

GUIDELINES

AUSTRALIAN TAXATION OFFICE - ACCESS TO LAWYERS' PREMISES

These guidelines have been agreed between the Commissioner of Taxation (Commissioner) and the Law Council of Australia (Council) in relation to the exercise of the access powers provided under taxation legislation at lawyers' premises in circumstances where claim of legal professional privilege is made.

INTRODUCTION

Section 263 of the Income Tax Assessment Act 1936 (ITAA) reads:

- (1) The Commissioner, or any officer authorised by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act. and for that purpose may make extracts from or copies of any such books, documents or papers.
- (2) An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.
- (3) (The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under sub-section (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section

Penalty for a contravention of this sub-section : \$1,000.

2. Other tax legislation contains similar provisions viz., section 1 2E of the Sales Tax Procedure Act 1934 and section 127 of the Fringe Benefits Tax Assessment Act 1986. The guidelines apply equally to all taxation legislation, operative at the relevant time.

3. Difficulties are sometimes experienced where a taxation officers wishes to inspect documents and records located at the office of a solicitor or the chambers of a barrister. In two recent cases, F.C.T. & Ors. v Citibank Ltd 89 ATC 4268 and Allen Alien & Hemsley v D.F.C. of T. & Ors. 89 ATC 4295, the Full Federal Court held that the doctrine of legal professional privilege applies to restrict the powers of the Commissioner under section 263. Accordingly, the power of access in section 263 should be read as not referring to documents to which the privilege applies. The Court also held the taxation officer was obliged to ensure that Citibank and in particular its staff had, in the circumstances, adequate opportunity to make claims of privilege on behalf of its clients.

4.
 - (a) The Commissioner recognises that a lawyer has an obligation to a client or former client not to permit access to privileged documents unless the client has waived the privilege and that difficulties could arise in certain circumstances in determining the proper application of the law.

- (b) The Council recognises the Commissioner's right to access to all documents that are not subject to the claim of privilege. The Commissioner's right of access to books documents and other papers is limited only by the requirement that the power must be exercised in good faith and in the proper exercise of the Commissioner's powers under the relevant taxation laws.

5. It is therefore seen as desirable by the Commissioner and the Council that an agreed procedure should be laid down for dealing with documents which may be subject to claims of legal professional privilege.

6. Accordingly, these guidelines have been agreed between the Commissioner and the Council. The latter organisation through its constituent bodies, the Bar Associations and the Law Societies of the States and Territories, represents the great majority of Australia's practising lawyers.

7. Taxation officers will follow the guidelines when seeking access to documents held on lawyers' premises. For its part, the Council encourages lawyers to positively assist in meeting access requests made by taxation officers in the proper exercise of the Commissioner's powers under the relevant taxation laws.

8. The aim of these guidelines is to provide taxation officers and lawyers with guidelines as to the procedure to be followed where issues of legal professional privilege arise in relation to documents on lawyers' premises to which access is sought pursuant to a relevant Act, being guidelines which will:

- ensure lawyers have the opportunity at all times to make any proper claim of legal professional privilege on behalf of their client in respect of privileged documents;
- ensure, while claims are made and determined, the integrity of the documents is assured;
- minimise both the frequency and volume of disputes;
- resolve any disputes as quickly as possible and with minimal disruption to all parties; and
- assist taxation officers in obtaining access to documents which are not the subject of privilege claims.

LEGAL PROFESSIONAL PRIVILEGE

9. Legal professional privilege attaches to confidential communications passing between a client and his, her or its legal adviser if the communications were made for the sole purpose of:

- enabling the client to obtain or the adviser to give legal advice; or
- litigation that is actually taking place or was in the contemplation of the client.

Legal professional privilege also attaches to confidential communications passing between the legal adviser or client and third parties if made for the sole purpose of litigation which is actually taking place or is in contemplation at the time.

The communication will be privileged only where the legal adviser was acting in that capacity and the relationship of legal adviser and clients existed: Cross on Evidence 3rd Australian Ed at p635.

