

“Resisting Disclosure in Tax Matters: Responding to section 264 Notices” by Michael Hines, barrister at the Victorian Bar.

Increasing focus on auditing of taxpayers

1. A key priority of the ATO’s activities in recent years has been and in the future will be risk profiling and the extensive audit of big business and identifying and addressing major tax risks, such as aggressive tax planning.¹
2. Where a tax advisor or scheme promoter takes a role in such planning, the ATO has used its access and information gathering powers to compel the advisor or promoter to hand over useful information, such as the names of clients who may have participated in the scheme, details of the scheme and so forth. In *McCormack’s* case,² for example, in the course of an audit, the Commissioner was able to exercise powers under s264 of the *Income Tax Assessment Act 1936* (ITAA36) in order to obtain client listings from a firm of accountants. Disclosure of a client’s identity by a lawyer is privileged only if such disclosure would convey something which would constitute a privileged communication,³ something we shall return to a little later on. Of course, the Commissioner may then audit the clients identified and exercise powers to require information from them.⁴
3. Published ATO guidelines state that taxpayers being audited are normally provided with information about the scope of the audit; inquiries may be directed to taxpayers, employees of taxpayers, and third parties.⁵ According to these guidelines, auditors may require access to records and documents which relate to years outside the years under audit in order to ascertain facts relating to matters under review; however, access would not normally be sought to sensitive current strategy files that contain information about a possible future transaction, eg a dossier on a likely takeover target.

Methods used by ATO to gather information and general issues

4. The ATO has published guidelines on the use of its access and information gathering powers in the form of a manual (‘the AIGM’). The manual includes detailed guidelines on access, s264 notices, the conduct of interviews, the making, challenging and disposition of claims to legal professional privilege and to the limited administrative concession extended by the Commissioner to certain documents prepared by external accountants, electronically stored information, privacy and secrecy, contempt of court, and search warrants. The guidelines were compiled after the Full Federal Court held in *Citibank v FCT*⁶ that a raid conducted by the ATO was an improper exercise of power, because it did not give the taxpayer sufficient time or opportunity to make claims of legal professional privilege.
5. The ATO may make informal requests for information or documents by telephone or letter; but in certain circumstances, for example, where the taxpayer fails to

¹ See ATO Compliance Program 2004-2005.

² 2001 ATC 4740.

³ See *FCT v Coombes (No 2)* 99 ATC 4634.

⁴ *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192 is another such case.

⁵ See *Complex audits: guidelines for the conduct of taxpayers and taxation auditors*, reported by CCH as A52.

⁶ (1989) 20 ATR 292. See, however, *JMA Accounting Pty Ltd & Entrepreneur Services Pty Ltd v Carmody* 2004 ATC 4736, in which a single Justice of the Federal Court cast doubt on the correctness of some aspects of the decision in *Citibank*.

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- comply, the ATO is dissatisfied with the response, or the request is addressed to a third party, the Commissioner may exercise a right of access to places or documents (s263 of the ITAA36), or serve a formal statutory notice requiring the provision of information, the production of documents, or attendance at an interview (s264.)⁷
6. Great care needs to be taken in providing information not to be misleading or deceptive.⁸ For example, it may be necessary to check with employees or agents to check that part of the picture is not being inadvertently obscured. What should and what shouldn't be disclosed often involves highly technical issues and matters of difficult judgement. For example, can the disclosure be compelled of documents out of the jurisdiction?⁹ When is it in the interests of the taxpayer to disclose such documents?
 7. ATO policy is to provide taxpayers with reasonable time to get legal assistance when necessary, and to prepare claims of legal professional privilege and claims to the related concessions; namely, the concession relating to accountants' papers referred to above, and the concession relating to corporate board documents on tax compliance. In most cases, taxpayers can request advance notice of requests for information, can ask for adequate time to respond, and can ask for requests to be put in writing. It's advisable for organizations to delegate responsibility for gathering information and liaising with the ATO to specific, responsible personnel.
 8. A request for information may raise a number of legal issues. In all but a very limited range of circumstances, failure or refusal to comply with a validly made requirement¹⁰ constitutes an offence.¹¹ It is important to determine what the notice validly requires. There may be issues about the proper construction of the notice. There may be an issue as to whether documents are in a person's custody or control: s264 applies to documents¹² only if they are in the custody or control of the person to whom the notice is given and concern a person's income or assessment. Commonly, it will be necessary to decide which if any documents are privileged and how to go about claiming the privilege or related concessions. There may be a question whether voluntary disclosure should be refused; eg, on the grounds that such disclosure would be in breach of an obligation of confidentiality owed to a third party. Less commonly, there may be a question about the validity of the notice itself: for example, it could be hopelessly ambiguous, or seek the production of documents unrelated to a person's income or assessment, or seek documents traveling beyond the purpose for which the notice was issued.¹³ Where a notice appears to be vague or excessive, there may

⁷ See paras 2.2.1ff of the AIGM.

