A TAXPAYER PRIVILEGE FOR AUSTRALIA

A THESIS COMPLETED IN SATISFACTION OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

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MARCH 2015

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Abstract

This thesis articulates the legal reform required in Australia to establish an effective taxpayer privilege, for tax advice, whether provided by lawyers or accountants, by setting out the key criteria for the necessary legislation. The thesis shows that common law client legal privilege is the basis of the taxpayer privilege and examines the historical development, the rationale(s) and critical criteria for the recognition of the privilege. The thesis shows how privilege developed to become absolute, permanent and removable only by client waiver or the crime-fraud exception.

Client legal privilege is justified by both the 'utilitarian' and 'rights' theories. The theories are not mutually exclusive and together they embrace the individual and societal interest in protecting confidentiality of financially sensitive communications, especially in the tax arena.

Four common law jurisdictions: Australia, New Zealand, the United Kingdom and the United States are examined because they have similar common law origins and have influenced each other in developing client legal privilege upon each other. New Zealand and the United States have legislated for a taxpayer privilege. Their experience provides lessons for Australia. The United Kingdom has a limited protection for confidential tax documents held by the tax accountant.

Tax advice is provided by two key professions, accountant and lawyers, and increasingly tax practitioners have dual qualifications. The role of the advisor in enabling the taxpayer to comply with the complex tax law in a self-assessment system is acknowledged by the Revenue authorities. The empirical evidence, scant as it is, demonstrates that sensitive financial information requires the protection of privilege if it is to be freely and frankly discussed with tax advisors. The thesis demonstrates that the emphasis needs to be on the advice provided by the advisor, rather than on the qualification of the advisor. This justifies the recommendation for reform in Australia.

STUDENT DECLARATION

I, Maria Italia, declare that the PhD thesis entitled ‘A taxpayer privilege for Australia’ is no more than 100,000 words in length including quotes and exclusive of tables, bibliography and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature Date March 2015

DEDICATION AND ACKNOWLEDGEMENT

I dedicate this thesis to my dearly departed parents, Giuseppa and Giuseppe, and my family Frank, Sebastian, Karen, Dorothy, Cara and Marcus. I thank my supervisor Professor Duncan Bentley for his valuable advice and supervision. I thank Professor Neil Andrews for his assistance, and for the valuable librarian assistance, I thank Murray Greenaway.

NOTATION OF PRIOR WORK

The following works of the author, which have been previously published, have been drawn on in the writing of this thesis:

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[Referenced in Chapter six of the thesis]

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Table of Abbreviations

AAT	Administrative Appeals Tribunal (Australia)
ACCA	Australian Competition and Consumer Commission
AICPA	American Institute of Certified Public Accountants
ALRC	Australian Law Reform Commission
ALRC Report 107	Australian Law Reform Commission 'Privilege in Perspective: Client Legal Privilege in Federal Investigations (2007)
ATO	Australian Taxation Office
Charter	*The Taxpayers Charter Your Rights, Your Obligations* (Australia)
Costigan Commission	Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (Australia)
CPA	Certified Public Accountant (United States)
Discussion Paper	Commonwealth of Australia, Department of Treasure, 'Privilege in relation to Tax Advice' (April 2011)
GAAR	General Anti-Avoidance Rule (Australia)
Guidelines	Guidelines for Exercising Accessing to External Accountants' Papers (Australia)
HMRC	Her Majesty's Revenue and Customs (United Kingdom)
ICAA	Institute of Chartered Accountants in Australia
ICAEW	Institute of Chartered Accountants in England and Wales
IRC	Internal Revenue Code (United States)
IRD	Inland Revenue Department (New Zealand)
IRS	Internal Revenue Service (United States)
ITAA	*Income Tax Assessment Act 1936* (Cth) (Australia)
Keith Committee	Report of the Committee on Enforcement Powers of the Revenue Department (Cmnd 8822 HMSO, 1983) (United Kingdom)
Ralph Review	John Ralph, Review of Business Taxation to Australian Government Treasury, *A Tax System Redesigned* (July 1999)
Reform Act	*Internal Revenue Service Restructuring and Reform Act 1998* (United States)

Section 7525	Confidentiality Privileges Relating to Taxpayer Communications (United States)
SPS	Standard Practice Statement (New Zealand)
TAA *1953*	*Taxation Administration Act 1953* (Cth) (Australia)
TAA *1994*	*Tax Administration Act 1994* (New Zealand)
TMA	*Taxes Management Act 1970* (United Kingdom)

CHAPTER ONE

Introduction

1.1 Background to the research

Client legal privilege is a product of the common law therefore, at the time of its development it was confined to the legal profession, as it was the only recognised profession providing legal advice. Client legal privilege protects from compulsory disclosure confidential communications between the legal professional and the client, for the purpose of obtaining legal advice and/or preparation for litigation, provided that they are directly related to the professional's duties as legal advisor.[1] Client legal privilege is 'in derogation of the search for truth,'[2] it stands in derogation of the public's 'right to every man's evidence' acting as a shield or cloak against information sought by the opposing party. The Courts have given a narrow construction to the privilege,[3] particularly when it is the taxpayer who seeks to invoke the privilege to withhold information from the Revenue authority in tax enforcement proceedings. The courts reason that the information is in the taxpayers' or their advisors' hands, thus there is an information asymmetry in favour of the taxpayer.

Society has changed, accountants now provide more of the advice on tax law to their clients,[4] as well as providing tax planning services to assist clients in meeting their compliance obligations, while trying to legitimately minimise their tax burden. In a self-assessment tax system, the burden is shifted to the taxpayer to interpret the law, maintain records and make accurate returns. Returns are no longer subject to individual examination by Revenue officers the returns are largely accepted as lodged. The system relies heavily on the voluntary compliance of taxpayers and taxpayer honesty in preparing tax returns**,** with the understanding that the information they disclose will be treated with utmost confidentiality by the Revenue authority.[5] Faced with such complexity, uncertainty and the risk of heavy

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1 See *Carter v Northmore Hale Davy* & *Leake* (1995) 183 CLR 121; and *R* v *Derby Magistrates' Court; Ex parte B* [1996] I AC 487.

2 *United States v Nixon* 418 US 683, 710 (2002).

3 *Cavallaro v United States*, 284 F 3d 236, 245 (1st Cir, 2002).

4 Institute of Chartered Accountants in Australia, Submission to Commonwealth Government Department of Treasury, *Discussion Paper: Privilege in Relation to Tax Advice*, 8 August 2011 Executive Summary, page 1, 'There are more than 60,000 registered tax agents in Australia serving the needs of around 70 percent of the population.' See also *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 [121] (23 January 2013) for the changing expectations of taxpayers; this case further analysed in Chapter eight of the thesis.

5 In Australia the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010 (No 145, 2010) – Schedule 1* (Cth), Division 355 contains the current secrecy provisions. The *Act* in conjunction with section 38 of the *Freedom of Information Act 1982* (Cth) govern the secrecy of taxpayer information.

financial and/or criminal sanctions, taxpayers turn to tax practitioners for assistance, and in the case of individual taxpayers and small business, this is usually their tax accountant. The role of the tax practitioner in this context is important to both the taxpayer and to the efficient operation of the tax system itself.

The thesis concentrates on a group of four familial common law jurisdictions: New Zealand, the United Kingdom, the United States and Australia,[6] which share many similarities in their common law of client legal privilege and its intersection(s) with the tax systems. In all four jurisdictions the tax system is: a self-assessment system; the Revenue authorities have intrusive and coercive information gathering powers, powers that are subject to client legal privilege, given that 'the tax law is vast, complex, unclear, often lacking in coherence, and counterintuitive.'[7] Revenue authorities' powers are also subject to test of validity and the exercise of those powers for a proper purpose and in a reasonable manner.[8]

The complexity of the tax law is a serious problem facing taxpayers. Joseph Raz enumerated eight main principles which derived from the basic idea that the 'rule of law' depends for its validity or importance on the particular circumstances of different societies. '(1) All laws should be prospective, open and clear. (2) Laws should be relatively stable. (3) The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules. (4) The independence of the judiciary must be guaranteed. (5) The principles of natural justice must be observed. (6) The courts should have review powers over the implementation of the other principles. (7) The courts should be easily accessible and (8) the discretion of the crime preventing agencies should not be allowed to pervert the law'[9] In his extra judicial writing the Honourable Justice G T Pagone[10], referred to Raz's principles to underscore the importance of certainty to the rule of law. Pagone then turned to the causes of uncertainty within tax law including: the inherent uncertainty of language; the mismatch between the lawyer's tools of statutory interpretation and a tax statute drafted using an economic or accounting understanding of tax concepts; differing judicial constructions of tax statutes and the intentional uncertainty in the drafting of tax statutes to allow for discretion or to prevent tax avoidance.

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6 Canada could have been included in this group, especially given that Quebec has the 'secret professionelle' within its civil law, however Canada has not legislated a taxpayer privilege and Australia would have few lessons to take from the Canadian experience, hence it has been excluded from this thesis.

7 Jonathan Schwarz, 'Rights and Powers: Protecting the Legitimate Interests of Taxpayers' (2009) 3 *British Tax Review* 306, 309.

8 See Chapter six of this thesis.

9 Joseph Raz, 'The Rule of Law and Its Virtue' (April 1977) 93 *Law Quarterly Review* 195, 198-202.

10 Gaetano T Pagone, 'Tax Uncertainty' (2009) 33 *Melbourne University Law Review* 886, 887.

The complexity that the taxpayer faces is a product of: the complexity of the legislation itself; the way that the legislation in interpreted and enforced by the Revenue authority, and judicial interpretation of tax legislation. Complexity generates uncertainty, especially when the outcome of a law lacks predictability. Uncertainty tends to reduce trust between the taxpayer and the tax system. Complexity therefore reduces the system's transparency, making it harder for taxpayers to understand their obligations and their ability to comply with the law. Furthermore, the complexity leads to increased compliance costs for taxpayers.[11]

Tax practitioners come from two key professional groups: lawyers and accountants, with a greater number now having dual qualifications. Client legal privilege operates to protect confidential communications between taxpayers and their tax lawyers; while taxpayers who choose to employ the services of tax accountants are often reliant on the voluntary concessions of the Revenue authority to grant a limited immunity from access to confidential tax advice provided by tax accountants; and/or in the case of the United States and New Zealand on a limited legislated privilege for tax accountants and their clients. Tax practitioners, be they accountant or lawyer, perform three key functions: tax return preparation; tax advice and planning and negotiator/litigator on behalf of the taxpayer with the tax authority.

Tax return work ultimately involves disclosing information to the tax authority, and as such communications related to preparing the tax return, lack the confidentiality that is essential to privilege. The accounting records, documents implementing transactions and information upon which the return is based are and should be easily accessible to the Revenue authority. The tax return is the primary source of information for the Revenue authority. The taxpayer is generally in possession of the evidence that determines the taxpayer's tax liability, and the taxpayer decides the extent and amount of their statutory obligation to pay tax. Hence the burden of proof in most tax cases falls upon the taxpayer.[12] As clearly stated in *Weise v Commissioner* the 'burden of proof is on the taxpayer where facts and evidence [are] peculiarly within his control and knowledge.'[13]

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11 See Greg Pinder, 'The Coherent Principles Approach to Tax Law Design' (Autumn 2005) *Economic Round-up* 75, 85-6 <http://archive.treasury.gov.au/documents/987/PDF/07_coherent_principles.pdf >.

12 See Maria Italia, 'Burden of Proof in Tax Cases: A Comparison between Australia and the United States' (2011) 7(1) *International Review of Business Research Papers* 231, 234 discussion on sections 144ZZK and 14ZZKO *Taxation Administration Act* (Cth) 1953.

13 *Weise v Commissioner of Inland Revenue*, 93 F 2d 921, 923 (8th Cir, 1938). See also *Lucas v* O'Reilly (1979) 36 FLR 102, in the Australian context.

In the role as tax advisor and planner, practitioners assists clients in the creation of transactions that enable them to arrange their affairs so as to meet their legal obligations, whilst minimising their tax burden. The argument advanced for confidentiality for communications about the tax consequences of completed or prospective transactions, is essentially that compelled disclosure of tax advice information would make taxpayers less likely to seek advice from tax practitioners. These are sensitive financial communications that deserve the protection of privilege.

> Generally, taxpayers seek to protect the thought processes, notes, opinions and analyses of their advisers; this may include tax opinions, tax planning memoranda, analyses of what constitutes substantial authority, discussions of contrary authority and analyses of alternatives rejected in tax planning.[14]

Tax planning is characterised as the legitimate exploitation of revenue legislation and ordinary business structures to ensure tax minimisation and is sanctioned by law.[15] It is often the tax practitioner's advice that is directly concerned with the taxpayer's rights and liabilities enforceable in tax law.

In the third role of representing the taxpayer in a controversy with the Revenue authority the tax practitioner serves as advocate for the taxpayer. Confidential communications in preparation for negotiations with the Revenue authority need the protection of privilege to ensure that the tax practitioner has all the facts and is able to represent the taxpayer's case fully, or indeed to avoid unnecessary litigation. Cooperation with the Revenue authority will in many instances lead to a successful resolution. Accountants are generally able to represent clients before the Revenue authority in civil proceedings before tribunals, but they are not allowed to practise in civil or criminal courts. It is when the Revenue authority exercises its authority to progress a matter to a civil or criminal court, that the role of the lawyer becomes paramount. The problem is that it is often difficult for the taxpayer and their tax accountant to discern when a case shifts sphere, and it is in these instances that tax accountants have to ensure that confidential communications with their clients are protected.[16] Often the tax accountant will be retained by the lawyer or client to assist in the case and the common law

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14 Ronald E Friedman and Dan L Mendleson, 'The need for CPA-Client Privilege in Federal Tax Matters' (1996) 27(3) *The Tax Adviser* 154, 155. See also *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 [121] (23 January 2013) and their Lordships discussion of the need to protect sensitive financial information, analysed further in Chapter eight of the thesis.

15 See Rodney Fisher, *Making Tax Laws Work for You: A Simple Guide to Tax Planning* (McGraw-Hill. 2001) 126, Fisher explains tax planning as `within the letter of the law and within the intent of the law'.

16 The Australia Federal Police and/or the Commonwealth Director of Public Prosecutions make the final decision to prosecute a case as a criminal case.

on 'third party' communications will determine whether communications remain confidential and therefore protected by privilege.[17]

1.2 Taxpayer privilege in the four common law jurisdictions

In the United Kingdom, the *Keith Committee*[18] in 1983 recommended extending a limited privilege to duly appointed tax agents, providing tax advice and in 1989 the *Taxes Management Act 1970* was amended to implement the recommendation.[19] Section 20B(9)(a) provided protection for an auditor's work papers that were in their possession and section 20B(9)(b) provided a non-disclosure right for communications that were in the possession of their tax accountant. Section 20B(8) protected confidential communications with legal advisers that was in the possession of the legal adviser. The tax profession shared an understanding that section 20(C) of the *Taxes Management Act 1970* abrogated client legal privilege, except for the protections specifically provided for in the legislation. The House of Lords decision in *Grenfell*[20] dispelled that understanding, with all five Law Lords[21] concluding that client legal privilege as a 'fundamental human right' could be overridden only by express words or necessary implication, and that therefore section 20(C) was subject to client legal privilege.[22] The *Finance Act 2008* introduced the necessary amendment to ensure that advice provided by the legal profession was protected by client legal privilege whether in the hands of the client or the legal adviser. However no amendment was introduced to protect advice by tax accountants, leaving the curious situation that confidential communications that were the property of, and were in the control of, an auditor or tax accountant were protected from access by the Revenue authority, while the same documents, or copies thereof were not protected in the hands of the client. This divide between tax lawyers and tax accountants remains in the current legislation. Lord Hoffman in *Grenfell*, noted that 'section 20B(9) is a curious provision which appears designed to protect the proprietary interests of the tax accountant in his working papers …It had nothing to do with LPP.'[23]

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17 In the case of Australian states that have enacted Uniform Evidence Acts, they have extended privilege to third party communications. In the common law, *Pratt Holdings Pty Ltd and Another v Commissioner of Taxation* (2004) 136 FCR 357, extended the privilege to third party communications. See Chapter five of the thesis.

18 United Kingdom, *Report of the Committee on Enforcement Powers of the Revenue Department*, (Cmnd 8822 HMSO, 1983) presided over by Lord Keith of Kinkel.

19 See Chapter eight of the thesis.

20 *Regina (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563.

21 Ibid Lord Nicholls, Lord Hoffmann, Lord Hope, Lord Hobhouse and Lord Scott.

22 Ibid 606-7 (Lord Hoffman).

23 Ibid 572-3[19].

In 1998 the United States enacted the *Internal Revenue Service Restructuring and Reform Act,(Reform Act)* creating via section 7525 of the *Internal Revenue Code* (IRC) a taxpayer privilege based on the common law client legal privilege[24] thus creating the possibility of a privilege that could 'level the playing field' between tax lawyers and tax accountants.

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorised tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.[25]

However, the legislation created three significant limitations to section 7525; limitations that in effect drastically reduced the scope and effectiveness of the privilege. The first limitation provided that the privilege can only be asserted by a Certified Practising Accountant (CPA) authorised to practice before the Internal Revenue Service (IRS) and must relate to federal tax matters. Confining the protection to actions involving the Revenue authority severely limits scope of the protection. It is argued in this thesis, that confidential communications should be protected from access by *any opposing party* or regulatory body. Such protection would diminish the possibility of the Revenue authority gaining access to confidential communications indirectly, from other regulatory bodies, with which it may have information sharing agreements.

The second limitation in the *Reform Act* is that the privilege may only be asserted in noncriminal tax matters before the IRS and only in noncriminal tax proceeding brought by or against the United States. Accountants are not authorised to practice criminal law, thus it is logical to limit the privilege to representation before the IRS and/or tribunals. However, the privilege should provide continued protection of confidential tax accountant-client communications beyond the point of the IRS decision to progress a matter to a civil or a criminal court.[26]

Third, the privilege does not apply to any written communication by CPAs in connection with the promotion of, or participation in, any tax shelter arrangement. The crime/fraud exception developed in the common law[27] serves to exclude from the protection of client legal privilege, any communications brought into existence for the purpose of requesting or providing legal advice in furtherance of a crime or fraud, and this same rule has been applied

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24 See Chapter eight of the thesis

25 United States, *Internal Revenue Code* §7525(a)(1) (2006).

26 See Linda Burilovich, 'Protecting Communications and Documents from IRS Summons and Enforcement'(11 April 2013) *The Tax Adviser* <http://www.aicpa.org/publications/taxadviser/2013/april/pages/burilovich_apr2013.aspx> .

27 See *Regina v Cox and Railton* [1884] 14 QBD 153.

to section 7525.[28] Thus this third limitation, hastily added during the passing of the legislation,[29] is unnecessary and has the potential to exclude tax-accountant advice on legitimate tax minimisation arrangements.

The three exceptions cumulatively create a privilege that is far from certain or absolute, as noted by John Gergacz.

> However, unlike the privilege, the protective scope of § 7525 is severely restricted. Although a taxpayer may structure tax adviser communications within the requirements of § 7525, they may not be protected because of unknowable circumstances that may arise in the future. Thus, the confidentiality promise of § 7525 should not be overvalued. Although § 7525 may act as a post-communication shield, it cannot be relied upon at the actual time of the communications due to its restrictions.[30]

In New Zealand the *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* creates a statutory right of non-disclosure for tax practitioners;[31] the right is completely separate from the common law client legal privilege, and protects 'tax advice documents' from the Inland Revenue's (IRD) information gathering powers. The New Zealand legislation sought to, and in many instances succeeded in, avoiding the limitations created by the United States legislation. The creation of a taxpayer's privilege, separate from the common law, reduces the responsiveness and flexibility of the privilege. The privilege will not be able to adapt quickly and seamlessly to changes in the common law. The problems are further compounded by the Courts' narrow interpretation of the right of non-disclosure, as noted in *Blakeley*[32] and *ANZ.*[33] The legislative requirement that 'tax contextual information' be available to the IRD, coupled with the very wide definition of 'tax contextual information' including all documents relating to information or facts about a transaction, means that communications that would be protected by client legal privilege are not protected by the right of non-disclosure. Furthermore, the overly inclusive crime/fraud exception to the right of non-disclosure in section 20B(2)(c), applying to documents made or brought into existence for the purpose of committing an illegal or wrongful act, creates an exception that can result, as noted by Andrew Maples, in a very wide net.

> [U]nlike tax evasion, tax avoidance is not illegal; rather it 'is often within the letter of the law but against the spirit of the law.' For this reason, it may be viewed as 'wrong', which raises the issue

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28 See *United States v BDO Seidman, LLP*, 492 F 3d 806 (7th Cir, 2007).

29 See Petroni Alyson, 'Unpacking the Accountant-Client Privilege under I.R.C. Section 7525' (1998-1999) 18 *Virginia Tax Review* 843, 862.

30 John Gergacz, 'Using the Attorney-Client Privilege as a Guide for Interpreting I.R.C. § 7525' (2005-06) 6 *Huston Business & Tax Law Journal* 240, 247.

31 Sections 20B to 20G of the *Taxation Administration Act 1994* (Cth). Refer to Chapter eight of the thesis.

32 *Blakely v Commissioner of Inland Revenue* (2008) NZHC 223[18].

33 *ANZ National Bank Ltd v Commissioner of Inland Revenue* (2008) 23 NZTC 21,918.

> of whether advice regarding tax avoidance arrangements may be seen as promoting or assisting the commission of a 'wrongful act'.[34]

In 2007 the Australian Law Reform Commission, (ALRC) in its '*Report 107, Privilege in Perspective: Client Legal Privilege in Federal Investigations'* recommended that a 'New Zealand style' right of non-disclosure for tax accountants be introduced.[35] The then Labor Government responded in 2011 with a call for yet more submissions to its Discussion Paper: '*Privilege in relation to Tax Advice.'*[36] The government has not responded to the submissions received. In 2013 a Liberal coalition government was elected, and the issue of privilege for tax advice is yet to surface. In 2009, the then Labor government, introduced the *Tax Agents Services Act* (Cth) reinforcing of the role of tax agents in assisting taxpayers in discharging their tax obligations, and established a National Tax Practitioners Board to regulate tax practitioners. This 2009 *Act* with its wide range of safeguards and protection mechanisms for taxpayers creates a positive environment within which a future legislated taxpayer privilege could successfully operate.[37] The ALRC has made clear recommendations. The Government is yet to act.

1.3 Hypothesis

This thesis will demonstrate that Australian taxpayers enjoy the least protection for their confidential communications with their tax accountants in comparison to the other three common law jurisdictions reviewed. The other three jurisdictions' actions to create a taxpayer privilege provide lessons for Australia; lessons that can be heeded to avoid the shortfalls of those systems and ensure that the Australian taxpayer privilege is indeed effective. The thesis calls for legislative reform in Australia to 'level the playing field' between tax lawyers and tax accountants and provides the theoretical and comparative basis for implementing such reforms. A taxpayer privilege should provide an absolute and permanent privilege for taxpayers, so that they can confidently predict at the time of making the communication with their chosen tax practitioner, that the privilege will apply to their communications, and that those privileged communications cannot be accessed by any counterparty. The hypothesis is that:

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34 Andrew Maples, 'The Non-Disclosure Right in New Zealand: Lessons for Australia?' (2008) 1 *Journal of the Australasian Law Teachers Association* 351, 356 (citations omitted).

35 See Chapter nine of the thesis.

36 Commonwealth of Australia, Department of Treasury, *Privilege in Relation to Tax Advice; Discussion Paper* (April 2011) <http://lowpollutionfuture.treasury.gov.au/documents/2005/PDF/DP_Privilege_in_relation_%20to_tax_advice.pdf>

37 Institute of Chartered Accountants in Australia, Submission to Commonwealth Government Department of Treasury, *Discussion Paper: Privilege in Relation to Tax Advice*, 8 August 2011, 4.

It is timely and beneficial to both taxpayers and the tax system to legislate a taxpayer privilege for Australia.

The hypothesis poses a number of research questions that are answered within the thesis. Questions on the historical development of client legal privilege are addressed in Chapter two. Questions relating to the theoretical underpinnings of client legal privilege are addressed in Chapters three and four. Questions on 'the Australian law of client legal privilege?' are addressed in Chapter five. Questions on how client legal privilege operates in the tax arena and interacts with the powers of the Australian Commissioner of Taxation are addressed in Chapters six and seven. Questions on 'similarities and differences between the protection of taxpayer-tax accountant confidential communications in Australia and the protection afforded taxpayers in the United Kingdom, New Zealand and the United States' are addressed in Chapter eight. Chapter Nine articulates the critical criteria essential to a taxpayer privilege; criteria that will assist in its implementation.

The *timeliness* for the reform is underpinned by the ALRC's call for a taxpayer privilege;[38] the Discussion Paper 'Privilege in relation to Tax Advice'[39] issued by the then Assistant Treasurer, the Honourable Bill Shorten; the regime for the regulation of tax practitioners set out in the *Tax Agent Services Act 2009*[40]and legislation providing for a taxpayer privilege in the United States and New Zealand. The *benefit* of the reform to both taxpayers and the tax regime is in the role tax practitioners perform in assisting taxpayers to comply with the tax laws in a self-assessment system, a role that will be enhanced by the enactment of a taxpayer privilege.

1.4 Method and outline

The thesis begins in Chapter two by applying a doctrinal method to the historical development of the law of client legal privilege. The doctrine underpinning client legal privilege provides the basis for its current application in the common law and legislation. This chapter employs in-depth analysis of the process of legal reasoning employed by judges in the leading equity and common law cases in the England. Doctrinal legal research is a qualitative method, the law is reasoned and not simply uncovered or 'found'; the law cannot

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38 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (December 2007).

39 Commonwealth of Australia, Department of Treasury, Discussion Paper, *Privilege in relation to Tax Advice*, (April 2011).

40 The *Tax Agent Services Act No. 13. 2009* (Cth) superseded the provisions that were formerly in the *Income Tax Assessment Act 1936* (Cth) section 251L which covered the privileges and duties of registered tax agents.

be objectively isolated. [41] An exploration of opposing views of judicial decision making and those espousing the theories is undertaken. The declaratory theory where 'the judge merely *finds* pre-existing law; then he *declares* what he finds'[42] is pitted against the judicial creativity or positivist theory of judicial decision making and laid to rest. Client legal privilege has been fashioned by the common law and the 'creativity' of judges has influenced its development.[43]

Client legal privilege is a creature of the common law and therefore it developed in a piecemeal fashion through a series of English equity and common law cases. The common law over time established a number of critical criteria for the recognition of privilege including: the need for confidentiality in the communications involved in seeking and obtaining legal advice and legal services; a lawyer-client relationship based on confidentiality; that the privilege is the right of the client[44] and the permanent status of privilege: 'once privileged, always privileged'.[45] Client legal privilege was restricted to the legal profession as at this period, the legal profession was deemed to be the only profession that could provide legal advice.

Chapter three examines the utilitarian rationale for client legal privilege; privilege is justified or rejected by balancing the *utility* of the privilege against the costs of the privilege to litigation. This chapter uses theoretical research to understand the rationale(s) that underpin the doctrine of client legal privilege and to highlight the flaws in the law. The thesis builds on the concept that law is a social construct and does not exist in a doctrinal vacuum.[46] Thus research designed to secure a deeper understanding of the law as a social phenomenon, includes research on the historical, philosophical, linguistic, economic, social or political implications of the law.[47] The chapter analyses the impact of John Locke's theory of individualism and Adam Smith's economic theory on the utilitarian rationale for client legal privilege.

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41 Ian Dobinson and Francis Johns, 'Qualitative Legal Research' 22 in Mike McConville and Wing Hong Chui, '*Research Methods for Law'* (Edinburgh University Press, 2007).

42 Beryl Harold Levy, 'Realist Jurisprudence and Prospective Overruling' (1960) 109(1) *University of Pennsylvania Law Review* 1, 1 (emphasis in original).

43 See Chapter five of the thesis for illustration of judgments in the Australian setting that have influenced the operation of the doctrine.

44 See *Minet v Morgan* (1873) 8 LR Ch 361.

45 *Calcraft v Guest* [1898] 1 QB 759, 761-2 (Sir Nathaniel Lindley MR).

46 Terry Hutchinson, *Researching and Writing in Law* (Thomson, 3rd ed, 2010) 7.

47 Ibid 8 citing the 1982 Canadian study on the state of legal research and scholarship, the *Arthurs Report*.

Bentham was opposed to all rules of privilege, with the possible exceptions for Crown secrets and the confession to a Catholic priest.[48] Bentham and Wigmore's opposing views are explored and analysed. Wigmore provided the ultimate utilitarian treatise on client legal privilege and his influence is still evident in legal decisions.[49] Wigmore was a passionate believer in the scientific nature of judicial proof; the need to design precise evidentiary rules and a strong believer in the duty to testify. He advocated a narrow set of evidentiary rules that would not obstruct unnecessarily the 'investigation of truth' and the 'administration of justice'.[50] He established four criteria as prerequisites to the existence of any privilege protecting confidential communications, providing that only if all four conditions are present should a privilege be recognised[51] however, once recognised it should be absolute in character.[52]

Wigmore's empirical assumption is that privilege *causes* the client to engage in full and frank discussions, and that *but for* the privilege those discussions would not take place. Privilege therefore protects only those disclosures *necessary* to obtain informed legal advice, which might not have been made absent the privilege. Thus the privilege is valued as a means to an end.[53] The protection of confidential communication is not viewed as an end in itself but as a means of promoting candour in the client's communication, leading to better legal advice and/or representation.

The chapter examines the limited empirical research on whether client legal privilege encourages communications; concluding that there is insufficient evidence to support the assumption that *but for* the privilege the client would not freely and fully communicate with the legal advisor.

Chapter four acknowledges that there are two competing, but not mutually exclusive, rationales for the privilege doctrine, the utilitarian (instrumental) and the humanistic rights

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48 See Gerald J Postema, 'The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 *Georgia Law Review* 1393, 1410.

49 The United States Supreme Court, for example appealed to the authority of Wigmore's treatise in *Jaffe v Redmond*, 518 US 1 (1996); and *Swindler & Berlin v United States*, 524 US 399 (1998).

50 John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton, revised ed, 1961) vol 8, §2192, 73.

51 Ibid §2285, 527-8.

52 Ibid §2322, 631 (emphasis in original). Wigmore followed the English common law principle of 'once privileged, always privileged' in asserting 'that the privilege continues even after the *end of litigation* or other occasion for legal advice and even after the *death of the client*.'

53 Edward J Imwinkelreid, 'An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis' (1994) 73 *Nebraska Law Review* 511, 543.

theories (non-instrumental). As noted by Shuman 'though the approaches differ in theory, they do not show marked differences in practice.'[54]

Locke's theory of individualism embraces the principle that individuals have zones of privacy, in which they may conduct themselves according to their own intelligent judgement, as long as they do not adversely affect others. The humanistic rationale is that it is desirable to create certain privileges out of respect for personal rights such as privacy and autonomy. This rationale treats privileges as corollaries to the rights to privacy and personal autonomy.[55] The humanistic rationale rests on a moral judgement against compelling the revelations of certain confidential communications. The basis is a normative proposition about the extent to which the government legal system should respect the confidentiality of persons' communications.[56] The United States Supreme Court in *Jaffe* used a humanistic justification to extend privilege to client-psychotherapist communications, declaring that there are 'zones of privacy' protecting 'personal autonomy'[57] and that the protection of privacy was a legitimate `end in itself.'[58]

The enshrining of the right of privacy in a 'Bill of Rights' in western democracies is examined: Australia, is one of the few countries without a national Bill of Rights; New Zealand and its *Bill of Rights Act 1990;* the United Kingdom with its *Human Rights Act 1998* and its adherence to the European Union *Convention on Human Rights 1950;* and the United States with its Constitutional guarantees for the right of privacy, are all examined. Both the common law and the statutory recognition of the right are explored, with emphasis on the right to privacy for confidential communications in a professional-client setting.

Chapter five shifts the focus to the Australian setting; it applies a doctrinal analysis to pivotal cases in the Australian common law that have influenced the development of client legal privilege. Two main controversies are explored, first whether privilege as a rule of evidence is restricted to the curial context, or whether as a substantive rule it applies to all processes where there is a compulsion to disclose information. Cases examined in reference to this first issue are: *O'Reilly v Commissioner of State of Victoria*[59] wherein it was held that client legal privilege be confined to judicial proceedings and *Baker v Campbell*[60] which in a narrow 4:3

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54 Daniel W Shuman and Myron S Weiner, `The Privilege Study: an Empirical Examination of the Psychotherapist-Patient Privilege' (1982) 60 *North Carolina Law Review* 894, 906.

55 Imwinkelreid, above n 53, 543-4.

56 Edward J Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Wolters Kluwer, 2nd ed, 2009) 295.

57 *Jaffe v Redmond*, 51 F 3d 1346, 1356 (1995).

58 Ibid.

59 (1983) 153 CLR 1.

60 (1983) 153 CLR 52.

High Court decision,[61] less than a year later, reversed the *O'Reilly* decision and brought the Australian common law into line with that of other common law jurisdictions[62] holding that client legal privilege, as a substantive right, was to operate beyond the curial context, to the investigative context.

The second issue concerns the appropriate 'test of purpose' to be applied: *sole purpose* or *dominant purpose* test. *Grant v Dow*ns[63] established the *sole purpose test* for client legal privilege and twenty-three years later *Esso Australia Resources Limited v Commissioner of Taxation*[64] overruled *Grant v Downs* and established a dominant purpose test, bringing the Australian law again into alignment with other common law jurisdictions[65] and with the *Evidence Act 1995* (Cth). The *Evidence Act* highlights the increasing role of the legislature in governing client legal privilege and hence the importance of statutory interpretation in the operation of the privilege.