10. The privilege does not apply to communications made:
- before the client contemplated obtaining, or the legal adviser contemplated giving, legal advice, or for, or
 - to facilitate the commission of, a fraud, crime or illegal purpose.
11. Legal professional privilege does not extend:
- to protect things lodged with a legal adviser simply for the purpose of obtaining -immunity from production: F.C. of T. v ANZ Bank Group Ltd 79 ATC 4039 and Baker v Campbell 1983 ALR 385; or
 - to physical objects, e.g., cash or bullion contained in a safety deposit box : Baker v Campbell. supra.
12. The privilege is the privilege of the client, not that of the legal adviser, and may be waived by the client only.

DOCUMENTS THAT WOULD USUALLY BE PRIVILEGED

13. Only documents representing legal advice or created or brought into existence for the sole purpose either of submission to legal advisers for advice, or use in actual or contemplated legal proceedings, fall within the privilege.

14. In Trade Practices Commission v Sterling (1978) 36 FLR 244 at 245, 246 Lockhart J described a number of classes of documents which attracted legal professional privilege. His Honour made it clear that legal professional privilege was not limited to these types of documents. The purpose of setting them out was to give guidance to those making an assessment as to whether legal professional privilege applied. Those classes of documents are as follows:

- (a) Any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or agent of either of them.
- (b) Any document prepared with a view to its being used as a communication of this class, although not in fact so used.
- (c) Communications between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client's obtaining legal advice or assistance.
- (d) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf.
- (e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence.

- (f) Communications passing between the party and a third party (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and 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 put before the solicitor with - the object of obtaining his advice or enabling him to prosecute or defend an action.
- (g) Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his agent.

15. Examples of privileged communications or documents include:

- (a) A detailed bill of costs or memorandum of fees but only if it discloses the nature of the advice sought or given (Packer v DFCT 84 ATC 4666).
- (b) Advice and opinions of a solicitor or legal counsel (Brewer v Castles (No.3) (1984) 52 ALR 581).
- (c) A solicitor's notes of a conference with officers of a client company (Macedonia Pty Ltd v FCT (1987) 18 ATR 929.).
- (d) Copies of privileged documents generally will also be privileged (Vardas v South British Insurance Co Ltd [1984] 12 NSWLR 652).
- (e) Drafts or copies of documents created for the purpose of submitting a report to or seeking the advice of a solicitor (Brambles Holdings v Trade Practices Commission (No.3) (1981) 58 FLR 452).
- (f) Briefs and copies of solicitors' briefs to counsel.
- (g) Written communication, formal or informal, by the client to solicitor or barrister or vice versa.
- (h) Solicitor's diary notes including Counsel's advice.

These are merely examples; the above list is not intended to be exhaustive and each is subject to the requirements of paragraph 9.

16. Whether and in what circumstances legal advice given by an in-house legal adviser is subject to privilege has been discussed in a number of authorities (Waterford v Commonwealth of Australia (1987) 163 CLR 54; D.F.C. of T. v Citibank 88 ATC 4941; Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners [1972] 120 B 102 at p. 129; and A-G (NT) v Kearney (1985) 158 CLR 500). Until a conclusive precedent has been set the ATO will seek to have the limits of any privilege which may be available decided in the Courts.

DOCUMENTS NOT COVERED BY PRIVILEGE

17. Having regard to the authorities, the following non-exhaustive categories of communications would not, in the absence of unusual circumstances, attract privilege:

- (a) Documents which constitute or evidence transactions; e.g., contracts, conveyances, declarations of trust, offers or receipts, even if they are delivered to a solicitor or counsel for advice or use in litigation Baker v Campbell, per Murphy J. at page 409 supra; also accounting, financial or banking records, invoices, company minutes, etc.
- (b) Documents which would otherwise satisfy the requirements of privilege but which were not intended to be confidential when made; Lloyd v Mostyn 152 ER 558 and Baker v Campbell, supra.