⁸ See ss8K, 8N and 8P of the *Taxation Administration Act 1952* ('TAA'.)

⁹ Not, it appears, under s264 (having regard to the presumption against extra-territoriality), but see s264A.

¹⁰ As distinct from a request for voluntary disclosure.

¹¹ See ss8C and 8D of the TAA and the *ATO Prosecution Policy*.

¹² As distinct from information as referred to in s264(1)(a), wherein there is no requirement for the information to concern any person's income or assessment.

¹³ See *Smorgon & Ors v FCT & Ors* 79 ATC 4039, 4374; *May* 98 ATC 4975; *McLaren & Ors v DFCT* 2001 ATC 4136 and *ANZ & Ors v DFCT* 2001 ATC 4140. The reasons for the decision to issue the notice can be requested under s13 of the *Administrative Decisions Judicial Review Act 1977* ('the ADJR Act') and

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be a question whether the notice should be read down, for example by ignoring apparently invalid portions, or whether the whole should be treated as being invalid.¹⁴ Note, however, that uncertainty or excessive ambiguity is unlikely to constitute a successful ground of challenge to the validity of a notice unless it is impossible on a reasonable reading of the notice to make sense of it.¹⁵

Need for taxpayers to retain documents

9. There are mandatory statutory requirements for the retention of records relevant for tax purposes.¹⁶ In addition, documents may have to be retained for purposes of proof and to rebut the drawing of adverse inferences, because they are relevant to existing litigation, or for some other reason.¹⁷

Commissioner’s access power: s263

10. Under s263, the Commissioner and any officer authorized by him has full and free access to places and documents provided it is for the purposes of the Act, and for that purpose may make extracts from or copies of documents, but may not seize them or take them away without consent. The purposes of the Act cover tax investigations and audits not carried out for an improper purpose.
11. It has been recently held by a single Justice of the Federal Court¹⁸ that s263(1) does not require (for the exercise of the access power) that any document, etc, have a particular distinguishing feature such as relevance to taxation matters. Section 263(1) rather limits the purpose for which access may be exercised.
12. It’s an offence to hinder or obstruct an ATO officer exercising a power of access.¹⁹ The occupier is required to provide the officer with all reasonable facilities and assistance for the effective exercise of powers under s263.²⁰ It’s advisable for the occupier to ask the person purporting to exercise the power for proof of his authority,²¹ and to ask that the search be temporarily delayed so that the occupier can obtain legal advice (unless he already has it) and if the occupier wishes, have his lawyer present.²²
13. The Commissioner’s powers under s263 are subject to legal professional privilege, but not to a mere right of confidentiality. The related concessions are also applicable. It has been recently held by a single Justice of the Federal Court²³ that an irregularity as to legal professional privilege occurring in the exercise of the access power, does not necessarily in every case invalidate the exercise of the power; it may be merely an irregularity.

under the FOI Act and the decision itself is liable to review under the ADJR Act. As an example, a notice might be invalid if it sought information totally unrelated to the audit or dispute in the course of which it was issued and did not relate to any other legitimate subject of enquiry.

¹⁴ See *Perron Investments Pty Ltd & Ors v DFCT* 89 ATC 5039.

¹⁵ See *Perron* at 5041, 4044-5, 5050, 5053 to 5056 and 5063; *May v DFCT* 98 ATC 4960, 4969-70 and 4972-3; *Smorgon* at 4047.

¹⁶ See for example, ss262A (1) and (2), 262(1D), 262A(3)(b).

¹⁷ See *British American Tobacco Association of Australia Services Ltd v Cowell (as representing the estate of McCabe)* [2002] VSCA 197 at paras 56, 165ff, 169, 173, 191.

¹⁸ In *JMA Accounting Pty Ltd & Entrepreneur Services Pty Ltd v Carmody* 2004 ATC 4736, 4749.

¹⁹ See *Criminal Code*, s149.1.

²⁰ See s263(3).

²¹ See s263.

²² See AIGM at paras 1.2.41, 1.2.43, 1.2.72.