The *Evidence Act 1995* (Cth) reinforces both Murphy J's views in *Baker v Campbell* that the privilege, previously referred to as 'legal professional privilege' should be known as 'client legal privilege' and the *dominant purpose test* proposed by Barwick CJ in his dissenting decision in *Grant v Downs.* The *Evidence Act* was limited to the adducing of evidence in cases before the Federal Courts therefore, from 1995 until the 1999 High Court *Esso* decision there were differing rules applying to cases before the Federal Courts as opposed to the common law pre-trial procedures.[66]

The chapter addresses the question of whether client legal privilege is abrogated by legislation requiring the production of confidential information. In *Corporate Affairs Commission of New South Wales v Yuill*[67] the High Court overturned President Kirby's decision,[68] and held that relevant legislation[69] abrogated by necessary implication the

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61 Majority judgment: Murphy, Wilson, Deane, and Dawson JJ. Dissenting judges: Gibbs CJ, Manson and Brennan JJ.

62 Most influential was the New Zealand case of *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191. In England the House of Lords in *R v Derby Magistrates Court Ex parte B* [1996] AC 487 recognised client legal privilege as a substantive right applying to search and seizure powers.

63 (1976) 135 CLR 674.

64 (1999) 43 ATR 506.

65 *Waugh v British Railways Board* [1979] 2 All ER 1169, 1174 (Lord Wilberforce) the House of Lords, introduced the dominant purpose test for client legal privilege. In the New Zealand Court of Appeal case *Guardian Royal Exchange Assurance of New Zealand v Stuart* [1985] 1 NZLR 569, 605 (Richardson J) also introduced the dominant purpose test.

66 State and territory versions of the Uniform Evidence Act have extended the operation of client legal privilege to pre-trial procedures. See Chapter five of the thesis.

67 (1991) 172 CLR 319 (Majority judgment: Brennan, Dawson and Toohey JJ. Dissenting judges: Gaudron and McHugh JJ).

68 *Yuill v Corporate Affairs Commission of New South Wales* (1990) 20 NSWLR 386, 407.

69 The legislative provisions referred to involved sections 295, 299(2)(d) and 308 of Part VII of the Companies Code (NSW).

operation of client legal privilege in that context. The matter was finally resolved by the High Court in the unanimous decision in *Daniels Corporation International Pty Ltd v ACCC* [70] where the Court, adopting a human rights justification for the privilege, held that 'statutory provisions are not the be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect.'[71]

Chapter six, continues the emphasis on the Australian common law and examines the Commissioner of Taxation's extensive and coercive powers of access and investigation, provided for in sections 263 and 264 of the *Income Tax Assessment Act 1936 (Cth) (ITAA).* The doctrinal methodology is adopted to examine a number of high profile cases involving the relevant sections of the *ITAA* and the operation of client legal privilege in the tax arena. The chapter examines the history of the legislation and finds that it is little changed from its first incarnation in 1915. The scope and the operation of sections 263 and 264 are examined and the interaction of these powers with 'procedural fairness' and the doctrine of 'legitimate expectation' is also explored. Both sections 263 and 264 have been found by the courts to be subject to client legal privilege, making it one of the key brakes on the Commissioner's powers.

The differing justifications for client legal privilege and the privilege against self-incrimination are examined through key common law cases including *Environment Protection Authority v Caltex Refining Pty Ltd*[72] and *Perron Investments Pty Ltd v Deputy Commissioner of Taxation.*[73] Sections 8C and 8D of the *Taxation Administration Act 1953* (Cth), which create offences respectively, of failing to comply with a request to produce documents, and failing to comply with a request to give evidence, 'to the extent that the person is capable of doing so' are examined in the case law to determine whether the words can be interpreted as abrogating the privileges. The courts concluded that client legal privilege unlike the privilege against self-incrimination is not abrogated by either the *ITAA* or the *TAA.*

Chapter seven examines the curbs on the Commissioner's powers, concluding that client legal privilege is one of the key limitations to the Commissioner's powers. The chapter seeks to secure a deeper understanding of the law as a social phenomenon, concentrating on the political content of the law. The Commissioner as an agent of the Commonwealth is required

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70 (2002) 213 CLR 543 (Majority judgment: Gleeson CJ, Gaudron, Gummow and Hayne JJ). McHugh, Kirby and Callinan JJ produced separate judgments while agreeing to allow the appeal.

71 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 (Majority judgment: Gleeson CJ, Gaudron, Gummow and Hayne JJ).

72 (1992-3) 178 CLR 477.

73 (1988) 20 ATR 504.

to behave as a 'model litigant' in the conduct of litigation. Government agencies exercise power for the public good and must act as a moral exemplar.[74] The Commissioner's extensive powers create an imbalance with the taxpayer and in an effort to address this imbalance the Commissioner has voluntarily committed to a *Charter*[75] of taxpayers' rights and granted concessions to external accountants' confidential communications with their clients.[76] Australian Governments of both Labor and Liberal persuasions have shown a preference for allowing the Commissioner to exercise autonomy in implementing tax laws, rather than legislating 'taxpayers' rights' or imposing other controls over the agency.

The chapter also addresses the influence of the High Court under the leadership of Sir Garfield Barwick and its literalist interpretation of legislation, in frustrating the Commissioner's efforts to combat tax avoidance. The Commissioner had to seek the Government intervention with legislation to redress the situation; Part IVA of the *ITAA* was enacted in 1981 to this end. When Part IVA failed as the panacea, it was amended, most recently in 2013.[77] The chapter articulates the fundamental issues identified in the 2007 ALRC Report *Privilege in Perspective* which led to its recommendation that a 'New Zealand style' right of non-disclosure for tax accountants be introduced to 'level the playing field'.

Chapter eight turns the focus on attempts by other jurisdictions to 'level the playing field' between tax lawyers and tax accountants, and examines the legislation passed in the United States[78] and then in New Zealand,[79] with a view to determining whether similar approaches should be adopted in Australia. The chapter examines the political environment within which the legislation was made, especially in the United States, and the rivalry between the two professions. The United Kingdom has not enacted legislation to specifically protect confidential taxpayer -tax accountant communications, though from 1989[80] until the House of Lords decision in *Grenfell*,[81] the tax profession worked on the assumption that a taxpayer

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74 See *Australian Securities and Investments Commission v Meredith Hellicar* [2012] HCA 17, 84 (2 May 2012) (Heydon J).

75 Australian Tax Office, 'The Taxpayers Charter Your Rights, Your Obligations. How to be Heard.' (Charter Booklet) (ATO, 1997).

76 Australian Taxation Office, *Guidelines to Accessing Professional Accounting Advisors' Papers* (issued 16 November 1989, reviewed 30 June 2010) <https://www.ato.gov.au/General/Gen/Guidelines-to-accessing-professional-accounting-advisors--papers>.

77 *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth),

78 *Internal Revenue Service Restructuring and Reform Act 1998* Pub L No 105-206, 112 Stat 685 22 July 1998.

79 *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* (NZ).

80 *Taxes Management Act* 1970 (UK) amended in 1989 to include section 20B(9) - (11) as a result of the recommendations of *Report of the Committee on Enforcement Powers of the Revenue Department*, (Cmnd 8822 HMSO, 1983) presided over by Lord Keith of Kinkelrecommendations of 1983.

81 *Regina (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563.

privilege did exist. The taxpayer privilege provided for in each of the three jurisdictions reviewed have their shortcomings, nonetheless taxpayers do enjoy some protection of their confidential communications with their tax accountants - more than is currently the case for Australian taxpayers who have to rely on the Commissioner's voluntary concession to external accountant work papers. Lessons are drawn from each of the jurisdictions, lessons that if heeded in Australia could lead to an effective taxpayer privilege.

Chapter nine proposes a legislated taxpayer privilege for Australia. The thesis has adopted a doctrinal analysis to determine the existing law of client legal privilege in the tax context; considered the problems currently affecting the law and the policy underpinnings of the existing law, highlighting the flaws in the policy and then proposed law reform.[82] The chapter analyses the ALRC's 2007 Report[83] recommendation for a tax advice privilege, and the Government's belated response in the 2011 'Discussion Paper: Privilege in relation to Tax Advice;'[84] using these as a counterpoint to the proposed taxpayer privilege.

The chapter analyses both the Law Council of Australia and the Institute of Chartered Accountants of Australia's (ICAA) submissions to the ALRC 107 Report' and to the 2011 'Discussion Paper' to highlight the differences between the two opposing arguments and responds to the issues raised. The Commissioner's *Guidelines* are subjected to criticism by both groups, the Law Council's solution is to amend the Guidelines, while the ICAA concludes, and the thesis agrees, that the Guidelines are beyond repair. The ICAA points to the *Tax Agents Services Act 2009* (Cth) as evidence that tax accountants are highly regulated and required to respect the confidentiality of their clients, to countervail the perennial argument by the legal profession that accountants are not subject to regulation.

The rationale(s) for the taxpayer privilege are the same as those for client legal privilege in chapter three the thesis applied Wigmore's four criteria to the taxpayer-tax accountant relationship, arguing that a taxpayer privilege can be justified by the utilitarian rationale. From a rights perspective, the relationship between the taxpayer and the tax accountant, dealing as it does with highly sensitive financial information, is one worthy of protection. The taxpayers' right to privacy for their confidential communications with their tax practitioner is

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82 See Wing Hong Chui, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007).

83 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (December 2007).

84 Commonwealth of Australia, Department of Treasury, *Privilege in Relation to Tax Advice; Discussion Paper* (April 2011). <http://lowpollutionfuture.treasury.gov.au/documents/2005/PDF/DP_Privilege_in_relation_%20to_tax_advice.pdf> .

not an absolute right - it must be balanced with the ATO's right to information, in order for it to collect the taxes due. The balance can be struck by ensuring that the ATO has full and free access to documents that form the basis of tax return information; taxpayers in a self-assessment system face heavy penalties for failure to disclose relevant information on their returns, this provides ample incentive to comply with the tax law and disclose the relevant information. The self-assessment tax system is reliant on the voluntary compliance of taxpayers and the taxpayer faced with complex tax laws turns to tax practitioners, accountant or lawyer, for assistance.[85] The tax practitioner is in a position to influence the behaviour of the taxpayer, to ensure compliance and therefore a more effective tax system.

A taxpayer privilege can be based on the common law client legal privilege, so that as society changes, and the common law adapts to those changes, the taxpayer privilege will also accommodate the changes. A taxpayer privilege should provide an absolute and permanent privilege for taxpayers, so that they can confidently predict at the time of making the communication with their chosen tax practitioner, that the privilege will apply to their confidential communications, and that those privileged communications cannot be accessed by any counterparty.

The legislation for a taxpayer privilege will need to address two difficult issues: first it must protect tax accountants from accusations that 'they are practising law' when they are providing tax advice and/or representing clients in negotiations with the ATO. Second it must ensure that confidential communications between the taxpayer and their tax accountant retain their privileged status should the ATO exercise their discretion to escalate a civil procedure to the Courts, especially to the criminal courts.

In providing a historical, doctrinal and comparative basis for the introduction of a taxpayer privilege, this thesis for the first time draws together a comprehensive theoretical basis for the implementation of a taxpayer privilege and provides clear criteria that support its implementation.

[85] Australian Taxation Office, 'Compliance Program 2012–13.' Registered tax agents currently lodge more than 70 per cent of income tax returns for individuals and more than 90 per cent of business income tax returns. About 50 per cent of micro-enterprise activity statements are lodged by tax agents.

CHAPTER TWO

Historical Development of Client Legal Privilege

2.1 Introduction

The thesis firstly investigates the history of client legal privilege to discern the rationale(s) for the privilege and articulate the principles that underlie it. In doing so, it examines the literature that underpins the development of privilege, demonstrating the inconsistencies that make a clear theoretical analysis difficult. It will show that client legal privilege is a creature of the common law and that it therefore developed in a piecemeal fashion through a series of English equity and common law cases.

A necessary starting point for a discussion of privilege is the early theories of judicial decisions, which shaped its development from Elizabethan concepts. Later development was framed by the Equity/Common law approaches which saw the development of a number of critical criteria for the recognition of privilege. Given their subsequent importance, this chapter's focus is particularly on: the confidential nature of communications in seeking and obtaining legal advice and legal services; a lawyer client relationship based on confidentiality; the right of the client to the protection of confidential communications from compulsory disclosure and the ability to predict at the time of the communication, that communications will be protected by privilege. The privilege developed to be absolute in its application and permanent in its duration. These criteria continue on to this day and are important in the formulation of a taxpayer privilege.

The chapter is based on an examination of early English cases in order to understand and explain the original rationale(s) of client legal privilege, thus facilitating an understanding of how privilege operates; what communications it protects from compulsory disclosure; how the privilege affects the administration of justice and the limitations to privilege. The chapter also takes account of the countervailing argument to client legal privilege, that in the interests of a fair trial, litigation should be conducted on the footing that all relevant evidence is available to the court.

This chapter is descriptive and historical in nature. Although the thesis is based in a doctrinal research methodology, the early chapters recognise that the law and tax are social constructs and therefore provides a wider non-doctrinal historical and theoretical underpinning to the work.

Client legal privilege is traced to the reign of Elizabeth 1 in the 16th century; during this period the legal profession was the only profession to provide legal advice, and the privilege

was appropriately only recognised in regards to the legal profession. The development of the crime/fraud exception to privilege is traced to illustrate the confused state of precedent that prevailed in the common law from the 1743 decision in *Annesley v Anglesea*[1] through to the 1884 decision in *Regina v Cox and Railton*.[2] The history is framed by theme and is therefore not chronological. However, most criteria developed in their current form during the 19th century.

Later chapters will explore whether the values or rationales identified in these early cases are relevant or present in the taxpayer-tax practitioner relationship.

2.2 Theories of judicial decisions

Common law judges had generally sided with the parliament during the constitutional conflict in the 1600s which had led to the Civil War and ultimately to the Glorious Revolution of 1689 and the 1689 *Bill of Rights.* The *Bill* acknowledged the sovereignty of Parliament. Judges had to reconsider their position especially in the light of the 1610 decision by Sir Edward Coke in the Bontham case.[3] Sir Edward Coke argued in Bontham that judicial reasoning of the common law was so potent that it was above the law made by Acts of Parliament.[4]

The view adopted in the 17th century was that judges do not make law rather, 'the judge merely *finds* pre-existing law; then he *declares* what he finds.'[5] This declaratory theory of judicial decisions, as espoused by the famous 17th century judge, Sir Matthew Hale, is that:

> [T]he decisions of the courts do… not make a law properly so called, (for that only the King and Parliament can do); yet they have great weight and authority in expounding, declaring and publishing what the law of this Kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than an opinion of a many private persons, as such, whatsoever.'[6]

This theory that precedents serve to illustrate the principles of laws enacted by Parliament, served to protect judges from accusations that they were making the law, or that the law did not exist before they used it to decide a particular case.[7] This view was also endorsed by

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1 17 How St Tr 1139.

2 14 QBD 153.

3 *Thomas Botham v College of Physicians* (1610) 8 Co Rep 107.

4 8 Co Rep 107, 118.

5 Beryl Harold Levy, 'Realist Jurisprudence and Prospective Overruling' (1960) 109(1) *University of Pennsylvania Law Review* 1, 1 (emphasis in original).

6 Sir Matthew Hale, *History of the Common* Law, (Henry Butterworth, 1820) 67.

7 See *Jones v Randall* (1774) 98 ER 954 (Lord Mansfield) 'The law of England would be a strange science if indeed it were decided upon precedents only. Precedents serve to illustrate principles and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them.'

Francis Bacon and William Blackstone amongst other famous 17th and 18th century judges, and continued on by Lord Mansfield. Blackstone described the common law as the 'chief cornerstone of the laws of England, which is generally immemorial custom …, from time to time declared in the decisions of the courts of justice'[8] Lord Devlin is another staunch opponent of judicial law making or judicial creativity and vigorously supports the declaratory theory. He asserts that 'judicial lawmaking is unacceptable because it is undemocratic.'[9]

> The Judges are the Keepers of the law and the qualities they need for that task are not those of creative lawmakers. The creative lawmaker is the squire or the social reformer and the quality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it.[10]

Sir Rupert Cross noted that reports of cases were unreliable and judges were often acting on their memory of what had occurred previously, thus the present system of precedent could not have existed before the 1850s.[11]

A distinction is drawn between the common law and the rules of equity laid down by the Court of Chancery,[12] which owe their authority to the fact that they are judge made, as noted by Sir George Jessel.

> …it must not be forgotten that the rules of Courts of Equity are not, like the rules of Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time - altered, improved, and refined from time to time. In many cases know the names of the chancellors who invented them. No doubt they were invented for the purpose of securing a better administration of justice, but still they were invented.[13]

The opposing view, of judicial creativity or positivist theory, is that judges do make the law. This view was espoused by Jeremy Bentham, John Austin, John Salmon, Oliver Wendell Holmes, Lord Denning and Lord Reid amongst others. The positivist asserted that the common law existed because it was the product of judicial will - laid down by judges, not discovered. Jeremy Bentham contemptuously asked who has made the common law if not judges.

> Do you know how they [judges] make it [the common law]? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me. They won't tell a man beforehand what it is he *should not do* – they won't so much as allow

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8 William Blackstone, *Commentaries on the Law of England* (1765) reprinted with introduction by Stanley N Katz, (University of Chicago Press, 1979) 66.

9 Patrick Devlin, 'Judges as Lawmakers', (1976) 39(1) *Modern Law Review* 1, 10.

10 Ibid 16.

11 See Rupert Cross and J W Harris, '*Precedent in English Law*' (4th ed Clarendon Press, 1991) 24-25.

12 The Court of Chancery was established long after the common law courts, in the reign of Henry the V11 which started in 1485.

13 *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 Ch D 696, 710.

> of his being told: they lie by till he had done something which they say he should not *have done,* and then they hand him for it. What way, then, has any man of coming at his dog-law?[14]

Bentham wanted the common law codified so that it would be confirmed by the legislature. Justice Oliver Wendell Holmes was also scathing of the declaratory theory, and held that legal doctrine doesn't count for much.

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[15]

Lord Reid compared the declaratory theory to fairy tales.

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour …But we do not believe in fairy tales any more.[16]

The declaratory theory had been consigned to history however, the debate over judicial activism and creativity is still relevant today and of importance to this thesis. It will be taken up again in later chapters.

Privilege is the product of the common law and the common law within the positivist theory, is the subject of development by judges, especially appellate judges. It is a living system of law,[17] reacting to new events and new ideas that make it capable of providing a system of practical justice relevant to the times in which the citizens live. A judge in deciding a case does so, on the basis of what he understands the law to be, from the applicable statutes, if any, and from precedents of previous decisions. The law is thus developed, usually through modest development of existing principle and so can take its place as a congruent part of the common law as a whole; in what Lord Goff has termed the 'mosaic' of common law. The precedent is the 'cement of legal principle' providing the necessary stability.[18] However, as illustrated by the judgments of Lord Brougham, in championing the cause of privilege, there are occasions where the judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle.

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14 John Bowring (ed), *The Works of Jeremy Bentham,* (William Tait, 1843) vol V, 235.

15 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 469.

16 Lord Reid, 'The Judge as Law Maker' (1972-3) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

17 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 377[G] (Lord Goff).

18 See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378[C] (Lord Goff).

Lord Goff's view of precedent has been opposed by Karl Llewellyn and Julius Stone:[19] they both noted that that there were conflicting rules for interpreting both case and statute law. Llewellyn observed that for almost every canon of construction, there exists an opposing canon against it.[20]

2.3 Privilege was the right of the Elizabethan 'gentlemen of honour'

The privilege[21] developed slowly and haltingly, through a number of leading cases, from the right of the lawyer to a right that belonged to the client and could only be waived by the client. Lord Brougham in the Court of Chancery championed this development. Client legal privilege was deemed paramount, and as such, it trumped the countervailing policy that the courts should have access to all the available evidence. A word of caution from Professor Harzard is appropriate.

> There may be a sufficient justification for the privilege; indeed the verdict of our legal history is to that effect. But no argument of justification should ignore the fact that the attorney-client privilege, as far as it goes, is not only a principle of privacy, but also a device for cover-ups. That, of course is what makes contemplation of it both interesting and troubling.[22].

The history of client legal privilege in English law can be traced to the reign of Elizabeth 1 in the 16th century when adversarial trial procedures were in their formative stages.[23] The privilege initially belonged to gentlemen, and the courts recognised the right of gentlemen not to violate a pledge of secrecy. The class of gentlemen included barristers[24] but not advocates, solicitors, businessmen or scriveners as they were more commonly known. Elizabethan confidentiality existed to protect the honour and integrity of the gentleman,[25] the holder of the confidential information and the secrets entrusted to them by their clients.[26] The privilege belonged to the barrister as a gentleman, it was for the barrister to decide whether to protect

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19 Julius Stone has influenced a number of activist judges on the Australian High Court including Justice Michael Kirby.

20 Karl N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Constructed' (1949-1950) 3 *Vanderbilt Law Review* 395, 401-406.

21 The word 'privilege' comes from the Latin *private lex*, a prerogative given to a person or to a class of persons.

22 Geoffrey C Hazard, 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1062.

23 The statute of 1562 *Act for Punishment of Such as Shall Procure or Commit Wilful Perjury,* 5 Eliz I Ch 9, compelled witnesses to attend and testify. The practice of reporting case was not widely practiced till 1557.

24 Max Radin, 'The Privilege of Confidential Communication between Lawyer and Client' (1927-1928) 16 *California Law Review* 487, 487: 'In France they constituted a *noblesse de la robe*, only very little below the formal nobility and constantly seeping into it.'

25 The *Sex Disqualification (Removal) Act 1919*, 9 & 10 Geo 5, c 71, abolished the prohibition on women becoming barristers; it also enabled women to become jurors and to enter the civil service. Ivy Williams was the first woman to be called to the English bar in 1922.

26 *Annesley v Anglesea* (1743) St Tr 1139.

the communication by claiming privilege or to decline, it as he saw fit.[27] The barrister as a presenter of evidence and argument to the court was considered not merely an 'officer' of the court, but a member of it.[28] The advocate, solicitor, or scrivener did not have such high standing; they were men of business viewed as servants of the family whose business and affairs they managed. The solicitor prepared the file for the client's case, drafting the pleadings, and making arrangements on behalf of the client, for the assistance of the barrister to present the case to court. The scriveners 'enscribed' documents and may also have given advice on the side.[29]

Scrivener Notaries, were in a class of their own, they had the role of writing up legal documents. They were required to undertake a two year apprenticeship, be fluent in one or more foreign languages, and be familiar with the principles and practice of foreign laws.[30] They enjoyed a form of privilege, as Lord Sumption noted.

> From the origins of the privilege in the late eighteenth century to the present day, the case law refers to it as attaching to the advice of lawyers, i.e. barristers, solicitors and attorneys and, in the very early days of the doctrine, the scriveners who drew up wills, charters and other legal instruments. In most of the early cases lawyers were identified in contradistinction not to other sources of professional legal advice, but to professionals whose advice was not legal at all, such as priests or doctors. Once this distinction became too well understood to require repetition, the references in the cases to the advice of lawyers persisted but simply reflected the assumption that lawyers were the only source of skilled professional legal advice. [31]

Accountants in this period would have been considered simply as scriveners.[32] There was an old and powerful sentiment that servants must keep the secrets of the master. The Roman

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27 James A Gardner, 'A Re-evaluation of the Attorney-Client Privilege' (1963) 8 (3) *Villanova Law Review* 279, 289.

28 Hazard, above n 22, 1071. This is an argument that is still put forward by the legal profession to restrict client legal privilege to the legal profession.

29 Ibid 1070.

30 These scriveners were governed in London by the Worship Company of Scriveners, a Company founded in 1373 and granted its Royal Charter by King James 1 in 1617. The status of the Scrivener Notary may derive more from the Notary role than the Scrivener, as the title suggests that they were Notaries Public, a recognized legal office in civil law systems and used to notarise or authenticate documents to be used in foreign jurisdiction in particular.

31 *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 [121] (23 January 2013). Lord Clarke in the same case [142] repeats the statement. 'The privilege also applied historically to scriveners.'

32 Maria Italia, 'Gentleman or Scrivener: History and Relevance of Client Legal Privilege to Tax Advisors" (2010) 6 (1) *International Review of Business Research Papers* 391. See also Stephen R Walker, 'The Genesis of Professional Organization in Scotland: a Contextual Analysis' (1995) 20(4) *Accounting, Organizations and Society* 285. The first modern organization of professional accountants took place in Scotland in 1853. See also David Sugarman, '*Who colonised whom? Historical Reflections on the Intersection between Law, Lawyers and Accountants in England'* in Yves Dezalay and David Sugarman (eds), *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets* (Routledge, 1995) 227 'The rise in the number of accountants and the formation of a new profession and a professional association came about in the 1800s as solicitors professionalized themselves. They modelled on barristers. They ejected those doing book keeping from the profession as not being gentlemen'.

precedent that the servant could not testify against his master is believed to have influenced the principle of confidentiality.

> At Rome the public policy which supported the privilege was not directed against self-incrimination, but against the corruption of the family – or quasi-family – relations which would ensue by making uncertain and suspicious what was assumed to demand the fullest confidence, *uberrima fides.* The policy which sought to conserve *uberrima fides* was consciously deemed superior to that which sought the correct settlement of controversies or the punishment of offenders, with the one exception of treason.[33]

The servant was part of the family and the relationship of all members of the family was based on mutual fidelity. The theory seems to have been that if a member of a family testified on behalf of another they could not be believed because they had a strong motive for misstatement.[34] Advocates from very ancient times in Rome, could not be called as witnesses against their clients while the case was in progress and in the fourth century both advocates and attorneys were, by imperial mandate, made incompetent as witnesses in the case in which they acted.[35] That the Roman precedent was the source of the English rule cannot be proved.[36] It may be that the oath and the honour of the attorney and the operation of the adversarial legal system were sufficient to explain the privilege.[37]

There was much confusion within the common law, over whether legal advice privilege or litigation privilege, formed the initial basis of privilege. The courts tended to refer to 'professional privilege' without necessarily distinguishing between the two limbs of privilege. Lord Carswell in *Three Rivers Council v Bank of England*[38] undertook anextensive investigation of the historical development of privilege, and found litigation privilege to be an extension of the legal advice privilege based on the confidential communications between lawyer and client.

2.4 Privilege as part of the public policy against self-incrimination

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33 Radin, above n 24, 491.

34 Ibid 488. See also David W Louisell, 'Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today' (1956) 31 *Tulane Law Review* 101, 101 'In European legal thought emphasis is placed upon the moral importance of refraining from coercion of witnesses in matters of conscience; such coercion, in the face of conflicting concepts of loyalty and duty, is considered to put witnesses in an intolerable position, resulting as to some in the likelihood of perjury.'

35 Radin, above n 24, 488.

36 Ibid 489, and 492: 'The real fact is that, whether we admit it or not, the Roman and medieval attitudes are very much in our bones. We, too, think that the relationships based on mutual fidelity are valuable constituents of our society and we do not relish the idea of disturbing them even to aid the process of formal justice.'

37 *Trial of James Hill* (1977) 20 How St Tr 1317, 1362-3 'the law knows nothing of that point of honour'.

38 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48 (11 November 2004); [2005] 1 AC 610.

Roman law did not always distinguish between competence, compellability and privilege. The distinction was an English one.[39] Unlike Roman law, client legal privilege at common law and in equity was not directly related to any supposed lack of credibility of the witness,[40] but rather to the abhorrence of self-incrimination. The public policy that all persons ought to be able to fully and freely tell their lawyer all the facts about the case without fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties, developed slowly, and it developed as part of the public policy against self-incrimination. Without the privilege the individual's right against self-incrimination could only be attained by relinquishing the right to communicate confidentially with counsel, and the individual's right to retain counsel could not be exercised without risking the surrender of the right against self-incrimination.[41] In the words of Max Radin:

> On the criminal side there is besides, a healthy and commendable repugnance to self-incrimination. ... We should not like to convict a man solely on what he has himself been trapped into admitting, and when he speaks by the mouth of an advocate, our feeling is quite the same.[42]

The courts developed the theory to prevent the attorney from being put in the anomalous position of having to be witness, as well as advocate for their clients, and given that parties at this time were not permitted to testify in court, it is not unreasonable to assume that the court would be sceptical about introducing the hearsay testimony of a party via the advocate.[43] The privilege also serves to discourage litigation; the legal advisers with all the facts placed unreservedly before them are better able to caution the client against frivolous suits, and to discover when and how to avoid litigation.

2.5 The two systems: equity and common law

The equity courts were an early adaptation of the Roman or civil courts, with their emphasis on 'doing justice' according to the King's conscience. The Lord Chancellor as the 'keeper of the King's conscience'[44] exercised vast discretion in deciding cases. He could give or withhold relief, not restricted by precedent, but rather on the basis of what he viewed as

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39 Gardner, above n 28, 290 citing: Sir William Searle Holdsworth, *A History of English Law* (Sweet and Maxwell, 3rd ed, 1944) vol 10, 187 'English law developed on native lines.'

40 C A Morrison, 'Some Features of the Roman and the English Law of Evidence' (1956) 33 *Tulane Law Review* 577, 585.

41 Michel Rosenfeld, 'The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations' (1982) 33 *Hastings Law Journal* 495, 511.

42 Radin, above n 24, 490.

43 Lloyd B Snyder, 'Is Attorney-Client Confidentiality Necessary?' (2002) 15 *Georgetown Journal of Legal Ethics* 477, 481.

44 Sarah Worthington, *Equity* (Oxford University Press, 2nd ed, 2006) 8, the early Chancellors were often clergymen or nobles, acting as the King's confessor and thereby literally as keeper of the King's conscience. 'Equity' means fair or just; its legal meaning is 'rules developed to mitigate the severity of the common law'.

morally right. He could order a party to disclose documents, he could issue subpoenas compelling the attendance of the defendant or witnesses to court and he could examine them on oath. Chancery exercised testimonial compulsion and imposed upon witnesses and parties the duty to testify some two centuries before the common law.

The common law of evidence developed slowly; with a slow accumulation of rulings by judges and a series of isolated responses to different problems, at different times, comprising of highly fragmented doctrines, exceptions and technicalities, which were not preserved in print, but rather placed into practice and forming the traditions of the trial courts. The reporting of cases was not widely practiced until 1557, and even when cases were reported the cases did not reveal any thought on the rationale for privilege.[45]

In the common law courts the testimony of witnesses was the exception; early juries functioned as sources of information, rather than evaluators of evidence.[46] The adversarial mode of trial was developed piecemeal and with numerous exceptions to the rules, including the rules for the compulsory production of testimony. The adversarial nature of trials was influenced by John Locke's theory of individualism - that everyone serves the common good by pursuing their self-interest; and Adam Smith's economic theory in which competition is the `invisible hand' that regulates self-interest; themes that will be developed in the next chapter.

The statute of 1562[47] compelled witnesses to attend court and testify; thus initiating the process of trial in open court. By the middle of the 17th century the functions of witnesses and jury were entirely distinct.[48] By the 18th century the 'best evidence' doctrine had been firmly established and then dominated the law for nearly a century. The courts started to revise, reason upon, and draw principles out of the mass of 'precedents' that had been generated. In 1898 the abolition of the rule that an accused was not a competent witness in his own trial was accompanied by an express removal of the privilege against self-incrimination if the accused chose to give evidence.[49] The prosecution was precluded from commenting upon the accused exercise at trial of the right to remain silent.[50] The trial system was adversarial and

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45 Ho Hock Lai, 'History and Judicial Theories of Legal Professional Privilege (1995) *Singapore Journal of Legal Studies* 558, 560. Furthermore, as noted by Lord Reid, 'The Judge as Law Maker' (1972-3) 12 *Journal of the Society of Public Teachers of Law* 22, 24 'Generally we only have an abstract of the written pleadings and the result.'

46 Holdsworth, above n 39, 185.

47 *Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury 1562*, 5 Eliz 1 ch9 §12 'penalty and civil action imposed on those who refused to attend after service of process and tender expenses.'

48 Holdsworth, above n 39, 182-3.

49 *Criminal Evidence Act 1898* (UK), section 1(e).

50 Ibid.

the prosecution had the onus of proof. From the 17th century onwards the common law courts and the Chancery recognised the privilege against self-incrimination, and that 'no one is obliged to produce/accuse himself.'[51]

2.6 Client legal privilege for the trio of: counsel, solicitor, and attorney

Client legal privilege as a rule of evidence came to the fore with the universal duty to testify and the imposition of compulsory process to secure the testimony of witnesses in an open court, before a jury charged with evaluating the evidence. The judicial search for truth could no longer be obstructed by voluntary pledges of secrecy. However the courts decided that communications with a legal adviser formed a *special* category because of the importance of obtaining legal advice. Client legal privilege developed to protect confidential communications between a client and legal adviser from compelled disclosure. A legal adviser could not be called upon to divulge the secrets of the client.

Berd v Lovelace[52] followed on the heels of the 1562 statute, and was the first reported case to decide that all competent persons could be compelled to testify, with the exception of the solicitor, who could not be compelled to testify on matters concerning the suit. The report is very short and is quoted in full:

> Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed the Master of the Rolls, it is ordered that he said Thomas Hawtry shall not be compelled to be deposed, touching the same, and that he shall be in no danger of any contempt, touching the not executing of the said process.[53]

Dennis v Codrington[54] applied the same privilege to counsel, ordering that he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he was of counsel. *Wilson v Rastall*[55] confined the privilege to the trio of counsel, solicitor and attorney; furthermore as noted by Lord Sumption, the case established three key principles in the operation of the privilege.

> In *Wilson v Rastall* (1792) 4 TR 753, it was established (i) that the privilege was a right of the client, not of the lawyer, (ii) that the lawyers was therefore precluded from giving evidence of privileged matters even if he was willing to, and (iii) that the privilege was not confined to the litigation in which disclosure was sought nor to litigation in which the client was a party, but extended to any litigation in which it was sought to compel the production of documents or the appearance of a witness.[56]

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51 The Latin maxim 'nemo tenetur se ipsum prodere/accusare'.

52 (1577) Cary 62; 21 ER 33.

53 Ibid. Quoted in full in Holdsworth, above n 39, 47.

54 Ibid.

55 (1792) 4 Term Rep 753.

56 *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, [115] (23 January 2013).

Atterbury v Hawkins[57] dismissed a claim for privilege in the case of a scrivener stating 'he is not a civil confessor as a lawyer is nor to be so treated, but rather a person suspected in law as apt to make unlawful concealments.'[58] A claim for privilege needs more than trust and confidence; it also needed to be based on a lawyer acting in his professional capacity.[59] That the claim to privilege should be restricted to legal professionals was questioned by Lord Brougham in *Greenough v Gaskell.*[60] However, it should be noted that during this period the legal adviser was compared to professions not offering legal advice, but rather concerned with confidential personal or medical advice.

