v FCT*.⁵⁴ Before the decision of the High Court in that case, it was thought that, at common law, legal professional privilege could not apply to a communication unless it was made for the sole purpose of giving or obtaining legal advice or the provision of legal services. The decision relaxed the requirement of sole purpose to one of dominant purpose.
36. Plainly, however, the concession contained in the guidelines has not been withdrawn.⁵⁵
37. The concession arises from the Commissioner’s acceptance that there is a class of documents which should, in all but exceptional circumstances, remain within the confidence of taxpayers and their professional accounting advisors.⁵⁶ In respect of such documents, the ATO acknowledges that taxpayers should be able to consult with their professional accounting advisors on a confidential basis to enable full and frank discussion to take place and for advice to be communicated on that basis.⁵⁷
38. In *Deloitte’s* case, Goldberg J described⁵⁸ the evident purpose of the guidelines as being to provide by analogy with legal professional privilege a measure of protection, except in exceptional circumstances, to clients of professional accounting advisors in respect of disclosure of confidential taxation advice given to them by their professional accounting advisors; in other words, the provision of accounting advice given in connection with conception, implementation and completion of transactions or arrangements and advice given after a transaction has been completed are to be protected from production except in exceptional circumstances.
39. Nevertheless, the analogy is not complete, in a number of important respects.
40. In the first place, the protection afforded under the Guidelines constitutes an administrative concession,⁵⁹ which the law would not otherwise recognize. This is

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‘Drawing the veil over taxation advice given by accountants: legal professional privilege and the ATO’s guidelines on “Access to Professional Accounting Advisors’ Papers.”’ in contrast to legal professional privilege, which is a rule of substantive law.⁶⁰ As we shall see, a consequence of this difference is that a taxpayer has no right to expect that the guidelines will be followed, only a right to procedural fairness and a right to expect that they will be taken into account.⁶¹

41. In the next place, the guidelines state that they apply only to documents prepared by external professional accounting advisors who are independent of the taxpayer.⁶² Hence, it seems that the guidelines do not apply to documents prepared by an in-house accountant. By contrast, on the present state of the authorities, the better view is that a communication between a client and an in-house lawyer acting in the capacity of lawyer can be privileged.⁶³
42. Thirdly, under the Guidelines, in certain circumstances, the protection from non-disclosure can be withdrawn.⁶⁴ Legal professional privilege is subject to far fewer restrictions.⁶⁵
43. Whereas the requisite purpose of privileged communications need only be a dominant purpose,⁶⁶ the requisite purpose under the Guidelines must be a sole purpose.⁶⁷
44. There is a strong case for saying that there is no compelling reason why the guidelines should afford less protection to communications between clients, accountants and their agents than advice privilege affords to communications between lawyers, clients and their agents. Indeed, it is difficult to find a satisfactory reason⁶⁸ why advice privilege should not extend to advice about the taxation laws given by persons who are not lawyers but are adequately qualified to give such advice (such as accountants giving advice about tax laws) and from whom clients customarily (and quite properly) seek such advice.⁶⁹

Types of documents covered

45. The guidelines refer to three types of document called source documents, restricted source documents, and non-source documents. The guidelines describe source documents as documents which record a transaction or arrangement entered into by a taxpayer, including papers prepared in connection with the conception, implementation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement. The guidelines say that source documents also include traditional accounting records, documents comprising the permanent audit file held by a professional accounting advisor performing a statutory audit,⁷⁰ and tax working papers (except for those which merely state a professional accounting advisor’s opinion on the matters presented in a tax return.⁷¹ The guidelines state that the ATO will seek full and free access to source documents, which are not restricted source documents.⁷² This comes as no surprise, since such documents have no real analogy with documents to which legal professional privilege applies.
46. Restricted source documents are confidential advisings and advice papers that are both prepared by an external professional accounting advisor solely for the purpose of advising a client on matters associated with taxation, and prepared in connection with the conception, implementation and completion of the transaction or arrangement. They are created prior to or contemporaneously with the transaction or arrangement and are source documents of a particular type.⁷³