²³ In *JMA Accounting Pty Ltd & Entrepreneur Services Pty Ltd v Carmody* 2004 ATC 4736 at 4757.

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14. Note that guidelines for the use of access powers to lawyers offices are contained in the AIGM, entitled Access to Lawyers’ Premises.
- Commissioner’s power to require information: s264**
15. Under s264, the Commissioner can require any person to furnish him with such information as he may require; and to attend and give evidence concerning his or any other person’s income or assessment, and may require him to produce all documents, etc, whatever in his custody or under his control relating thereto. This power enables the Commissioner to make wide ranging enquiries and a fishing expedition into the income or assessment of taxpayers.²⁴
16. As with s263, the Commissioner’s powers are subject to legal professional privilege²⁵, but not to a mere right of confidentiality or a privilege against self-incrimination. Likewise, the related concessions apply. While the question what arrangements will answer the minimum requirement for a practical and realistic opportunity to assert claims of privilege will depend upon the circumstances of the particular case, at least in certain cases, a notice should refer to the possible availability of legal professional privilege.²⁶ Claims to the privilege can be made by the recipient of the notice or the person whose privilege it is.²⁷
17. A s264 notice must relate to the powers and functions of the Commissioner. The Commissioner’s functions include the ascertaining of taxable income, the due making of assessments, and the recovery of tax payable.²⁸ His powers include the power to make investigations. The notice is invalid to the extent that it travels beyond the purpose for which it was issued.²⁹ The purpose for which it was issued depends on the circumstances, and in some cases, on the issues in dispute or the scope of the audit.³⁰ As an example, a notice may be issued for the purpose of determining an objection. In such a case, parts of a notice which traveled beyond that purpose could be invalid.³¹ It is likely that the purpose will become more narrowly focused as the investigation proceeds; for example, after rather than before re-assessments have issued.
18. The notice has to allow what is a reasonable time for compliance in the circumstances.³²
19. A notice issued after the determination of an objection could be warranted if issued in pursuance of a fresh audit, but a notice requiring information on an issue

²⁴ See *Deloitte v DFCT* 98 ATC 5192, 5206-7.

²⁵ It is standard practice for notices issued under s264 to notify the recipient of the notice of his or her entitlement to claim the privilege.

²⁶ See *Perron* 89 ATC 4310.

²⁷ See *Perron* 89 ATC 4310.

²⁸ See *FCT v Industrial Equity* 90 ATC 5008, 5013-5015; *De Vonk v DFCT* 95 ATC 4820 at 4831-2 and *Grant & Ors v DFCT* 2000 ATC 4649 at 4652.

²⁹ See *Smorgon* at 4046 and 4052 and *May* 98 ATC at 4975.

³⁰ See *McLaren* supra and *ANZ* supra.

³¹ Note, however, that the Commissioner is not confined in his consideration of the objection to the grounds relied upon by the taxpayer: *Lighthouse Philatelics Pty Ltd v FCT* 91 ATC 4942.

³² See *Perron* 89 ATC 4310.

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- in an appeal, depending on the circumstances, could be in contempt of court or otherwise improper.³³
20. The Commissioner must of necessity indicate in a s264 notice to attend and give evidence, the time and place at which the evidence is to be given,³⁴ but the notice is required to do no more than make it clear that the evidence to be given concerns the income or assessment of a person or persons. It is not necessary that the notice specify particular topics. Nor is it necessary that it explicitly limit the period of time as to which evidence is required.³⁵ The notice can require attendance before any or all of several named authorized officers.³⁶
 21. A s264 notice to produce documents, besides relating to a person’s income or assessment, must identify with sufficient clarity the documents which are required to be produce and must show the person to whom it is addressed that any document which he is required to produce is one whose production the Commissioner is entitled to require; so, where the notice is addressed to one person, requiring him to produce the documents of another, the notice must show that those documents relate to the income or assessment of a particular person, who must be identified.³⁷ A notice which falsely assumes that a document whose production is required relates to someone’s income or assessment, is to that extent invalid.³⁸
 22. A s264 notice can require the recipient to produce only those documents which are in his custody or under his control when he receives the notice; the section is concerned with the ability of the person to whom the notice is addressed to produce the documents when required to do so. Custody and control are not limited to exclusive custody and control. Physical control, legal control, or the right to possession suffices.³⁹ But the fact that someone (eg, a parent company) would hand over the documents if asked (eg, by its subsidiary) does not.⁴⁰
 23. Parts of documents which need not be disclosed can be masked.⁴¹ Such parts may be irrelevant, may not relate to a person’s income or assessment,⁴² may be protected by legal professional privilege, or may be covered by one of the related concessions. Of course, it is necessary to explain to the Commissioner the basis on which material has been masked.