> The foundation of this rule is not difficult to discover. It was not (as has sometimes been said) on account of any particular importance which the law attributed to the business of the legal professors, or of any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others and especially to medical advisers.[61]

Spark v Middleton[62] spelt out the parameters of what questions counsel is required to answer:

> *…he should only reveal such things as he either knew before he was Counsel, or that came to his knowledge since by other persons* ... and the Court only put the question. Whether he knew from his own knowledge[63]

The parameters of privilege were further confined in *Preston v Carr*[64] wherein a plaintiff demanded production from the defendant of letters written to his solicitors; letters that set out the facts of the case with a view to their being presented to counsel for an opinion. The Court held that the letters had to be produced, although counsel's opinion in response did not. The reasoning of the Court was that when a communication to an attorney can be proved by some means other than the attorney's testimony, as for example in this case by pre-existing documents, the privilege does not apply.

2.6.1 The lawyer as the client's alter ego

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57 (1678) 2 Chan Cas 242.

58 Ibid.

59 *Trials of the Duchess of Kingston* (1776) 20 How St Tr 355, 386-91 established that there was no general privilege over confidential communications. A surgeon in that case was compelled to give evidence of matters communicated to him confidentially and professionally; and as a personal friend, Lord Barrington, was also compelled to give evidence in breach of confidence.

60 (1833) 1 My & K 88; 39 ER 618.

61 Ibid 103.

62 (1664) 1 Keb 505; 83 ER 1079.

63 Ibid 1079 (emphasis added). These parameters later took a firmer form and continue to apply today. See also *Bulstrod v Letchmere* (1676) 22 ER 1019 'the defendant, being a Counsellor at law shall not be bound to answer concerning any writings which he hath seen, nor for any thing which he knoweth in the cause as Counsellor'

64 (1826) 1 Y & J 175; 148 ER 634.This is a troubling case, if viewed from our current understanding of the operation of privilege.

Annesley v Anglesea[65] has been interpreted as a rationalisation of privilege rooted in the idea that the lawyer is the client's alter-ego.[66] The alter ego theory is not precisely propounded in the case but traces of it can be found, mixed with other rationales, in both the arguments and the judgement.[67] The decision resulted in a refusal to apply the privilege, though the grounds are not entirely clear. However the alter-ego theory continues to find favour.[68] Privilege under this theory, is a reflection of the unification of the legal personalities of the client and the lawyer; espousing the idea that the client's legal position should not be prejudiced by the engagement of legal assistance. Lord Chief, Baron Bowes, based his final conclusion on the fact that the communication in question was not 'necessary' to securing the attorney's assistance, however he did emphasise the role of the lawyer as the client's trustee.

> The policy of the law in protecting secrets disclosed by the client to his attorney [is] in favour of his client, and principally for his service and ... the attorney is *loco* of the client and therefore his trustee.[69]

The attorney stands in place of the client, who cannot be examined as witness against himself,[70] thus evidence cannot be obtained from the client indirectly through the lawyer.

> *Ponit in loco suo attornatum*, the attorney is as himself. And it is contrary to the rules of natural justice and equity that any man should betray himself. ... [The attorney] is in the place of the client, and as he entrust him with secrets, he is not to disclose them without his leave...[71]

2.7 Lord Brougham's championing of privilege

Early cases though not explicit about the rationale for privilege alternatively based the privilege on the honour of the counsellor, a view expressed more often in equity, or on the need to protect the client's secrets; a view expressed in common law. This common law 'utilitarian' view was sometimes expressed as the need to protect the client's secrets, for their exposure would be a hindrance to all society, commerce and conversation.[72] The utilitarian rationale will be explored in greater detail in chapter three.

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65 (1743) 17 How St Tr 1139. The issue of privilege was addressed by a total of eleven counsels, and the trial lasted fifteen days before the Court of Exchequer in Ireland.

66 Lai, above n 45, 568.

67 Ibid.

68 See for example *Waugh v British Railways Board* [1980] AC 521, 536 'The system of forensic procedure with legal professional advice and representation demands that communications between lawyer and client should be confidential, since the lawyer is for the purpose of litigation merely the client's alter ego.' See also *O'Reilly v Commissioner of the State Bank of Victoria* (1982) 13 ATR 706, where it was held that the alter ego principle applies to notices issued under section 264 of the *Income Tax Assessment Act 1936*(Cth).

69 (1743) 17 How St Tr 1139, 1239.

70 The parties to a case could not themselves give evidence at a common law trial until the middle of the 19th century.

71 (1743) 17 How St Tr 1139, 1225-26.

72 *Anonymus* (1694) LPR 556, referred to in Charles Viner, *General Abridgment of Law and Equity* (2nd ed, London 1791) vol XII, 37-38.

The rule of privilege was well established by the end of the 18th century however the rationale was not fully developed until two cases decided by Lord Brougham LC at the beginning of 1833; namely *Bolton v Corporation of Liverpool*[73] and *Greenough v Gaskell.*[74] 'These two cases heard by Lord Brougham, in the Court of Chancery, expanded the scope of the attorney-client privilege; provided the fundamental grounds in policy for the privilege and provided for its expansion'.[75] A number of criteria are discussed separately below.

The rationale espoused for the privilege was that it promotes communication between the client and counsel, which furthers the interests of justice in both the context of the client seeking legal advice and in connection with litigation.[76] In *Bolton* Lord Brougham justified privilege on the basis of the 'necessity' of legal consultation; arguing that the privilege secures the client's right to prohibit the lawyer from revealing confidential communications to the prejudice of the client, and thus it induces candour from the client and facilitates the conduct of legal proceedings. In the words of Lord Brougham, the importance of uninhibited communication between the client and counsel is deemed paramount.

> If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in Courts of Justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal adviser. But without such communication no person can safely come into Court, either to obtain redress or to defend himself.[77]

In *Greenough* Lord Brougham cited his prior decision in *Bolton,* and further elaborated the legal theory that favoured a more expansive treatment of the privilege; he set out the *fons et origo*[78] of client legal privilege.

> To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions that much wider a violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of.
> ...it is out of the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial

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73 (1833) 1 My & K 88; 39 ER 614.

74 (1833) 1 My & K 98; 68 ER 558.

75 Lord Sumption in *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, [116] (23 January 2013) refers to *Greenough v Gaskell* (1833) 1 My & K 88, 39 ER 618 as 'a judgment which is generally regarded as the foundation of the modern law.'

76 See Christopher T Hines, 'Returning to First Principles of Privilege Law: Focusing on the Facts in Internal Corporate Investigations.' (2011) 60 *Kansas Law Review* 33, 43.

77 (1833) 1 My & K 88, 94-5; 39 ER 614.

78 This term was used by Lord Carswell in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, 90 (11 November 2004); [2005] 1 AC 610.

> proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous.[79]

Lord Brougham's conclusions were followed in the 19th century, in a number of subsequent significant cases.[80] However, he was not without his critics, his pronouncements in both these cases was seen to fly in face of precedents and to ignore *Annesley v Anglesea*[81] altogether, by not citing it at all and extending the privilege to communications and documents that previously would not have attracted the protection of privilege.[82] Moreover his decisions made it clear that privilege applied to legal advice per se, and that it was not necessary that the communications be connected to litigation in progress, or in contemplation. Prior to Lord Brougham's pronouncements there was much confusion as to whether confidential communications unrelated to litigation could attract privilege.

Hazard notes that *Annesley* was a case in which the rule of privilege was nearly wiped out.[83] The outcome of that case was the attorney was required to testify.[84] The privilege was not upheld; indeed Lord Chief Baron Bowes expressed a reluctance to fix the boundaries of privilege, stating a preference to determine such cases upon their own circumstances.[85]

> Their dispute focused on whether a more precise definition of the privilege would include or exclude matters of the sort[86] that Giffard (the attorney) had learned. The analysis, both because they reveal how unformed the rule of privilege was at the time and because they anticipate substantially everything that has since been said on the subject.[87]

The plaintiff in seeking to obtain the evidence of the attorney for the defence presented three key arguments. First, in order for privilege to attach to information from the attorney it

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79 (1833) 1 My & K 98, 101-3; 68 ER 558.

80 See *Herring v Clobery* (1842) 1 Ph 91, 94-5 Lord Lyndhurst LC; *Holmes v Baddeley (1844) 1 Ph 476, 480-1* Lord Lyndhurst LC*; Carpmael v Powis* (1846) 1 Ph 687, 692 Lord Lyndhurst LC; *Pearse v Pearse* (1846) 1 De G & Sm 12 Sir Knight Bruce V-C; and *Lawrence v Campbell* (1859) 4 Drew 485, 490 Kindersley V-C.

81 (1743) 17 How St Tr 1139.

82 Hazard, above n 22, 1084 '*Bolton and Greenough* saw a broad range of communications held immune from discovery.'

83 Ibid 1073.

84 Giffard (the attorney) was willing to testify, however the court declined to treat that as determinative and instead examined the basis of the defendant's objections, concluding that it would allow the attorney's evidence. *Annesley v Anglesea*, (1743) 17 How St Tr 1139, 1239-42.

85 *Annesley v Anglesea,* (1743) 17 How St Tr 1139, 1239. Lord Chief Baron Bowes concluded that the communication from the client was not 'necessary' to securing the attorney's assistance. A formula that signifies that the court had no firm idea of what the general rule for privilege in these circumstances should be.

86 Giffard had in the course of a conversation with the defendant (Richard Earl of Anglesea, and brother of Arthur of Altham, and heir to Arthur's inheritance should Arthur die childless) learned the defendant knew that James Annesley was Arthur's son (therefore entitled to the inheritance) and that he would 'give £10,000 to have him hanged.' *Annesley v Anglesea*, (1743) 17 How St Tr 1139, 1141.

87 Hazard, above n 22, 1075.

should be 'directly' related to the pending case. Second, that the privilege should be limited to the attorney's evidence that is 'essentially' related to the matter upon which the consultation was based. And third, the privilege should not shield communications revealing the client's intention to commit a wrong. Traces of all three arguments can be found in the current doctrine of client legal privilege: the privilege should extend to obtaining advice and retaining an advocate; the privilege attaches to communications concerning matters pertinent to the client-legal advisor relationship; and the crime/fraud exception applies to the rule of privilege.

2.8 The dilemma of privilege: betrayal of confidence versus suppression of truth

Lord Brougham's 1833 decisions have been severely criticised by jurist Hazard, describing in 1978 Brougham's decision as a reformulation of privilege that substantially departed from precedent and ignored the dilemma of privilege.[88]

> But it ignores the dilemma: the definition of the privilege will express a value choice between protection of privacy and the discovery of truth and the choice of either involves the acceptance of an evil – betrayal of confidence or suppression of truth.[89]

This concern was reflected at the time and Lord Langdale expressed his objections to Lord Brougham's decisions, in a number of his own judgments[90] in the decade after *Bolton* and *Greenough.* One of Lord Langdale's main objections, was that the privilege contradicts the very purpose of discovery, which is to allow a party to 'sift the conscience'[91] of his adversary, in order to get to the truth by extracting from the adversary 'all relevant facts within [his] knowledge ... and ... all the documents by which those facts may be manifest.'[92] *Flight v Robinson*[93] was one case that attempted to reassert the philosophy of disclosure established in earlier decisions, decisions from which Lord Brougham had parted ways. The court observed the contradiction between the principle of confidentiality upon which privilege is based and the principle of truth-disclosure that is the raison d'être of an equitable bill of discovery.

> The arguments [for the privilege] ... have assumed, that concealment of the truth was, under the plausible names of protection or privilege, an object which it was particularly desirable to secure,

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88 Ibid 1084: 'As a demonstration of manipulation of precedent, Brougham's performance is unsurpassed. As a resumé of existing law, it bore practically no resemblance to reality.' (Citations omitted).

89 Ibid 1085.

90 See *Storey v Lord John Georg Lennox* (1836) 1 Keen 341, 349-50; *Nias v Northern and Eastern Railway Co* (1838) 2 Keen 76; *Greenlaw v King* (1838) 1 Beav 137, 143-4; Flight *v Robinson* (1844) 8 Beav 22, 35-6; 50 ER 9.

91 *Nias v Northern and Eastern Railway Co* (1838) 2 Keen 76, 79; 40 ER 963.

92 *Flight v Robinson* (1844) 8 Beav 22, 33-4; 50 ER 9. See also *Storey v Lord John Georg Lennox* (1836) 1 Keen 341.

93 (1844) 8 Beav 22; 50 ER 9.

> forgetting ... that the principle upon which this Court has always acted, is to promote and compel the disclosure of the whole truth relevant to the matters in question.[94]

Eventually in 1846, Lord Langdale publicly conceded defeat, albeit reluctantly.[95] In *Reece v Tyre*[96] Lord Langdale noted that the significance attached to the doctrine of privilege was such that it overrode the requirement of full disclosure in the search for truth.

> The unrestricted communication between parties and their professional advisers, has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained.[97]

2.9 'Once privileged, always privileged'

The need for candour by the client was promoted in this often quoted statement by Sir James Knight Bruce V-C in the1846 case of *Pearse v Pearse*[98]

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of the Courts of Justice; still, for the obtaining of these objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly may cost too much. And surely the meanness and mischief of prying into a man's confidential communications with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.[99]

The condition of perfect security in the statement emphasises the importance of the recognition that effective legal advice requires absolute candour between the client and his lawyer, or as stated in 1876 by Jessel MR in *Anderson v Bank of British Columbia*[100] the need to make 'a clean breast of it'[101] to one's lawyer.

In *Calcraft v Guest*[102] in 1898 Sir Nathaniel Lindley MR placed the emphasis on the permanent status of privilege.

> ... as regards professional privilege, on looking at the authorities, it appears to me that this case is covered by the case of *Minet v Morgan* ...and that if there are any documents which were protected by the privilege to which I am alluding, that privilege has not been lost. I take it that, as a general rule, *one may say once privileged always privileged.* I do not mean to say that privilege

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94 Ibid 50 ER 9, 14.

95 See *Carpmael v Powis* (1834)1 Ph 687, 688; and *Reece v Tyre* (1846) 9 Beav 316, 319.

96 (1846) 9 Beav 316.

97 *Reece v Tyre* (1846) 9 Beav 316, 319.

98 (1846) 1 D G & Sm 12.

99 (1846) 1 D G & Sm 12, 28-9; cited with approval by Lord Carswell in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, (11 November 2004); 112 [2005] 1 AC 610. See also *Pearce v Foster* [1885] 15 QBD 114, 119-20 Sir Baliol Brett MR.

100 (1876) 2 Ch D 644.

101 Ibid 649.

102 [1898] 1 QB 759.

> cannot be waived, but the mere fact that documents used in a previous litigation are held and have not been destroyed does not amount to a waiver of the privilege.[103]

In *Pearce v Foster*[104] in 1885 Sir Balliol Brett MR has already pointed out that privilege is not created by merely handing documents to a legal adviser, but that the essence of the privilege is the need to be able to communicate fully and frankly with the legal adviser.

> I do not think that, where documents are already in existence *aliunde*, the mere fact of their being handed to a solicitor for the purposes of conduct of an action can create a privilege; but where documents are brought into existence by a solicitor or through a solicitor, with a view to his giving professional advice as to the conduct of an action, these are in the nature of professional communications, as such are privileged.[105]…
> The privilege with regard to confidential communications between a solicitor and client for professional purposes are to be preserved, and not frittered away. The reason for the privilege is that there may be that free and confidential communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that this freedom of communication will be impaired. The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action.[106]

Pearce v Foster[107] extended the rule of 'once privileged, always privileged' to instances where evidence created in relation to litigation that did not materialise, will remain privileged, even where that evidence is later sought for use in subsequent litigation.

Client legal privilege developed to be viewed as more important than the countervailing principle that in the interests of a fair trial, litigation should be conducted on the footing that all relevant evidence is available to the court.

> The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of privilege with regard to it is essential to the interests of justice and well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk.[108]

The acceptance of privilege as an absolute red-light rule, can be seen in the 1996 judgment of Lord Taylor CJ[109] in which he stated that there can be no question of balancing the privilege against other public interests.

> …if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case irrespective of the client's merits.[110]

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103 Ibid 761-2 (emphasis added).
104 [1885] QBD 114.
105 Ibid 118. This remains the law in common law countries.
106 Ibid 199-20.
107 Ibid.
108 *Southwark Vauxhall Water Co v Quick* [1878] 3 QBD 315, 317-8, (Cockburn CJ).
109 *R v Derby Magistrates Court, ex parte B* [1996] AC 487.
110 Ibid 508.

As early as 1851 *Russell v Jackson*[111] reinforced the principle that confidential communications survive the death of the client and continue onto their heirs. Once a communication or document is privileged it remains privileged and the privilege passes on to the successors in title, unless the privilege is waived.

2.10 Pre *Minet v Morgan:* uncertain status of client communications

Although the principle of privilege was largely settled from about 1833, there remained contrary statements about the operation of privilege in the case law pre 1873, and the period was described as 'an unsettled period in the English law of professional privilege.'[112] A significant issue was the client's freedom from compulsion to testify to confidential communications with the legal advisor; this continued to be debated until it was firmly settled in favour of the client, in the 1873 decision of *Minet v Morgan.*[113] The Court of Appeal authoritatively agreed with Lord Brougham's view, that privilege applied to both communications when a client is seeking or receiving advice and to communications in preparation for litigation; and importantly, that neither the client nor counsel could be compelled to disclose the confidential communications. The principle developed over-time, to include all confidential communications passing in a professional capacity, between counsel and client. The privilege also applies to communications made through a third party as agent whether employed by the lawyer or the client.[114]

2.11 The adversarial underpinnings of litigation privilege

A criterion in the application of the principle of privilege that impacts on the development of this thesis is that confidentiality contrary to the case for legal advice privilege, is not central to litigation privilege. Litigation privilege focuses on the protection of evidence gathered directly by the legal adviser or indirectly, through third parties, in preparation for litigation in progress or in reasonable contemplation. The privilege serves to protect access to opposing counsel's brief: the legal research; theories and conclusion reached, are all protected.

The origins of professional privilege for communications with the client or with third parties in preparation for litigation are intimately connected with the adversarial approach to trials and the English division of legal practice between the solicitor and counsel. Hazard explains that this division of labour is fundamental to understanding the early cases dealing with

111 (1851) 9 Hare 387; 69 ER 558.
112 *R v Uljee* [1982] 1 NZLR 561, 566 Wigram V-C.
113 (1873) 8 LR Ch 361.
114 *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 682.

privilege, and that it had functional, doctrinal and conceptual significance.[115] Functionally, the solicitor prepares a written statement of facts as communicated by the client. This written statement becomes part of the 'case for counsel' upon which counsel will base the decision as to whether litigation, or indeed defence of the case, should proceed. Once counsel makes the decision to litigate or to defend the case, this 'case for counsel' takes on a very desirable status and often becomes the object of demands for production by the opposing party. Doctrinally, the courts more readily gave effect to the privilege, when invoked by counsel, than when sought by solicitors or scriveners; and conceptually, the distinction may help to explain why privilege was initially thought to belong to the lawyer rather than the client.

The courts over a number of cases extended the protection of privilege to include all evidence obtained in the course of preparing one's case for trial. Eventually all documents prepared by or for counsel with a view to litigation were held to be immune from pre-trial discovery by the opposing party. The documents are often prepared by third parties for counsel's consideration. The privilege extended to these third party documents was often referred to as, in the words of Jessel MR in 1876, 'quasi-professional privilege.'

> There is nothing …which brings the matter of opinion within the rules as to professional privilege, or within what is sometimes called quasi-professional privilege, by which I understand this: that, where the advice or communication does not proceed from the solicitor directly, but is information set at his instance by an agent employed by him, or even by the client on his recommendation, or in some way or other procured by a solicitor acting in the case for the plaintiff or defendant, the communication is privileged.[116]

The adversarial trial is viewed as a contest,[117] with each party left to their own devices in seeking out evidence and making their case; the judge has the passive role of umpire. The common law courts, in the interests of fair play, developed rules and procedures, using written interrogatories for discovery, in advance of trial, of all relevant facts surrounding the case, while prohibiting access to the opposing counsel's brief. The procedure facilitated the discovery of an opponent's evidence while preventing unjustifiable claims for privilege.

Lord Carswell in his 2004 opinion in *Three Rivers*[118] conducted an extensive review of the historical development of client legal privilege and concluded that the branch of client legal privilege which is now commonly known as litigation privilege had a later origin, to be found

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115 Hazard, above n 22, 1071.

116 *Bustro v White* (1876) 1 QBD 423, 427 (Jessel MR).

117 Akin to Adam Smith's 'market place', in which the *invisible hand*, produces the price, and in the common law it produces the rule.

118 The full citation is *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48 (11 November 2004); [2005] 1 AC 610.

in the dicta of three cases decided in the latter part of the 19th century.[119] Lord Carswell found that litigation privilege, properly analysed, entailed an extension of privilege for legal advice. Litigation privilege extended to communications and documents falling outside the confidential relationship of lawyer and client, to communications with third parties to assist the lawyer in the preparation of the case. These communications were justified on the ground that their disclosure would have enabled an opposing party to see part of the adversary's brief. The confusion about whether privilege for litigation pre dated advice privilege or visa-versa is in part due to the fact that English courts referred to 'professional privilege', without necessarily distinguishing between to two strands of privilege.[120]

2.12 Can a party be compelled to answer questions of their knowledge of materials contained within privileged documents?

The 1884 case of *Lyell v Kennedy*[121] raised the issues of privilege in relation to the discovery of documents and whether a party can be compelled to answer interrogatories concerning their knowledge of the materials therein. It was already well established that pre-existing documents could not attract privilege simply by being handed to a legal adviser[122] but *Lyell* clearly stipulated that documents are not classified as pre-existing when they are *assembled* by a solicitor in preparation for litigation. The Court held that the whole assembly of photographs and excerpts of public records, being the result of professional knowledge, skill and research of the solicitors, obtained for the defence of the action, must be privileged, as any disclosure of the copies and photographs might reveal the professional adviser's theories of the case. Once it was established that the documents were privileged, the question that remained was how far the client could go in avoiding the answering of questions of his knowledge of materials contained within the privileged documents. On appeal[123] Cotton LJ drew a distinction between bare facts 'patent to the senses'[124] which are not privileged, and the results or deductions drawn by the legal adviser from the facts, all held to be privileged.

The House of Lords in *Lyell v Kennedy (No. 2)* [125] agreed with the opinion of the Court of Appeal and ruled that the character of the knowledge was determined by its source, and the source being privileged, the information would also be privileged. This 'litigation privilege'

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119 *Anderson v Bank of British Columbia* (1876) 2 Ch D 644; *Southwark Vauxhall Water Co v Quick* (1878) 3 QBD 315; *Wheeler v Le Marchant* (1881) 17 Ch D 675.

120 *See Bustro v White* (1976) 1 QBD 423, 427.

121 (1884) 27 Ch D 1.

122 *Preston v Carr* (1826) 1 Y & J 174.

123 *Kennedy v Lyell* (1883) 23 Ch D 387.

124 Ibid 407-8.

125 (1883) 9 App Cas 81.

as per the 'advice privilege' is both absolute and permanent in nature and duration.[126] This decision can be viewed as one extreme to which the courts were prepared to go to protect confidential communications from disclosure. The documents concerned in this case could have been obtained by the opposing counsel through their own efforts, and to the extent that the underlying facts could have been unravelled from the attorney's theories, strategy and tactics of the case, the client could have been required to answer, and the court would have avoided doing violence to the equitable principle that a party must answer as to his total knowledge.[127] *Lyell* can be contrasted to the accepted requirement that in answering interrogatories a party must disclose the knowledge which they may have obtained, even though the communication itself may be privileged.[128] Furthermore, it can also be compared to the situation in reference to advice privilege, where a client's knowledge of facts, as such, or knowledge gained from reports prepared for consultation with a legal advisor, are not privileged.[129]

2.13 Crime-fraud exception to privilege pre *Regina v Cox and Railton*[130]

The 1743 case of *Annesley v Anglesea*[131] is the precursor to the crime-fraud exception to privilege. The decision read narrowly, led the court to finding that there was no privilege for communications with an attorney unless the communications were made to obtain legal services. Indeed *Annesley* was rarely cited or discussed for almost a century and a half. The crime-fraud exception either went unrecognised or was confined to narrow limits until 1884 when the Queen's Bench, in *Regina v Cox and Railton* [132] brought some order to the confused precedents and laid the foundation for the current scope of the exception.[133] Nonetheless, *Annesley* is worth discussing, because its presuppositions and conclusions are much at odds with the current approach to the fraudulent client.[134] Annesley's attorney in the case, Mr Harward, made sweeping arguments about the legal professional's public duty.

> I take the distinction to be, that where an attorney comes to the knowledge of a thing that is *malum in se*, against the common rules of morality and honesty, though from his client, and

126 See James A Gardner, 'Privilege and Discovery: Background and Developments in English and American Law' (1965) 55 *The Georgetown Law Journal* 585, 615 In the United States the 'work product privilege' is limited to the duration of the litigation.

127 Ibid 609.

128 See *Greenough v Gaskell* (1833) 1 My & K 88, 101 'the client is required to disclose all he knows, believes, and thinks respecting his case.'

129 See *Wheeler v Le Marchant* (1881) 17 Ch d 674, wherein reports were not protected by privilege if made *only* for the purpose of enabling the attorney to furnish advice to the client.

130 [1884] 14 QBD 153.

131 (1743) 17 How St Tr 1139.

132 [1884] 14 QBD 153.

133 David J Fried, 'Too High a Price for Truth: the Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds' (1986) 64 *North Carolina Law Review* 443, 447.

134 Ibid 447.

> necessary to procure success in the cause, yet it is no breach of trust in him to disclose it, as it can't be presumed an honest man would engage in a trust that by law prevented him from discharging that moral duty all are bound to, nor can private obligation cancel the justice owing by us to the public.[135]

As the rule for the crime-fraud exception started to take shape, much reference was made in criminal cases, to the meaning and importance of an action being defined as *malum in se;* references that led to confusion about the operation of the exception. The judges in *Annesley* made it clear that there was nothing unethical in the attorney's conduct and ruled that the attorney could be compelled to testify to facts that he did not learn in the role of attorney. There was no examination by the court of the client's subjective purpose in making the statements to his attorney. There was intense debate about whether the statements were privileged, but the Court took the view that the statements were not 'necessary' to the pursuit of legal advice, and therefore not privileged.

The *Annesley* approach to communications in furtherance of civil fraud, as opposed to crime, was dominant for a very long time. The courts came only hesitantly to the idea that the disclosure of a communication that met all the conditions for privilege could be compelled because of the client's subjective purpose in making it.[136] In the few cases in which the courts ordered an attorney to testify about a client's civil frauds, the analysis, as in *Annesley*, was always that the attorney was not acting as an attorney with respect to the particular communication; hence, it was not confidential. In cases of civil fraud, the theory of an exception to the privilege simply was not used.[137] Only one case pre 1884, *Russell v Jackson*[138] applied the exception to a civil wrong, identifying the client's supposedly illegal purpose as fraudulent.[139] Nor would the courts permit privilege to apply to communications where an attorney assisted a client in perpetrating a civil fraud, for the attorney's own benefit; privilege played no role in such communications.

> [I]t is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases *of exception* to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form any part of the professional occupation of an attorney or solicitor.[140]

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135 (1783) 17 How St Tr 1139, 1232 (emphasis added).

136 Fried, above n 133, 450.

137 Ibid 452.

138 (1851) 9 Hare 387; 68 ER 558.

139 Ibid 560. In this case an attorney was compelled to testify to a deceased testator's intention that a legacy, apparently absolute, was really upon a secret trust for the establishment of a Socialist school. The case concerned ideological differences between Socialist and Christian principles, and the supposedly *illegal purpose* was the creation of a Socialist school.

140 *Follet v Jeffreyes* (1850) 1 Sim (Ns) 1; 61 ER 1, 6 (Lord Cranworth V-C).

Thus where the solicitor is a participant in the client's fraud and the communications are instruments of that fraud, the court would compel discovery. No cases, however, actually found such participation.[141] Where the solicitor is an unwitting agent, the courts were still hesitant to overcome the claim of privilege and compel the testimony of the solicitor; as demonstrated in *Charlton v Coombs.*[142]

> There was no allegation in the bill connecting the solicitor who claims the privilege with the fraud in respect of which relief is sought ... The bill, no doubt, says that the client of the solicitor committed a fraud; but in order to take the case out of the rule of privilege, there must be some specific charge in the bill connecting the solicitor with the fraud[143]

Where reference was made to *Annesley* in criminal cases, the crimes were either referred to as *malum in se* or *malum prohibitum.* An action deemed to be *malum in se* was seen 'as inherently and essentially evil, that is immoral in [their] nature and injurious in [their] consequences, without regard to the fact of [their] being noticed or punished by the law of the state.'[144] This definition shows signs of being influenced by the ecclesiastical law wherein a priest who committed an offense *malum in se* could be defrocked. An act that was deemed *malum prohibitum,* was an action in violation of positive law. As noted by Best J in *Bensley v Bignold,*[145] the usefulness of this distinction is questionable.

> The distinction between *mala prohibita* and *mala in se* has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interests of the State.[146]

2.13.1 *Regina v Cox and Railton*:[147] the crime-fraud exception hinges on professional confidence and professional employment

The 1884 case of *Cox* saw the Court for the first time, hold unequivocally that there is no privilege when a client consults an attorney for the purpose of committing a crime or fraud, even where the client does not reveal such a purpose to their attorney.

> The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possible be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment."[148]

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141 Fried, above n 133, 455.
142 (1863) 32 LJ Ch (Ns) 284.
143 Ibid 286 (V-C).
144 *Black's Law Dictionary* (West Publishing, 5th ed, 1979) 865.
145 (1822) 106 ER 1214.
146 (1822) 106 ER 1214, 1216.
147 [1884] 14 QBD 153.
148 Ibid 167 (Stephen J).

Stephen J in delivering the judgment on behalf of the ten Justices based his reasoning on the need for both professional confidence and professional employment.

> In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes *no confidence*, for the state of facts which is the foundation of the supposed confidence, does not exist.[149]

The Court for the first time focused on the client's *intention* in making the communication, and reasoned that where the client is knowingly dishonest, they can have no legitimate expectation of privilege. The purpose of privilege is to protect bona fide communications, to make perfect frankness between the client and attorney possible, without fear that such communications can be discovered. There was no frankness here on the part of the clients, and no attempt to take the attorney into their confidence, within the ordinary meaning of the word confidence.

The defendant's counsel argued that: '[T]here was nothing to shew the defendants had any fraud in view when they went to, or indeed, when they came away from the solicitor ...'[150] It could be argued that the clients decided to commit the fraud, aided by the attorney's unwitting advice. Therefore, it is not strictly accurate to say that in this case, the clients had a criminal object in view in their communications with their solicitor. The question of the client's intention may be irrelevant, what is relevant is whether the client did commit a fraud after consulting the attorney. If the availability of the privilege further depends on whether the client abused their attorney's counsel in perpetrating that fraud, the court must know what the attorney advised the client, before it can determine whether the privilege applies.[151] The Court acknowledged the practical difficulties that may flow from attempts to apply the exception and decided against the creation of a bright-line rule, opting instead for a case-by-case approach.

> We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers is that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose which would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exist, the secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorised to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser not after the commission of the crime for the legitimate purpose of being defended, but before the commission

149 Ibid 168 (emphasis added).
150 Ibid 162.
151 Fried, above n 133, 459.

> of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case.[152]

A second compelling reason for the crime-fraud exception focuses on the position of the legal adviser. It would be most unreasonable if a lawyer could not give evidence against a client if it subsequently transpired that the client had sought their advice for a fraudulent or criminal purpose.[153] Or in the words of Sir Wood V-C in the 1886 case of *Gartside v Outram:*[154] '[Y]ou cannot make me a confidant of a crime or fraud and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part.'[155]

2.14 Conclusion

The rationale for client legal privilege is not easily discerned in the early case law, mainly because the decisions were rarely reported, and once they were, judges rarely gave clear reasons for their decisions. Furthermore, the cases often referred simply to 'professional privilege' without distinguishing between advice privilege, and litigation privilege.

The initial theory that the privilege belonged to the barrister and served to protect their professional honour, may have been influenced by Roman law. By the 17th century the common law espoused the view that the privilege served the interests of the client. Equity courts seems more concerned with issues of trust between the counsellor and the client, and had not totally abandoned the honour theory.

The theory that the legal representative as the client's alter-ego argued that there was a unification of the legal personalities of the lawyer and the client, advancing the view that the client's rights should not be prejudiced by the engagement of legal assistance. The theory is grounded on the 'safety' principle, namely a client's right to seek legal assistance, so as to 'safely' engage in litigation. The privilege served to both facilitate the 'safe' conduct of litigation, and to discourage frivolous litigation.

The early 19th century saw the prominent role of Lord Brougham in championing the cause of privilege with sweeping statements as to the vast range of communications and documents that could be protected by privilege and the emphatic argument that privilege was not restricted to communications linked to litigation in progress or in anticipation. *Minet v*

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152 [1884] 14 QBD 153, 175-6.

153 A L E Newbold, 'The Crime-Fraud Exception to Legal Professional Privilege' 53 *The Modern Law Review* 472, 475.

154 (1856) 25 LJ Ch 113.

155 Ibid 114.

Morgan in 1873 settled the law both in terms of client's right to claim the privilege to resist disclosure of confidential communications and that privilege applied to both communications involved in seeking legal 'advice' and communications in pursuit of 'litigation'. The privilege in both instances was absolute and permanent, and could only be removed by via waiver by the client, or by the crime-fraud exception.

Recent case law demonstrating the current application of the 19th century recognition of privilege is considered in the next two chapters. However, the 19th century cases clarified the principles underpinning the doctrine of privilege. The advice privilege serves to encourage full and frank communications in the client lawyer relationship and thereby serves to further justice. This advice privilege is not strategic; its purpose is not to give one party an advantage over the other, but rather to foster a confidence between the client and the lawyer. A client or lawyer's knowledge of pre-existing facts or indeed pre-existing documents is not protected by privilege. Only confidential communications between client and lawyer are protected from discovery.