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47. Non-source documents are other advice and advice papers; for example, these include advisings provided after a transaction has been completed, where the advisings did not affect the recording of the transaction or arrangement in the books of account or tax return.⁷⁴ They include papers contained in the current audit file prepared or obtained by an external professional accounting advisor in the course of an audit under any statutory code or stock exchange listing requirement, in the course of a prudential tax audit, or in the course of a due diligence report.⁷⁵
48. There is a fourth class of documents with which the guidelines are concerned: papers prepared for the purpose of appeal to [sic] the Administrative Appeals Tribunal (‘the AAT’) or courts. The guidelines state that ATO officers will not seek access to any papers prepared by professional accounting advisors solely for the purpose of representing a taxpayer in legal proceedings (including an objection, appeal or review) under a taxation law.⁷⁶ This concession appears to be more or less analogous to litigation privilege.
49. Like privileged documents, restricted source and non-source documents have to be confidential. They lose that status if disclosed to independent third parties, unless both the taxpayer and the professional accounting advisors agreed to the disclosure to specific nominated independent third parties.⁷⁷ It could be argued that this proviso is too restricted, and that it should suffice that the disclosure is on a confidential basis.⁷⁸

Application of concession to information as well as documents

50. In *Deloitte*,⁷⁹ the applicants applied for an order of review in respect of decisions by the Deputy Commissioner to exercise power pursuant to s264(1) by issuing notices requiring them to furnish information. Goldberg J held⁸⁰ that it was clear that the provisions in the guidelines in relation to access to professional accounting advisors’ papers and documents are also intended to apply in relation to the seeking of information pursuant to s264(1)(a),⁸¹ but that one has to use an analogy in seeking to fit the concept of requesting information into the categories of source documents, restricted source documents and non-source documents. One has to bring forth the equivalent of the contents of source, restricted source or non-source documents. Thus, the fact that advice was given, and information relating to the identification of the persons who went into, set-up or participated in the arrangement which the Commissioner wished to investigate, the fees charged and the contributions made were not protected from disclosure, whereas the content or substance of the advice would have been. His Honour drew a distinction between the disclosure of information of an advice nature (which is protected), and information of an objective factual nature (which is not.)
51. The Guidelines imply that, except in certain circumstances, in a litigated case before the courts and the AAT, the ATO will preclude itself from seeking the use of restricted source and non-source documents listed in litigation procedures.⁸² It is not clear whether in such a case, the reference to documents can be taken to apply to information generally.⁸³

Manner in which claim for concession to be made

52. The benefit of the concession has to be claimed by or on behalf of the client.⁸⁴ This is analogous to the principle that legal professional privilege belongs to the

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53. The guidelines state that categorization of a document as a restricted source document or as a non-source document has to be substantiated in considerable detail (set out in the guidelines) on a document by document basis.⁸⁶ The Commissioner imposes similar requirements for claims to privilege, although in the latter case, he can insist on no more than the law requires. In each case, the ATO has proformas.
54. The guidelines state that they will be adhered to by ATO officers provided that taxpayers and their professional accounting advisors use them in the spirit in which they were formulated.⁸⁷
55. Failure to provide the required substantiation may cause ATO officers to seek access to restricted source and non-source documents and may cause approval for such access to be granted by an authorized officer. Hence, when claiming the concession, it is prudent to comply with the relevant proformas so far as practicable.
56. Where there is disagreement between the ATO officer and the professional accounting advisor or taxpayer about whether or not access to particular documents may be sought, the guidelines set out procedures to be followed for the interim custody of the documents and their non-disclosure to the ATO.⁸⁸

Manner in which approval for access to restricted source and non-source documents granted

57. The guidelines state that for audits, access will not be granted to such documents without the approval of specified [ATO] officers.⁸⁹ The main text of the guidelines says that access may only be sought with the (personal) written approval of the Deputy Commissioner of the Office in which the relevant ATO audit manager is located, but a footnote⁹⁰ states that a change to this was made by the “Guidelines to Authorisations”, July 1997, allowing approval to be given in the exercise of the access power authorized to be used in a wallet authority, by less senior ‘independent’ officers.⁹¹ It is understood that ‘Independent’ refers to ATO officers of the required seniority who are not the segment leader of the team involved in the audit or case in question. This footnote was excluded from at least some earlier published versions of the guidelines.⁹²
58. The guidelines state⁹³ that for appeals and review, the ATO will not seek to inspect or obtain documents listed in litigation procedures except with the (personal) written approval of the Deputy Commissioner of the office in which the relevant ATO Appeals and Review Group head is located.⁹⁴

Circumstances in which approval granted for access to restricted source and non-source documents

59. The guidelines state that access to restricted source documents will only be sought in exceptional circumstances.⁹⁵ Properly interpreted, the guidelines mean that access to non-source documents will not be sought other than in exceptional circumstances either. As we shall see, those circumstances are considerably wider, than the circumstances where legal professional privilege is denied to the analogous class of advisings and advice papers prepared by a lawyer for a client.