³³ See *De Vonk* 95 ATC 4820; *Donovan v DFCT* 92 ATC 4114; *Watson* 99 ATC 5313; *Brambles Holdings Ltd v TPC (No.2)* (1980) 44 FLR 182.

³⁴ See *Ganke v DFCT* 75 ATC 4097; *Elliot & Ors v DFCT* 90 ATC 4937 and *Perron* 89 ATC 4310 and 5038, 5051 to 5052.

³⁵ See *ANZ* supra at 4143.

³⁶ See *Holmes & Ors v DFCT* 88 ATC 4906; *FCT v Industrial Equity* 2000 ATC 4197; *Watson v FCT* 99 ATC 5313.

³⁷ *Smorgon* supra at 4047 cf 4054.

³⁸ See *Smorgon* at 4045 to 4046 and 4048 to 4049.

³⁹ See *Smorgon* supra.

⁴⁰ See *Lonrho Ltd v Shell Petroleum* [1980] 1 WLR 635.

⁴¹ See *Clarke v DFCT* 89 ATC 4521.

⁴² Note that this limitation does not apply to a requirement for information as opposed to the attending and giving of evidence or production of documents.

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24. The recipient of a s264 notice commits an offence if he fails to comply to the extent that he is capable of doing so.⁴³ The recipient of the notice has to decide, difficult though the task may be, which documents, etc are required; if his decision is wrong he exposes himself to prosecution and penalty.⁴⁴
25. Unless before expiration of the notice, he gets the Commissioner’s written agreement to cancel the notice, or to extend the time for compliance, or not to prosecute or impose penalties for non-compliance, a recipient of a notice wishing to challenge it or parts of it, may be placed in an invidious position. By reason of the exposure to prosecution or penalty, the recipient may be practically constrained to take proceedings to determine what his obligations are. Such proceedings can be taken under s39B of the *Judiciary Act 1903* (for example, proceedings for a declaration or quia timet injunction), or under the *Administrative Decisions Judicial Review Act 1977* (the ADJR Act).⁴⁵ Nevertheless, it is often preferable (at least in the first instance) to adopt the practical expedient of responding to a notice by producing only what on a fair reading of it, the notice requires and can validly require, rather than by challenging its validity in court proceedings (although it may be advisable to reserve this right.)⁴⁶ Court proceedings may be advisable in a doubtful case, where the recipient does not wish to comply with the requirement imposed by the notice.
26. An examination conducted pursuant to s264 is conducted in private, generally at an ATO office, although it is common for both the ATO and the examinee (and sometimes the taxpayer) to be legally represented. There is authority that the ATO is entitled to be so represented.⁴⁷ There is no requirement to give the examinee a list of the questions to be asked at the examination, but at the examination, the examinee’s lawyer can object to irrelevant or improper questions, and claim legal professional privilege and the related concessions. Although the officer conducting the examination has power to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to conduct the examination, he has to do so fairly and not oppressively.⁴⁸ Generally, there is no difficulty about getting a transcript of the examination, although it would be advisable to clarify this beforehand.

Legal professional privilege

⁴³ See TAA, ss8C and 8D. Under s6.2 of the Criminal Code 1995, there are no fault elements of the offences and there is no defence to s8C of mistake of fact. The fact that compliance with a notice will require considerable effort will not, of itself, lead to the notice’s being invalid: *Perron* supra. “Fails” means no more than omits or does not: see *Briggs v DFCT* 86 ATC 4896, 4900.

⁴⁴ See *Smorgon* supra at 4053.

⁴⁵ See *DFCT v Carke & Kann* 84 ATC 4273.

⁴⁶ ATO policy is to encourage the resolution of disputes. As against this, the ATO has recently been reinforcing the message that the ATO will not shy away from litigation: see First Assistant Commissioner, Kevin Fitzpatrick, ‘The Australian Taxation Office’s Approaches to Aggressive Tax Planning’, speech given at the Centre for Tax System integrity’s Third International Research Conference, 24-25 July 2003.

⁴⁷ See AIGM at para 5.3.2. See also *McLaren* supra; *Dunkel v DFCT* 91 ATC 4142 and *Grant* 2000 ATC 4649.

⁴⁸ See *Grant* supra and *The Section 264 Examination* by Sorensen in (1996) 25 AT Rev 5.