The privilege in preparation for litigation is strategic in the sense that it preserves opportunities for a lawyer's strategic decisions that are consistent with the adversarial system and serves to protect the lawyer's brief. The lawyer can take advantage of the doctrine to protect information that they may later introduce in court. Information that has been created by the lawyer: the lawyer's mental impressions; legal opinions; notes; and other results of the lawyer's expertise are all protected from disclosure to the opposing party. The privilege is extended to communications with third parties and documents prepared by third parties, for a lawyer to examine or use in preparation litigation that is in progress or reasonably anticipated.

These early cases eventually established the scope and boundaries of privilege, and in many instances these precedents are still influential in current litigation. The next chapter will discuss the utilitarian rationale for client legal privilege, and the influence of Wigmore's treatise on the privilege, especially in the United States.

CHAPTER THREE

Utilitarian Rationale for Client Legal Privilege

3.1 Introduction

The historical context examined in the previous chapter provides the necessary background to understanding the rationale(s) underpinning the doctrine of client legal privilege and the development of the utilitarian rationale for privilege. This chapter focuses on the utilitarian rationale for client legal privilege; the theory emphasises that the test is functional, it aims to protect confidential communications between parties involved in a confidential relationship; hence the doctrine places the emphasis on the function served by the adviser, rather than on the 'status' of adviser. This theoretical research fosters a more complete understanding of the conceptual bases of client legal privilege. The utilitarian theory lends itself to be applied to the taxpayer-tax accountant relationship,[1] and adds weight to the call for law reform via the creation of a taxpayer privilege.

The chapter analyses the impact of 17th century British philosopher John Locke's theory of individualism - that everyone serves the common good by pursuing their self-interest. Locke's analysis was based on the social conditions in 17th and 18th century England. Locke's *Second Treatise of Government* published in 1690[2] presented his political theory of individualism as a normative theory of individual natural rights.[3] Adam Smith's writing in 1776 developed his economic theory in which competition is the 'invisible hand' that regulates self-interest. Both have had a profound influence upon the utilitarian theories. The utilitarian rationale for privilege acknowledges the antagonism between individual and social goals, but maintains that if properly balanced within the adversarial system and client legal privilege can function for the greater good of society.

The adversarial system itself is likened to the Adam Smith's market place, with the parties competing before an independent arbitrator. Jeremy Bentham was a British philosopher, jurist and social reformer. He is regarded as the founder of modern utilitarianism; his writings in the 1780s confirmed him as the leading expert on Anglo-American philosophy of law. Bentham and John Stuart Mill were both committed to Locke's theory of individualism. John Stuart Mills was a student of Bentham's philosophy. Bentham's attack on privilege, as one

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1 See *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 36[122] (23 January 2013) (Lord Sumption).

2 John Locke, *The Second Treatise of Government* (Salus Populi Suprema Lex Esto, first published 1690, 1764 ed).

3 See Ruth W Grant, 'Locke's Political Anthropology and Lockean Individualism' (1988) 50 *Journal of Politics* 42.

serving only the interests of the guilty, and John Henry Wigmore's response are both critically evaluated.

Wigmore was an American jurist and expert in the American law of evidence. In 1904 he provided the ultimate treatise on client legal privilege, in his most famous work, *Treatise on the Anglo-American System of Evidence in Trials at Common Law*[4] and his influence is still present in legal decisions.[5] Wigmore was not content to describe the status quo rather, he traced its genesis. He developed a set of four criteria that he urged courts and the legislature to use in deciding whether to recognise a privilege.[6] Wigmore's utilitarian rationale for privilege, presents a privilege that is permanent and absolute, providing certainty for clients, in their confidential communications. The empirical assumption made by Wigmore is that it is the privilege that *causes* the client to engage in full and frank communications with the legal adviser, and that such conduct would not occur *but for* the existence of the privilege. However, empirical evidence is in fact limited and it is questionable whether empirical evidence alone, can provide answers to the behavioural impact of the privilege on clients and professionals alike.

3.2 John Locke's vision of individualism

John Locke's vision of individualism is fundamental to understanding how the utilitarian theory shaped the development of the law governing the right of an individual to assert privilege for their confidential communications. John Locke was a leading English figure at the forefront of the phenomenon which came to be known as the 'Enlightenment'[7], also referred to as the 'long' 18th century. Locke's individualism arises from a rejection of the principle of subordination, inherent in all hierarchical societies;[8] all individuals in Locke's vision are independent, equal and free.[9]

> Men being, as has been said, by nature free, equal and independent, no one can be put out of his estate and subjected to political power of another without his own consent, which is done by

4 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law; including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada* (Little, Brown, 2nd ed, 1923).

5 The United States Supreme Court, for example appealed to the authority of Wigmore's treatise in *Jaffe v. Redmond*, 518 US 1 (1996) and *Swindler & Berlin*, 524 US 399 (1998).

6 Edward J Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Wolters Kluwer, 2nd ed, 2009), 13.

7 The 'Enlightenment' spanned the period of 1688 to 1800.

8 Western civilizations subscribe to this ideology of individualism in which society is composed of independent individuals who are free and equal, other civilizations share a belief in the hierarchical nature of the social order.

9 In Locke's theory, the individual is independent in that he is not subordinate to any other. Equal in that each individual is entitled to equality of opportunity. Free in that each individual can dispose and order his person, actions and possessions as he chooses. The individual is fundamentally self-sufficient and self-contained; able to enjoy an absolute right to his person and to the fruits of his labour.

> agreeing with other men, to join and unite into a community for their comfortable, safe and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left, as they were, in the liberty of the state of Nature.[10]

Locke's approach to taxation reflects his vision of individualism and is based on his views on private property[11] and government.[12] By consenting to live in a community, the individual gives consent to paying tax. Taxation, for Locke is however, in itself 'institutional coercion' - it is justified as the means to provide benefits in return for the surrender of individual rights. Taxation as a social construct is part of a social contract between individuals and the government. Man's freedom consists not in any *absolute* license to do as one pleases, but rather 'liberty to dispose, and order, as he lists, his person, actions, possessions and his whole property…'[13] Protection of property and assets is central to Locke's theory. Locke's broad right to property encompasses the 'right to be left alone' to enjoy one's possessions, personality, thoughts, emotions and sensations therefore, the right to privacy is implicit in the right to property. Equality is derived from each individual being equally independent and to enjoy equality of opportunity.

Locke's view provides a moral foundation for a society that allows each individual to devote exclusive attention to the pursuit of self-interest as long as he does not interfere with any other individual's pursuit of their self-interest. No individual has a duty to perform any act for another; all the individual must honour, is the duty to refrain from performing any act that would impede the independence or freedom of another; 'the salient and truly revolutionary characteristic of Locke's individualism is that the individual's single-minded pursuit of self-interest both preserves the individual's sanctity and promotes the common good.'[14]

Locke's civil society has a government that is minimal in its powers and activities. All that is required of government is: the establishment of a judicial system to adjudicate controversies,

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10 John Locke, above n 2, §44. See also Jane Frecknall-Hughes, 'Locke, Hume, Johnson and the Continuing Relevance of Tax History' (2014) 12(1) *eJournal of Tax Research* 87, 92: Locke did not acknowledge his authorship of this treatise during his lifetime, thinking it too dangerous to do so.

11 Property in Locke's theory includes not only land and possessions, but life, liberty, human capacities, and labour.

12 In Locke's theory the government's function is to enforce natural rights, it does not have the power to override natural law.

13 John Locke, above n 2, §57.

14 Michel Rosenfeld, 'Between Rights and Consequences: A Philosophical Inquiry into the Foundations of Legal Ethics in the Changing world of Securities Regulation' (1981) 49 *George Washington Law Review* 462, 472.

punishing those who trespass on the natural rights of others, and the deployment of sufficient police protection to ensure its citizen's peaceful and unfettered enjoyment of their property. [15]

3.3 Adam Smith's economic analysis: self-interest and the 'invisible hand'

Adam Smith's economic analysis is based on Locke's natural law foundation, his theory of individualism and individualistic approach to moral philosophy. Smith's inquiry gave renewed vigour to Locke's individualism: the laws of the market illustrated how an individual's pursuit of self-interest, in an economy in which everyone is similarly motivated, results in competition, which in turn, ensures that society receives the goods it desires at the prices it is prepared to pay.[16] Competition is Smith's `invisible hand' that silently guides the self-interested individuals toward the path that is most beneficial to society as a whole.

The market system expels general morality from the realm of economics; the individual is motivated by self-interest or self-love, and the 'invisible hand' of competition automatically takes on the role of moral regulator of the market, transforming the clash of opposing private self-interests into the common good. The individual is free to pursue his self-interest without regard to the common good or the moral consequences of their economic activity, as long as competition prevails, the market will regulate the common good. Smith employs the language of Locke's social contract theory to develop his four canons of a 'good' tax: equity/proportionality; certainty; convenience and efficiency.[17]

3.4 How individualism influenced the development of privilege

As noted in chapter two client legal privilege originally belonged to the attorney to safeguard the 'oath and honour of the attorney' however, by the eighteenth century the protection shifted to the client, and it is at this same time that the ideology of individualism emerged principally, from the political philosophy of John Locke and the economic theory of Adam Smith.[18] In an individualistic democratic society, with minimal government, the attorney is primarily the representative of the individual client; he is a partisan representative. The function of the attorney is to do for the client that which the client in a less complex society, would have been able to do for themselves.[19] To the extent that attorneys aid clients in

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15 John Locke, above n 2, §95 'Men being, as has been said , by nature, all free, equal and independent, no one can be put out of his estate, and subjected to the political power of another, without his own consent.'

16 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W. Strahan and T. Cadell. 1776) Book 1.

17 Ibid Book 5.

18 Michel Rosenfeld, 'The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligation' (1982) 33 *The Hastings Law Journal* 495, 496.

19 In the ideal system the individual would not need the 'specialised' skills of the attorney, to enforce his rights. The contrary argument is often made that the lawyer is viewed as a `hired gun'. This contrary

asserting their individuality, the attorney is morally obligated to society to act in the interests of the client. The obligation is based on the assumption that the individual's pursuit of their self-interest serves the common good, through the mediating force of competition. This is because the adversarial system of justice is structured like Smith's economic market system.[20] It is a competitive system in the administration of the law, with deliberate reliance on partisan representatives to bring out the truth and achieve justice. Thus in law courts as in the market place the state is reduced to the position of an impartial umpire between competitors.

> A trial is not a dispassionate and cooperative effort by all the parties to arrive at justice. It is the adversary system, the competitive system in the administration of the law. ...The adversary system in law administration bears a striking resemblance to the competitive economic system. In each we assume that the individual through partisanship or through self-interest will strive mightily for his side, and that kind of striving we must have. But neither system would be tolerable without restraints and modifications, and at times without outright departures from the system itself.[21]

With each side pursing their own self-interests in a courtroom, the judge and/or jury plays a role of impartial arbitrator, akin to role of the Smith's `invisible hand' in the competitive market place, the adversary system becomes the 'market place of ideas'.[22] The truth is revealed because the litigants are motivated solely by their self-interest, while the judge is required to keep an open mind, to stay above the fray, until all the evidence has been presented by the parties. The thesis is that truth is best achieved by the impartial arbiter educated by competent opposing counsel each acting in the best interests of their client. This idea that truth emerges as a human reality only in dialogue, is rooted in Plato's philosophy that dialogue is at the heart of truthseeking.[23] While the aim of the adversarial system is to arrive at the truth, the means it employs are designed to promote individual autonomy and to maximize individual control over the gathering and presentation of evidence. [24] The privilege must function in harmony with the adversary system's pursuit of truth; it accomplishes this by granting protection to confidential lawyer-client communications made in the course of

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argument is refuted by Freedman. See Monroe H Freedman, `Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 191.

20 See Marvin E Frankel, 'From Private Fights towards Public Justice' (1976) 51 *New York University Law Review* 516, 535 Judge Frankel characterises the American adversary system 'as the Adam Smith style of adjudicative procedure'.

21 Elliott E Cheatham, 'The Lawyer's Role and Surroundings' (1952-53) 25 *Rocky Mountain Law Review* 405, 409-10.

22 The phrase first appears in the opinion by Justice William O. Douglas in the Supreme Court: *United States v Rumely*, 73 S Ct 543, 551 (1953).

23 See Robert P Lawry, 'Lying, Confidentiality, and the Adversary System of Justice' (1977) 4 *Utah Law Review* 653, 654-55 citing Plato, Seventh Letter, c 341 in Josef Pieper, *Guide to Thomas Aquinas* (Scranton , 1962) 74. Thomas Aquinas advances the argument by treating the adversary with the highest respect.

24 In chapter four the thesis will expand on the theory of rights and individual autonomy.

seeking or receiving legal advice, while not permitting the privilege to shield otherwise discoverable information. It is confidential communications that the privilege protects, not facts or pre-existing information or documentation. In the litigation context it serves to protect the attorney's brief, each party is required to construct their own case, and not to piggy-back upon the work of the adversary. The participants 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain, is little better than no privilege at all.'[25] If a judge could later order disclosure even 'in limited circumstances' there would be a 'chilling effect' on the potential client's willingness to confer and confide.[26]

Lord Brougham's 1821 famous speech in defence of Queen Caroline,[27] eloquently articulates the individualism belief that the attorney's primary moral duty is to advocate the client's self-interest.[28] However, the attorney is morally obligated to promote the client's interests only insofar as the exercise of these interests does not destroy competition, and thus impede the common good. To the extent that lying, like cheating or stealing, undermine the very integrity of the process of competition, the attorney is morally obligated to society not to assist the client in any way with the formulation, transmission, or use of a lie. Or in the words of Lawry no one has a right to lie under any circumstances within the adversary system. [29]

3.5 Consequentialism and utilitarianism

The clearest expression of consequentialism is found in utilitarianism; a philosophy grounded in individualist ideology. However, underlying the utilitarian view is a rejection of the

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25 *Upjohn Co v United States*, 449 US 383, 393(1981) Justice Rehnquist.

26 Edward J Inwinkelreid, `Questioning the Behavioral Assumption underlying Wigmore an Absolutism in the Law of Evidentiary Privileges' (2004) 65 *University of Pittsburgh Law Review* 145, 153 citing Kekewich J in *Williams v Quenbrada Railway, Land and Copper Co* [1895] 2 Ch 751, 754.

27 See Ray Patterson 'Legal Ethics and the Lawyer's Duty of Loyalty' (1980) 29 *Emory Law Journal* 909, 909 citing Lord Brougham, (1821) 2 *Trial of Queen Caroline* 8. 'An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and cost to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.' Lord Brougham later acknowledged that the statement was not so much a statement of professional duty as it was a political threat to George 1V, in that he would reveal the secret marriage of George 1V to a Roman Catholic, if the ministers did not withdraw the divorce bill. Ten years later he presided in the Court of Chancery.

28 This can be contrasted with the role of the lawyer in a socialist state, where there is no division of duty between the judge, prosecutor and defence counsel, and the defence counsel is required to assist the prosecution in finding the truth in the case.

29 Robert P Lawry, above n 23, 657. This can be contrasted with Monroe H Freedman, 'The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions' (1996) 64 *Michigan Law* Review 1469: 'I favoured the view that the lawyer who knows that the client intends to lie on the witness stand should make good faith efforts to dissuade the client from committing perjury, but if unsuccessful in those efforts, the lawyer should maintain confidentiality and should present the client's testimony at trial in the *ordinary* way.' (emphasis added).

proposition that an individual's pursuit of self-interest will necessarily bring about the realisation of the common good. Consequentialism holds that the moral value of an act must be determined from its consequences. Being rooted as it is in individualism its conception of what is good is predicated on what is good for the individuals *qua* individuals rather than on what may be good for society at large.[30] The emphasis is on the consequences of an action, thus the consequences, not the intention of the actor, determine whether an action is right. Under consequentialism rights are always subject to question. The utility of the consequences aim is for the greatest happiness for the greatest number. A right must be justified by reference to the common good. Moreover, even when the public accepts a right believing its exercise promotes the good, the right is not absolute.[31] Rights can be evaluated and decisions can be made as to which rights should be permitted, expanded, curtailed or given priority based on their contribution to the common good.[32]

Two prominent early exponents of the utilitarian theory are Jeremy Bentham and John Stuart Mill, both committed to nineteenth century individualism. However, they opposed two key premises of Locke and Smith's theory. First, in the economic sphere, they rejected the proposition that the pursuit of individual self-interest necessarily leads to the common good.[33] And second, in the political sphere, they opposed Locke and Smith's minimalist government; they saw a role for government in harmonising personal and societal interests through legislation.

3.6.1 John Stuart Mill's economic theory diminishes the role of Smith's 'invisible hand'

Mill's economic theory centred on production rather than on distribution. The economic laws govern the sphere of production and the most efficient means of production was the free market; in this sphere there are no questions of morality, the pursuit of self-interest results in moral or right actions. 'Mill's separation of the realm of production from that of distribution undermines the proposition that the pursuit of individual self-interest coincides with the realization of the common good.'[34] Moral and political considerations were in Mill's theory, relegated to the sphere of distribution.

> In Mill's sphere of distribution where no "invisible hand" is at work, the pursuit of self-interest does not necessarily lead to the greatest happiness for the greatest number. In those instances in

30 Michel Rosenfeld, above n 18, 507.
31 Ibid 480.
32 Ibid 481.
33 Ibid 475.
34 Ibid 476.

> which the good is not enhanced, the individual or some authority acting in the public interest must restrict the pursuit of self-interest.[35]

For utilitarians their overriding principle of morality required all actions to be measured by their effect on the total distribution of goods within society. The morality and rightness of every action is determined by the principle that holds that the good consists in the promotion of the greatest happiness for the greatest number. Thus the public interest is some form of aggregation of private interests, or in the words of Bentham it 'is vain to talk of the interests of the community, without understanding what is in the interests of the individual.'[36]

Nonetheless, utilitarianism raises a number of difficult problems.

> Determining the proper equilibrium between the private and public interest and translating the abstract principle of the common good into concrete social goals tailored for particular socio-political contexts are troublesome. Moreover, by reducing the normative value of every action to its consequence, utilitarianism fundamentally threatens certain basic rights that underlie both an efficient free market economy and the philosophies of Locke and Smith.[37]

3.7 Bentham's science of legislation

Bentham's aim was to construct a science of legislation, a purely empirical science based upon observable facts. Morality was to be converted into science, a science resting upon facts. Bentham's belief was in a combination of laissez-faire economics[38] - in that sphere he adhered to the economic views of Smith; and he looked to political reform to harmonise interests through legislation, while still maintaining a belief in minimal government.

Bentham found himself in conflict with the existing English legal establishment, he was particularly critical of the development of the traditional 'common law'[39] with its entanglement of jurisdictions; its distinctions between law and equity and its system of rules for excluding evidence.

> Consistent with his general utilitarian philosophy, he believed that a balance must be struck between the direct ends of justice to obtain rectitude of decision and collateral concerns justifying the exclusion of evidence in some circumstances.[40]

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35 Ibid 477 (citations omitted).

36 Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford Clarendon Press first published 1789, 1823 ed) 7. John Stuart Mill, 'Utilitarianism' in *Utilitarianism, On Liberty, Essay on Bentham* (M. Warnock, ed, 1962) 288-89: Mill echoed Bentham: 'each person's happiness is a good to that person, and the general happiness, therefore a good to the aggregate of all persons.'

37 Michel Rosenfeld, above n 18, 479.

38 More precisely Bentham was an adherent to what he calls the `*laissez-nous faire'* principle, literally translated as 'be quiet' principle, in that almost all legislation is improper. Security and freedom are all that industry requires of government.

39 Jeremy Bentham, above note 36, Bentham had a total disregard for history. His analysis assumes the existence of a 'ready-made' man.

40 Laird C Kirkpatrick, 'Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement' (1992) 25 *Loyola of Los Angeles Law Review* 837, 840 citing Jeremy Bentham, *Constitution Code 463* in John Bowring (ed), *Works of Jeremy Bentham*, (William Tait, 1843) 11 vols.

He attacked client legal privilege on the grounds that its principal virtue is to aid the criminal in concealing their crime, scarcely admitting any exception to the general rule of taking any evidence you can get, except for Crown secrets and confessions to a Catholic priest, secrecy in such a case was deemed useful.[41] 'In advocating a clergy-penitent privilege, Bentham favoured a ground of exclusion that was not even recognized by English common law of the time.'[42]

Legal professionals of all categories, he viewed as having a common interest in multiplying suits and complicating procedure. The legal profession was deemed to be in the closest relations to the monarchy, the aristocracy, and the whole privileged and wealthy class. He proposed to reduce as far as possible the influence of the legal profession by removing lawmaking authority from the judges and placing it solely in the hands of Parliament; judicial decisions were to be subject to statutory law. This was at a time when the 1792 judgment in *Wilson v Rastall*[43] had established privilege for the trio of counsel, solicitor and attorney.

3.7.1 Bentham's attack on privilege

Bentham was opposed to privileges.

> As a general proposition, Bentham opposed both incompetency rules and privileges. To borrow a phrase from Antony at Caesar's funeral, Bentham "came to bury" privileges, "not to praise"[44] them. ... Only the "natural" system, permitting rational inquiry relatively free of exclusionary rules, could ensure rectitude of decision – accurate decision-making.[45]

Bentham's view is that 'privilege is a pernicious institution.'[46] The privilege is of no value to the innocent, as they have nothing to fear from the law, but the privilege is of definite value to the guilty, as they have much to hide.[47] Privilege is socially undesirable, as all it does is reduce deterrence of violations of the law; the consequence of abandoning privilege is that

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'[A]nd on which side shall be the claim to preference, will, in each individual instance, depend upon the circumstances of the individual case.'

41 Gerald J Postema, 'The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 *Georgia Law Review* 1393, 1410. 'Bentham was no admirer of the exclusion of evidence on grounds other than avoiding delay, vexation, or expense at trial ...He had only contempt for the privilege against self-incrimination.'

42 Laird C Kirkpatrick, above n 40, 842.

43 (1792) 4 Term Rep 753.

44 William Shakespeare, *Julius Caesar* Act 111, scene 2, Line 79.

45 Edward J Imwinkelreid, above n 6,143, (emphasis in original).

46 Louis Kaplan and Stephen Shavell, 'Legal Advice about Information to Present in Litigation: its Effects and Social Desirability' (1981) 102 (3) *Harvard Law Review* 565, 605.

47 Daniel R Fischel, 'Lawyers and Confidentiality' (1998) 65 *University of Chicago Law Review* 1, 22, Fischel expands on Bentham's argument. 'My argument is similar to Bentham's but goes further. Whereas Bentham argued the privilege benefited the guilty but was of no value to the innocent, I argue that the privilege in fact harms the innocent. The harm exists because the privilege makes it more difficult for the innocent credibly to communicate that they have nothing to hide.'

the guilty will be deprived of assistance from their legal adviser, to concoct a false defence.[48] Bentham also attacked spousal privilege asserting that it goes far beyond making 'every man's house his castle'[49] and permits a person to convert his house into 'a den of thieves'; it secures 'to every man in the bosom of his family, and in his own bosom, a safe accomplice.'[50]

'Natural rights' in Bentham's view were simple nonsense, he was opposed to the theory of the 'rights of man' and to the American Declaration of Independence, as so much jargon. Bentham's view is that all rights are legal rights and that discourse of moral rights is incoherent. He repudiated the theory of rights yet accepted their conclusions of universal suffrage; the levelling of all privileges and the absolute supremacy of the people. Bentham's view was that no law can be defended except by reference to facts, and therefore to 'utility'. Bentham reasoned that the existing privileges and inequalities were unjustified, because they did not promote the greatest happiness of the greatest number. Wigmore was also of the view that:

> …the complete abolition of the rules (of exclusion) in the future is at least arguable, not merely in theory but in realizable fact. …[It has been shown] that in the United States and today justice can be done without the orthodox rules of evidence.[51]

Bentham's work still enjoys the support of many legal scholars.

> Bentham's work is significant not only from a historical point of view but also from a philosophical and practical one. This is so for two reasons; First, Bentham's theory of adjudication represents the only sustained attempt in the English language at a philosophical account of the law of procedure. To the extent that he raises and formulates problems in this area, his work is of considerable philosophical interest, even if his theory must ultimately be rejected. Second, passing notice of certain of Bentham's remarks on procedure have frequently been taken by commentators as evidence for a plausible 'indirect utilitarian' (or rule-utilitarian) interpretation of Bentham's general moral and political theory.[52]

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48 Ibid 24-6: again Fischel approves and expands on Bentham's argument. 'Why isn't the problem solved by the attorney explaining to the client ... the parties can obtain effective advice without confidentiality simply by learning from the advisor what the governing legal rules are … And if a lack of complete confidentiality results is less effective legal advice relating to complex regulatory requirements, so what? It is precisely in this context where the presumption that improved legal advice will result in socially desirable behavior is the weakest. …Finally the effect of disclosure on morale is a function of the existing legal rule. If everyone understands at the outset that confidentiality is not absolute, no feeling of betrayal will result from disclosure. ...the legal profession is the primary beneficiary of confidentiality. What is important to recognize, however, is that the benefits identified are not shared by clients or society as a whole.'

49 See Sir Edward Coke, *The Institutes of the Laws of England*, (1st ed Societie of Stationers, 1628).

50 See *Trammel v United States*, 445 US 40, 51-52 (1980) quoting Jeremy Bentham, *Rationale of Judicial Evidence* (John Stuart Mills ed, Hunt & Clarke, 1827).

51 Laird C Kirkpatrick, above n 40, 837 citing John Henry Wigmore, *Evidence* § 8c (Tiller rev, 1983) 630.

52 Gerald J Postema, above n 41, 1393-4 (citations omitted).

Charles McCormick in his 1938 commentary favoured Bentham's approach to privilege and overoptimistically predicted the ultimate demise of all rules of exclusion of evidence.[53]

3.8 Wigmore's response to Bentham's attack

John Henry Wigmore is the foremost proponent of a utilitarian justification for client legal privilege, however he commenced his argument, in agreement with Bentham, that the judicial search for truth required that all privileges, should be narrowly confined.

> Wigmore was Jeremy Bentham's most important successor. ...Wigmore shared most of Bentham's sentiments about privilege law. Like Bentham, Wigmore was an empiricist who questioned humanistic rationales for exclusionary rules of evidence. Like Bentham, Wigmore assigned the highest priority to rectitude of decision in adjudication. And like Bentham, Wigmore viewed himself as a legal reformer. However, Wigmore adopted a more modest reform agenda than Bentham's. Wigmore noted Bentham's failure to convince courts and legislature to abolish privileges in wholesale fashion. He therefore adopted a more limited strategy.[54]

In response to Bentham's attack on privilege Wigmore noted:

> (1) There is in civil cases often *no hard and fast line between guilt and innocence*, which will justify us as stigmatizing one or the other party and banning him from our sympathy.
>
> (2) Even assuming that the party against whom the law would decide is, by virtue of an illegality (technical or otherwise) in his cause, not to be considered as worthy of aid or encouragement, nevertheless, in a great part of civil litigation, it does not happen that *all the acts and facts on one side have been wholly right* and lawful and all of those on the other side wholly wrong and unlawful;. ... It should be added that the client's attitude in criminal cases (where we may assume that, if guilty, he is wholly and indivisibly guilty) need not be taken as justifying Bentham's argument in that class of cases. This is so because the communications will there be in effect self-incriminating admissions, and if they could be obtained from an attorney, some of the same evils would follow which ...constitute the reasons for forbidding compulsory self-incrimination.
>
> (3) Even assuming, for civil cases, the negative of the foregoing argument – i.e., assuming that in any cause one party's case is wholly right and the other's wholly wrong – still, so far as the wrongdoer is consequently deterred from seeking legal advice, that result is not, as Bentham would have it, an unmixed good; for *it does not follow* that "*a guilty person would not* in general *derive quite so much assistance* from his law adviser, in the way of concerting a false defence, as he may do at present." This does not follow except on the assumption that every legal adviser invariably proceeds, on request, to assist, by litigation or otherwise, the unjust causes that may be laid before him by his clients.
>
> (4) The consideration of 'treachery,' so inviting an argument for Bentham's sarcasms, is after all not to be dismissed with a sneer. The *sense of treachery* in disclosing such confidences is impalpable and somewhat speculative, but it is there nevertheless. ...Certainly the position of the legal adviser would be a difficult and disagreeable one, for it must be repugnant to any honourable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his only testimony ...If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist.'[55]

Wigmore quotes Bentham in reference to this 'treachery' argument.

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53 Charles T McCormick, 'Tomorrow's Law of Evidence' (1938) 24 *American Bar Association Journal* 507, 580-81. 'So we have said that the hard rules of exclusion will soften into standards of discretion to exclude. But evolution will not halt there. Manifestly, the next stage is to abandon the system of exclusion.'

54 Edward J Imwinkelreid, above n 6, 148-9.

55 John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton, revised ed, 1961) §2291, 552-3 (emphasis in original).

> When in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court, might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act. [56]

Wigmore's appeal to the 'honour' of legal advisers is at odds with his assertion that client legal privilege promoted freedom of consultation.

> That doctrine, (*the oath and honor* of the attorney) however, finally lost ground, and by the last quarter of the 1700s, as already noticed (§ 2286 *supra),* was entirely repudiated. The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one's pledge under the force of the law. ...That new theory looked to the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal adviser (§2291 *infra*). It proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law.[57]

Whether the traditional 'honour and gentlemanly conduct' theory of the 1700's, popularised by Wigmore, was the original source of the rule of privilege has been questioned by prominent legal scholars, amongst them Professor Snyder.

> The evidentiary privilege is the legal system's version of the idea that a gentleman should never disclose information that another gentleman gave in confidence. This theory assumes that legal representation in the sixteenth century consisted mainly of lawyers representing the legal interest of aristocrats and landed gentry, or in other words, the gentlemen. Recent research indicates that legal representation was not so restricted; ...It is unlikely that the privilege evolved from the rules of gentlemanly conduct when the majority of legal clients were of "the middling sort," rather than members of the upper classes.[58]

Wigmore noted that the honour theory was repudiated by the end of the eighteenth century, and that the utilitarian theory of privilege had taken root;[59] in order to promote freedom of consultation of legal advisers by clients. The apprehension of compelled disclosure by the legal adviser must be removed and hence the law must prohibit such disclosures except on the client's consent.'[60] For Wigmore, the turning point[61] came with the *Duchess of Kingston's Case.*[62] The case centred on the recognition of the physician-patient privilege based upon the physician's honour; the decision refused to give recognition to the privilege. Yet lawyers were to be treated differently. The theory was that the privilege was *necessary*

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56 Jeremy Bentham, above n 50, quoted in John Henry Wigmore, above n 55, 549. See Michael L Waldman, "Beyond Upjohn: the Attorney-client Privilege in the Corporate Context' (1987) 28(3) *William and Mary Law* Review 473, 480 'This idea of personal treachery still lingers over violations of the privilege.'

57 John Henry Wigmore, above n 55, 543 (emphasis in original).

58 Lloyd B Snyder, 'Is Attorney-Client Confidentiality Necessary?' (2002) 15 *Georgetown Journal of Legal Ethics* 477, 480-1.

59 John Henry Wigmore, above n 55, 543 for a while the 'honor' and the instrumental rationales co-existed.

60 Ibid 545.

61 Ibid 527.

62 (1776) 20 How St Tr 355.

because attorneys could represent clients effectively *only if* they knew all the facts, and that the client would not reveal these facts if the lawyer could be forced to reveal them in court. Professor Hazards argues that the historical foundations of privilege are not as firm as the tenor of Wigmore's language suggests.

> On the contrary, recognition of the privilege was slow and halting until after 1800. It was applied only with much hesitation, and exceptions concerning crime and wrong-doing by the client evolved simultaneously with the privilege itself. ...Taken as a whole, the historical record is not authority for a broadly stated rule of privilege or confidence. It is, rather, an invitation for reconsideration. [63]

Hazard also rightly, takes issue with Wigmore's interpretation of the absorption of the privilege rule into American law.

> Wigmore's presentation of the absorption of the rule into American law is breathtaking. Having portrayed the development in England as an inexorable movement from Elizabethan beginning to Victorian triumph, suppressing both the Georgian confinement and the Victorian reservations, he then says: "In the United States this lengthy controversy seems never to have found echoes."[64]

3.8.1 Wigmore's utilitarian formula for privilege

Wigmore's famous 1904 treatise on evidence sought to codify and the law of evidence.[65] As a passionate believer in the scientific nature of judicial proof and the need to design precise evidentiary rules, he advocated a narrow set of evidentiary rules that would not obstruct unnecessarily the 'investigation of truth' and the 'administration of justice'.[66] Wigmore established four criteria as prerequisites to the existence of any privilege protecting confidential communications, and only if these four conditions are present should a privilege be recognised[67] and once recognised it should be absolute[68] in character.

The four criteria amount to a classic utilitarian cost-benefit analysis. The often quoted passage[69] announcing the test reads:

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63 Geoffrey C Hazard, `An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1070. Indeed Hazard (1071) argues that by the last quarter of the eighteenth century 'the doctrine fell out of favour and was rejected as antithetical to the judicial search for truth.' Privilege re-emerged in the early nineteenth century, with utilitarianism sparking its resurrection.

64 Ibid 1087 (citations omitted).

65 John Henry Wigmore, above n 55.

66 Ibid §2192, 73.

67 Ibid §2285, 527-8.

68 J Andrew Coutts, 'House of Lords: Evidence of Instructions to Legal Advisers' (1996) 60 *Journal of Criminal Law* 176, 179 citing Lord Taylor CJ stating that the drawback to the approach of those who would allow the possibility of an exception (to the 'absolute' rule of privilege) is that 'once any exception to the general rule is allowed, the client's confidence is necessarily lost'. Then, 'one can see at once that the purpose of the privilege would thereby be undermined'.

69 Ellen S Soffin, 'The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity' (1985) *Duke Law Journal* 1217, 1223 'Federal courts have cited with approval Dean Wigmore's four fundamental conditions necessary to establish any privilege'. Common law jurisdictions also frequently cite Wigmore's general principles of privilege in Law Commission inquiries into privilege in general, or privilege for specific professions or relationships and in case law .

> Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception... four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> Only if these four conditions are present should a privilege be recognized. These four conditions must serve as the foundation of policy for determining all ...privileges, whether claimed or established.[70]

These four criteria represent an expansive open-ended rationale that would enable any number of relationships between professionals and their clients to fulfil the requirements for privilege. However, as a strong believer in the duty to testify, Wigmore constricted the recognition of privileges to the traditional privileges,[71] and was not in favour of creating new ones.[72] He cautioned against the extensive use of privileged communications, and he found himself unable to justify several privileges created by State statutes, arguing that they were the result of lobbying by organised occupational groups protecting their own particular interests. In the case of attorney-client privilege all four prerequisites are present, with the only condition open to any dispute being the fourth.[73] Wigmore summarised the general principles of the privilege as:

> *(1) Where legal advice of any kind is sought* (2) *from a professional legal adviser in his capacity as such,* (3) *the communications relating to that purpose,* (4) *made in confidence* (5) *by the client,* (6) *are at his instance permanently protected* (7) *from disclosure by himself or by the legal adviser,* (8) *except the protection be waived.*[74]

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70 John Henry Wigmore, above n 55, 527 (emphasis in original).

71 Ibid, the four traditional relational privileges discussed by Wigmore are: attorney- client (§2290), husband-wife (§2332-2341), physician-patient (§2380--2391), and priest-penitent (§2394-2396). Wigmore concluded that all of the four requisites exist for the attorney- client, husband-wife, and priest-penitent.

72 Ibid §2286, 528-30. Wigmore concluded that: 'in the absence of statute to the contrary, a confidential communication between *partners*, or to a *clerk, trustee, commercial agency, banker, journalist, broker, employee of an adjustment bureau, surety, accountant*, or to *any other person* not holding one of the specific relations hereafter considered, is not privileged from disclosure.' (Emphasis in original; footnotes excluded).

73 Ibid §2285, 528.

74 Ibid §2292, 554. See Bruce Kayle, 'The Tax Adviser's Privilege in Transactional Matters: a Synopsis and a Suggestion' (2000 -2001) 54(3) *Tax Lawyer* 509, 511. 'This statement is now frequently repeated by the courts verbatim [*United States v Bein*, 728 F 2d 107,112 (2d Cir, 1984); *United States v Kovel*, 296 F 2d 918 (2d Cir, 1961)] and is the accepted articulation of the privilege. Furthermore, the federal test for corporate officers and employees, deviated little from this formula and was enunciated in *United States v United Shoe Machinery Corp*, 89 F Supp 357, 358-39 (D Mass, 1950) 'The privilege applies only if (1) the asserted holder of the privilege is or sought to by someone to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the

Wigmore expressed his agreement with the Model Code of Evidence adopted in 1942 by the American Law Institute, and the Uniform Rules of Evidence approved in 1953 by the National Conference on Uniform State laws, and their decision 'excluding all of the so-called novel privileges.'[75]

Utilitarianism as the justification for privilege justifies or rejects a specific privilege by balancing the *utility* of the privilege against the costs of the privilege to litigation. Wigmore's formulation asserts that communications made within a given relation should be privileged only if the benefit derived from protecting the relation outweighs the detrimental effect of the privilege on the search for truth.

> Accordingly, utilitarian theory could justify the preservation of the attorney-client privilege despite its shortcomings. Although the privilege has the harmful consequence of the concealment of otherwise relevant information, this consequence is outweighed by the benefits of the assertion of a greater number of just claims and more effective presentation made possible by uninhibited attorney-client consultations.[76]

Wigmore's empirical assumption is that the privilege *causes* the client to engage in the desirable conduct, namely full and frank communications with the legal adviser, and that such conduct would not occur *but for* the existence of the evidentiary privilege. The privilege protects only those disclosures *necessary* to obtain informed legal advice, which might not have been made absent the privilege. The privilege under this utilitarian justification fulfils the appropriate function so long as clients still confide in their attorneys.[77] On that assumption the recognition of the evidentiary privilege becomes cost free; the only evidence suppressed is evidence that would not have come into existence had it not been for the recognition of the privilege. Thus the privilege is valued as a means to an end.

> These justifications (instrumental or utilitarian) argue that privileges should be recognized as a means to the end of promoting certain types of out-of-court conduct such as candid consultations between patients and their physicians and clients and their attorneys. A growing body of empirical research has called into question the underlying assumption that the existence *vel non* of privileges has a significant impact on the out-of-court behaviour of actors such as patients and clients.[78]

3.8.2 Legal scholars question Wigmore's emphasis on the 'secrecy' of communications

communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

75 Ibid, §2287, 537.

76 Michel Rosenfeld, above n 18, 508.

77 David Fried, 'Too High a Price for Truth: the Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds' 64 *North Carolina Law Review* 443, 491 'Indeed some authorities, concluding that there is no ready substitute for legal advice see no reason the privilege should not be narrowed still further or even abolished.' (Citations omitted).

78 Edward J Imwinkelreid, 'An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis' (1994) 73 *Nebraska Law Review* 511, 543 (citations omitted).

Wigmore's requirement that the communications between the parties be made in confidence, has been attacked by many legal scholars, prominent amongst them: Professor Rice writing in 1998.

> The secrecy requirement does not further the goal of the attorney-client privilege – encouraging openness and candor in communications between an attorney and client. ...He [Wigmore] goes on to assert "[t]his element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties." He concludes that without this condition *no privilege*, attorney-client or otherwise, should be recognized. Beyond this *ipsi dixit*, there is no discussion of, or other justification offered for, the importance assigned to the requirement. ...Wigmore asserts, without elaboration that "[t]he reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy." ...Throughout both English and U.S. history, however, not a single reported decision can be found in which a court has either explicated this reasoning or questioned its logic.[79]

Rice's argument is that the *exclusionary* effect of the privilege is what is fundamental to the candour being sought, not the encouragement of the *secret* context of the communication. The fact that the client may be desirous of secrecy is no justification for making it a requirement; all it does is add costs[80] to the system without any corresponding benefit.

Professor Bok expressed a less than flattering view of the operation of secrecy in 1984; namely that it creates the ideal condition for allowing unscrupulous attorneys to advise their clients about how to successfully engage in improper conduct.

> Because it bypasses inspection and eludes interference, secrecy is central to the planning of every form of injury to human beings. It cloaks the execution of these plans and wipes out all traces afterward. It enters into all prying and intrusion that cannot be carried out openly. While not all that is secret is meant to deceive – as jury deliberations, for instance are not – all deceit does rely on keeping something secret. And while not all secrets are discreditable, all that is discreditable and all wrong doing seek out secrecy (unless they can be carried out openly without interference, as when they are pursued by coercive means).[81]

Professor Morgan in the 1940's advocated radical reform of the rules of evidence[82] and questioned what, if any, benefits may flow to the community by maintaining the protection of secrecy. Would the removal decrease the information conveyed to the legal adviser, and if so, would it lead to a reduction in valid claims going to adjudication? Morgan's view is that any answer would be pure conjecture; he concludes that a scientific code of evidence would:

> …erect no privilege for communications between client and attorney, and would contain only some reasonable restrictions upon the right of a litigant to call an attorney conducting a trial to

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79 Paul R Rice, 'Attorney-Client Privilege: the Eroding Concept of Confidentiality should be Abolished' (1998) 47 (5) *Duke Law Journal* 853, 857-9 (emphasis in original; citations omitted).

80 Ibid 860-5, Rice nominates three costs; first the cost incurred by the proponent in establishing that he intended the communication to be confidential. Second, costs incurred in offering evidence of the relationship of each of the named recipients of the confidential information, to be privy to the communication. And third, the costs involved in establishing that the initial confidentiality has been maintained, and not waived inadvertently or otherwise.

81 Sissela Bok, *Secrets: on the Ethics of Concealment and Revelation* (Vintage Books, 1984) 26.

82 Laird C Kirkpatrick, above n 40, 837 stating that Professor Morgan advocated for radical reform.

> testify against his client therein. But there is no hope of securing the adoption of such a provision.[83]

Rice refers to both English and United States case law in the 18th and early 19th centuries to highlight that the attorney-client privilege was premised upon the confidential nature of the relationship, rather than upon the confidential or secret nature of the communication.[84] Rice's conclusion is that the secrecy serves no apparent purpose either at the inception or for the duration of the privilege; it increases the costs of the privilege's creation and preservation and furthermore, it complicates the judicial resolution of each claim.[85]

Professor Shavell[86] in his 1988 study, created a model to determine what influence confidentiality has on the decision to obtain advice. He concluded that in different situations, confidentiality will have different effects on whether a party seeks advice, and that the main advantage of confidentiality 'is that more individuals will discuss their plans with attorneys and then may decide against acting'.[87] Assuming that it is probable that the attorney-client privilege increases communications and that the communications lead to behaviour modification, then the expectation would be that the privilege causes the greatest amount of law-abiding behaviour by clients, which in the long run will be beneficial to society.[88]

Professors Kaplow and Shavell[89] have argued that the case for protecting ex ante communications between attorneys and clients in influencing how clients act, is far stronger than the case for protecting ex post communications after the act or in litigation.

> Skepticism about the value of legal advice in litigation is suggested by the manner in which it differs from advice provided before people act. The latter type of advice will lead individuals to behave more in accord with the law. Advice provided in litigation, after individuals have acted, has no similar general tendency. Thus, there is no obvious reason to believe that advice supplied

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83 Edmund M Morgan, 'Some Observations Concerning a Model Code of Evidence' (1940) 89(2) *University of Pennsylvania Law Review* 145, 153.

84 Paul R Rice, above n 79, 868-7: *Andrews v Solomon*, 1 F Cas 899, 900-01 (1816): 'An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him.' *Blount v Kimpton*, 29 NE 590, 591(1892): holding that communications between an attorney and his client, though made in the presence or hearing of a third party, are still confidential as between the attorney and the client. *People v Buchanan*, 39 NE 846, 854 (1895): finding that the privilege prevents the attorney from revealing the communications between him and his client although a third person present during the communications is not within the privilege.

85 Paul R Rice, above n 79, 897.

86 See Steven Shavell, 'Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, And Protection of Confidentiality' (1988) 17 *Journal of Legal Studies* 123.

87 Ibid 143.

88 Alison M Hill, 'A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community' (1995) 27 *Case Western Reserve Journal of International Law* 145, 177.

89 Louis Kaplow and Stephen Shavell, 'Legal Advice about information to present in Litigation: Its effects and social desirability' (1989) 102 *Harvard Law Review* 565.

> ex post is socially valuable, however strongly clients desire it and however much the legal profession profits by providing it.[90]

Wigmore's analysis remains influential and many courts and commentators still use his terminology and classification scheme for privileges and related doctrines.[91] Sexton notes Harzard's criticism of Wigmore's historical analysis, however he concludes that 'most commentators would agree that, today, the privilege is based on Wigmore's utilitarian model and is designed to promote freedom of consultation between lawyer and client.'[92]

3.8.3 The empirical critique: weighing the systemic costs and benefits of privilege

At the systemic level, client legal privilege promotes unfettered communication that can provide important information to legal representatives and to the court; assure client compliance with the law and foster consultation. The fear of subsequent disclosure of confidential communication would inhibit free and frank communications, nevertheless as noted by Sexton in 1982 following on from *Upjohn v United States,*[93] given that privilege can conceal evidence from a court it needs to be confined with narrow limits.

> Notwithstanding the interest that the attorney-client privilege purports to serve, even its staunchest proponents concede that, whenever the privilege is invoked, otherwise relevant and admissible evidence may be suppressed. Inherently, the attorney-client privilege, like all privileges, potentially hinders the administration of justice. Indeed, although the benefits of the privilege are indirect, in the words of Wigmore, "its obstruction is plain and concrete." In other words, a tension exists between the secrecy required to effectuate the privilege and the openness demanded by the factfinding process. Because of this tension, it has been concluded broadly that the contours of the privilege should "be strictly confined within the narrowest possible limits consistent with the logic of its principle."[94]

This formulation itself invites the courts to perform a balancing act to establish the threshold question of whether to recognise a privilege, once the threshold question has been resolved in the affirmative, the privilege should stand unless waived by the client or the crime/fraud

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90 Ibid 614, note this finding is particularly significant for the tax practitioner-client communications as it is the advice provided in the tax planning stage that can influence the behaviour of the client: whether they will enter into a transaction, or how they will structure that transaction to comply with the tax laws.

91 Edward J Imwinkelreid, above n 6, 148: 'That imprint is evident at even the highest levels of the American judiciary. The Supreme Court, in the 1996 decision in *Jaffe v. Redmond*, (518 U.S. 1) and the 1998 opinion in *Swindler & Berlin*, (524 U.S. 399) felt obliged to appeal to the authority of Wigmore's treatise. The fact that the courts still cite the treatise is not the full extent of its influence. The impact is even more profound. More fundamentally, the modern law still reflects Wigmore's basic approach to privilege doctrine – a distrust of privileges, born of the priority he assigned to rectitude of decision and an empiricism that led him to be sceptical of humanistic rationales.' Wigmore's treatise is also extensively cited in case law and scholarly texts throughout common law countries.

92 John E Sexton, 'A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege' (1982) 57 *New York University Law Review* 443, 446 citing Note, 'The Attorney-Client Privilege, Fixed Rules, Balancing, and Constitution' (1977) 91 *Harvard Law Review* 464, 470.

93 *Upjohn Co v United States*, 449 US 383 (1981).

94 Ibid 446 (citations omitted).

exception applies. Pollard's rejoinder to this attack is that the costs imposed by a privilege are no less speculative than the benefits.

> If the privilege encouraged a communication that would not have otherwise occurred and then shielded that communication from discovery, the result is a net "wash" for evidentiary purposes. The exceptions to privileges and concepts such as waivers diminish the costs of the privilege and can provide access to the most important evidence. Furthermore, communications that are determined not to be privileged cannot be forced out of unwilling witnesses, so compelled disclosure may often result in false testimony. Finally, the loss of a single piece of evidence will rarely make or break a case.[95]

Rosenfeld states the case for privilege employing a utilitarian justification.

> Accordingly, utilitarian theory could justify the preservation of the attorney-client privilege despite its shortcomings. Although the privilege has a harmful consequence of the concealment of otherwise relevant information, this consequence is outweighed by the benefits of the assertion of a greater number of just claims and the more effective presentation made possible by uninhibited attorney-client consultations.[96]

If a proposed privilege satisfied the balancing test at that systemic level, then Wigmore favoured classifying the privilege as *absolute*, as had been decided by the English courts in the 16th century. He opposed treating the privilege as qualified in the sense that would allow the opponent to defeat the privilege claim by making a case-specific, ad hoc showing of compelling need for the privileged information.

Wigmore in his fourth requisite for establishing a privilege takes into account only the systemic harms caused to the truth-seeking role of the courts. His starting point is that every witness is legally obligated to testify unless 'extrinsic policy' justifies the exception.[97]

> ...by relying exclusively on the interests of people not involved in the litigation, the justification frees itself of any taint associated with permitting particular individuals to hide inculpatory information. ...by considering only extrinsic social policy, the justification elevates the interest advanced by privileges to the same plane as the societal interest in ascertaining the truth.'[98]

The utilitarian emphasis on the consequences of the privilege compels the application of a fixed rule of privilege, for fear that departure from it in particular cases, may undermine its claimed benefits for all prospective attorney-client communications.

Legal communications have been given 'weighty' value because of the *necessity* of legal representation. It is argued that attorney-client communications help to bring relevant information before the court; help ensure client compliance with the law and help clients

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95 Deana A Pollard, 'Unconscious Bias and Self-Critical Analysis: the Case for a Qualified Evidentiary Equal Employment Opportunity Privilege" (1999) 74 *Washington Law Review* 913, 999 (citations omitted).

96 Michel Rosenfeld, above n 18, 508.

97 John Henry Wigmore, above n 55, §2285, 527.

98 Note, 'Developments in the Law: Privileged Communications' (1985) 98 *Harvard Law Review* 1450, 1474.

realise the full limits of their legal rights.[99] The protection offered by privilege enables free communication and helps create information, information that may guide future action, and information that did not exist before and might not exist otherwise, if not for the privilege.[100] Hence because information might not exist were it not for the privilege, any loss of information when the privilege is upheld may be more imagined than real.

Professor Leslie warns of the necessity to confine privilege within narrow borders.

> In a perfect world, however, the privilege would shield no evidence. Privilege generates the communication that privilege protects. Eliminate the privilege, and the communication disappears or is rendered unreliable. ...In reality, however the privilege is not a but-for cause of all attorney-client communications. Clients may gain privilege protection for statements that they would have made without the privilege, simply by minding the privilege rules. To the extent that clients claim the privilege unnecessarily, the privilege obstructs the fact-finding process. It excludes communications that would otherwise have been discoverable. Thus have courts and commentators ceaselessly, almost stridently, emphasized the importance of construing the privilege narrowly.[101]

Critics of this systematic weighing challenge the notion that the privileges actually encourage communications. Too often such convictions are based on inadequate data or sentiment rather than on fact.[102]

> Virtually every present or former (legal) practitioner has an anecdote about a close-mouth client who bares his or her soul after – and only after – the attorney assures the client that the client is revealing the secrets solely to the attorney "and these four walls'.[103]

3.9 Empirical evidence of privilege encouraging communications, is very limited

There is indeed very little empirical evidence of the actual behavioural effects of privilege. The best known survey was conducted by Yale Law Journal over the months of November and December 1961:[104]

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99 See Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060.

100 See Stephen A Saltzburg, 'Privileges and Professional Lawyers and Psychiatrists' (1980) 66 *Virginia Law Review* 597, 610.

101 Melanie B Leslie, 'The Costs of Confidentiality and the Purpose of Privilege' (2000) *Wisconsin Law Review* 31, 31-5: Leslie refutes Rice's argument that the confidentiality requirement is irrelevant and that it has no substantial function; 'scholars and courts adjudicating privilege issues have long struggled with the tension between the need for the privilege and the substantial cost of shielding relevant evidence from the fact finder.'

102 Edmund M Morgan, above n 83, 150. *Compare* Melanie B Leslie, above n 101, 37: 'rarely, if ever do courts have the benefit of empirical evidence when fashioning common-law rules.'

103 Edward J Imwinkelreid, above n 6, 296.

104 Notes and Comments, 'Functional Overlap between the Lawyer and Other Professionals: its implications for the Privileged Communications Doctrine' (1962) 71 *Yale Law Journal* 1226, 1260: the Comment discusses whether the privilege should be withdrawn, partially or totally, from the attorney-client relationship, or extended to accountants, business associates, marriage counsellors, psychiatrists, psychologists or social workers – professions in which the functional parallel is most striking. The comment concluded that eliminating the attorney-client privilege or partial withdrawal of the privilege in areas of overlapping functions be rejected as to do so may destroy or at least imperil the beneficent aspects of the privilege. It further suggested that privilege be extended to psychiatry, psychology, and social work; but that accountants and business associates should not be given the privilege.

> ...our survey indicated that more people would talk to a lawyer *sans* privilege, than they would to a marriage counsellor. Lawyers, significantly more than laymen, believe the privilege encourages free disclosure to them. ...most people were either unaware of the attorney-client privilege or believed that it extended to other professional relationships as well. ...Our limited survey suggests that lawyers, generally, are less favourable than laymen to extensions of the privilege.[105]

The survey finding that the average person knows little about privileges may be not affect people's behaviour. If people do not know the law of privilege, this does not encourage communications. Alternately their need to communicate would overcome their fear of disclosure. The empirical data, such as it is, is mixed. What may be more significant is whether those who are aware of the nonexistence of a privilege would be deterred from engaging in communications.[106] Furthermore it could be argued that the lack of knowledge of privilege could be remedied by education, professionals themselves are likely to inform clients of the existence or otherwise of the privilege, and publicity might inform even more. Professor Krattenmaker argued in 1973 that even a subconscious awareness of the privilege may influence human behaviour.[107]

The Yale Law Journal study demonstrated that those people most likely to need the privilege, namely litigants, are more likely to inform themselves about the rule than the general populace, and that if it should become known that there is no privilege, (and it would take only one sensational case to accomplish this) it is probable that a great many clients will be deterred from consulting lawyers or from disclosing freely to them.[108]

Professor Zacharias after reviewing the Yale study concluded that the 'Yale figures call into question the need for unlimited attorney-client confidentiality rules.'[109] In 1998 he conducted a further study in Tompkins County, New York and the responses supported the proposition that some form of confidentiality rule serves confidentiality's basic premise that clients will confide more readily when they believe confidences will be respected. The survey found that on the whole, the clients accepted that lawyers have a higher legal obligation to preserve confidences than accountants.[110] However, few were prepared to trust lawyers more than

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105 Ibid 1232-1233 (citations omitted) 1233-4: thus Wigmore's criteria which speak in terms of 'the community's' evaluation of the relationship might more accurately have been phrased 'society as the community of lawyers sees it.' (Citations omitted).

106 Note, above n 98, 1474-5 the survey indicates that privileges do not affect the behaviour of most people, however the effects on a group of 25 to 30 per cent at the margin may well be enough to justify the evidentiary loss attending recognition of the privilege.

107 Thomas G Krattenmaker, 'Testimonial Privileges in Federal Courts: an Alternative to the Proposed Federal Rules of Evidence as they affect Marital Privileges' (1973) 16 *California Law Review* 1353, 1371.

108 Note, above n 98, 1475 provided the example: 'the sending of a priest to jail for refusing to testify might apprise a significant number of people that their communications with clergy are not protected.'

109 Fred C Zacharias, 'Rethinking Confidentiality' (1989) 74 *Iowa Law Review* 351, 379.

110 Ibid 384; 57.6 % of clients responded that lawyers must keep confidentiality more than accountants; 50.7 % of clients would give information to lawyers more readily than to accountants.

priests, doctors, psychologists or psychiatrists.[111] Thus the data calls into question the central role the legal profession attributes to strict privilege rules in encouraging potential clients to engage lawyers and confide in them.[112] The Tompkins County study is however, limited by its relatively small sample group and its surveying of residents who had exhibited an interest in legal issues by volunteering to serve as mock jurors.[113]

Professor Alexander conducted a study in 1989 of corporate attorney-client privilege in Manhattan, New York and concluded that the study did not prove that attorney-client privilege actually encourages candour in communications between attorneys and corporate management:

> Empirical data alone, however, will never resolve all of the problems generated by corporate privilege. Policy considerations should also play a role in shaping it. Furthermore, the type of empirical data collected in a survey of attorneys and corporate executives unavoidably contains a certain amount of professional bias.[114]

There were also two studies conducted by the American Bar Association Task Force on Attorney-Client Privilege in 2005. Both surveys asked similar questions and obtained similar results. One study conducted by the Association of Corporate Counsel[115] produced responses that were overwhelmingly in favour of the continuance of privilege in the corporate setting, with 95 per cent responding that there would be a 'chill' in the candour of information provided to counsel if the privilege ceased to protect of client communications. The second survey, conducted by the National Association of Criminal Defense Lawyers: the White Collar Crime Project[116] found that 30 per cent of the clients of the in-house counsel had 'personally experienced' erosion in the protection afforded by privilege since the Enron collapse, and the percentage leapt to 47.6 per cent in the case of outside counsel clients. The surveys concluded that fear that federal prosecutors will continue to pressure corporations under investigation to waive attorney-client privilege and work-product protections hamper corporate compliance efforts.[117]

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111 Ibid 384; clients responded that lawyers must keep confidentiality more than priests (22.2%), doctors, (30.4%) and psychologists or psychiatrists 31.3%).

112 Ibid 384.

113 Daniel Northrop, 'The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document To Be Released to Third Parties: Public Policy calls for at Least the Strictest Application of the Attorney-Client Privilege' (2009) 78(3) *Fordham Law Review* 1481,1505.

114 Vincent C Alexander, 'The Corporate Attorney-Client Privilege: A Study of the Participants' (1989) 63 *St John's Law Review* 191, 414.

115 Association of Corporate Counsel, 'Association of Corporate Counsel Survey: Is the Attorney-client Privilege under Attack? (April 6, 2005) < hackett@acca.com>.

116 Leonard Post, 'White-collar Crime: Eroding Privilege Hurts Corporate Compliance– Pressure to Waive Privilege Dissuades open Airing of Problems' (April 27, 2005) *National Law Journal* 6.

117 Ibid.

The empirical critique is not sufficiently solid to support the estimates of either critics or proponents as to either the costs or the benefits of privileges.[118] Contrary to Wigmore's assertion neither the costs nor the benefits are easy to identify, let alone measure. Furthermore the empirical studies of the impact of the evidentiary privileges on the willingness of clients to confide in professional consultants do not bear out Wigmore's generalisations.[119]

3.9.1 Estimating the behavioural impacts, in the absence of privilege

The utilitarian justification for client legal privilege is not borne out by the empirical research. The empirical data, scant though it is, points to reluctance by clients to communicating freely about sensitive issues in the absence of privilege. All else being equal, the more incriminating the evidence the greater the liability, (and thus the more valuable the information to society) the less likely it would be that a person would communicate it without the privilege.[120] The behavioural impact of an absence of privilege on the professional also needs to be considered; especially given that the professional is more likely than the nonprofessional to know about whether privilege applies, and therefore to change their behaviour accordingly.

The impact is particularly acute in the case of the criminal defence lawyer. First, the lawyer has a duty to learn everything possible about the client's case, before advising a client; the lawyer needs to know the truth in order to effectively represent the client's case. Second, the lawyer has a duty to preserve the clients' confidences and third, the lawyer as an officer of the court has duty to the court of frankness and candour. These three duties have been coined as the *perjury trilemma* by Professor Freedman.[121] The resolution of these prima facie,

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118 Note, above n 98, 1474.

119 See Richard C Wydick, 'The Attorney-Client Privilege: Does it really have Life everlasting?' (1998-99) 87 *Kentucky Law Journal* 1165, 1173: 'If we depend solely on the utilitarian justification of client privilege, then we should indeed be troubled by the shortage of empirical evidence about whether the candor of attorney-client communication would or would not be lessened if the privilege were curtailed at the client's death.' (Citations omitted).

120 See Notes and Comments, above n104, 1477.

121 The term was first coined by Freedman in his article: Munro H Freedman, 'Symposium of Professional Ethics. Professional Responsibilities of the Criminal Defense Lawyer: the Three Hardest Questions' 64*Michigan Law Review*1469, 1469 wherein Freedman poses three questions: '1.Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? 2. Is it proper to put a witness on the stand when you know he will commit perjury? 3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?' Freedman notes (1482) '...there are policies that justify an affirmative answer to the three questions that have been posed in this article. These policies include: the maintenance of an adversary system; the presumption of innocence; the prosecution's burden to prove guilt beyond a reasonable doubt; the right to counsel and the obligation of confidentiality between lawyer and client.' These are questions that can of course be equally cogently answered in the negative.

conflicting duties has caused much controversy in the field of legal ethics[122] particularly, when a client makes the intention to commit perjury, known to the lawyer. The lawyer is required to protect the privileged communications of the client; the lawyer is obligated to urge the client to disclose the truth, but to remain silent if the client chooses not to do so. The lawyer's duty to the court, as an officer of the court, was described by the American Bar Association Standing Committee on Ethics and Professional Responsibility in 1945 as:

> '[W]hile ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court [Canon 22], this duty does not transcend that to preserve the client's confidences [Canon 37].'[123]

Then again eight years later in 1953, the Committee resolved the conflict in favour of confidentiality.

> `We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.'[124]

3.10 Utilitarian justification for a taxpayer privilege

Wigmore's formula is often cited by the judiciary as authority either for or against applicability and scope of the privilege. However, as noted by Jentz, there are certain inconsistencies that exist between a flexible interpretation of the four conditions and the courts' treatment.

1. The Wigmore formula is based on (1) the *nature* of the communication involved and (2) the importance of maintaining the relationship involved from society's view point. In contrast to these tests, the courts have based the applicability of the privilege primarily on the *communicators* involved and their respective titles.[125] i.e. is he an attorney, client, doctor accountant? This arbitrary test in no way harmonizes with the Wigmore Standard.
2. The courts, by themselves, have not expanded the privilege doctrine with regard to professional relationships beyond that of attorney-client[126] even though Professor Wigmore does not hint at such a limitation. Given the overlap in functions existing between certain professions (e.g. the tax "attorney" and the tax accountant"), this judicial self-restraint is not justified under the Wigmore approach.[127]

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122 See Monroe H Freedman 'Getting Honest About Client Perjury' (2008) 21 *Georgetown Journal of Legal Ethics* 133, 139.

123 American Bar Association Standing Committee on Ethics of Professional Responsibility: Formal Opinion 268 (1945) cited in Monroe H Freedman, 'Perjury: The Lawyer's Trilemma' (1975) 1 Litigation 26, 27.

124 American Bar Association Standing Committee on Ethics of Professional Responsibility: Formal Opinion 287 (1953).

125 See eg: *Gariepy v United States,* 189 F 2d 459 (6th Cir, 1951); *Olender v United States,* 210 F 2d 795 (9th Cir, 1954).

126 Wigmore was taken seriously in *Re Kryschuk and Zulynik* [1958] 25 WWR 77, where the privilege was recognised for information obtained by social workers.

127 Gaylord A Jentz, 'Accountant Privileged Communications: Is it a Dying Concept under the New Federal Rules of Evidence" (1973) 11(2) 149 *American Business Law Journal* 151 (emphasis and citations in original).

Tax practitioners come from two key professions, accounting and the law, with an increasing number having dual qualifications. In the words of Richards:

> Tax professionals practice in a twilight zone. If they practice as accountants, they spend much of their time acting as quasi-lawyers. And if they practise as lawyers they spend much of their time acting as quasi-accountants. …In the end the quality of the advice received is more likely to reflect the individual who gave it rather than the profession in which he or she practises.[128]

Confidential communications between a taxpayer and their tax lawyer attract client legal professional, while the same communications between a taxpayer and their tax accountant do not. The courts have been unsuccessful in attempting to draw the line between what constitutes accountants' work and what qualifies as legal advice in the tax arena.[129] In the case of small businesses and individual taxpayers it is usually their tax accountant, someone with whom they are more likely to have formed an on-going advisor relationship with over time that they turn to for tax advice. In this respect, the tax accountant plays an important role in facilitating compliance with the law and access to a fair hearing before the tax authorities. The tax accountant serves the dual function of assisting the taxpayer and the broad public interest in the effective administration of justice, especially in a self-assessment tax system.

In applying Wigmore's criteria to the taxpayer-tax accountant relationship, the first criterion that the communications must originate in a confidence that they will not be disclosed, is not difficult to establish. Confidentiality is central to the taxpayer-tax accountant relationship if 'sensitive' financial issues are to be fully explored and structured to comply with the law. That tax law is very complex[130] and it has long been recognised that taxpayers require the assistance of professionals in order to be to meet their compliance requirements.[131] Therefore taxpayers regularly turn to tax practitioners for assistance.[132] As a consequence tax practitioners exert a strong and direct influence on the level of tax compliance, and the ethical

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128 Robert Richards, 'Tax Accountant or Tax Lawyer?' (1992) 62 (2) *Australian Accountant* 23, 24.

129 The case law in this area is extensive and will be examined in later chapters in this thesis.

130 See *Hepples v Commissioner of Taxation* (1992) 173 CLR 492, 511 (Deane J) 'successive administrations have allowed the Act to become a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in search to identify the provisions relevant to a particular case.'

131 See Thomas Walter Swan, 'Learned Hand' (1947) 57 *Yale Law Journal* 167, 169 quoting Justice Learned Hand: 'In my own case the words of such an act as the Income Tax for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer [me] no handle to seize hold of [and that] leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.'

132 John Collett, 'Many Happier Returns' *The Age* (on line) (May 19, 2010) <http://www.theage.com.au/news/business/money/tax/many-happier-returns/2010/05/18/1273948128782.html>. In Australia almost 80 % of individual taxpayers use a tax agent. In Britain and the US less than 60 % of taxpayers use a tax agent and in New Zealand the figure is about 20 %.

standards of their clients.[133] Taxpayers seek to legitimately minimise their taxes without facing the risk that they may at some time in the future be accused of engaging in tax avoidance or evasion.[134] The taxpayers' legitimate goal of minimising their tax burden was explained in the classical words of Justice Learned Hand.

> Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced extractions, not voluntary contributions. To demand more in the name of morals is mere cant.[135]

The operation of a self-assessment system depends on taxpayers' voluntary compliance with the law and taxpayer honesty in preparing tax returns,[136] with the understanding that the information they disclose will be treated with utmost confidentiality.[137] These are sensitive communications that deserve the protection of confidentiality.

> Generally, taxpayers seek to protect the thought processes, notes, opinions and analyses of their advisers; this may include tax opinions, tax planning memoranda, analyses of what constitutes substantial authority, discussions of contrary authority and analyses of alternatives rejected in tax planning.[138]

Wigmore deliberately biased the test against the creation of new privileges. The bias is most clearly embedded in the second criterion: that the assurance of confidentiality must be truly 'essential' to the satisfactory maintenance of the relation. In effect the advocate of a privilege must demonstrate that absent the privilege, the taxpayer would be deterred from either consulting the tax practitioner or hesitant in making the necessary disclosures during the consultation. The assumption is that there is a causal relationship between the creation of the privilege and the occurrence of the desired behaviour; *but for* the existence of the privilege, the typical taxpayer would be unwilling to engage in the full and frank communications. The limited empirical evidence has indicated that 'sensitive information' relates to information of

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133 Brian Erard, 'Taxation with Representation: an Analysis of the Role of Tax Practitioners in Tax Compliance' (1993) 53 *Journal of Public Economics* 163.

134 See John McLaren, 'The Distinction between Tax Avoidance and Tax Evasion has become Blurred in Australia: Why has it Happened?' (2008) 3(2) *Journal of Australasian Tax Teachers Association* 141, 145. The distinction between tax planning, tax avoidance and tax evasion is not always clear, especially for taxpayers.

135 *Gregory v Helvering*, 69 F 2d 809, 810 (1935).

136 See *MacKinlay Transport v The Queen* [1990] 2 CTC 103, 108 Justice Wilson.

137 See Maria Italia, 'Taxpayer Privilege and the Revenue Authorities' Obligation to Maintain Secrecy of Taxpayer Information: Recent Developments in Australia, and a comparison with New Zealand, the United Kingdom and the United States' (2011) 17(2) *New Zealand Journal of Taxation Law and Policy* 151.