- (c) Documents or communications made for or involving the participation in a fraud or an illegal purpose. Murphy J_ in Baker v Campbell, supra, said : "It is not available if a client seeks legal advice in order to facilitate the commission of crime or fraud or civil offence (whether the adviser knows or does not know of the unlawful purpose)".
- (d) A solicitor's trust account records; Packer and Ors v Deputy Federal Commissioner of Taxation 84 ATC 4666 and Allen Alien & Hemsley v D. F.C. of T. & Ors. (1988) 81 ALR 614, 626.
- (e) Documents brought into existence for more than one purpose. If the existence of the document can be explained, in part only, by a purpose other than submission to a legal adviser for advice or for use in legal proceedings then it will not be privileged.
- (f) Fax books recording faxes sent, to the extent that they do not disclose the actual advice Sharp v DFCT 88 ATC 4165, 4184.
- (g) A written communication directing a solicitor to send money to a third party, Allen Allen & Hemsley v DFCT supra.
- (h) Lists of clients or associates.

18. Where a taxation officer has requested access to documents held by a taxpayer and the taxpayer claims privilege, the taxpayer will be given the opportunity to request that the documents be delivered to his/her/its lawyer. If the taxpayer requests such action the documents are to be placed in envelopes/container and sealed to the satisfaction of the taxation officer. The envelopes/container are then to be delivered, in the company of the taxation officer and the taxpayer to the taxpayer's lawyer, where upon the guidelines as set out below are to be followed. While the guidelines are concerned with access to lawyers' premises the spirit of the guidelines will apply where a solicitor or barrister has received a notice under section 264 of the ITAA (or its equivalent).

GUIDELINES

19. These guidelines proceed on the assumption that the taxation officer seeking access to documents has been properly authorised by the Commissioner or a delegate of the Commissioner. Taxation officers are expected to demonstrate courtesy, integrity, fairness and impartiality during access to the lawyers' premises and will endeavour not to draw attention to the proceedings at hand.

20. The effect of these guidelines, in summary, is that a taxation officer will not inspect any document to which access is being sought and which is held by a lawyer, until the lawyer has been given the opportunity to claim legal professional privilege on behalf of the client in respect of any of those documents. Where a claim is made but it is disputed by the taxation officer, the taxation officer will not inspect any document the subject of the claim until either:

- (i) the claim is abandoned or waived; or
- (ii) the claim is dismissed by a court.

21. As a general rule, access to documents at a lawyers' premises would be sought after the taxation officer had given adequate notice to ensure that the lawyer will be present and provide the lawyer with an opportunity to review the documents. What represents adequate notice will depend on the facts of each case. However, in routine cases where it is unlikely that the documents sought would be privileged (e.g., see paragraph 17) and an appropriate senior lawyer is available the steps outlined below may constitute adequate notice.

22. (a) When seeking access to documents held at the premises of a lawyer, taxation officers will:

- (i) identify themselves by name, advise they are authorised officers of the ATO and produce their authorities (the authority should always be retained by the taxation officer and not be surrendered to another person);
 - (ii) advise they are acting under the powers conferred by section 263 of the ITAA (or its equivalent in other taxation legislation) and are making enquiries for the purpose of the relevant Act;
 - (iii) indicate the types of books, documents or other papers to which access is sought;
 - (iv) seek the assistance of the occupier in facilitating access in accordance with section 263(3); and
 - (v) make available to the occupier a copy of these guidelines, for the occupier to make a copy or to read them.
- (b) If no partner, principal or lawyer authorised by a partner or principal is in attendance at the premises then, if practicable, relevant documents or that part of the premises where they are held or believed to be held should be sealed and the access deferred for a reasonable period to enable a partner, principal or an authorised lawyer to attend. If sealing the premises is impracticable then the taxation officer, in an appropriate case, might simply await the arrival of one of the above persons.
- (c) A reasonable time will be allowed to enable the lawyer to consult his or her client(s) and/or to obtain legal advice from another lawyer. The lawyer should seek instructions from the client(s) to accept the guidelines as set out below and enable the lawyer to give a written undertaking to the taxation officer that the document(s), subject to guidelines will be secured (e.g., in a locked cabinet or safe) and not removed from the lawyer's premises unless otherwise specified in these guidelines. The taxation officer would normally remain on the premises during this period.
- (d) However, where the lawyer cannot obtain the client's instructions and/or legal advice within a short space of time or where there are a substantial number of documents for the lawyer to peruse and consider claims to privilege, the taxation officer, on being satisfied as to the security of the documents sought and having received a list of the documents as outlined at paragraph 22(j)(i)-(vi) and (viii) and a written undertaking from the lawyer that the secured documents are not to be removed from the lawyer's office within 20 working days or such other period as the parties agree to, will make an appointment to return to inspect the documents at the earliest possible date.
- (e) In the circumstances where the lawyer is unable to provide a written undertaking (referred to in sub-paragraph 22(c)) due to the unavailability of his/her client(s) the ATO recognises that the lawyer may undertake to secure the document(s) while awaiting the instructions from his/her client but cannot be bound by that undertaking if the client demands the return of the document(s) that may be privileged.
- (f) In circumstances such as the above the taxation officer must decide on the appropriate course of action to be taken given the urgency of the matter, the documents requested and the likelihood that the client will agree to the undertaking.
- (g) Where an undertaking is not provided by the lawyer due to the instructions of the client, such action as is appropriate may be taken by the taxation officer (refer paragraph 23 and 24).