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27. In his section on Large business, in the Compliance Program for 2004-5, the Commissioner wrote that in several cases access to records and claims for privilege from disclosure have become a major issue.
28. The principles of the common law privilege apply when claims to legal professional 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 s264.⁴⁹
29. Under the common law, legal professional privilege is a rule of substantive law 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 advice (this can be referred to as ‘advice privilege’), or the provision of legal services, including representation in legal proceedings⁵⁰ (this can be referred to as ‘litigation privilege.’)
30. The primary principle of the privilege as it applies to documents, 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.⁵¹
31. 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.⁵² 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.⁵³
32. The privilege is that of the client.⁵⁴
33. 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.⁵⁵ 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

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

⁵⁰ 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.

⁵¹ The principle was stated in these words by Barwick CJ in *Grant v Downs* (1976) 135 CLR 674, 677.

⁵² See *Pratt Holdings Pty & Anor v FCT* 2004 ATC 4526 at para 19 and cases there cited.

⁵³ See *Pratt* at paras 20 and 88 and case there cited.

⁵⁴ 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.

⁵⁵ *Packer & Ors v DFCT* 84 ATC 4666, 4668; *Allen Allen & Hemsley v DFCT* (1989) 20 FCR 576,583.

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privileged communication was made, as distinct from its contents.⁵⁶ Nor does the privilege prevent the revelation of communications made in furtherance of crime or fraud.⁵⁷ For the privilege to apply, the communication must be confidential.⁵⁸ Finally, the privilege may be waived.⁵⁹

Legal professional privilege and communications with third parties: advice privilege

34. 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 a third party, such as the client’s accountant.⁶⁰
35. According to the Full Federal Court,⁶¹ the primary principle of the privilege as it applies to documents (as stated above⁶²), is a principle of advice privilege as it applies to documents made by or given to a third party. Presumably, an analogous principle would apply to other forms of information, and confidential information tending to reveal the privileged content of such documents would also be protected.
36. The Full Federal Court held⁶³ 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.
37. In an unequivocal departure from the English cases and several Australian cases, the Court held⁶⁴ that it mattered not whether the accountant was the client’s agent for the purposes of communicating with the lawyer.⁶⁵ This decision significantly extends the reach of advice privilege as it applies to documents made by or given to a third party.

⁵⁶ *Deloitte* at 5211. And see *NCA v S* (1992) 100 ALR 151, 159; *FCT v Coombs (No 2)* 99 ATC 4634; *McCormack v DFCT* 2001 ATC 4740.

⁵⁷ See cases referred to in *Clements, Dunne & Bell Pty Ltd v Commissioner, Australian Federal Police* (2001) 188 ALR 515; 48 ATR 650.

⁵⁸ See, eg, *Baker v Campbell* (1983) 153 CLR 52, 95.

⁵⁹ 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.

⁶⁰ See *DSE(Holdings) Pty Ltd v Intertan inc & Anor* (2003) 203 ALR 348 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.

⁶¹ See *Pratt Holdings Pty & Anor v FCT* 2004 ATC 4526.

⁶² In para 30 hereof.

⁶³ At para 41.

⁶⁴ At paras 41, 96, 105, and 107.

⁶⁵ *Cf DSE* supra 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.

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38. Nevertheless, the Court cautioned that the difficulties in proving the relevant dominant purpose should not be underestimated, and that particular care needs to be taken in evaluating evidence of purpose in a setting in which an 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 is 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 comment, the purpose is unlikely to be the dominant purpose. Legal professional privilege does not extend to protect things lodged with a legal adviser for the purpose of obtaining immunity from production, nor to third party advices to the principal simply because they are then "routed" to the legal adviser. 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 legal adviser, the less likely it is that that document will be found to be privileged in the third party's hands.
39. Furthermore, it seems that 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 to be necessary that the accountant be retained by or at the request of a client.⁶⁶ Thus, 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.⁶⁷ 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. 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.⁶⁸
40. For the time being, at least in the Federal Court and in taxation appeals and reviews, the Judgment of the Full Federal Court is the most authoritative on the subject of third party advice privilege.

Litigation privilege

41. The privilege applies 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 existing, pending or in contemplation. Documents emanating from or prepared by third parties (including employees of a client) are covered by litigation privilege if

⁶⁶ See *Pratt* at para 95.

⁶⁷ See *Belgravia Investments Ltd v Canada* [2002] FCJ No 870; 2002 FCT 649 at [49] to [50].