138 Ronald E Friedman and Dan L Mendleson, 'The Need for CPA-Client Privilege in Federal Tax Matters' (1996) 27(3) *The Tax Adviser* 154.

a financial nature, especially information that could lead to criminal charges of tax evasion.[139]

Wigmore's third criterion that the relation must be one which in the opinion of the community ought to be sedulously fostered, ensures that very few relationships would surpass the hurdle. The tax accountant does perform a vital role in the self-assessment system in assisting taxpayers to fulfil their burden of proof. The system imposes the burden upon the taxpayer to make accurate returns and is reliant on honest and accurate return and accompanying documentation by the taxpayer.[140] Taxpayers face heavy financial penalties for failure to disclose relevant financial information in their tax return hence, their need for professional assistance. Tax accountants are accountable to the Revenue authority, their accounting firm, and their client. A study by Cox and Radtke in 2000[141] reported that significant accountability pressure exists from the tax accounting firm to comply with tax law, while simultaneously pleasing the tax client. In balancing these obligations the tax accountant encourages the client to comply with all the legal requirements while interpreting the requirements aggressively in favour of their client, when there is precedent or an arguable case for doing so.

Wigmore's fourth criterion requires a balancing between the injury that in this case would be suffered by the taxpayer-tax accountant relationship, should confidential communications not be protected by privilege, against the benefit gained by the Revenue authority in being able to access the necessary documentation. Indeed a balance needs to be struck between the taxpayer's right to confidentiality and the Revenue authority's ability to access information so that it can collect the necessary revenue as efficiently and equitably as possible. Generally Revenue authorities have broad investigative and compulsory disclosure powers. Powers that essentially are only subject to the operation of client legal privilege. The extending of a similar privilege to taxpayers who choose the often less expensive alternative and consult a tax accountant to organise their tax affairs, would arguably result in a relatively small increase in costs for the Revenue authority.

Wigmore did argue against the extension of privilege to the accounting profession, even though numerous American States[142] had enacted accountant-client privilege. The argument

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139 Daniel W Shuman and Myron S Weiner, 'The Privilege Study: an Empirical Examination of the Psychotherapist-Patient Privilege' (1982) 60 *North Carolina Law Review* 894, 919-20.

140 See *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193 (26 February 2004).

141 Stephen R Cox and Robin R Radtke, 'The effects of Multiple Accountability Pressures on Tax Return Preparation Decisions' (2000) 12 *Advances in Taxation* 23.

142 John Henry Wigmore, above n 55, §2286, 533-4 cites 14 State legislatures that have enacted accountant client privileges.

in this proposal is that the privilege be confined to the taxpayer-tax accountant relationship, a taxpayer privilege; it is beyond the scope of this thesis to argue for a general advice privilege for accountants.

3.11 Conclusion

The utilitarian rationale for privilege as espoused in the early 20th century by Wigmore has formed the basis of legislation on client legal privilege, and is still relied upon by the courts in justifying the existence and the operation of the privilege. This utilitarian rationale is not a definitive justification for privilege. The limited empirical evidence does not support the assumption that *but for* the privilege the client would not freely and fully communicate with the legal advisor. What the research does point to is that sensitive information may be less likely to be communicated in the absence of privilege.

Wigmore followed the English common law principle of 'once privileged, always privileged'[143] in asserting 'that the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client'*.[144] Whether the privilege necessitates such a permanent status has also been questioned, but ultimately not refuted, by a number of legal commentators and the courts.[145]

There are two basic competing rationales for the privilege doctrine, the instrumental or utilitarian, and the humanistic rights theories. The choice between the instrumental versus non-instrumental support for relational privileges is not mutually exclusive.[146]

> Upon closer analysis, however, the two can more accurately be viewed as representing the opposite poles of a continuum that comprises all the forms that individualism might embrace.[147] …Indeed, not only did Mill require that individual autonomy be afforded protection to preserve the efficiency of the self-regulating sphere of production, but he also vehemently maintained that the attainment of the common good is inextricably interwoven with the promotion and protection of individual liberty. [148]

The next chapter will explore the humanistic value as possible normative explanations of privilege; directing its attention to privacy and personal autonomy as the ultimate humanistic values justifying the creation or retention of privilege.

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143 *Calcraft v Guest* [1898] 1 QB 759.

144 John Henry Wigmore, above n 55, 631 (emphasis in original).

145 See Richard C Wydick, above n 119. See also Edward J Imwinkelreid, above n 6.

146 Daniel W Shuman and Myron S Weiner, above n 139, 906.

147 Michel Rosenfeld, above n 18, 532-3

148 Ibid 534.

CHAPTER FOUR

A humanistic or 'theory of rights' rationale for client legal privilege

4.1 Introduction

The previous chapter concluded that the utilitarian justification for client legal privilege alone is not supported by empirical evidence, and that indeed empirical research on the behavioural impact of privilege (or the absence of privilege) in a professional relationship, may not resolve the question of the costs and benefits of client legal privilege. The 1961 Yale Law Journal study concluded:

> Both camps in the privilege debate are hampered by empirical uncertainty. One can never prove that costs outweigh benefits or vice-versa with regard to a particular privilege: such arguments inevitably degenerate into simple unsupported assertions. The debate must instead focus on the values that society seeks to protect in a particular area or particular relationship. Once these values are identified, the evaluation of the privilege must rest not merely on an attempted cost-benefit analysis, but also on considerations of personal privacy and the social acceptability of a legal system that intrudes into particular areas.[1]

The utilitarian justification for privilege as espoused by Wigmore[2] with his four criteria for the recognition of privilege, do not lend themselves readily to the creation of privilege for professional relationships[3] beyond the traditional privileged relationships that were recognised by Wigmore in his treatise.[4] This thesis calls for a taxpayers' privilege therefore it is important to investigate the humanistic or theory of rights rationale for privilege with its emphasis on the privacy and autonomy of individuals to enable their free self-expression.

The previous chapter discussed the theory of individualism as developed by John Locke within a utilitarian framework. The theory of individualism can also be expressed within a theory of rights. The two theories are not mutually exclusive, and can work together to provide a stronger basis for client legal privilege, within our adversarial system of adjudication. As noted by Rosenfeld whenever an expression of individualism is explicitly grounded on either a theory of rights or on some form of utilitarianism, it implicitly embraces notions embedded in the other.

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1 Note, 'Developments in the Law: Privileged Communications' (1985) 98 *Harvard Law Review* 1450, 1474.,

2 John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton, revised ed, 1961).

3 For example, the United States Supreme Court in *Brandzburg v Hayes*, 408 US 665 (1972) footnote 29 cited Wigmore in rejecting privilege for journalists. See also Jeffrey S Nestler, 'The Underprivileged Profession: the Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 213 'Over the past hundred years, however, Wigmore's factors, while still relevant, have been superseded by a more expansive vision of evidentiary privileges.'

4 John Henry Wigmore, above n 2; the four traditional relational privileges discussed by Wigmore are: attorney- client (§2290), husband-wife (§2332-2341), physician-patient (§2380--2391), and priest-penitent (§2394-2396).

> These competing theories provide two useful analogies to rights and consequences in the adversary system. First, both the theory of rights and utilitarianism reconcile individual rights and the good of society, at least in theory. Arguably, the attorney-client privilege not only protects the client's individual rights, but also promotes the discovery of the truth. Second, if the theory of rights and utilitarianism fail to reconcile individual rights and the good of society, they lose their claim to legitimacy in the context of individualism. Similarly, if the adversary system is not perceived as conducive to the discovery of the truth, the legitimacy of the attorney-client privilege should become increasingly difficult to justify.[5]

This chapter will focus on individualism in the context of a theory of rights, as a rationale complementary to the utilitarian rationale, for client legal privilege. The chapter will concentrate first on contrasting the utilitarian and humanistic rationales for client legal privilege. Second a number of early English common law cases that recognised the protection of property interests are discussed. Third Warren and Brandeis's seminal essay, on the right to privacy[6], which sought to establish a right to privacy as a common law principle per se, will be discussed. Their work proved influential in the courts of the United States, and spurred other legal writers to continue their work. Prosser is one such writer, whose work will be referred to.[7]

Fourth the definition of privacy, as developed by Alan Westin, in his 1967 thesis[8] encompassing four different psychological and physical relations is examined. Fifth 20th century cases recognising the right to privacy will be briefly examined. And sixth the practice of enshrining 'rights' within in a legislated 'Bill of Rights' is examined. Australia is one of the few western democracies without a national Bill of Rights. New Zealand and its *Bill of Rights Act*[9]*;* the United Kingdom with its *Human Rights Act*[10] and its adherence to the European Union *Convention on Human Rights;*[11] and the United States with its Constitutional[12] guarantees for the right of privacy will all be briefly examined. Both the common law and the statutory recognition of the rights are explored, with emphasis on the right to privacy for confidential communications in a professional-client setting.

As already noted, in the final analysis neither the utilitarian nor the humanistic rationales for the justification of client legal privilege are in themselves empirically valid. A full utilitarian

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5 Michel Rosenfeld, 'The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary system, and the Corporate Client's SEC Disclosure Obligations'(1981-82) 33 *Hastings Law Journal* 495, 501 (citations omitted).

6 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

7 See William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

8 Alan F Westin, *Privacy and Freedom* (Atheneum, 1967).

9 *Bill of Rights Act 1990* (NZ).

10 *Human Rights Act 1998* (UK).

11 *Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UTS 221 (entered into force 3 September 1953).

12 *Constitution Act 1787*, 17 September 1787.

approach that balances all the individual and societal interests would be better suited to providing an all-encompassing rationale.

4.2 Contrasting the utilitarian and humanistic justifications for client legal privilege

The utilitarian justification for client legal privilege is that it fosters full and candid communications from clients who might not seek legal advice if they thought their adviser could be forced to disclose confidences. The utilitarian justification rests on the behavioural assumption that *but for* the assurance of confidentiality the client would refrain from either consulting or making confidential disclosures to their legal adviser.

The humanistic rationale is that it is desirable to create certain privileges out of respect for personal rights such as privacy and autonomy. This rationale treats privileges as corollaries to the rights to privacy and personal autonomy.[13] The guarantee of privacy allows for personal autonomy and helps to ensure free self-expression.[14] Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.[15]

The humanistic rationale rests on a moral judgement against compelling the revelations of certain confidential communications. The basis is a normative proposition about the extent to which the government legal system should respect the confidentiality of a person's communication.[16] Within this context the 'honour' theory can be described as the first humanistic rationale for client legal privilege; the initial sentiment was that barristers, being honourable men, should not suffer the indignity of being forced to betray their clients' confidence. The Roman law sought to protect the sanctity of relationships. The basis for exclusion of testimony was the general moral duty not to violate the underlying fidelity upon which the protected relationship was built.[17] The lawyer's loyalty[18] to his client should be respected. Fried has argued that privacy is the moral capital of trust,[19] requiring an intimacy

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13 Edward J Imwinkelreid, 'An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis' (1994) 73 *Nebraska Law Review* 511, 543-44.

14 Charles Nesson, 'Modes of Analysis: The Theories and Justifications of Privileged Communications' (1985) 98 *Harvard Law Review* 1471, 1479.

15 Charles Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475, 488 'By according the privilege (privilege against self-incrimination) as fully as it does, our society affirms the extreme value of the individual's control over information about himself. …it is the point of the privilege that a man cannot be forced to make public information about himself.'

16 Edward J Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Wolters Kluwer, 2nd ed, 2009) 295.

17 Max Radin, 'The Privilege of Confidential Communication between Lawyer and Client' (1928) 16 *California Law Review* 487, 490.

18 *See* Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 *Yale Law Journal* 1060.

19 Charles Fried, *An Anatomy of Values* (Harvard University Press, 1970) 81.

based on 'the sharing of information about one's actions, beliefs or emotions which one does not share with all.'[20]

Both the utilitarian and humanistic rationales have been subjected to strong criticism. Both justifications require a balance that ultimately cannot be resolved empirically. The utilitarian rationale focuses on the societal interest in encouraging communications, while the humanistic rationale focuses on the individual interest in privacy. The utilitarian, or traditional rationale, highlights the systemic benefits of the privilege, such as the encouragement of communications, while the humanistic rationale focuses on the immediate benefits to the individual, such as the privacy and autonomy interests.

> A full utilitarian approach would balance all relevant interests, including those balanced under either the traditional justification or the privacy rationale. …the rise of the privacy rationale must be regarded as the development not of an alternative rationale, but of a supplementary one, responding to the limitations of the traditional justification. Judges and commentators, however, have generally continued to view the traditional justification and the privacy rationale as mutually exclusive alternatives[21]
>
> Individual privacy interest and non-individuated societal interests may together outweigh the costs of a particular privilege, even if neither alone could outweigh them.[22]

4.2.1 Individualism and theory of rights

The right of privacy is a continually evolving right, litigants must look to society's ideas on how much privacy is reasonable and national acceptance of ideas as harbingers of corresponding changes in the contours of the zones of privacy.[23] The creation of a private, intimate enclave for the client and the legal adviser will enable the free disclosure of all information relevant to the making of intelligent, independent choices. As long as a zone of autonomy exists around each and every individual, the opportunities for abuse and oppression are lessened. When privacy is threatened it enables control, manipulation and oppression. Thus privacy is a fundamental component to freedom. As noted by Imwinkelreid privacy protection is intertwined with liberty.

> A liberal democratic society should not only intervene to protect autonomy when the violation of a person's autonomy is certain or probable. More broadly, society should act to create conditions conducive to autonomy – in this setting, conditions that conduce to truly autonomous life preference choice. In particular, society should create conditions which give the person good reason to trust that the consultant will make a bona fide effort to assist the person to make an intelligent, independent choice.[24]

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20 Ibid 142.

21 Note, above n 1, 1484.

22 Ibid 1485.

23 Gary L Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision' (1976) 64 (6) *California Law Review* 1447, 1483.

24 Edward Imwinkelreid, 'The Rivalry between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in *Jaffe v. Redmond*, 518 U.S. 1 (1996)' (1998) 49 *Hastings Law Journal* 969, 987. (Citations omitted).

In this setting privacy is fostered as a normative proposition rather than an empirical hypothesis. The theory is tested by examining its consistency with liberal democratic theory, rather than measured by scientific investigation.

4.2.2 Key differences between the utilitarian rationale and the humanistic rationale

A key difference between the utilitarian rationale and the humanistic rationale is that in the utilitarian justification, the privilege is as absolute and permanent as possible, while under the humanistic rationale the privilege may have to give way to other interests. The humanistic rationale favours a case-by-case balancing of the interests concerned, applying a reasonableness test wherever possible. As a qualified privilege the privilege can be overridden by a showing of 'need for the information'. The trial judge will determine in the interest of justice whether the evidentiary need for the disclosure outweighs the client's privacy interest. The battle is between the search for truth and the individual's privacy needs.

Individualism requires the recognition of individual rights that guarantee the minimum of individual autonomy and dignity required to sustain the individual as an independent moral agent. The principle that individuals have a sphere of action limitable only to when other members of society receive injury is attributed to John Stuart Mill:

> …his philosophy suggests a zone of privacy where individuals may conduct themselves according to their own intelligent judgment as long as they do not adversely affect others who may not approve of the conduct for themselves. Privacy in this context refers to conduct which is closely and intimately related to the individual and his consenting associates, as opposed to privacy in the sense of concealment from others. This distinction is often overlooked...[25]

What conduct falls within the zone of privacy will depend on the factual and value judgments society makes regarding the effect of individual conduct. Immediate and direct injury to non-consenting persons would in Mill's view fall outside the zone of privacy.

The issue is whether personal privileges, such as client legal privilege can be defended as important protectors of individual privacy. The attorney-client privilege relies on four values to give it strength:

> Faced with growing demands for both revelation and secrecy, those who have to make decisions about whether or not to uphold confidentiality faced numerous quandaries. …these should be resolved on the basis of four premises …(1) individual autonomy over personal information, (2) respect for relationships between human beings and for intimacy, (3) the universal acceptance of a pledge of silence creating an obligation beyond either of these, and (4) the utility of professional confidentiality to persons and society.[26]

The task is to assess what individual and societal benefits might flow from the public protection afforded to privacy.

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[25] Arden Doss and Diane Kay Doss, 'On Morals, Privacy, and the Constitution' (1971) 25 *University of Miami Law Review* 395, 399.

[26] Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Pantheon Books, 1982) 120.

> The rejection of a claim of privilege destroys the claimant's control over the breadth of the audience receiving personal information as well as his control over the timing and conditions of its release. Clearly then, limitations on testimonial privileges are an invasion of privacy.[27]

The confidentiality of communications is a privacy interest in itself, whatever impairment it may cause to the seeking of truth. Where confidentiality is the reasonable expectation of the client, and for some reason it is later disclosed by the legal adviser two distinct harms can occur: '(1) Embarrassment of having secrets revealed to the public and (2) the forced breach of an entrusted confidence.'[28] These harms are very real to the person whose secret has been revealed and will have a chilling effect on others who may desire to seek legal assistance. First harm is suffered by the client having to endure the shame and second the harm of treachery is suffered by the adviser, in divulging the client's secrets.

The privacy rationale raises three distinct questions:

> (1) whether people have a need to keep certain communications confidential; (2) whether this need is legally cognizable; and (3) whether the privacy interest outweighs the need for information.[29]

The first question is best answered, later in this chapter, by and the work of Warren and Brandeis[30] and Westin's thesis of privacy,[31]

4.3 Early English common law recognition of protection of property interests

English jurisprudence had by about the 17th century recognised that the protection of a person's home was a fundamental principle; this concept was established by the 17th century jurist, Sir Edward Coke, in his treatise *The Institutes of the Laws of England*, 1628:[32] 'For a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge].'

Unauthorised entry is trespass, as evidenced in the Earl of Chatham's famous speech in 1776 in respect of warrants:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the winds may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.[33]

The courts resolved cases on the basis of generally accepted principles of the times, such as those of property interest, rather than engaging the language of rights to privacy. The right of

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27 Thomas G Krattenmaker, 'Testimonial Privileges in Federal Courts: an Alternative to the Proposed Federal Rules of Evidence' (1973) 62 *Georgetown Law Journal* 61, 86.

28 Note, above n 1, 1481.

29 Ibid 1481: Note the similarity of these three questions to Wigmore's 2nd, 3rd, and 4th prerequisites for privilege.

30 Samuel D Warren and Louis D Brandeis, above n 6.

31 Alan F Westin, above n 8.

32 Sir Edward Coke, *The Institutes of the Laws of England*, (1st ed. Societie of Stationers, 1628).

33 Cited by Lord Denning MR in *Southam v Smout* [1964] 1 QB 308, 320.

privacy, in fact, underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence. Equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of a relationship with the other.

In the seminal case of *Prince Albert v Strange*[34] the defendant was a publisher who had obtained copies of private etchings made by the Prince Consort of members of the royal family at home. Vice-Chancellor Knight-Bruce, in granting an injunction restraining the publication of a catalogue containing descriptions of the etchings, said that it was:

> an intrusion - an unbecoming and unseemly intrusion…offensive to that inbred sense of propriety natural to every man - if, intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life - into the home (a word hitherto sacred among us)… [35]

The cause of action in the case was based upon the defendant's actual or constructive knowledge of a confidential relationship. It was not essential that the information should concern the Prince's family life or be in any other way personal. Any confidential information would have done. Nor was it essential that the defendant should have intended widespread publication.

Entick v Carrington[36] is a leading English case establishing the civil liberties of individuals and limiting the scope of executive power. The case highlighted that the state may do nothing but that which is expressly authorised by law, while the individual may do anything but that which is forbidden by law. It is also believed that this case exercised a decisive influence upon the shaping of the fourth[37] and fifth[38] amendments to the United States Constitution.[39]

Lord Camden in his decision in *Entick v Carrington* invalidated 'paper searches' conducted under the authority of a technically valid warrant:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. ... By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing.[40]
>
> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel

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34 (1849) 2 De G & SM 293; 1 Mac & G 25

35 (1849) 2 De G & SM 293, 313.

36 (1765) 19 Howell's State Trials 1029.

37 Fourth Amendment: right to be free from unreasonable searches and seizures. *See Warden v Hayden* 387 US 294, 304 (1967).

38 Fifth Amendment: privilege against self-incrimination. See *Schmerber v California* 384 US 757, 760-63 (1966).

39 Comment, 'The Life and Times of *Body v United States* (1886 -1976)' (1977) 76(1) *Michigan Law Review* 184, 186.

40 (1765) 19 Howell's State Trials 1029, 1066.

> and unjust and it would seem, that search for evidence is disallowed upon the same principle. Then, too the innocent would be confounded with the guilty.[41]

4.4 Warren and Brandeis conception of the 'right of privacy'

Before 1890, the idea that one had a right to privacy was virtually unheard of in the United States and England.[42] The seminal essay by Warren and Brandeis,[43] on the private law meaning of privacy served to show that the doctrines of trespass, nuisance, and property were inadequate to the task of providing redress for refined forms of intrusion.

> The essay has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law. …Piecing together old decisions in which relief had been afforded on the basis of defamation, or the invasion of some property right or the breach of confidence or an implied contract, the article concluded that such cases were in reality based upon a broader principle which was entitled to separate recognition. This principle they called the right to privacy;[44]

Warren and Brandeis 1890 essay highlighted that the courts had yet to recognise a separate actionable 'right of privacy'. They stressed the important role of the common law to grow to meet the demands of society; finding inspiration in the recognition of a right of privacy in the law of France and Rome.[45] They encouraged judicial creativity.

Privacy, in common law jurisdictions, was protected by other rights such as property and contract rights. Political, social, and economic changes taking place required the recognition of new rights. The common law needed to respond to the changing demands of society. Warren and Brandeis critically reviewed the decisions of both English common law and the newer American common law cases to establish their concept of the right of privacy. They noted the change from the earliest decisions that gave remedy only for physical interference to life and property; to consideration of the spiritual nature of man. This recognition of mankind's feelings, intellect and nature in general caused the law to evolve and recognise actions for nuisance, libel, slander and the alienation of spousal affection.[46]

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41 (1765) 19 Howell's State Trials 1029, 1073.

42 See Charles E Cantu, 'Privacy' (1988) 7 *Saint Louis University Public Law Review* 313, 317.

43 Samuel D Warren and Louis D Brandeis, above n 6: Brandeis became Mr Justice Brandeis, and championed of the right of privacy, as illustrated by his often quoted statement the 'right to be let alone' in his dissenting judgment in *Olmstead v United States* 277 US 438 (1928), 478.

44 William L Prosser, above n 7, 383-4. (Citations omitted).

45 Samuel D Warren and Louis D Brandeis, above n 6, 198 referenced the Roman law remedy for the mental suffering caused by '*injuria*', or 'insult, from an intentional and unwarranted violation of the 'honor' of another, citing Carl Salkowski, *Roman Law*, 688.The French Revolution's *Declaration of Rights of Man and the Citizen* (August 1789): 'Since property in an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it …'

46 Charles E Cantu, above n 42, 318.

The right to life had in Warren and Brandeis's view come to mean the right to enjoy life, the right to be left alone, especially from newspapers and their unscrupulous reporting of the 'news'.[47]

> The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.
> If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual …If, then decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.[48]

Warren and Brandeis were concerned to limit the right to privacy; to determine the exact line at which the dignity and convenience of the individual should yield to the demands of the public welfare or private justice. They advocated a case by case balancing of the right, to take account of varying circumstance, while acknowledging that this by necessity renders the doctrine more difficult to apply and creates uncertainty in its operation.

Their conclusion is noteworthy:

> The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?[49]

The essay was followed by a number of other scholars in legal articles on privacy, and with very few exceptions the writers have agreed, expressly or tacitly, with Warren and Brandies.[50] Warren and Brandeis's article was quoted in a number of cases, not always in agreement. The most controversial case was *Robinson v Rochester Folding Box Co;*[51] concerning the printing of a portrait of a young woman advertising a brand of flour, without her consent. The four-to-three split decision, of the State of New York High Court rejected Warren and Brandeis's thesis and declared that the right to privacy did not exist. The Court reasoned that there was a lack of precedent[52] and that the purely mental character of the injury would lead to a vast amount of litigation. Furthermore it feared an undue restriction on

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47 Samuel D Warren and Louis D Brandeis, above n 6, 196.

48 Ibid 205-6.

49 Ibid 220.

50 See William L Prosser, above n 7, 384 for discussion of other articles where authors have agreed or disagreed with Warren and Brandeis. See eg Roscoe Pound, 'The Fourteenth Amendment and the Right of Privacy' 13 *Western Reserve Law Review* 34, 36 '…when in 1890 the memorable paper of Warren and Brandeis expounded a right of privacy infringed without attack upon the physical person or deprivation of substance, it was regarded as a highly doubtful stretching of the supposedly fundamental analogy of trespass with force of arms.'

51 171 NY 538; 64 NE 442 (1902).

52 Chief Judge Parker, citing *Atkins v John E Doherty & Co* 121 80 NW 285 (1899) 'An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.'

the freedom of the Press. The Court reviewed the English cases discussed by Warren and Brandeis and came to the conclusion that they did not in any way support the position of the plaintiff. However, Gray J in a strong dissenting opinion in *Robinson* said:

> The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without the right to invoke the exercise of the preventive power of a court of equity.[53]

The decision caused a storm of public disapproval, and in the following year 1903 the New York Legislature enacted a statute[54] making it both a misdemeanour and a tort to make use of the name, portrait, or picture of any person for advertising purposes or for the purposes of trade without their consent. Two years later in 1905, the Supreme Court of Georgia rejected the *Robinson* decision and recognised the right of privacy, notably it followed the dissenting arguments of Gray J. The Georgian case, *Pavesich v New England Life Insurance Co,*[55] became a leading case, it concerned an insurance company publishing in a newspaper a likeness of the plaintiff without his consent, and attributing to him a statement that was false. For the next thirty years the United States courts continued to dispute whether the right of privacy existed at all, choosing in turn whether to follow *Robinson* or *Pavesich.*[56]

> Finally in 1939, the Restatement of Torts adopted the idea espoused half a century earlier by Warren and Brandeis, and slowly but surely the tide turned strongly in favour of recognition: the decisions rejecting recognition began to be outnumbered, and in 1955 the *Index of Legal Periodicals* inserted the heading entitle *Privacy.* This was the final impetus.[57]

4.4.1 William Prosser builds on Warren and Brandeis seminal work

Prosser in 1960,[58] refined the loose conglomeration of cases, identified by Warren and Brandeis, in the private law arena, into four groups of torts. The four torts have little in common, except that each represents and interference with the 'right to be let alone'.

> The four torts may be described as follows:
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name, or likeness.[59]

Prosser's classification was widely accepted by the State courts.[60]

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53 171 NY 538, 563; 64 NE 442, 450 (1902).

54 NY Sess. Laws 1903, Ch. 132 §1-2. Amended in 1921, NY Civil Rights Law §50-51.

55 122 Ga 190; 50 SE 68(1905).

56 William L Prosser, above n 7, 386.

57 Charles E Cantu, above n 42, 320.

58 William L Prosser, above n 7.

59 Ibid 398. Tort 3 (false light in the public eye) 'seems to have made its first appearance in 1816, when Lord Byron succeeded in enjoining the circulation of a spurious and inferior poem attributed to his pen.' *Lord Byron v Johnston* (1816) 35 ER 851.

60 Charles E Cantu, above n 42, 314:'This classification was soon adopted by the Restatement of Torts, and in virtually every jurisdiction in the United States.' (Citations omitted).

4.4.2 The constitutional right to privacy

The right to privacy has emerged, not only as a common law right, but also as a constitutional one,[61] with the United States Supreme Court in the late 1940's engaging in language of 'a constitution right of privacy' regarding the improper search and seizure of an individual's premises or body.[62] The Supreme Court went on to develop the theory that individuals are all endowed with the inalienable right to be left alone, a principle established in the 1965 *Griswold v Connecticut*[63] decision. The Court reasoned that the specific guarantees in the *Bill of Rights* have 'penumbras, formed by emanations from those guarantees that help to give them life and substance.'[64]

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one …The Fourth Amendment explicitly affirms the "right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create his own privacy which governments may not force him to surrender to his detriment. The Ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[65]

The right of privacy is not absolute and will usually be balanced against competing interests, be they the interests of the State or of other individuals. As Justice Goldberg noted in *Griswold v Connecticut* while the right of privacy is less than absolute, it may not be abridged 'simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.'[66] Goldberg J reasoned that the State should have evidenced a compelling interest in subordinating individual liberty, but failed to do so.[67] Goldberg J went on to determine the boundaries of protection in negative terms; by stating that the necessary inquiry is whether the right is of such a character that it cannot be abridged without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'[68]

4.5 Alan Westin's thesis of privacy and the individual's need for privacy

Secrecy and privacy are not interchangeable terms. Privacy, in the sense of the right to be left alone, involves the voluntary and secure control of the individual over the communication of

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61 Ibid 315.

62 Ibid 322-23: citing *Wolf v People of the State of Colorado*, 338 US 25, 27-28 (1949). 'The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society.'

63 381 US 479 (1965).

64 Ibid 484 (1965).

65 Ibid 484 (1965).

66 Ibid 497 (1965).

67 Ibid 497 (1965).

68 Ibid 498 (1965).

information about oneself. Privacy as defined by Westin in his 1967 thesis[69] encompassed four different psychological and physical relations between an individual and others. The four states of privacy are solitude, intimacy, anonymity and reserve.

Communication of the self to others is always incomplete, it is always based on the need to hold back some parts of oneself as either too personal and sacred, or too shameful and profane to express in the particular situation.

> The manner in which individuals claim reserve and the extent to which it is respected or disregarded by others is at the heart of securing meaningful privacy in the crowded, organization-dominated settings of modern industrial society and urban life.[70]

Privacy, in Westin's theory, performs four functions for individuals in democratic societies: personal autonomy; emotional release; self-evaluation; and limited or protected communication. The four can flow into each other: A right of privacy serves to promote and protect personal autonomy; without privacy there is no individuality.

The human need for autonomy is linked to the development and maintenance of this sense of individuality, and the human desire to avoid being manipulated or dominated by those who might otherwise penetrate one's innermost secrets. The individuals' decision of when and how to express their views publicly is a crucial aspect of autonomy.

Limited and protected communication provides the individual with the opportunities needed for sharing confidences and intimacies with trusted friends, secure in the knowledge that the social norms of a civilized society will minimise breaches of confidence. Alternatively the individual may seek professionally objective advice from persons whose status in society provides some guarantee that they will respect the confidentiality of the communication. Privacy is a very important instrument for achieving individual goals of self-realization.

Individuals need disclosure and companionship as well as privacy. This balance between privacy and disclosure will be powerfully influenced, by both society's cultural norms and the particular individual's status and life situation.[71] The basis of mutual trust is one person's willingness to surrender privacy by sharing information about themselves and another's responsive willingness to maintain the privacy of the shared information as against third parties.

> …the right to privacy is not simply a very important means to highly valued but distinct ends. Rather, privacy is further an end in itself – an essential condition of political liberty and our very humanity. ...Democracy requires individual growth, creativity and responsibility, and an inner zone of personal security which the state cannot penetrate. Privacy provides both that zone of

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69 *See* Alan F Westin, 'Science, Privacy, and Freedom: Issues and Proposals for the 1970's' (1966) 66 *Columbia Law Review* 1003. Westin set out his privacy thesis in Alan F Westin, above n 8.

70 Ibid 1022.

71 Ibid 1029.

> impenetrable individuality and the means by which public contributions can flow from responsible individual control over oneself. Privacy both protects private citizens from state control and permits full development of their public selves.[72]

In a complex legal world, individuals need 'the guiding hand of counsel'[73]to make choices in a reflective manner. Society should create conditions which give the person good reason to trust that the consultant will make a bona fide effort to assist the person to make an intelligent, independent choice.[74]

The whole network of American constitutional rights – especially those of free speech, press, assembly, and religion; securing 'persons, houses, papers and effects' from unreasonable search and seizure; and assuring the privilege against self-incrimination – was established to curtail the ancient surveillance claims of government authorities.[75] Democratic societies provide substantial amounts of privacy to allow each person widespread freedom to work, think, and act without surveillance by public or private authorities, and to provide similar breathing room for organizations; but they try to strike a delicate balance between disclosure and privacy in government itself.[76]

4.6 20th century common law recognition of a right to privacy and the balancing of interests

Common law countries have relied on the courts to create and define client legal privilege, and the courts for the most part have used utilitarian rationales in their reasoning, but in many instances they have combined this with the right to privacy. In the words of legal commentator Liam Brown:

> Legal professional privilege has been described as a fundamental or human right.[77] It is also a 'practical guarantee of fundamental rights,'[78] an 'important common law right',[79] 'founded upon the notion of fundamental human rights',[80] and an 'important human right deserving of special protection'.[81] [82]

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72 Thomas G Krattenmaker, above n 27, 89.

73 *Powell v Alabama* 287 US 45 (1932).

74 Edward Imwinkelreid, above n 24, 987.

75 Alan F Westin, above n 69, 1044.

76 Ibid 1050.

77 *Baker v Campbell* (1983) 153 CLR 85 at 116-8: *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543, 576 (Kirby J).

78 Liam Brown, 'Justification for Legal Professional Privilege when the Client is the State' (2010) 84 *Australian Law Journal* 624, 634: citing *Goldberg v Ng* (1995) 185 CLR 83, 121 (Gummow J).

79 Ibid: citing *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

80 Ibid: citing *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 92 per Kirby J.

81 Ibid: citing *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 at 576 per Kirby J.

82 Ibid (citations included).

The privilege has also been described in terms of being 'a necessary corollary of fundamental, constitutional, or human rights'[83] with the principle being based on 'a strong sense that any person charged or in peril of a charge has a fundamental human right to professional advice- which may not be effectively given if facts are withheld.[84]

The decision as to whether the privilege should be absolute thus providing certainty or whether it should be conditional, involves a number of factors:

> What effect the choice will have on administrative cost-savings, restraint of judicial discretion, and encouragement of communications; a determination of what effect it will have on the rule's under – and overinclusiveness; and a determination of how normatively important these effects are. All these factors must be qualified by the effect of any gap between the actual and apparent uncertainty of the privilege rule. Thus, the choice of the form of the privilege is largely independent of the substantive rationale for the privilege.[85]

Legal commentator Kennedy notes the role of certainty in the law.