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60. According to the guidelines, access to restricted source documents may be sought in a number of specified circumstances, in which access to non-source documents may also be sought.⁹⁶
61. The specified circumstances allow access to be sought where the documents are necessary to prove in court known facts relating to a contested assessment, where there are reasonable grounds to believe that fraud or evasion, or an offence under the *Taxation Administration Act 1953*, or any other illegal activity has taken place, or where neither the taxpayer’s records nor the taxpayer can be located.⁹⁷
62. The specified circumstances allow access to be sought where, after following procedures involving the ATO and the taxpayer, there is still insufficient factual information [available to the ATO.] The procedures to be followed vary, depending on the circumstances. In some circumstances, the guidelines say that access will be sought, in others that it may be.⁹⁸ The Commissioner has elaborated on what constitutes insufficient factual information in his speech, ‘A Question of Balance.’⁹⁹
63. The statement in the guidelines that they will be adhered to by ATO officers provided that taxpayers and their professional accounting advisors use the guidelines in the spirit in which they were formulated¹⁰⁰ may mean that there are other circumstances in which the guidelines contemplate that access may be allowed.
64. In *ONE.TEL Ltd v DFC of T*,¹⁰¹ Burchett J held that a situation calling for the application of the general anti-avoidance provisions could be seen as exceptional circumstances within the guidelines. Whether it should was a matter for the decision-maker [one of the senior or ‘independent’ ATO personnel referred to above], as was the issue whether, in truth, the situation was possibly of that complexion. It is unclear from *ONE.TEL’s case* whether Burchett J considered that the exceptional circumstances referred to in the guidelines, were limited to the particular circumstances referred to above that are specified in the guidelines as being the circumstances in which ATO officers shall or may seek approval for access to restricted source and non-source documents.
65. It may be that the guidelines, like a policy, should not be read pedantically.¹⁰²
66. None of the particular circumstances referred to above that are specified in the guidelines as being the circumstances in which ATO officers shall or may seek approval for access to restricted source and non-source documents, would constitute grounds for refusing a claim of legal professional privilege. It has been held by a single Justice of the Federal Court,¹⁰³ that legal advice to further what is allegedly a scheme under Part IVA of the ITAA36 is not protected from disclosure by legal professional privilege, but this is at the very least controversial. Furthermore, although legal professional privilege does not prevent the revelation of communications made *in furtherance* of a crime or fraud,¹⁰⁴ a person seeking advice due to concerns about involvement in a possible fraud which had already been committed, by retaining a lawyer, could ensure that the advice was privileged.¹⁰⁵ By contrast, the administrative concession does not apply where there are reasonable grounds to believe that fraud or evasion has taken place.

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67. It has been held¹⁰⁶ that the guidelines may be departed from in an individual case for sufficient reason. An extreme example is where there is a need for urgency because of the risk of destruction of documents.¹⁰⁷

68. In one instance, the guidelines differentiate between access to restricted source documents and access to non-source documents. In specified circumstances, access to relevant non-source documents in the current audit file will only be sought where access to restricted source documents does not provide the necessary information.¹⁰⁸

Challenging grant of such approval and exercise of access power

69. It has been held by Goldberg J of the Federal Court, that the manner in which the guidelines have been promulgated and their contents make it clear that they are, at the least, a relevant consideration to which the Commissioner and officers of the ATO must have regard and at the most (without deciding the issue) they are matter which create a legitimate expectation in taxpayers and their professional accounting advisors that they will be complied with according to their terms.¹⁰⁹

70. Hence, failure to give the guidelines proper or adequate consideration in making a decision to which they apply (such as whether or not to approve access), could make that decision liable to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (‘the ADJR Act’.)