⁶⁸ See *Nickmar* at 56 and *Pratt* at para 95.

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prepared with the dominant purpose of use in existing or contemplated litigation.⁶⁹

Waiver

42. Although the privilege, like the related concession, can be waived, a court is not entitled to draw an adverse inference from the non-waiver of privilege. An adequate assessment of the possible risks and disadvantages of waiver should be made before waiving privilege: this requires the advisor to be confident that he or she has got all of the relevant documents and taken them into account. Selective waiver can be hazardous, because of the risk of imputed waiver. On the other hand, when negotiating penalties with the ATO – normally this happens close to settlement – it may be useful to waive privilege in order to prove that the taxpayer took reasonable care.
43. Disclosure which is inconsistent with the maintenance of confidentiality that the privilege is intended to protect, will waive the privilege. This is imputed waiver.⁷⁰ Once the conclusion in an advice is stated, together with the effect of it,⁷¹ once there is voluntary disclosure of the gist or conclusion of the advice,⁷² there is imputed waiver of the privilege over the whole of the advice to which reference is made including the reasons for the conclusion; however, disclosure of one conclusion but not others in an advice does not necessarily amount to waiver in respect of the non-disclosed conclusions unless perhaps they are so interconnected that they cannot be separated or isolated.⁷³

Resolving disputed claims of privilege

44. The ATO is likely to resist any ‘blanket claims’ to privilege; eg, where a general claim is made over all documents stored together in a particular place.⁷⁴
45. Where claims to privilege are challenged and the parties cannot resolve the dispute, an alternative to litigation may be mediation. The ATO’s guidelines say that mediation could be particularly useful in resolving contested claims of legal professional privilege.⁷⁵ Another alternative is having the dispute decided by a mutually acceptable barrister.

The related concessions

46. In *Deloitte’s* case, Goldberg J described⁷⁶ the evident purpose of the Commissioner’s guidelines on “Access to Professional Accounting Advisors’ Papers: Guidelines for the Exercise of Access Powers”⁷⁷ as being to provide by

⁶⁹ See *Pratt* at para 89; *Wheeler v Le Marchant* (1881) 17 Ch D 675. The privilege does not exist in the absence of a legal adviser. The privilege extends to material gathered for the purpose of compiling the brief in the litigation.

⁷⁰ See *Mann v Carnell* (1999) 201 CLR 1. In deciding whether there is the requisite degree of inconsistency, the court will have regard where necessary to considerations of fairness.

⁷¹ See next case footnoted, per Tamberlin J.

⁷² See next case footnoted, per Gyles J.

⁷³ See *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237; see also *McCabe’s* case supra.

⁷⁴ See AIGM at para 8.2.34.

⁷⁵ See *Code of Settlement Practice* at para 3.10.

⁷⁶ At 5211.

⁷⁷ A copy of the guidelines was published as an addendum to Chapter 8 (Legal Professional Privilege) to the AIGM. 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* supra.

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- 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.
47. Besides this concession relating to certain papers prepared by external accountants, there is another similar concession relating to corporate board documents on tax compliance risks.⁷⁸ Access to certain corporate board documents will not be sought during a risk review or audit except in exceptional circumstances.
 48. Nevertheless, the analogy between legal professional privilege and the related concessions is not complete, in a number of important respects.
 49. In the first place, the protection afforded under the concessions constitutes an administrative concession,⁷⁹ which the law would not otherwise recognize. This is in contrast to legal professional privilege, which is a rule of substantive law.⁸⁰ 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.
 50. In the next place, Part 1 of the guidelines relating to accounting papers states that they apply only to documents prepared by external professional accounting advisors who are independent of the taxpayer. 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.⁸¹ The concession relating to board documents covers documents of the relevant type created by suitably qualified in-house or independent advisors.
 51. Thirdly, in certain circumstances, the protection from non-disclosure provided by the related concessions can be withdrawn.⁸² Legal professional privilege is subject to far fewer restrictions. Whereas the requisite purpose of privileged communications need only be a dominant purpose, the requisite purpose with

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. The concession contained in the guidelines has not been withdrawn.

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 still exists.

⁷⁸In his speech, ‘Corporate Governance and Tax Compliance,’ 22/9/04, the Commissioner stated that he will shortly be issuing a practice statement containing the relevant guidelines.

⁷⁹ See part 1 of the guidelines.

⁸⁰ See above.

⁸¹ 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 Qd R 146, 149 to 150.

⁸² See, for example, parts 2.2, 5 and 6 of the guidelines relating to accountants’ papers.