> Certainty, on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them. From the point of view of the state, this increases the likelihood that private activity will follow a desired pattern. From the point of view of the citizenry, it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe. [86]

Every exception to the rule reduces the generality of the rule, and increases uncertainty, diminishing limits on judicial arbitrariness, and increasing administrative costs.[87] Maintaining a certain rule when it is only slightly preferable to an uncertain rule may lead to under and over inclusive effects thus eroding the certainty of the rule.

> A qualified privilege may provide more certainty to clients than absolute privileges that are subject to numerous exceptions. …Broad exceptions may cause more of a client's communications to be disclosed than if the privilege were qualified.[88]

The simplistic notion that utilitarian justified privileges have an overriding concern for certainty, and that humanistic justified privileges are indifferent to certainty and would function as efficiently under a case-by-case rule, is not necessarily correct, the importance of certainty becomes a matter of degree and varies with each type of privilege.

4.7 Constitutional recognition of rights in a 'Bill of Rights'

The term 'Bill of Rights' or 'declaration of rights' originated in England, in 1689.[89] Parliament asserted its supremacy over the monarch, and passed a Bill of Rights, listing a

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83 *A M & S Europe Ltd v Commissioner of the European Communities* [1983] QB 878, 941.

84 *R v Uljee* [1982] 1 NZLR 561, 569.

85 Note, above n 1, 1490.

86 See Duncan Kennedy, 'Form and Substance in Private law Adjudication' (1976) 89 *Harvard Law* Review 1685, 1688 (footnotes omitted).

87 Ibid 1689-90.

88 See Kerry L Morse, 'A Uniform Testimonial Privilege for Mental Health Professionals' (1990) 51 *Ohio State Law Journal* 741, 752-3.

number of fundamental rights and liberties for all Englishmen - rights that reflect the influence of John Locke. This Bill in turn influenced the development of the human rights guarantees in the amendments to the United States Constitution, and the *European Convention of Human Rights.* Lord Scarman noted that the draftsmen of the United States Charter[90]

> …were in fact English lawyers, brought up in the Middle Temple and other Inns, making sure that for the protection of the individuals and the States, the individual States, the English Common Law with the powers of the Monarch removed, should become the charter for basic human rights. Now, the American Bill of Rights is a very Common Law document. Strangely enough the European convention of Human rights borrows an enormous amount from the American Bill of rights.[91]

Australia is the only western democratic country with neither a constitutional nor legislated bill of rights.[92] However, the Australian High Court in *Communist Party v Commonwealth*[93] demonstrated that the judges of the High Court are prepared to interpret the *Australian Constitution Act 1900* provisions in such a manner as to uphold the rights of individuals and limit the power of the Federal Government. That this decision was made by a court in a country without a Bill of Rights at a time in history when contemporaneous decisions by the United States Supreme Court[94] suppressed the rights of assembly and association, (also concerning communists) is in the words of Justice Kirby worthy of constant reflection.[95]

The High Court has interpreted the *Australian Constitution* by implication to provide a number of human rights for Australian citizens,[96] with *Lange v Australian Broadcasting*

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89 On 13th of February 1689, the Lords Spiritual and Temporal Commons presented to Prince William and Princess Mary of Orange a 'declaration in writing'. The declaration of right lays down the limits on the powers of the crown; sets out the rights of Parliament; and certain basic rights for all Englishmen. The Bill was preceded by *the Habeas Corpus Act 1679* 31 cha 2, c2.

90 See Michael D Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (July 1988) 62 *The Australian Law Journal* 514, 517-18.

91 Ibid 517-18: citing Lord Scarman in the discussion in J H McCluskey, 'Law Justice and Democracy' the *Reith Lectures1986* (Sweet and Maxwell 1987) 108.

92 The Federal government refused to support the Australian Democrats' Australian Bill of Rights (2000).

93 (1951) 83 CLR 1. The case involved a challenge to the Federal Government's *Communist Party Dissolution Act 1950* (Cth), asserting that the Act was beyond the powers of the Federal Parliament and therefore invalid. Only Latham CJ upheld the validity of the Act. Dixon J led the majority decision in asserting that the implied principle of the rule of law requirement of objective criteria for the taking away of ordinary civic rights under a valid federal law. Thus the Court ruled the law invalid. The Government in September 1951 held a Referendum to change the Constitution and thus overturn the High Court decision. The Referendum failed to meet the goal of the majority of the people of the Commonwealth in a majority of the States.

94 *Dennis v United States,* 314 US 494 (1951) (Vinson CJ, Reid, Burton, Minton, Frankfurter and Jackson JJ: with dissenting judgments by Black and Douglas JJ). This decision of the United States Supreme Court upheld the validity of the *Smith Act* 54 Stat 671, 18 US Code 1946 – an Act that had many similarities with the Australian legislation to dissolve the Communist Party.

95 See Michael D Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 579.

96 The High Court in the late 1990's under the leadership of Mason CJ has retreated from this activist role.

Corporation[97] being such a case. A unanimous opinion of the High Court in this case, found in the *Australian Constitution* an implication, necessary to the parliamentary and electoral form of representative government, that there should be minimum requirements of free speech, in the media and elsewhere. In a right-conscious society, such as Australia, people will to turn to the courts to enforce their fundamental rights, even without a formal Charter of Rights; however, this does not obviate the need for a formal national Bill of Rights.

Australia is a signatory to all five international treaties that make up the *International Bill of Human Rights 1948;* however none of these treaties are legally binding in Australia. The right to a fair trial and the right not to be compelled to incriminate oneself are recognised in the *Optional Protocol to the International Covenant on Civil and Political Rights.*[98] Australia as a signatory to this covenant has not enacted legislation incorporating its provisions into domestic law. However, being a signatory to the *Covenant* gives Australian individuals the right to lodge complaints with the Human Rights Committee. The Committee's response is non-binding. Gummow J in *Minister for Foreign Affairs and Trade v Mango*[99] explained the application of international treaties to the interpretation of domestic statutes.

> The Parliament may make no attempt to incorporate expressly into domestic law the terms of a convention which has been ratified by Australia. Nevertheless, the terms of a convention may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation …This is taken on the footing that parliament intended to legislate in conformity and not in conflict with international law.[100]

As stated by Kirby J in *Al-Kateb v Godwin*[101] international rules 'do not bind as other 'rules' do. But the principles they express can influence the legal understanding.'[102] However, this view has not received the High Court's endorsement, as illustrated by McHugh J in the same case.

> …it is impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of the rules of international law. Legislators intend their enactments to be given effect according to their natural and ordinary meaning.[103]

President Maxwell in *Royal Women's Hospital v Medical Practitioners Board of Victoria*[104] urged legal practitioners to advance human rights arguments, where the opportunity presents

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97 (1997) 189 CLR 520.

98 GA res 2200A (XXI), 21 GAOR Sup (No 16), UN Doc A/6316 (16 December 1966).

99 (1993) 112 ALR 529.

100 (1993) 112 ALR 529, 560.

101 [2004] HCA 37; 219 CLR 562, (6 August 2004).

102 See Michael D Kirby, above n 90, 529-30 '…it behoves the judiciary to struggle for release from too narrow and provincial conception of its role and duties. Cases do present themselves where judges can opt for an internationalist approach to the issues before them. …Our duty as lawyers is to make ourselves aware of the gradual evolution of international statements of human rights and the jurisprudence developing around the, even where domestic law does not bind us to apply them. They are becoming part of the law of the world we live in.'

103 *Al-Kateb v Godwin* [2004] HCA 37[65]; 219 CLR 562 (6 August 2004).

itself. 'Practitioners should be alert to the availability of such arguments and should not be hesitant to advance them where relevant.'[105] Legal commentator Rogers agrees with Maxwell.

> The author (Rogers) is encouraged by Maxwell J's observations regarding the potential for development in this area of jurisprudence. He states, "[s]ince the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise".[106] More recently, Vickery J, in a case involving the statutory power of sale of a family home, confirmed that "following *Mabo v State of Queensland [No. 2]* (1999) 175 CLR 1 (Mabo), international law now has an entrenched influence on Australian jurisprudence."[107] [108]

The High Court decision in *Mabo* reversed a decision by the Judicial Committee of the Privy Council principally on two grounds: one that the old theory of the law had been founded in factual error. The old theory was based on the mistaken belief that the Aboriginal people being nomads, had no connection with the land and therefore no interest in the land, of a kind which the common law should recognise. The second stimulus to a changed approach was the international law of human rights against discrimination by reason of race. In the development and expression of the Australian common law the deep principles of international human rights law inevitably affect the expression of the common law of Australia.[109]

There is no Federal Charter of Human Rights. However, the Australian Capital Territory in 2004 enacted the *Human Rights Act,* and in 2006 the Victorian Parliament enacted the Victorian *Charter of Rights and Responsibilities.* The Victorian *Charter of Rights and Responsibilities* follows the United Kingdom and New Zealand models. Other states are yet to enact similar rights protection.

Warren CJ in a detailed judgment in the Supreme Court of Victoria[110] considered the nature of the relationship between the powers of investigation of organised crime offences in the *Major Crime (Investigative Powers) Act 2004* (Cth) and the human rights guaranteed by the *Charter of Rights and Responsibilities,*[111] namely a person's right to a fair hearing and right not to be compelled to testify against himself or herself or to confess guilt. Section 39 of the *Act* clearly and unambiguously abrogates the privilege against self-incrimination. The *Major Crime Act* provides for a direct use immunity of compelled information, but not for derivate

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104 [2006] VSCA 85 (20 April 2006).
105 [2006] VSCA 85, 71.
106 [2006] VSCA 85, 71.
107 *Nolan v MBF Investments Pty Ltd* [2009] VSC 244[151] (18 June 2009).
108 Dan Rogers, 'Coercion in Crime Commissions and the Abrogation of the Privilege against Self-Incrimination' (2012) 32 *Queensland Lawyer* 135, 142 (citation included).
109 *Mabo v State of Queensland [No. 2]* (1999) 175 CLR 1, 42 (Brennan J).
110 *Re Application under the Major Crime (Investigative Powers) Act* 2004 [2009] VSC 381.
111 Sections 24(1) and 25(2)(k) of the *Charter of Rights and Responsibilities 2006* (Vic).

use immunity. Her Honour accepted that the privilege against self-incrimination under common law includes both direct and derivate use immunity,[112] and that the *Major Crime Act* tends to limit the *Charter of Rights and Responsibilities* rights. However, the limitation was not demonstrably justifiable under section 7 of the *Charter of Rights and Responsibilities;*[113] and the State has the onus of justifying the limitation. Such a justification requires a high standard of proof and 'a degree of probability which is commensurate with the occasion.'[114] Her Honour noted that the rights under the *Charter of Rights and Responsibilities* defined the relationship between the individual and the State, and that they protect people against aggressive behaviour of those in authority.

> They reflect the philosophy that the State must prove its case without recourse to the suspect. They are fundamental to the criminal justice system and their importance should not be underestimated.[115]

4.7.1 New Zealand's *Bill of Rights Act 1990*

New Zealand enacted a *Bill of Rights Act* in 1990 and it forms an integral part of the law of New Zealand as stated by Cooke P, in *R v Goodwin*[116]

> The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance.[117]

The *Bill of Rights Act* was based on the *International Covenant on Civil and Political Rights* it did not create any new rights, but confirmed the existing common law rights. The *Bill of Rights Act* did not include a right to privacy. In fact there is no general right to privacy in New Zealand law.[118] Case law has developed a general tort of invasion of privacy and McGarth J and Thomas J, in dissenting judgments in *Brooker v Police*[119] expressed support for the strengthening privacy rights, pointing to international recognition of the right to privacy and social attitudes in New Zealand.[120] The New Zealand Law Commission in its review of privacy[121] has recommended a range of changes be made to the law of privacy.

4.7.2 The United Kingdom's '*Constitution*' and *Human Rights* legislation

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112 *Re Application under the Major Crime (Investigative Powers) Act* 2004 [2009] VSC 381[36].
113 Ibid 381[164].
114 Ibid 381[147].
115 Ibid 381[146].
116 [1993] 2 NZLR 153.
117 Ibid 156.
118 *Brooker v Police* [2007] 2 NZLR 91, 164. Followed by *Bradley v Wignut Films* [1993] 1 NZLR 716. 731-33.
119 [2007] 2 NZLR 91.
120 Ibid 136-148 (McGarth J); and 213-229 (Thomas J).
121 New Zealand Law Commission, 'Review of Privacy' (2011).

The United Kingdom is one of the few countries in the world that does not have a written or codified constitution. Therefore it developed an extensive number of areas through doctrine and principle over a long period of time. Its concept of the separation of powers between the three levels of governance: parliament, the executive and the courts was a political rather than legal principle. The classic theory of Parliamentary supremacy based on Dicey's[122] theory works on an understanding of sovereignty in terms of hierarchical order or power, with the judicial branch being the weakest of the three; with the courts recognising that they can be overridden by Parliament. Parliament enjoys a comprehensive and exclusive power of law making, with the power to make, change and unmake any law. It also enjoys a comprehensive and exclusive immunity of law making against any other person or body: its laws are not to be changed or unmade by any other person or body. The only thing it cannot change are the terms of its legislative actions.

> That the rule of law and the separation of powers complement the sovereignty of Parliament is not surprising. It is a fact accepted by the leading British constitutional theorists today. Under the influence of Diceyan orthodoxy, however, is not often acknowledged that the latter two doctrines, organise and ultimately limit the scope of the first. We cannot say that legislative supremacy is prior to the rule or law or the separation of powers. They operate jointly, or not at all.[123]

The first Bill of Rights was enacted in England in 1689, as noted in chapter two of the thesis, and it established Parliament's sovereignty over the Monarchy.

The United Kingdom enacted a *Human Rights Act* in 1998, to give further effect to the rights contained in the *European Convention on Human Rights.*[124] The *Human Rights Act* via section 3 requires all courts and tribunals in the United Kingdom to interpret legislation so far as possible in a way compatible with the rights laid down in the *Convention.* Nonetheless, there is currently an investigation by the Commission on a Bill of Rights to create a new Bill of Rights. The Commission concluded in April 2012 that there 'is no consensus within the Commission on the fundamental issue of whether or not a UK Bill of Rights was needed and if so, what problems it would address.'[125]

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122 See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 3-4.

123 Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution' (July 2009) 22(2) *Canadian Journal of Law and Jurisprudence* 1, 11 (citations omitted).

124 Full title is: *Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UTS 221 (entered into force 3 September 1953). As a founding member of the *Council of Europe* the United Kingdom acceded to the *Convention* in 1951, however it was not unit 1960 that British citizens were able to bring claims in the European Court of Human Rights.

125 April 2012 (Sir Leigh Lewis, Chair of the Committee). The Commission issued a second consultation paper in July 2012, and has held meetings with the judiciaries across the United Kingdom.

The *European Convention on Human Rights*[126] reaffirmed the Governments of European countries belief in the fundamental freedoms which are the foundation of justice and peace. Article 1 reads: 'The High contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.'[127] The European Court of Human Rights[128] has the role of ensuring observance of the Convention. The task is to ensure that States respect the rights and guarantees set out in the *European Convention.* Most of the European nations that have signed the *European Convention*, including the United Kingdom, have incorporated the *European Convention's* principles into their own domestic laws.

The *European Convention* has become an unexpected tool of taxpayer protection; tax policy-makers need to ensure that their tax measures are in line with the basic requirements imposed by the *European Convention.* In *Chambaz v Switzerland*[129] the Court concluded that the Swiss court by forcing a plaintiff in the course of a tax evasion investigation to provide potentially incriminating documents, was in violation of Article 6 (Right to a Fair Trial) of the *European Convention*. The Swiss authorities were found to have violated the plaintiff's right to silence; the case is illustrative of the Courts' continued endeavours to strengthen the taxpayers' right in litigation, in an attempt to level the playing field between the individual and the government, in tax cases.[130]

The decision in the United Kingdom Court of Appeal in *R (on the application of Morgan Grenfell' & Co. Ltd) v Special Commissioner*[131] concluded that section 20(1) of the *Tax Management Act 1970* authorises an Inspector to issue a notice requiring disclosure by a taxpayer of privileged material. The Court also addressed the role of the *European Convention* specifically Article 8(2)[132] and concluded that the economic wellbeing of the

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126 4 November, 1950 Rome and its five Protocols: 20 March 1952 Paris; 6 May 1963 Strasbourg; 6 May 1963 Strasbourg; 16 September 1963 Strasbourg and 20January 1966 Strasbourg.

127 Section 1 of the *Convention* has 66 Articles that highlight the various rights, and five Protocols creating additional rights.

128 The Court was set up in 1959 in the French city of Strasbourg, to hear cases brought by individuals, organisations and states against the countries which are bound by the convention. The Court will only hear a case when all domestic legal avenues have been exhausted. Plaintiffs must show that they have been a direct victim of an alleged violation and they cannot bring cases against individuals or private bodies.

129 (2012) (Application number 11663/04) ECHR 142.

130 See Ernst & Young, 'Major Developments: Three New Tax Judgments from the European Court of Human Rights' (2012) 49 *EU Direct Tax News* 1.

131 [2001] STC 497.

132 ARTICLE 8 Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security,

country was a ground on which the right to respect for private life and correspondence might be abrogated. On appeal in the House of Lord's[133] Lord Hoffman cited the European Court of Human Rights case of *Foxley v UK,*[134] confirming that client legal privilege is a fundamental human right, which can be derogated from only in exceptional circumstances, and expressed doubt that 'exceptional circumstances' would include the public interest in the collection of financial information by the Revenue.

Sedley LJ in *Douglas v Hello! Ltd*[135] in the United Kingdom Court of Appeal recognised that there is a right of personal privacy as an extension of the equitable right to have breaches of confidence restrained.

> The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individual's privacy; but they have felt unable to articulate their measures as a discrete principle of law. Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy … [Thus] equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. [136]

Sedley LJ went on to affirm that if the recognition of a right of privacy was not justified on common law principles alone, the *Human Rights Act 1998,* Article 8 right to respect for private and family life, home and correspondence gave 'the final impetus' to recognition of the claim.[137]

4.7.3 The Constitution of the United States

The United States Constitutional Amendments provide a number of rights for its citizens, rights that were influenced by the theories of John Locke. In reference to evidentiary privileges, Rule 501 of the *Federal Rules of Evidence* reads:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 501 left the existing common law privileges undisturbed and enabled the judiciary to interpret the law, create privilege-like non-disclosure rules[138] and where necessary recognise new privileges. In the federal system, the judiciary is primarily responsible for the initiation and subsequent modification of all the major relationship-based evidentiary privileges.

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public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

133 *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Tax* [2003] 1 AC 563.

134 (2000) 31 EHRR 637, 647.

135 [2001] 2 WLR 992.

136 Ibid 992[110]-[111].

137 Ibid 992[111].

138 Raymond F Miller, 'Creating Evidentiary Privileges: An Argument for the Judicial Approach' (1999) 31 *Connecticut Law Review* 771, 777.

Hence, the United States Supreme Court has been dynamic especially in racial desegregation, voting rights and reform of criminal procedure. It has 'legislated' where consensus was non-existent or at least doubtful. The one new evidentiary privilege it created was the psychotherapist-patient privilege in *Jaffe v Redmond.*[139] The Court concluded that Federal Rule of Evidence 501 'did not freeze the law governing the privileges,' and that exceptions may be established where justifiable public and private ends, in the light of the court's reason and experience, outweigh the need for probative evidence.[140] The District Court as the Court in the first instance rejected the claim for a psychotherapist-patient privilege. On appeal the Seventh Circuit Court sustained a qualified, case-by-case privilege claim. The Court used a humanistic justification, declaring that there are 'zones of privacy' protecting 'personal autonomy'[141] and that the protection of privacy was a legitimate 'end in itself.'[142] The Court coupled this with an instrumental justification observing that patients frequently divulge 'highly personal matters' and that public disclosure would 'be embarrassing to the point of mortification.'[143]

On further appeal the Supreme Court shunned the humanistic rationale espoused by the Seventh Circuit decision, and relying exclusively on instrumental reasoning, employing Wigmore's criteria, declared the privilege to be absolute. The argument was that patients must be able to predict with confidence, from the outset, that their revelations will remain confidential. The loss of probative evidence was combatted by reasoning that the revelations would not be made *but for* the existence of the privilege. Justice Scalia in his dissenting judgment asked rhetorically 'if that is so' – if the majority's instrumental rationale is valid – 'how come psychotherapy got to be a thriving practice before the 'psychotherapist privilege' was invented?'[144]

Congress is free to enact privilege-like confidentiality statutes via its general law making powers and the Federal Rules of Evidence. Two important statutes have involved the Internal

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139 518 US 1 (1996). See also William Whitmore Hague, 'The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics' (1983) 58 *Washington Law Review* 566, 572 'psychotherapist-patient privilege prevents the courts from forcing psychotherapists into a "cruel trilemma." (1) to violate the extraordinary trust imposed upon them by their clients and profession; (2) to lie, and thereby commit perjury; or (3) to refuse to testify and thereby be held in contempt of court.

140 518 US 1, 9 (1996) citing *Trammel v United States,* 445 US 40, 47 (1980).

141 *Jaffe v Redmond,* 51 F 3d 1346, 1356 (1995).

142 Ibid 1356 (1995).

143 Ibid 1356 (1995).

144 *Jaffe v Redmond,* 518 US 1, 24 (1996). See Carolyn Peddy Courville, 'Comment: Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution' (1998) 35 *Houston Law Review* 187, 214-18; 214 'Justice Scalia's dissent argues against a psychotherapist-patient privilege as a whole.' Justice Scalia launched a three prong attack on the majority decisions.

Revenue Service powers: firstly, the *Confidentiality and Disclosure of Returns and Return Information*[145] protecting the unauthorised disclosure of tax return information, except where authorized by the statute; and secondly, the *Internal Revenue Restructuring and Reform Act 1998*[146] extending the attorney-client common law privilege, with three notable exceptions, to protect confidential communications between taxpayers and their tax practitioner. This legislative reform will be followed up in chapter eight of the thesis.

4.8 Conclusion

The rationale for the law of client legal privilege requires the balancing of both the individual privacy rights and the societal costs and benefits. The privacy rationale for privilege though compelling is not in itself sufficiently strong to either justify existing evidentiary privileges or create new privileges. It is however a powerful adjunct to the utilitarian justification for privilege, and together the two rationales are able to embrace the individual and societal interest in protecting the confidentiality of communications; especially in the tax arena where financially sensitive information is the subject matter of the confidential communications.

Client legal privilege has evolved from the common law, though there have been and continue to be efforts to codify the privilege in legislation, and in the United States, especially at the State level the legislature has been active in creating new privileges. Nevertheless the courts are continuously involved in defining the contours of the privilege, by their interpretation of statutes and by their observance or otherwise of precedent. Bills of Rights, Constitutional Amendments, and international treaties have also lead to greater recognition of human rights. The next chapter will concentrate of the common law development of client legal privilege in the Australian arena.

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145 26 USC § 6103(g) (1994) Raymond F Miller, above n 137, 778 'the President can issue an executive order requiring the Internal Revenue Service to release confidential taxpayer information to any federal agency – a disclosure mechanism which has been used over 70 times in the last 40 years.'

146 Pub L No 105-206, 112 Stat 685; 26 USCA §7525.

CHAPTER FIVE

Common Law Development of Client Legal Privilege in Australia

5.1 Introduction

Client legal privilege in Australia has developed through the common law, and this chapter highlights the key cases involved, usually decided in the higher appellate courts, with the emphasis on the reasoning of the judges. In this analysis reference is made to the historical basis and the theoretical constructs, for client legal privilege set out in the previous chapters. Essentially there were two main controversies on the development and operation of privilege, in Australia: first, whether privilege as a rule of evidence is restricted to the curial context, or whether as a substantive rule it applies to all processes where there is a compulsion to disclose information. Second the appropriate 'test of purpose' to be applied. This changed from being that so long as 'one' of the purposes of the communication was to seek or obtain legal advice, or to gain legal services in connection with litigation, privilege would apply; to the adoption of the stringent 'sole purpose test', then to the current 'dominant purpose'. The dominant purpose test is a higher hurdle than the previously accepted test of 'one' of the purposes. This chapter builds on from chapter two on the early English history of client legal privilege and traces the development of privilege in the Australian common law; with emphasis on the period from 1976 to 2015, applying a doctrinal analysis to the cases.

In the legislative context, client legal privilege involving Federal Court matters was codified by the *Evidence Act 1995* (Cth). The legislation followed on from the recommendations of the Australian Law Reform Commission, (ALRC) it implemented a dominant purpose test for the adducing of evidence before the Federal Courts. Between 1995 and 1999 there was much confusion as to which test applied in which context; with the *Grant v Downs*[1] decision that the sole purpose test applied at common law, and the *Evidence Act* applying a dominant purpose test in the Federal Courts. The *Evidence Act* did not apply beyond the curial contexts, and even then, it was limited to the Federal Courts, or to courts in States that had adopted the uniform evidence legislation. This confusion meant that regulatory bodies with compulsory powers of access and/or seizure, such as the Australian Competition and Consumer Commission, Australian Securities and Investment Commission, and the Australian Taxation Office (ATO) were able to access documents that did not meet the sole purpose test, yet in any Federal Court action, those documents that satisfied the dominant purpose test, would be protected by client legal privilege. The 1999 High Court judgment in

[1] (1976) 135 CLR 657.

Esso Australian Resources Ltd v Commissioner of Taxation[2], adopted the dominant purpose test for client legal privilege, bringing the common law test into congruence with the statutory test, and bringing the Australian common law in line with the law in other common law countries.

The High Court judges over time increasingly adopted the humanistic 'rights based' language, discussed in chapter four, as the rationale for client legal privilege. The 2002 High Court decision in *Daniels*[3] firmly established a right-based rationale for privilege, holding that client legal privilege is a right that cannot be easily displaced, except by clear words or necessary implication. Legislation employing general terms will not be deemed to have implicitly abrogated the privilege. The legislature has been reluctant to clearly abrogate client legal privilege, though it has abrogated the privilege against self-incrimination.

5.2 Client legal privilege and the common law

As noted in chapter four, unlike New Zealand, the United Kingdom, and the United States where Bills of Right have constrained and reformulated common law principles, in Australia legislation is generally silent on the operation of privilege; hence it has been left to the courts to resolve cases and simultaneously set the boundaries for the operation of privilege and provide the rationale(s) for the privilege. The competing public interest, that in the interests of a fair trial the courts should have access to all the relevant evidence available, has meant that client legal privilege has been confined within narrow limits. The courts in Australia, have traditionally used a utilitarian justification for privilege[4], but have moved on to using a rights based justification for privilege. This has been accompanied by a shift from interpreting legislation from the viewpoint of the *purpose* which the legislation was meant to serve, seen most clearly in the 1976 case of *Grant v Downs*[5] and the cases which followed it, to interpreting the legislation so as not to be construed as abrogating important common law rights, in the absence of clear words or necessary implication to that effect, as in the 2002 of *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission.*[6]

5.3 The Australian 'sole purpose test' for privilege: *Grant v Downs*

As client legal privilege developed through the common law, the emphasis has been and continues to be on the purpose for which the communications came into existence. The

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2 (1999) 201 CLR 49.

3 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543.

4 *Attorney General* (NT) *v Kearney* (1985) 158 CLR 500, 511 (Gibbs CJ) citing John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton, revised ed, 1961) vol 8, §2291, 545.

5 (1976) 135 CLR 674.

6 (2002) 213 CLR 543.

privilege protects the communications rather than the documents that evidence the communications, thus the same protection applies to both oral and written communications.

In Australia significant limitations were placed on the scope of client legal privilege by the *sole purpose test* established in the 1976 High Court decision in *Grant v Downs.*[7] At the time of the *Grant v Downs* decision the common law position was not clear; there was very limited authority on the standard for client legal privilege in the British Commonwealth at the level of final courts of appeal. Therefore the High Court did not have much guidance to go on. The understanding was that a claim to privilege would be upheld if submission to a legal adviser was *one* of the purposes of the communication, not necessarily the most important one, and even if some other non-privileged purpose was also involved.[8] Barwick's view in *Grant v Downs* was that English decisions on the matter had not advanced beyond the 1913 judgment in *Birmingham*[9] even though there had been an expansion of companies and government agencies, involved in business. In *Birmingham* Buckley LJ, explained that it was not necessary:

> …that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as material upon which professional advice should be taken in proceedings pending, or threatened or anticipated[10]

Subsequently, some Australian and English decisions had adopted a narrower view of the scope of privilege,[11] and in the English *Birmingham* case Hamilton LJ though agreeing with the final resolution of the case, reasoned that a *primary* or *substantial* purpose accounting for the creation of the document should apply.[12] Hamilton's reasoning was preferred in a number of subsequent English cases[13] signalling a contraction of the scope of client legal privilege.

Rath J hearing *Grant v Downs*[14] in 1974, in the Supreme Court, upheld an appeal, ruling that the claim to privilege had been made out. Rath reasoned that a document is privileged if it

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7 (1976) 135 CLR 674.

8 See *Warner v Women's Hospital* [1954] VLR 410; *Cataldi v Commissioner for Government Transport* [1970] 1 NSWLR 65; and *Grant v Downs* [1974] 2 NSWLR 401.

9 Full case title: *Birmingham & Midland Motor Omnibus Co Ltd v London & North Western Railway Co* [1913] 3 KB 850.

10 Ibid 856.

11 See *Toohey's Ltd v The Housing Commission of NSW* (1953) 52 SR (NSW) 407; *Weir v Greening* (1957) VR 296; *Seabrook v British Transport Commission* [1959] All ER 15; *Patch v United Bristol Hospital Board* [1959] 3 All ER 876.

12 *Birmingham & Midland Motor Omnibus Co Ltd v London & North Western Railway Co* [1913] 3 KB 850, 860.

13 See *Longthorn v British Transport Commission* [1959] 2 All ER 32; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1974] AC 405; See also *Maddison v Goldrick* [1976] NSWLR 651, 665.

14 [1974] 2 NSWLR 401.

came into existence for more than one purpose provided that its submission to a legal adviser was *one* of those purposes.[15]

The Full Bench of the High Court in *Grant v Downs* commenced by reaffirming the importance of the privilege, adopting a utilitarian rationale.

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is available.[16]

The majority judgment[17] ruled in favour of the sole purpose test.

> Unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. …For this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.[18]

The fact that a document was prepared in anticipation of litigation was not of itself sufficient to attract privilege; its creation must have the *sole purpose* of providing legal advice or professional services in connection with litigation.[19]

Their Honours stressed that a corporation ought not to be in a better position to claim the privilege than an individual. They felt that it was too easy for corporations to meet the previous test by a showing that *one* of the purposes of the communication was for transmission to legal advisers. Sir William Deane in the 1986 High Court case of *Attorney General* (NT) *v Maurice*[20] referred back to the English 1846 case of *Pearse v Pearse*[21] to argue that traditionally client legal privilege had been built on the view of the client as a vulnerable citizen pitted against the leviathan state, ought to be protected from compulsory disclosure of protected communications or materials, stating:

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15 [1974] 2 NSWLR 401, 406.
16 (1977) 135 CLR 674, 685.
17 Stephen, Mason and Murphy JJ.
18 (1976) 135 CLR 674, 685. (Majority judgment: Stephen, Mason and Murphy JJ).
19 (1976) 135 CLR 674, 683.
20 (1986) 161 CLR 475.
21 1 De G & Sm 12, 28-29.

> It's (legal professional privilege) efficacy as a bulwark against tyranny and oppression depends on the confidence of the community that it will in fact be enforced.[22]

The Court acknowledged that there had been a change in power of parties seeking privilege; the corporation or government department could not be viewed as a vulnerable client. Therefore the Court perceived the possibility of abuse of the privilege, by powerful parties. Furthermore, the Court queried whether the privilege in fact promotes full and frank disclosure or truthfulness by corporations.[23]

Barwick CJ in his separate judgment, in *Grant v Downs* proposed a slightly more liberal test based on the *dominant purpose test*, preferring the word 'dominant' to both 'primary' or 'substantial'[24] his Honour concluded that the principle should be stated thus:

> …a document which 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, should be privileged and excluded from inspection.[25]

Barwick CJ though employing the dominant purpose test, still had no difficulty in denying privilege to the communications in question.

This drastic narrowing of privilege by the High Court in *Grant v Downs* was greeted with disbelief by some practitioners[26] and legal academics.

> The sole purpose test created a heavy onus, and it may be that in recognition of this burden, some following decisions appear to seek to ameliorate the effects of the test while still endorsing it. In their judgment in *Waterford v The Commonwealth,*[27] Mason J (as he then was) and Wilson J applied the sole purpose test, but went on to propose that the sole purpose test would still be met even if the legal advice subject to the claim for privilege contained extraneous matter. While it may have been thought that the presence of extraneous matter in a document may tend to suggest some additional purpose other than the sole purpose, the judgment concluded 'that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final.'[28] [29]

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22 *Attorney General (NT) v Maurice* (1986) 161 CLR 475, 490 (Sir William Deane).

23 (1976) 135 CLR 674, 685-6 (Majority judgment: Stephen, Mason and Murphy JJ). Note the Australian Law Reform Commission, Report 107 *Privilege in Perspective: Client legal Privilege in Federal Investigations*, *Chapter Two: Rational for Client Legal Privilege*, 2.119. After considering a number of submissions advocating for and against the application of client legal privilege to corporations, concluded that it should apply to corporations. It reasoned that any characterisation of the doctrine as a *right* should be viewed more in terms of a right to access to a fair hearing or trial or access to legal advice, rather than a right that can only be ascribed to humans.

24 Ibid 678.

25 Ibid 677.

26 See Andrew Palmer, 'Legal Professional Privilege – the Demise of the Sole Purpose Test' (April 2000) *Law Institute Journal* 50, citing Dennis Pearce, 'Legal Professional Privilege' (1979) *Australian Current Law* 281.

27 (1986-1987) 163 CLR 54.