71. It has to be remembered, however, that not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court’s setting aside the impugned decision; the factor might be so insignificant that the failure to take it into account could not have materially affected the decision.¹¹⁰

72. Nor is it the function of the court reviewing the decision to substitute its own decision for that of the decision-maker; hence, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are to be taken into account.¹¹¹

73. A decision could be set aside if there were proof that it had been made mala fide, was misconceived or ignored the merits, was so unreasonable that no reasonable decision maker could have made it, was vitiated by error of law, or that there was no evidence to justify the decision.¹¹²

74. Even where there is a legitimate expectation, there is no entitlement to the substance of the expectation (eg, that the guidelines will be followed), but merely to the observance of procedural fairness before the substance of the expectation is denied.¹¹³

75. By the same token, the notion of legitimate expectation is not dependent on any principle of estoppel; it does not depend upon the knowledge and state of mind of the individual concerned, although such an expectation may arise from the conduct of a public authority towards an individual.¹¹⁴

76. In *ONE.TEL*,¹¹⁵ Burchett J of the Federal Court held that the guidelines give rise to a legitimate expectation that the Commissioner will conduct himself in the manner set out; except in such an urgent case as might arise if there were grounds for fearing the destruction of the documents in question, he cannot depart from the guidelines without giving the person concerned an opportunity to make out a case why he should not do so. Provided the Commissioner does allow the requisite

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opportunity, it is in the nature of the guidelines that they may be departed from in an individual case for sufficient reason.

77. In that case, the applicants sought judicial review of a decision by the Deputy Commissioner to give approval for officers to have access to restricted source and non-source documents on the basis that there was an exceptional circumstance, identified as the possible application of the anti-avoidance provisions. Of itself, this is not one of the specified circumstances referred to earlier.
78. Burchett J held¹¹⁶ that there is a further legitimate expectation, besides that referred to above. This further expectation, which is binding on the Commissioner, even when he proposes to act in accordance with the guidelines in the making of a decision to authorize access to certain documents on the footing of an exceptional circumstance, obliges him to give a person affected a prior opportunity of arguing that there is no such exceptional circumstance.¹¹⁷
79. In *ONE.TEL*, the applicants argued that they had not been given sufficient details about the exceptional circumstance to afford them this opportunity. Burchett J in rejecting this argument, held¹¹⁸ that in many cases (of which the present was one), it will be sufficient if the person affected knows or is in a position to anticipate what the issues are, so he knows what proposition he has to combat. In addition, his Honour noted that the applicants had not asked for further particulars.
80. Given the restrictions on what taxpayers and their professional accounting advisors may legitimately expect, successfully challenging a decision approving access to restricted source and non-source documents is likely to be a task of some difficulty.

Conclusion

81. When a client seeking legal advice from a lawyer, uses an accountant, communications to or from the accountant and certain accountant’s papers may be privileged. But where no lawyer is involved, legal professional privilege does not attach to such communications or papers. In these circumstances, the administrative concession contained in the guidelines may prevent the ATO from having unrestricted access to such communications or papers, but access is easier for the ATO to obtain than where legal professional privilege applies. In particular, the concession is unlikely to prevent access when anti-avoidance provisions such as Part IVA of the ITAA36 are in issue.
82. Whatever the arguments for and against, to date, the Commissioner has shown no inclination to enlarge the concession so that it is on all fours with legal professional privilege.

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21 June, 2004

Michael Hines is a member of the Victorian Bar Professional Standards Scheme approved under Professional Standards Legislation. His liability is limited under that Scheme. A copy of the Scheme will be supplied on request.

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¹ See ATO media release-Nat-3/85; the ATO Compliance Program 2003-4; and the ATO’s booklet, ‘Large business and tax compliance.’

² 98 ATC 5192.

³ The privilege has also been described as ‘a practical guarantee of fundamental rights’: see *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1996-1997) 188 CLR 501, 540.

⁴ As to what constitutes legal advice, see *Three Rivers District Council v The Governor & Company of the Bank of England* [2004] EWCA Civ 218 at paras 16, 20, 21 and 26 (petition to appeal to House of Lords pending at time of writing.)

⁵ The proposition stated is taken from *Daniels Corp international Pty Ltd v ACCC* (2002) 192 ALR 561, 564, 573. The legal proceedings can be existing, pending, or in contemplation. This involves an objective question: *Nickmar Pty Ltd v Preservatrice Skandia Insce Ltd* [1985] 3 NSWLR 44, 55; *Mitsubishi-Electric Pty Ltd v VWA* [2002] 4 VR 332.

⁶ See *Baker v Campbell* (1983) 153 CLR 52, 85. See *Trade Practices Commission v Stirling* (1978) 36 FLR 244, 245 for an inclusive list of categories of privileged documents.

⁷ See *Pratt* [2004] FCAFC 122 at para 19 and cases there cited. References to *Pratt* in these footnotes are to the decision of the Full Court of the Federal Court save where otherwise indicated.

⁸ See *Pratt Holdings Pty Ltd v Commissioner of Taxation* at paras 20 and 88 and case there cited.