- (h) Having informed the client(s) of the position and/or having obtained legal advice, where appropriate, the lawyer should assist the taxation officer by locating all documents which the taxation officer wishes to inspect. If the taxation officer requires access to the officer index system, the lawyer should **assist**, if necessary by explaining the index system to the officer.
- (i) The procedure set out below should then be followed:
 - (i) Where ATO access to documents is required and the lawyer believes some of the documents to be privileged, the taxation officer will allow the lawyer sufficient time in which to examine the documents and, if necessary, to seek advice on them. In the normal course of events, where prior notice has been given to the lawyer, it is envisaged that the lawyer will have sought instructions from the client and have examined the document(s) prior to access being sought. Where more time is appropriate, the lawyer should undertake the examination within a period agreed to by the lawyer and the taxation officer and ensure the security of the documents. The ATO reserves its right in these circumstances to be present while the lawyer examines the documents. However, documents may not be viewed by the taxation officer.
 - (ii) In respect of all documents identified by the lawyer and/or identified by the taxation officer in discussions with the lawyer as potentially within the access request, the taxation officer shall, before proceeding to inspect and copy the documents, ask the lawyer if he/she wishes to claim legal professional privilege on behalf of the client in respect of any of the documents. If a claim of legal professional privilege is then asserted in relation to any of those documents sought to be inspected, the lawyer shall indicate to the taxation officer an adequate description of the document(s) and in whose name the claim is made, and indicate the grounds upon which the claim is made, at least in general terms. The more specific the grounds indicated, the better placed the taxation officer will be to determine whether or not to concede the claim.
 - (iii) Where a claim of privilege is made on behalf of the client(s) the lawyer should contact the client(s) to seek instructions as to whether the claim should be maintained.
 - (iv) In respect of those documents which the lawyer claims are subject to legal professional privilege, the taxation officer should proceed in accordance with the guidelines set out below. In respect of the remaining documents, the taxation officer may then proceed to inspect and, if required, copy the documents.
- (j) A list of the documents in respect of which the lawyer asserts legal professional privilege and which the taxation officer does not concede or is not in a position to concede are so privileged should be prepared by either the lawyer or the taxation officer acting on information from the lawyer. The list will contain the following details:
 - (i) the nature of the document(s), e.g., letter, memorandum, opinion, statement of claim, advice file note, contract or other form of document, in relation to, for instance: a takeover, lease, financial arrangement, etc. The more specific a description of the nature of the

- document is, the better placed the taxation officer will be to determine whether or not to concede the claim;
- (ii) the exact number of documents and pages contained in that document withheld;
 - (iii) the date each document was prepared or executed, if not available this should be indicated;
 - (iv) the identity of the person who prepared and/or signed each document and to whom directed, if known;
 - (v) a physical description of each document, e.g., typed or handwritten;
 - (vi) whether the document is an original, a photocopy, facsimile or a carbon copy;
 - (vii) the grounds on which legal professional privilege is claimed at least in general terms, in respect of each document; and
 - (viii) the person in whose name the claim is made.