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- which documents to which one of the related concessions applies, must be a sole purpose.⁸³
52. The guidelines relating to accountants’ papers 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,⁸⁴ and tax working papers (except for those which merely state a professional accounting advisor’s opinion on the matters presented in a tax return.⁸⁵ The guidelines state that the ATO will seek full and free access to source documents, which are not restricted source documents.⁸⁶ This comes as no surprise, since such documents have no real analogy with documents to which legal professional privilege applies.
53. Similarly, when introducing the concession relating to corporate board documents on tax compliance, the Commissioner said that in the context of an audit the verification needed will be primarily focused on source documents that record and explain the relevant dealings and relate to the preparation of the documents lodged with the ATO or the calculation and payments of taxes.
54. 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.⁸⁷ 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.⁸⁸ 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.⁸⁹

⁸³ See parts 2.2, 2.3 and 7 of the guidelines relating to accountants’ papers (‘the guidelines’).

⁸⁴ 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.

⁸⁵ See part 2.1 of the guidelines.

⁸⁶ See part 3.1 of the guidelines.

⁸⁷ See part 2.2 of the guidelines.

⁸⁸ See part 2.3 of the guidelines.

⁸⁹ *Op cit.*

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55. Corporate board documents on tax compliance risk are documents created by advisors for the purpose of providing advice or opinion to the board (including properly constituted sub-committees) on tax risks associated with major transactions and arrangements or arising from corporate systems and processes.
56. There is a fourth class of documents with which the guidelines relating to accountants’ papers 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.⁹⁰ This concession appears to be more or less analogous to litigation privilege.
57. Like privileged documents, restricted source and non-source documents, and corporate board documents on tax compliance have to be confidential. Restricted source and non-source documents 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.⁹¹ Presumably, corporate board documents on tax compliance would lose their confidential status if disclosed to independent third parties in similar circumstances, bearing in mind that the documents are within the confidence of company directors and their advisors on tax compliance risk.
58. In *Deloitte*,⁹² 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 held⁹³ 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),⁹⁴ 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.) Presumably, similar principles would apply to the concession relating to corporate board documents on tax compliance.
59. The benefit of the concessions has to be claimed by or on behalf of the client.⁹⁵ This is analogous to the principle that legal professional privilege belongs to the

⁹⁰ See part 7 of the guidelines.

⁹¹ See part 4 of the guidelines.

⁹² 98 ATC 5192.

⁹³ At 5209 – 5211.

⁹⁴ See Part 1 of the guidelines.

⁹⁵ See, for example, parts 1 and 3.2 of the guidelines.

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- client rather than the lawyer, and is for the client to uphold or waive, as he or she thinks fit. The Commissioner stated that the ATO will not draw an adverse inference should a taxpayer refuse to provide documents covered by the concession relating to corporate board documents on tax compliance. Presumably, this is also the case where the concession relating to accountants’ papers, and legal professional privilege are claimed.
60. The guidelines relating to accountants’ papers 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.⁹⁶ The Commissioner imposes similar requirements for corporate board documents on tax compliance, and for claims to privilege, although in the latter case, he can insist on no more than the law requires. In each case of the concession relating to accountants’ papers and claims to legal professional privilege, the ATO has proformas.
 61. 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.
 62. 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, as with documents over which legal professional privilege is claimed, the guidelines relating to accountants’ papers set out procedures to be followed for the interim custody of the documents and their non-disclosure to the ATO.⁹⁷
 63. The guidelines relating to accountants’ papers state that for audits, access will not be granted to restricted source and non-source documents without the approval of specified [ATO] officers: generally senior officers not involved in the actual audit.⁹⁸ There is a comparable procedure for corporate board documents on tax compliance.
 64. Access to restricted source documents, non-source documents, and corporate board documents on tax compliance, will only be sought in exceptional circumstances.⁹⁹ 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.
 65. According to Parts 5 and 6 of the guidelines relating to accountants’ papers, 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.¹⁰⁰

⁹⁶ See part 3.2 of the guidelines.

⁹⁷ See part 8 of the guidelines.

⁹⁸ See parts 5 and 6 of the guidelines.

⁹⁹ See, for example part 2.2 of the guidelines.

¹⁰⁰ 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: see part 6 of the guidelines.