⁹ See *Mann v Carnell* (1999) 201 CLR 1, 10 – 11, 45; *Eso Australia Resources Ltd v FCT* (1999) 201 CLR 49, 54 – 55, 73, 81, 100.

¹⁰ *Packer & Ors v DFCT* 84 ATC 4666, 4668; *Allen Allen & Hemsley v DFCT* (1989) 20 FCR 576,583.

¹¹ *Deloitte* at 5211. And see *NCA v S* (1992) 100 ALR 151, 159; *FCT v Coombs (No 2)* 99 ATC 4634; *Mc Cormack v DFCT* 2001 ATC 4740.

¹² See cases referred to in *Clements, Dunne & Bell Pty Ltd v Commissioner, Australian Federal Police* (2001) 188 ALR 515; 48 ATR 650.

¹³ See, eg, *Baker v Campbell* (1983) 153 CLR 52, 95.

¹⁴ See *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of McCabe)* [2002] VSCA 197; *Mann v Carnell* (1999) 201 CLR 1.

¹⁵ *Pratt* at para 54 ; *FCT & Ors v Citibank Ltd* 89 ATC 4268; *Allen Allen & Hemsley v DFCT & Ors* 89 ATC 4295.

¹⁶ See *Daniels Corporation International Pty Ltd v ACCC* (2002) 192 ALR 561; *FCT & Ors v Citibank Ltd* 20 FCR 403; 89 ATC 4268; *Perron Investments Pty Ltd & Ors v DFCT* 90 ALR 1; 89 ATC 5039; *FCT v Coombes (No2)* 99 ATC 4082.

¹⁷ The statute also applies to hearings in the High Court. See *Mann v Carnell* (1999) 201 CLR 1; *Eso Australia Resources Ltd v FCT* (1999) 201 CLR 49.

¹⁸ See, for example, *ACCC v Safeway* (1998) 153 ALR 393, 420; *Carnell v Mann* (1998) 159 ALR 647, 658 to 661 (Full Federal Court) (on appeal, (*Mann v Carnell* (1999) 201 CLR 1), the High Court did not deal with the issues considered in this part of the Full Federal Court’s judgment); and SB McNicol, *Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted* (1999) 18 Aust Bar Rev 189.

¹⁹ See *Pratt* at para 45 and the case there cited.

²⁰ See *Wheeler v Le Marchant* (1881) 17 Ch D 675.

²¹ See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] 4 VR 332 at 335-336. In that case, Batt JA (with whom the rest of the Court agreed) said that litigation privilege applies also to information and documents which reveal confidential communications passing between a client *or* [my italics] the client’s legal adviser and third parties. Nevertheless, the privilege does not exist in the absence of a legal adviser (ie, a lawyer) acting in a professional capacity: see ‘Cross on Evidence,’ Australian Ed, Vol 1 at [25245] and the authorities cited at fnn 1 and 22 thereof. Thus, (except where the *Evidence Act 1995* applies) it is very doubtful whether there is a privilege for documents coming into existence as materials for the purposes of an action to be conducted by a litigant in person: *National Employers Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648, 654; *Minter v Priest* [1930] AC 558, 568. In *Trade Practices Comn v Sterling* (1978) 36 FLR 244, 246 Lockhart J said that litigation privilege extended to communications passing between the party and a third person (who is not the agent of the solicitor to receive the communication from the party) if they are made at the request or suggestion of the party’s solicitor; or , even without any such request or suggestion, they are made for the purpose of being

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put before the solicitor with the object of obtaining his or her advice or enabling him or her to prosecute or defend an action. Cf ss 119 (client legal privilege – litigation) and 120 (client legal privilege – unrepresented parties) of the *Evidence Act 1995*. At common law, in the context of litigation, the privilege extends not only to communications between the client and his or her lawyers, but also to material gathered for the purpose of compiling the brief in the litigation; furthermore, it is not necessary that the request be made by the solicitor as long as the purpose test is met: see *Pratt* at para 89 and cases there cited.

²² See *Three Rivers District Council v The Governor & Company of the Bank of England* [2003] QB 1556, 1561.