However, the details provided pursuant to paragraphs (i) to (viii) above should not result in the disclosure of privileged information. The document should also be designated by number or letter on the document to enable accurate identification. The disclosure of the above information in no way waives the privilege claimed.

- (k) The list should then be endorsed to the effect that having regard to the claim of legal professional privilege made by the lawyer on behalf of his or her client(s), ATO access has been sought but has not been obtained in respect of the listed documents and those documents have been sealed in the envelopes/container (see paragraph 22(m) below).
- (l) The endorsed list should then be signed by the taxation officer and the lawyer. The original list should be held by the taxation officer. Two copies of the endorsed list should be made, one held by the lawyer and the other copy retained with the envelopes/container.
- (m) All documents in respect of which privilege has been claimed should be placed by the lawyer and/or the lawyer's staff, in the presence of the taxation officer, in envelopes/container which should then be sealed and placed in a secure place on the lawyer's premises (e.g., such as a locked filing cabinet or safe). The lawyer should be permitted to take copies of any of the documents before they are placed in the envelopes/container (copies should be made by the lawyer if he/she will need to show the documents to the client or to enable the lawyer to carry out duties as legal adviser to the client or to seek legal advice). The sealed envelopes/container will not be opened unless in the presence of the taxation officer or subject to the agreement of the ATO. However, the taxation officer shall not be entitled to inspect these documents. Copies taken of the documents will also be covered by the claim of privilege.
- (n) Within 3 working days (or such time as is agreed by the parties) the lawyer will review the privilege claim in consultation with the client and advise whether it will be waived or abandoned in respect of any of the documents and if so, which documents. Any papers or documents which are no longer the subject of a claim will be made available to the taxation officer.
- (o) If within 14 days (or such longer period as may be agreed upon by the parties as reasonable) after the review period mentioned in 22(n) above, the lawyer has not contacted the taxation officer to advise on the maintenance of the

claim of privilege, the ATO will inform the lawyer that instructions to institute proceedings to determine the entitlement to access will be sent to the Australian Government Solicitor and no further steps will be taken in relation to ATO access to the documents until either:-

- (i) a further period of 14 working days (or such further period as may be agreed upon as reasonable) elapses without such proceedings having been instituted; or
 - (ii) proceedings to contest the privilege are successful; or
 - (iii) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.
- (p) Where proceedings to establish the privilege claim have been instituted arrangements should immediately be made to deliver the documents into the possession of the Registrar of the Court. The documents shall then be held by the Registrar pending the order of the Court.
- (q) Where the 14 working days as mentioned in paragraph 22(o)(i) above (or such further period as may have been agreed to) expire without the ATO instituting proceedings and advising the lawyer, the lawyer need not continue to maintain the documents as outlined in paragraph 22(m) above.

23. Where a lawyer takes the view that he/she must follow a course other than that described in the guidelines every effort should be made to acquaint the taxation officer with the reasons for this course and the lawyer's proposed method of securing the documents subject to the claim of privilege.

24. If agreement cannot be reached as to the security/integrity of the documents to the satisfaction of the taxation officer, the taxation officer may, as one course of action, seek an injunction. A taxation officer may stay on the premises while conferring with his/her supervisor as to the course of action to take.

25. The Commissioner recognises the duty that a lawyer owes to his/her client. However, the Commissioner and the Council expect that the lawyer will assert a claim for privilege only on documents which are or may be properly the subject of such a claim. Claims of privilege that appear to a taxation officer not to be well founded should be tested promptly by appropriate court action because the Courts have said that legal professional privilege will not be permitted to be a 'cloak for fraud' (A-G (NT) v Kearney (1985) 158 CLR 500). It should be noted that a person could also face prosecution under section 8X of the Taxation Administration Act for hindering or obstructing a taxation officer in the performance of his duties under section 263 of the ITAA. However, the Commissioner recognises that a lawyer who complies with the guidelines will not in so doing be hindering or obstructing a taxation officer in the performance of his/her duties.

REVIEW

26. It is intended that these guidelines will be monitored and reviewed from time to time, to ensure the required outcomes are being attained. This review should commence no later than November 1992.