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66. 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.¹⁰¹
67. 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.¹⁰² The Commissioner has elaborated on what constitutes insufficient factual information in his speech, ‘A Question of Balance.’¹⁰³
68. The statement in Part 1 of 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 formulated may mean that there are other circumstances in which the guidelines contemplate that access may be allowed.
69. In *ONE.TEL Ltd v DFC of T*,¹⁰⁴ 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 be 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.
70. It may be that the guidelines, like a policy, should not be read pedantically.¹⁰⁵
71. “Exceptional circumstances” in which access may be sought to corporate board documents on tax compliance would include the following cases:
 - (a) the taxpayer has not cooperated with the Tax Office to furnish full and complete information in a timely manner ;
 - (b) information important to the risk review or audit, including evidence as to purpose in entering into or carrying out the transaction or arrangement, cannot

¹⁰¹ See part 6 of the guidelines.

¹⁰² See part 6 of the guidelines.

¹⁰³ 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.”

¹⁰⁴ 2000 ATC 4229, 4246.

¹⁰⁵ See *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1989-90) 169 CLR 648, 684 per McHugh J.

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be sufficiently established from the taxpayer’s source documents and other enquiries; or

(c) the taxpayer has a history of serious non-compliance - for example, involving fraud or evasion or persistent avoidance of their obligations - or is under investigation in that regard.

72. As to (b), enquiries may relate to the systems and processes by which businesses conduct their affairs, in order to understand the context of the dealings being examined, to ensure that the company is following its own processes, and that the data used for tax purposes is correct by the Commissioner’s statements. Further, there will be occasions where the law includes a specific test, which requires that the purpose be established for which a transaction was undertaken or arrangements were put in place.
73. None of the particular circumstances referred to above that are specified as being the circumstances in which ATO officers shall or may seek approval for access to restricted source and non-source documents, or corporate board documents on tax compliance, would constitute grounds for refusing a claim of legal professional privilege. It has been held by a single Justice of the Federal Court,¹⁰⁶ 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, 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.¹⁰⁷ This is in contrast to the related concessions.
74. It has been held¹⁰⁸ that the guidelines relating to accountants’ papers 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.¹⁰⁹ Furthermore, the related concessions will be monitored and reviewed from time to time, to ensure the required outcomes are being attained.¹¹⁰ To date, only relatively minor changes appear to have been made to the guidelines relating to accountants’ papers.

Challenging grant of such approval and exercise of access power

75. It has been held by a single Justice of the Federal Court, that the manner in which the guidelines relating to accountants’ papers 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.¹¹¹ Hence, failure to give the guidelines proper or

¹⁰⁶ North J in *Clements, Dunne & Bell Pty Ltd v Commissioner, Australian Federal Police* (2001) 188 ALR 515; 48 ATR 650.

¹⁰⁷ I do not mean to suggest that the mere retainer of the lawyer would suffice if the advice were given by someone else.

¹⁰⁸ In *ONE.TEL* at 4245 and 4246.

¹⁰⁹ *Op cit.*

¹¹⁰ See part 9 of the guidelines.

¹¹¹ *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192, 5207.

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- 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 ADJR Act.
76. 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.¹¹² 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.¹¹³ 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.¹¹⁴
77. 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.¹¹⁵ 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.¹¹⁶
78. In *ONE.TEL*,¹¹⁷ 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 opportunity, it is in the nature of the guidelines that they may be departed from in an individual case for sufficient reason.
79. 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.

¹¹² *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1985-1986) 162 CLR 24, 40.

¹¹³ *Minister for Aboriginal Affairs v Peko Wallsend Ltd* at 40 and 41; and *Deloitte Touche Tohmatsu & Ors v DFCT* 98 ATC 5192, 5213.

¹¹⁴ See s5 of the ADJR Act; *Deloitte* 98 ATC 5192; *ONE TEL* at 4243ff.

¹¹⁵ 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.]

¹¹⁶ *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.

¹¹⁷ 2000 ATC 4245.

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80. Burchett J held¹¹⁸ 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.¹¹⁹
81. 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, held¹²⁰ 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.
82. Presumably, the principles referred to in *ONE.TEL* would also apply to the concession relating to corporate board documents on tax compliance.
83. Given the restrictions on what taxpayers, their professional accounting advisors, company directors and their advisors on tax compliance risk may legitimately expect, successfully challenging a decision approving access to restricted source and non-source documents, or to corporate board documents on tax compliance, is likely to be a difficult task. This will especially be so, when anti-avoidance provisions such as Part IVA of the ITAA36 are in issue.

30 September, 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.

¹¹⁸ At 4245 to 4246.

¹¹⁹ 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.

¹²⁰ At 4246.