²³ See *Pratt* and cases cited therein. The required type of agency would exist in cases where communications passed between a party or his or her accountant and a solicitor where the accountant acted merely as a medium of communication. Arguably, the situation could include cases where the accountant had been using his or her financial skill and knowledge to put the client’s position before his or her lawyers: see *Pratt* at first instance, (2003) 195 ALR 717, 728 (referring to *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (unreported, SC (NSW), Foster J, 27 September, 1984), and 734. In a Canadian case, *Susan Hosiery Ltd v Minister of National Revenue* [1969] 2 Ex. C.R.27, cited with approval in *Belgravia Investments Ltd v Canada* [2002] FCJ No 870; 2002 FCT 649 at para 43, the Exchequer Court referred to an accountant’s being used as a representative in the required sense for the purpose of placing a factual situation or problem before a lawyer to obtain legal advice. In *Three Rivers District Council v The Governor & Company of the Bank of England* [2003] QB 1556, 1574 to 1575, the Court of Appeal held that legal advice privilege applies only to communications passing between a client and his or her solicitor (whether or not through any intermediary) and evidence of the contents of such communications, and that it made no difference whether the intermediary was an agent or employee; the scope of the privilege was not enlarged if the intermediary were an employee. The Appeal Committee of the House of Lords dismissed a petition for leave to appeal from the decision of the Court of Appeal in *Three Rivers*.

²⁴ See *Jones v Great Central Railway Co* [1910] AC 4, 6.

²⁵ *Re Hightree Traders Ltd* [1984] BCLC 151,164.

²⁶ In England, it has been held that an employee of the client may not be the client or his or her agent in any relevant sense: see *Three Rivers District Council v The Governor & Company of the Bank of England* [2003] QB 1556, 1580 and 158. The position appears to be the same in New Zealand: see *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596, 602. Cf *Pratt* at para 1.

²⁷ See *Re Hightree Traders Ltd* [1984] BCLC 151; *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583; *Three Rivers District Council v The Governor & Company of the Bank of England* [2003] QB 1556. The Appeal Committee of the House of Lords dismissed a petition for leave to appeal from the decision of the Court of Appeal in *Three Rivers*.

²⁸ In these cases, the distinction is made between passing on and producing information; where a third party merely does the former, the privilege is not impaired, but, according to these cases, no privilege attaches where the third party does the latter. Cf the discussion of these cases in *DSE (Holdings) Pty Ltd v Intertan Inc & Anor* (2003) 203 ALR 348, 371 to 373, where it was held that a wider notion of agency should be applied. See also *GSA Industries (Aust) Pty Ltd v Constable* [2002] 2 Qd R 146, 151. In the latter situation, namely, producing information, can be placed an accountant acting as an accountant in giving accounting advice; a report prepared or brought into existence for a client by an accountant not acting simply as a medium of communication between the client and the legal adviser (even though the report was sought by the client for the dominant purpose of obtaining the legal advice); and non-legal advice prepared for a client by professional persons retained by him or her, even though that non-legal advice is conveyed to the client’s solicitor directly in order that the solicitor may provide consequential legal advice. In a United States case, it was held that if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists: *United States v Kovel* 296F 2d 918 (1961).

²⁹ *Re Hightree Traders Ltd* [1984] BCLC 151,164.

³⁰ See *DSE (Holdings) Pty Ltd v Intertan Inc & Anor* (2003) 203 ALR 348, 368 per Allsop J.

³¹ For a dictum to the contrary, see *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (unreported, SC (NSW), Foster J, 27 September, 1984, referred to in *Nickmar* at 55.) See also, ‘Wigmore on Evidence’, Vol VIII (1961) at sec 2301 fn 1. On any view, a communication between solicitor and

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client may be privileged even though the same communication between the solicitor and third party is not: see *Re Sarah C Getty Trust* [1985] QB 956.

³² [2004] FCAFC 122.

³³ See *Pratt* at para 3.

³⁴ [2004] FCAFC 122 at para 14.

³⁵ The principle was stated in these words by Barwick CJ in *Grant v Downs* (1976) 135 CLR 674, 677.

³⁶ See *Pratt* at paras 13, 14 and 83. In contrast to the Full Federal Court’s interpretation, the Court of Appeal in *Three Rivers* [2003] QB 1556, 1577, interpreted Barwick CJ’s statement as being confined to litigation privilege; the Court held that the reference to obtaining advice was limited to this context.

³⁷ At para 41.

³⁸ At paras 41, 96, 105, and 107.

³⁹ *Cf DSE* (2003) 203 ALR 348 at 373, in which Allsop J held that the agent so appointed to communicate with the lawyer is not limited to one who does no more than pass on knowledge or information received from the client, but can pass on information of his or her own, and that all that is necessary, is that the third party be the client’s deputed agent to communicate with the lawyer in connection with the provision of legal advice.

In *Pratt*, third party accountants had prepared a paper over which privilege was claimed. The paper was meant to summarize the historical background of the transactions giving rise to losses that were to be the subject of the solicitors’ advice. In preparing the paper, the accountants needed to exercise the professional skill of an appropriately qualified accountant. The accountants discharged their task by conveying the report to the client with a view to the client’s conveying the information to the solicitors; ie, the client, not the accountants, were the medium of communication with the solicitors.

⁴⁰ In *Wheeler v Le Marchant* (1881) 17 Ch D 675, 684-685, a surveyor rather than an accountant was employed in this manner. See *Pratt* at paras 23 to 24. See also the reasoning of Stone J in *Pratt* at paras 95 and 96.

⁴¹ Stone J (with whose reasons Merkel J also agreed) at paras 95 and 96, seems to have thought that consistently with *Wheeler v Le Marchant* (1881) 17 Ch D 675, 684-685 and Barwick CJ’s formulation of the primary principle in *Grant v Downs* (1976) 135 CLR 674, 677, the wider principle (dispensing with the requirement of agency) applies to obtaining, but not to giving legal advice. Neither of these two authorities gives much, if any, support to this proposition.

⁴² See *Pratt* at para 95.

⁴³ See *DSE* at 373-374.

⁴⁴ See *Wheeler v Le Marchant* (1881) 17 Ch D 575, 680-681.

⁴⁵ See s117(1) of the *Evidence Act 1995*.

⁴⁶ Note that in *Pratt* at paras 40 and 102, the Court found that the accountants were not agents of the client in any relevant sense at common law.

⁴⁷ See *Belgravia Investments Ltd v Canada* [2002] FCJ No 870; 2002 FCT 649 at [49] to [50].

⁴⁸ See *Nickmar* at 56 and *Pratt* at para 95.

⁴⁹ See *DSE* at 375 (communication from a client to client’s solicitor and financial adviser) and *Pratt* at 1st instance, (2003) 195 ALR 717, 738 (communication of lawyer’s advice by client to accountant.) See also *Mann v Carnell* (1999) 201 CLR 1. As to adducing evidence at a hearing in the Federal Court, see ss 117 and 122 of the *Evidence Act 1995* (C’th).

⁵⁰ See *Nickmar Pty Ltd v Preservatrice Skandia Insce Ltd* [1985] 3 NSWLR 44, 56.

⁵¹ At paras 106 and 45.

⁵² At para 46.

⁵³ At para 47.

⁵⁴ (1999) 201 CLR 49.

⁵⁵ This is apparent from the way in which audits are being conducted. Furthermore, a number of statements made by ATO officials confirm that the concession has not been affected.

⁵⁶ See part 1 of the guidelines.

⁵⁷ *Op cit.*

⁵⁸ At 5211.

⁵⁹ See part 1 of the guidelines.

⁶⁰ See above.

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⁶¹ See below.

⁶² See part 1 of the guidelines.

⁶³ See *Waterford v Commonwealth* (1986-1987) 163 CLR 54; *Dick Smith Electronics Pty Limited v Westpac Banking Corporation* [2002] FCA 1040 at para 40; and *GSA Industries (Aust) Pty Ltd v Constable* [2002] 2 QdR 146, 149 to 150.

⁶⁴ See parts 2.2, 5 and 6 of the guidelines.

⁶⁵ See above.

⁶⁶ See above.

⁶⁷ See parts 2.2, 2.3 and 7 of the guidelines.

⁶⁸ Other than historical reasons.

⁶⁹ On the other hand, questions have been raised about the justification for the existence of advice privilege (as opposed to litigation privilege) in any event: see *Kennedy v Wallace* [2004] FCA 332 at paras 59 – 63, per Gyles J.

⁷⁰ Part 2.1 of the guidelines explains that these documents explain or lead to an understanding of the taxpayer’s organization and operations and describes in some detail the documents expected to be found in the permanent audit file. It says that in the first instance, such information will be sought from the taxpayer, but that where such information is sought from a professional accounting advisor, the advisor may ask for the request to be in writing.

⁷¹ See part 2.1 of the guidelines.

⁷² See part 3.1 of the guidelines.

⁷³ See part 2.2 of the guidelines.

⁷⁴ See part 2.3 of the guidelines.

⁷⁵ *Op cit.*

⁷⁶ See part 7 of the guidelines.

⁷⁷ See part 4 of the guidelines.

⁷⁸ So that the person to whom the document is disclosed has an obligation or a duty of confidence. As to this, see *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1996-1997) 188 CLR 501, 537, fn 164.

⁷⁹ 98 ATC 5192.

⁸⁰ At 5209 – 5211.

⁸¹ See Part 1 of the guidelines.

⁸² See part 5.2 of the guidelines.

⁸³ In contrast to the reference in the Introduction to the guidelines (part 1 thereof), to furnishing information in accordance with s264 of the ITAA36 or its equivalents, Part 5.2 does not refer to information besides documents.

⁸⁴ See parts 1 and 3.2 of the guidelines.

⁸⁵ See above.

⁸⁶ See part 3.2 of the guidelines.

⁸⁷ See part 1 of the guidelines.

⁸⁸ See part 8 of the guidelines.

⁸⁹ See parts 5 and 6 of the guidelines.

⁹⁰ Fn 61 of the guidelines.

⁹¹ See part 5 of the guidelines.

⁹² The guidelines state that it is intended that they will be monitored and reviewed from time to time, to ensure the required outcomes are being attained: see part 9 of the guidelines. To date, only relatively minor changes appear to have been made to the guidelines.

⁹³ In part 5.2 of the guidelines.

⁹⁴ At least where approval at the audit stage has not already been granted. The guidelines could usefully be clarified in this regard.

⁹⁵ See part 2.2 of the guidelines.

⁹⁶ See parts 5 and 6 of the guidelines.

⁹⁷ See part 6 of the guidelines.

⁹⁸ See part 6 of the guidelines.

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⁹⁹ An address by the Commissioner, Mr Carmody, given on 17 September, 1999 (available on ATO website.) At page 7, he said,

“In those cases where the Accounting Advisors’ concession is claimed and we are unable to ascertain from the documents which have been provided the facts necessary to determine the taxation consequences of the particular transactions or arrangements then this will be considered ‘exceptional circumstances’ resulting in the removal of the concession. Likewise where the law requires a determination of the purpose for which a transaction or arrangement is entered into and this cannot be ascertained from the documents provided, then this would amount to ‘exceptional circumstances’ allowing the lifting of the concession. I am prepared to consider appropriate and timely arrangements for segregating any advice component from the factual information we are seeking.”

¹⁰⁰ See part 1 of the guidelines.

¹⁰¹ 2000 ATC 4229, 4246.

¹⁰² See *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1989-90) 169 CLR 648, 684 per McHugh J.

¹⁰³ North J in *Clements, Dunne & Bell Pty Ltd v Commissioner, Australian Federal Police* (2001) 188 ALR 515; 48 ATR 650.

¹⁰⁴ See above.

¹⁰⁵ I do not mean to suggest that the mere retainer of the lawyer would suffice if the advice were given by someone else.

¹⁰⁶ In *ONE.TEL* at 4245 and 4246.

¹⁰⁷ *Op cit.*

¹⁰⁸ See part 6 of the guidelines.

¹⁰⁹ *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192, 5207.

¹¹⁰ *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1985-1986) 162 CLR 24, 40.

¹¹¹ *Minister for Aboriginal Affairs v Peko Wallsend Ltd* at 40 and 41; and *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192, 5213.

¹¹² See s5 of the ADJR Act; *Deloitte* 98 ATC 5192; *ONE TEL* at 4243ff.

¹¹³ See *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1989-90) 169 CLR 648, 651-652 per Deane J and 678-679, 681 and 683 per McHugh J, who said (at 681) that subject to any statutory indications to the contrary, the doctrine of legitimate expectation entitles a person to be heard in opposition to a proposed exercise of a statutory power [eg, under s264] if its exercise will deprive him or her of any right, interest, benefit or privilege which that person has a legitimate expectation of obtaining or continuing to enjoy [eg, under the guidelines.]

¹¹⁴ *Ibid* at 669-670 per Toohey J, 681-2 per McHugh J. See also, *Minister for Immigration and Ethnic Affairs v Teoh* (1994 -1995) 183 CLR 273, 291, 301.

¹¹⁵ 2000 ATC 4245.

¹¹⁶ At 4245 to 4246.

¹¹⁷ Part 8 of the guidelines states that the basis upon which approval to seek access to restricted source and/or non-source documents is to be given, and the basis for determining whether a document is a source document or a restricted source document or non-source document is to be in accordance with the guidelines.

¹¹⁸ At 4246.