28 Ibid 66.

29 Rodney Fisher, 'Whither the Common Law Privileges: Vale Client Privilege in Tax Investigations?' (2002) 28 (2) *Monash University Law Review* 321, 338 (citation included).

The Australia sole purpose test for privilege[30] was more restrictive than the dominant purpose test that applied in New Zealand,[31] the United Kingdom,[32] and the United States.[33] Nevertheless the sole purpose test remained the test for privilege for twenty-three years till it was overturned in *Esso Australian Resources Limited v The Commissioner of Taxation.*[34]

The House of Lords in the 1979 case of *Waugh v British Railways Board*[35] referred to the Australian decision in *Grant v Downs* and expressed a preference for the dominant purpose test expounded by Barwick CJ; they considered the sole purpose test to be unduly restrictive. Lord Edmund Davies stated that its adoption 'denies privilege even to material whose outstanding purpose is to serve litigation, simply because another and very minor purpose was also being served.'[36] The House of Lords introduced the dominant purpose test, stating that the concept is well known,[37] and frequently applied in other areas of law.[38] Nevertheless this decision by the House of Lords served to narrow the operation of privilege from the prevailing more expansive test - that so long as *one* of the purposes of the communication was for legal advice or legal representation, then privilege would apply.

In New Zealand a similar question arose in *Guardian Royal Exchange Assurance of New Zealand v Stuart.*[39] The prevailing test at the time had been whether the legal purpose was an *appreciable* purpose of a communication. The Court of Appeal narrowed the test to the dominant purpose test. Richardson J noted:

> …I am satisfied that we should move to a dominant purpose test. First, a more restrictive test than appreciable purpose is called for in balancing the relevant public interest considerations. …Second, in terms of ease of application a dominant purpose test is both familiar to lawyers and more straightforward in its application. …Finally, it holds the scales in even balance, whereas at the other extreme, unless read down by refusing to rank as a 'purpose' any considerations other than submission to legal advisers which were in mind, a sole purpose test would provide extraordinarily narrow support for the privilege.[40]

5.4 Client legal privilege as a rule of evidence: *O'Reilly*

30 The earlier *Evidence Acts* used the sole purpose test, until the passage of the *Evidence Act 1995* (Cth). The 1993 *Bill* had continued to apply the sole purpose test, however the opposition Liberal and minority parties Senators amended the *Bill*, proposing a dominant purpose test, and it was reluctantly agreed to in 1995, by the then Labor government.

31 *Guardian Royal Exchange Assurance of New Zealand v Stuart* [1985] 1 NZLR 596 (CA).

32 *Longthorn v British Transport Commission* [1959] 2 All ER 32.

33 *Holm v Superior Court*, 42 Cal 2d 500 (1954).

34 (1999) 43 ATR 506.

35 [1979] 2 All ER 1169.

36 Ibid 1184.

37 The dominant purpose test has been extensively used in other branches of law, including insolvency and taxation.

38 [1979] 2 All ER 1169, 1174 (Lord Wilberforce).

39 [1985] 1 NZLR 569.

40 Ibid 605.

Grant v Downs had served to firmly entrench client legal privilege in respect of court proceedings, albeit with a sole purpose test, however it was not until seven years later in *O'Reilly,*[41] that the operation of privilege outside the courtroom setting was tested. This case was particularly important for this thesis because the subject matter of the case was client legal privilege in the tax context.[42] The two key questions, for the High Court in this case were: whether client legal privilege is confined to judicial and quasi-judicial proceedings? And whether the contractual duty of confidence to a client is overridden by a section 264 notice of the *Income Tax Assessment Act* 1936 (Cth) *(ITAA).* Mason J promptly dismissed the contractual duty of confidence argument; stating that the statutory duty in a section 264 notice to produce all books, documents and other papers, overrides any contractual or equitable duty owed by a professional to maintain the confidentiality of a client's records.[43] On the question of the application of client legal privilege, Mason J questioned how significantly the privilege advances the policy which it is supposed to serve, and whether the encouragement of a client to make full disclosure to his legal adviser, is so much stronger than the public interest in having litigation determined in the light of the entirety of the relevant materials. Mason J concluded that though the 'privilege is too well entrenched to be abolished by a flourish of the judicial pen. ...the privilege should be limited to judicial and quasi-judicial proceedings.'[44]

Wilson J's view (in agreement with Mason J) was that Diplock LJ in the English case of *Parry-Jones v Law Society*[45] had been correct in confining client legal privilege to judicial and quasi-judicial proceedings. On the question of the contractual duty of confidentiality Wilson J concluded that '[A] right to confidence cannot prevail over a statute.'[46] In reference to the New Zealand *West-Walker*[47] case, Wilson J stated*:*

> With great respect to their Honours who formed the majority in West-Walker's case …I have concluded that it would be an unwarranted extension of the privilege to hold it capable of protecting the documents in question from disclosure to the Commissioner pursuant to a s 264 notice… In my opinion the privilege is available to be claimed only in judicial or quasi-judicial proceedings. …Before leaving the case of *West-Walker,* I would say that I agree, with respect, with the detailed discussion of the decision of Lockhart J in *Crowley v Murphy;*[48] I acknowledge my indebtedness to that passage of His Honour's judgment. [49]

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41 *O'Reilly v Commissioner of State of Victoria* (1983) 153 CLR 1. High Court: Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

42 The principles decided in *O'Reilly* impact upon the arguments in chapter six of this thesis.

43 (1983) 153 CLR 1, 22.

44 Ibid 26.

45 [1901] 1 Ch1.

46 Ibid 5.

47 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.

48 (1981) 52 FLR 146-149; 34 ALR 518-520.

49 (1983) 153 CLR 1, 35. (Gibbs CJ and Mason J agreed with Wilson J; Murphy J dissented).

Murphy J agreed that section 264 of the *ITAA* overrides any contractual obligation, including any implied duty of confidence. However, Murphy J disagreed with Lord Diplock's restriction on the scope of privilege.

> The important public-policy which justifies the privilege would often be defeated if the privilege were not generally available. In general the privilege is a sufficient answer to any officer seeking the disclosure of protected communication, whether written or oral. The common law exception that the privilege cannot be used to facilitate the commission of crimes is applicable in relation to the operation of federal statutes. The strict confinement, since *Grant v. Downs*, of the class of privileged communications is a powerful reason for extending the protection generally and not limiting it to judicial or quasi-judicial proceedings.[50]

The *O'Reilly* decision meant that the ATO could obtain privileged communications pursuant to a section 264 notice of the *ITAA*, outside of any litigation. The communications once revealed at this investigative stage, would lose their confidentiality, making it difficult for privilege to be sustained in any subsequent judicial proceedings. Furthermore it meant that differing rules for claiming privilege, would apply at the investigative stage, compared to those at a judicial or tribunal hearing.[51]

5.4.1 New Zealand led the way, finding client legal privilege applicable to all forms of compelled disclosure

The 1954 case of *West-Walker*,[52] concerned section 163 of the New Zealand *Income Tax Act 1923*, a section substantially equivalent to the Australian *ITAA* section 264. The Full Court of the Supreme Court of New Zealand held that the common law privilege was generally applicable to all forms of compelled disclosure and could not be abrogated in the absence of the clearest legislative language. It pointed out that although the privilege had hitherto been invoked as immunity from production of evidence in court, its foundation was the public interest and hence it extended to protect all relevant communications from compulsory disclosure.[53]

> That a principle so long and so well-established, and so essential in the interests of justice, should be abrogated by the legislature in an indirect way is not to be expected. …I am of the opinion, therefore, that the Commissioner of Taxes must exercise the powers given by the section subject to the common law privilege protecting communications with solicitors which has been established in order that legal advice may be safely and effectively obtained. I do not think that the statutory provisions override the common law rule.[54]

Gresson J stated the position thus:

> It seems, to me '…consonant with reason and good discretion' to consider that this general principle affording special protection in respect of legal advice was not intended to be invaded by the general provisions in s.163. At best, it is doubtful whether its wide terms were intended to

50 (1983) 153 CLR 1, 27.

51 This point is discussed further in chapter six of this thesis.

52 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.

53 Ibid 206.

54 Ibid 208 (Fair J).

> extend to nullifying, in effect, the general rule of public policy expressed by the recognition of this privilege, and so it cannot be held to have done so.[55]

In 1983 the New Zealand High Court in *Rosenberg v Jaine*[56] specifically rejected the reasoning in the 1981 Australian case of *Crowley v Murphy*[57] that search warrants issued in respect of solicitor's offices were not subject to client legal privilege. The New Zealand Court found this reasoning to be out of line with New Zealand authority and principle,[58] and therefore took a markedly different line from the contemporary Australian jurisprudence prion to *Baker v Campbell.*[59]

The Australian High Court in *O'Reilly* agreed with *Crowley v Murphy,* preferring and applying the reasoning of Lord Diplock in *Parry-Jones.*[60]

> …privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings, because, strictly speaking, privilege refers to a right to withhold from a Court, or tribunal exercising judicial functions, material which would otherwise be admissible in evidence. What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client. Such a duty exists not only between a solicitor and client, but, for example between banker and customer, doctor and patient and accountant and client. Such a duty of confidence is subject to, and overridden by, the duty of any party to that contract to comply with the law of the land. It is the duty of such a party to contract, whether at common law or under statute, to disclose in defined circumstances confidential information, then he must do so, and any express contract to the contrary would be illegal and void.[61]

The *Parry-Jones* case influenced the outcome of a number of judgments,[62] including *Crowley v Murphy*[63] wherein the Full Federal Court held that the fact that the documents would have been privileged in legal proceedings was no answer to the issue or execution of a warrant. Lockhart J in *Crowley v Murphy* noted that: 'in the *Parry-Jones* case the English Court of Appeal was not referred to *West-Walker* case.'[64]

5.4.2 United States: client legal privilege available in administrative setting

In the United States it is firmly established that the privilege is available in administrative proceedings and in investigatory procedures in the absence of legislation abrogating the

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55 Ibid 212-3.

56 [1983] 1 NZLR 1. (Note: the Court of Appeal in New Zealand is superior to the New Zealand High Court).

57 (1981) 52 FLR 123.

58 [1983] 1 NZLR 1, 10-11.

59 (1983) 153 CLR 52.

60 [1969] 1 Ch 1.

61 Ibid 9. Cited by Mason J, 153 CLR 1, 33-4.

62 *Brayley v Wilton* (1976) 2 NSWLR 495; *Morse and Thompson v Harlock* (1977) WAR 65; *Smorgan v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475, 487-8; wherein Stephen J, choosing to follow *Parry-Jones,* referred to the case of *Commissioner of Inland Revenue v West Walker* and said that 'he had not found it possible to reconcile aspects of the reasoning in that case with that in the case of *Parry-Jones v Law Society.*' On appeal, (1979) 53 ALJR 336, the judgment of Stephen J was upheld.

63 (1981) 52 FLR 123.

64 Ibid 148.

privilege.[65] Thus the privilege is available in investigations by the Internal Revenue Service. The principle is the utilitarian one, generally espoused by Wigmore, that '[I]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal adviser must be removed; hence the law must prohibit such disclosure except on the clients consent.'[66]

5.4.3 In Australia *Baker v Campbell* overrules *O'Reilly* by applying a substantive rule test

O'Reilly prevailed for less than a year. The decision was reversed by *Baker v Campbell.*[67] The Full Court of the High Court referred to Canadian[68], New Zealand,[69] America[70] and the European Court of Justice[71] judgment and held by a narrow majority of 4:3[72] that in the absence of a clear expression of legislative intent to the contrary, search warrants cannot authorise the violation of client legal privilege. The majority judgment upheld the principle that client legal privilege was to operate beyond the curial context, to the investigative context where there is not, as yet, any question of admissibility of evidence.

Wilson J faced with his earlier decision in *O'Reilly* drew upon the humanistic rationale that the privilege protects the privacy and liberty of the individual, to change his stance.

> …in O'Reilly I took too narrow a view of the problem. In my reliance upon English authority, culminating in Parry-Jones v Law Society [1969] 1 Ch 1, …In the present case, the arguments of counsel ranged over a wider field and embraced Canadian and American decisions which had not received attention in the earlier cases.[73]
>
> …The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by stature the common law

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65 See *Colton v United States,* USCA 2251 [1962]; *United States v Summe,* 208 F Supp 925 (1962); *United States v. Schmidt,* 360 F Supp 339 (1973); *United States v. Schenectady Savings Bank,* 525 F Supp 647 (1981); *Burrows v Superior Court,* 529 P 2d 590 (1974); *O'Connor v Johnson,* 287 NW 2d (1979).

66 John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton, revised ed, 1961) vol 8, §2291, 545.

67 (1983) 153 CLR 52.

68 *Solosky v the Queen* (1979) 105 DRL 3d 745; *Descoteaux v Mierzwinski* (1982) 141 DLR 3d 590.

69 *R v Uljee* [1982] 1 NZLR 561, Cooke J in discussing legal professional privilege referred to a strong sense that any person charged or in peril of a charge has a fundamental *human right* to professional advice.

70 *Colton v United States,* 306 F 2d 633 [2d Cir, 1962]*United States v Summe,* 208 F Supp 925 (1962); *United States v. Schmidt,* 360 F Supp 339 (1973); *United States v. Schenectady Savings Bank,* 525 F Supp 647 (1981); *Burrows v Superior Court,* 529 P 2d 590 (1974); *O'Connor v Johnson,* 287 NW 2d (1979).

71 *A M & S Europe Ltd v Commissioner of the European Communities* (Case 155/79) [1983] QB 878, pronounced legal professional privilege as a necessary corollary of fundamental, constitutional, or human rights.

72 Majority judgment: Murphy, Wilson, Deane, and Dawson JJ. Dissenting judges: Gibbs CJ, Manson and Brennan JJ.

73 (1983) 153 CLR 52, 93.

> privilege attaching to the relationship of solicitor and client is an important element in that protection.[74]

Wilson J went on to note that a denial of privilege at the investigating stage potentially made redundant any claim for privilege in later proceedings.

> The very existence of the privilege as providing any significant protection and thereby making its contribution to the public welfare must be threatened unless as a matter of principle the protection extends to all forms of compulsory disclosure.[75]

Both Gibbs CJ and Mason J in their dissenting judgments argued that privilege should not apply in administrative inquiries, and referred to the practical difficulties faced by public officials in exercising their powers of access. Mason J, also held firmly to the view that his decision in *O'Reilly* was correct and should not be overruled; 'I am not persuaded by the Canadian and United States authorities that we should now depart from the majority decision in O'Reilly.'[76] Gibbs CJ called upon Parliament to give consideration to the role of privilege in relation to *ITAA* section 264 notices and *Crimes Act 1914* (Cth) section 10 warrants and to guarantee privilege in such cases.[77] A point also made by Wilson J, but with a different twist, '…it is for the legislature, not the courts, to curtail the operation of common law principles designed to serve the public interest.'[78] Only Wilson J, in the High Court, suggested a connection between the adversarial character of the proceedings and the availability of litigation privilege; he justified the privilege in the Tribunal hearing on basis that the Administrative Appeals Tribunal displayed adversarial characteristics.[79]

Baker v Campbell tipped the scales in favour of client legal privilege. The Court now saw its task as construing statutes subject to the presumption in favour of the preservation of fundamental common law rights.[80] Interestingly Murphy J in this case also considered the status of legal advice compared with other profession advice.

> In so far as client's legal privilege extends to material which was created for legal advice associated with pending or anticipated litigation, there is some force in the argument that legal advice should not be elevated above other professional advice such as medical or financial advice.[81]

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74 Ibid 95.
75 Ibid.
76 (1983) 153 CLR 52, 79-80.
77 Ibid 71-2.
78 Ibid 96.
79 *Waterford v Commonwealth* (1987) 163 CLR 54; HCA 25[21].
80 (1983) 153 CLR 52,105 (Brennan J).
81 Ibid 90.

The High Court in *Maurice,*[82] described client legal privilege as a fundamental or essential right, and worked on the assumption that the litigation arm of privilege 'was not confined to judicial or quasi-judicial proceedings'[83] rather, the right extended to cover proceedings before public officials, such as in that case, the Land Rights Commissioner.

5.4.4 England recognises client legal privilege as a substantive right

In England the question of whether privilege could apply to the growing search and seizure powers of various legal authorities was first answered in the affirmative by Parliament, with the enactment of the *Police and Criminal Evidence Act 1984*. Section 10 of the *Police and Criminal Evidence Act* defines the privilege and sets out its operation; the section provides that communications subject to client legal privilege are immune from police investigations.

In the 1996 case of *R v Derby Magistrates Court*[84] Lord Taylor CJ, after reviewing the history of legal professional privilege, recognised legal professional privilege as a substantive right.

> Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), as to which we did not hear any argument. …difficulty is this: whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched.[85]

This was an important decision given the large scale growth of arbitration in commercial law and tribunals in the public law, each with their modified rules of evidence.

The 2000 case of *Queen v A Special Commissioner*[86] concerning *Morgan Grenfell & Co Ltd's* tax related scheme, Buxton LJ stated that client legal privilege is a fundamental, 'virtually constitutional' human right, and went on to cite Lord Hoffman[87] to reinforce the principle that Parliament is constrained by the *Human Rights Act 1998* (UK) in legislating in a manner that undermines fundamental human rights. Buxton LJ noted:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.[88]

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82 *Attorney-General (NT) v Maurice* [1986] 161 CLR 475; (Gibbs CJ, Mason, Brennan, Dawson, Deane JJ).

83 [1986] 161 CLR 475, 480; (Gibbs CJ).

84 [1996] 1 AC 847.

85 Ibid 507. The 'other areas' referred to was privilege against self-incrimination. The privilege had been abrogated by legislative means in specific fields, including the *Taxes Management Act* 1970 (UK).

86 2000 WL 1629610 (8 November 2000). This case was heard in the High Court of Justice Queen's Bench Division - Administrative Court, by Lord Justice Buxton, and Mr Justice Penry Davey.

87 *R v Secretary of State for the Home Department ex p Simms* [1999] 3 WLR 328, 341.

88 Ibid 3[11] (8 November 2000).

In 2003 the House of Lords in the case of *Morgan Grenfell*[89] expressly rejected the reasoning used in *Parry-Jones*, and reinforced privilege as a substantive right applicable in all instances where there is a compulsion to disclose information.

> It is not the case that LLP (legal professional privilege) does no more than entitle the client to require his lawyer to withhold privileged documents in judicial or quasi-judicial proceedings, leaving the question of whether he may disclose them on other occasions to the implied duty of confidence. The policy of legal professional privilege requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all. The reasoning in the *Parry-Jones* case suggest that any statutory obligation to disclose documents will be construed as overriding the duty of confidence which constitutes the client's only protection.[90]

Lord Hoffman based his judgment on a human rights rationale;

> … (client legal privilege) is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, Ex p B* [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (*Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878.[91]

Lord Hoffman had been swayed by the reasoning in the New Zealand case of *West-Walker*.

> It is unfortunate that the Court of Appeal was not referred to valuable judgments of the Supreme Court of New Zealand in *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191, which reached the opposite conclusion in the context of a statutory power to require the production of documents and information for the purposes of the administration of the taxing statutes. The New Zealand judges pointed out that LPP was not merely a rule of evidence but a substantive right founded on an important public policy.[92]

It is now well settled in Commonwealth jurisdictions, the European Union Community, and the United States that police or other empowered authorities cannot access or seize communications to which client legal privilege attaches.

5.5 Privilege abrogated by express words or necessary implication: *Yuill*

In an Australia without a Bill of Rights, the courts bear the burden of interpreting legislation without the guidance that such a bill would provide, as has been demonstrated above in the United Kingdom cases. This issue was illustrated in 1991 by the *Yuill*[93]*case.* Yuill concerned a Corporate Affairs Commission summons requiring the production of documents by an officer of the corporation under investigation - Mr Yuill. Mr Yuill claimed client legal privilege to excuse himself from producing the documents. Hodgson J described the issue

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89 *R (on the application of Morgan Grenfell & C Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 (Lord Hoffman).

90 Ibid 611-12.

91 [2003] 1 AC 563, 606-7.

92 Ibid 612.

93 *Corporate Affairs Commission (NSW) v Yuill & Ors* (1991) 172 CLR 319.

before him as 'finely balanced';[94] however, he granted the declaration sought by the Commission. Mr Yuill appealed to the Supreme Court (NSW), Appeal Court.[95] The decision was delivered by Kirby P[96] with both Mahoney[97] and Handley JA concurring.[98] The issue on appeal was whether the provisions of Part VII of *Companies (NSW) Code*[99] adequately evince an intention by Parliament to override the common law client legal privilege.

Yuill in seeking to deny the Inspector access to the documents argued that once privilege is lost it cannot be restored.

> Once information has haemorrhaged, the privilege is lost and the confidentiality of the information cannot thereafter be restored. Moreover, the information disclosed may lead to further lines of inquiry or implicate third parties in a way which could not then be retrieved.[100]

Kirby noted the Commission's acceptance of the decision in *Baker v Campbell* that client legal privilege is not just a rule of evidence but a substantive rule of the common law; and went on to discuss the role of the courts in interpreting legislation and protecting fundamental rights.

> This case illustrates, in an interesting way, an aspect of the constitutional relationship between the courts and Parliament. Courts are not authorised by law to introduce limitations into statutes not provided by Parliament simply because they think that they should be there: …Yet under their powers of statutory interpretation, courts have reserved to themselves a function the protection of basic human and civil rights. They have done so without an entrenched Bill of rights.[101]

Kirby concluded that the legislation did not override client legal privilege.

> Neither by express enactment nor by unambiguous implication do any of the provisions in Pt VII of the Code evidence a Parliamentary purpose to deprive the appellants of their right to legal professional privilege in respect of the subject documents.[102]

The Corporate Affairs Commission appealed to the High Court. The High Court[103] in 1991 overruled Kirby's decision and held that the power conferred by the section 295(1) of the now defunct *Companies (NSW) Code 1981*,[104] to require the production of a corporation's books, unless there was a reasonable excuse, was not subject to client legal privilege. The

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94 *Yuill v Corporate Affairs Commission of New South Wales* (1990) 20 NSWLR 386, 388 (Kirby P.)

95 Ibid (Kirby P, Mahoney and Handley JJA).

96 President of the Court.

97 (1990) 20 NSWLR 386, 407.

98 Ibid 416.

99 The *Corporations Act 1989* (Cth) Division 9 re-enacts in substantially similar terms, the provisions of Part VII of the *Code.* 'The commencement of the new federal régime governing corporations has been delayed by this decision.' (1990) 20 NSWLR 386, 390 (Kirby J).

100 (1990) 20 NSWLR 386, 389.

101 Ibid 402 (citations omitted).

102 Ibid 407.

103 *Corporate Affairs Commission (NSW) v Yuill & Ors* (1991) 172 CLR 319 (Majority judgment: Brennan, Dawson and Toohey JJ Dissenting judges: Gaudron and McHugh JJ).

104 It is important to note that this legislation was enacted prior to *Baker v Campbell* (1983) 153 CLR 52; therefore, the prevailing common law was as established in *O'Reilly v Commissioner of State of Victoria* (1983) 153 CLR 1.

majority judgment was persuaded that the intention of the legislature by necessary implication was to abrogate client legal privilege.

> Apart from the character and purpose of the legislation, s.308 positively indicates, in respect of both books and statements, an intention not to extend the full protection of legal professional privilege beyond a *legal practitioner*. The unavailability of the privilege against self-incrimination strongly suggests that Pt VII was not intended to preserve legal professional privilege save to the limited extent provided in ss.299(2)(d) and 308. And the very limits imposed by those provisions render inescapable, in my view, the conclusion that it was intended that, save as provided, legal professional privilege should play no part in an investigation under Pt VII.[105]

Gaudron and McHugh JJ, in their dissenting judgments, each took the view that sections in question were explicable by the prevailing *O'Reilly* decision limiting client legal privilege to judicial and quasi-judicial proceedings. Subsection 299(2)(d) provides that evidence of a statement made by a person at an examination under Part VII is not admissible in criminal or civil proceedings against him if the statement disclosed matter in respect of which a claim of legal professional privilege could be made; and section 308 enables a legal practitioner to refuse to disclose a privileged communication. Gaudron and McHugh JJ reasoned that the sections intended to supply a measure of protection to privileged communications and could not be treated as manifestation of legislative intent to otherwise abrogate the privilege. Gaudron J drew attention to the differing treatment within the *Code* to client legal privilege and the privilege against self-incrimination, noting that section 296(7):

> …expressly abrogates the privilege against incrimination by providing that "(a)n officer is not excused from answering a question ... on the ground that the answer might tend to incriminate him". The express abrogation of the privilege to the extent specified in that sub-section precludes any implication of its abrogation to some greater extent.[106]

McHugh J drew a distinction between s 155 of the *Trade Practices Act 1974* (Cth) (the relevant legislation in *Pyneboard),* and the *Code* in concluding that there was no implicit legislative intent to abrogate client legal privilege.

> Unlike s.115 of the Trade Practices Act, therefore, the general terms of s.295 show no implied intention to abolish all relevant common law rights and privileges. To the contrary, the terms of s.296(7) expressly abolishing the common law right to refuse to incriminate oneself, and the terms of s.296(2) allowing a person with a "reasonable excuse" to refuse or fail to comply with a requirement made under s.295 show conclusively that s.295 has no such implied intention.[107]

The *Yuill* decision demonstrates a willingness by the High Court to allow the abrogation of client legal privilege if it deemed that the very object of the statute would be frustrated by its application. Furthermore *Yuill* protects only documents held by the legal adviser; it excludes the client's right to claim the privilege; contrasting sharply with the principle established in

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105 (1991) 172 CLR 319, 336 (Dawson J) (emphasis added).
106 (1991) 172 CLR 319, 341.
107 Ibid 351.

Minet v Morgan[108] that both parties to confidential communications should enjoy immunity from compelled disclosure.

5.6 Client legal privilege codified in the *Evidence Act 1995* (Cth)

The ALRC in 1979 was tasked with undertaking a comprehensive review of the law of evidence, with a view to producing a code of evidence and drafting a Uniform Evidence Act for all Commonwealth Courts and tribunals. The law was to apply to the Australian Capital Territory and to external Territories.[109] The terms of reference for the inquiry restricted it to the adducing of evidence in Federal Courts[110] and courts of the Territories. The ALRC took many years to complete the task, and was overtaken by case law; namely by Murphy J's pronouncement in the 1983 case of *Baker v Campbell*[111] that:

> …privilege is commonly described as legal professional privilege, which is unfortunate because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client's privilege, so that it may be waived by the client, but not by the lawyer.[112]

As a result the ALRC recommended in its interim Report on *Evidence*[113] a change of name from legal professional privilege to client legal privilege.

The ALRC's view was that the dominant purpose test proposed by Barwick CJ (in dissent) in *Grant v Downs* was the more appropriate test. Therefore the *Evidence Act 1995* section 118, legal advice privilege and section 119, litigation privilege both apply the dominant purpose test.[114]

The Attorney-General of Australia,[115] set out the terms of reference for an ALRC review of the *Evidence Act 1995,* after a decade of its operation and identified client legal privilege as an area of particular concern. The ALRC called for submissions from interested parties via its 2005 *Discussion Paper 69.*[116] The ALRC foresaw that difficulties might arise when a party obtains access to documents outside the courtroom, where the more stringent common law sole purpose test applied, yet those same documents would be protected in the courtroom by the dominant purpose test. In the *Discussion Paper* the ALRC proposed that the privilege

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108 (1873) 8 LR Ch 361.

109 Territories, does not include the Northern Territory, as it was granted self-government in 1978. Norfolk Island has not been specifically excluded from the report; it will be a matter for consultation with the Island Administrators, as to whether the new laws will extend to the Island.

110 The Federal Courts are the High Court of Australia, the Federal Circuit Court of Australia, the Federal Court of Australia and the Family Court of Australia.

111 (1983) 153 CLR 52.

112 Ibid 58.

113 Australian Law Reform Commission, *Evidence,* Report 38 (Interim) vol 1 (1985) [438].

114 Sections 118 and 119 were enacted following upon the final report of the Australian Law Reform Commission, *Evidence,* Report 38 (June 1987).

115 The Honourable Philip Ruddock.

116 Australian Law Reform Commission, *Review of the Uniform Evidence Acts,* Discussion Paper 69 (November 2005).

provisions of the *Act* should apply to: pre-trial discovery; the production of documents in response to subpoena; in non-curial contexts such as search warrants and notices to produce documents; as well as court proceedings.[117]

> The Commission strongly support the view that a dual system of client legal privilege operating in any one jurisdiction is undesirable. As well as producing inevitable confusion, there is increasing disparity between the common law and the uniform Evidence Acts. …client legal privilege is the subject of extensive litigation and the law continues to develop in response to changing business and legal practices. Should the common law continue to operate pre-trial and the uniform Evidence Acts at trial, the disparity between the two systems is likely to increase.[118]

There was general support for this proposition in the submissions to the ALRC. The Law Council of Australia in its submission could see no justification for different privilege rules applying at trial and pre-trial, especially given that importance of the privilege at the pre-trial stage.

> The difficulties posed by the failure of the Acts directly to cover pretrial proceedings can be seen in the litigation concerning client legal privilege where parties have sought to apply the statutory privilege at the important discovery and inspection stage of civil litigation. With this stage being crucial to decisions about settlement, it is here that in practice issues of privilege are necessarily fought. In the Council's opinion it makes little sense for discovery and inspection to be governed by common law privilege rules which may enable litigants to obtain discovery and inspection of documents which, under the uniform Evidence Acts, will be unavailable at trial.[119]

The ALRC concluded by reasoning that having wider access to communications on discovery or under a search warrant was not unusual; noting that access is not determined by the rules of admissibility. Thus, the ALRC failed to resolve the practical consequences that flowed from having the legislative dominant purpose test applying only to the adducing of evidence, and a stricter sole purpose test apply at the pre-trial process.[120] This problem was

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117 Proposal 13-1, Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (November 2005) [13.49].

118 Ibid [13.43].

119 Law Council of Australia, Submission to Australian Law Reform Commission, Issues Paper 28, *Review of the Uniform Evidence Act 1995*, 14 March 2005, 22-3. <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LawCouncilIP28submission-FINAL.pdf>. Submissions by the Australian Government Solicitor, the Director of Public Prosecutions in New South Wales, the Australian Securities and Investments Commission, CPA Australia and the Institute of Chartered Accountants in Australia all agreed that a single test for privilege should apply to pre-trial and trial procedures. The Australian Taxation Office and the Australian Competition and Consumer Commission in their submissions argued that client legal privilege should not apply at investigatory stages.

120 The *Evidence Act* 1995 (NSW) section 131A applies to pre-trial procedures in New South Wales, via the amended *Supreme Court Rules* (NSW) Parts 23, 24, 36 and 75, and the amended *District Court Rules* (NSW) Part 22, 22A and 29. The rules apply to discovery, interrogatories, subpoenas, notices to produce and oral examinations. However the *Rules* apply only to civil proceedings. The Australian Capital Territory Supreme Court has followed the NSW lead in amending its *Rules.* Section 131A of the *Victorian Evidence Act 2008* and section 131A of the *Tasmanian Evidence Act 1910* extend the application of client legal privilege in the same manner. The Commonwealth has also enacted a section 131A in its *Evidence Act* but it only extends client legal privilege to processes under which documents are produced (such as discovery and subpoenas) under Division 1A, but not to Division 1, namely sections 118 and 199.

compounded by the fact that in most instances privilege issues arise in relation to pre-trial procedures and at the interlocutory stage of civil proceedings.

5.7 The dominant purpose test, in the Australian common law following codification: *Esso*

The 1997 *Esso* case[121] began as an appeal in the Federal Court by Esso Australia Ltd, against its income tax assessments for the years 1987 to 1992; the proceedings were governed by sections 118 and 119 of the *Evidence Act 1995* (Cth) and hence the dominant purpose test applied. Foster J had two questions before him.

> First, is the test for client legal privilege with respect to discovery the sole purpose common law test or rather the dominant purpose test? Second, whether as a matter of law the court can order that dominant purpose documents be excluded from production pursuant to O 15 or r 15 of the *Federal Court Rules* 1979 (Cth)?[122]

Foster J referred to a line a cases commencing with *Telstra*[123] and *Towney*[124] that had ruled that the dominant purpose test should be applied to pre-trial procedures, by analogy or derivation, because of the impact of the *Evidence Act* on trial procedures. McLelland CJ in *Telstra* resorted to judicial pragmatism in finding that:

> …Although as a matter of construction the Act has no direct application to ancillary processes, nevertheless in my opinion the enactment of the *Evidence Act* principles in respect of the adducing of evidence at a hearing has resulted, as an indirect or flow-on effect, in the application of equivalent principles to all ancillary processes.[125]

In the context of the *Esso* case, if differing tests were to apply, this would mean that the ATO would be able to access and inspect documents that fail to meet the sole purpose test, and take advantage of any lines of inquiry that those documents may reveal; even though those documents that meet the dominant purpose test are not permitted to be admitted into evidence at trial.

Order 15, rule 15 of the *Federal Court Rules* empowers the Court to make an order excluding from production discovered documents on the basis that such documents meet the dominant purpose test as set out in sections 118 and 119 of the *Evidence Act.* The argument is that since those documents are protected from the adducing of evidence, such documents should 'by

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121 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1997) 37 ATR 470.

122 (1997) 37 ATR 470.

123 *Telstra Corporation v Australis Media Holding (No 1)* (1997) 41 NSWLR 277. This case was followed by the Full Court of the Federal Court in *Adelaide Steamship Company Ltd v Spalvins*, (1998) 152 ALR 418, which in turn was followed by the Court of Appeal in *Atkins v Abigroup Ltd*, (1998) *43 NSWLR 539.* However in the Full Federal Court, three of the five judges in *Esso Australia Resources Ltd v Federal Commissioner of Taxation of the Commonwealth* (1998) 159 ALR 664, 676 found that they were 'compelled to the conclusion that *Adelaide Steamship* was wrongly decided.' (Black CJ and Sundberg J) and at 721 (Finklestein J).

124 *Towney v Minister for Land & Water Conservation for New South Wales* (1997) 147 ALR 402.

125 *Telstra Corporation v Australis Media Holdings Limited and Ors* (1997) 41 NSWLR 277, 278.

order of the court' be protected from discovery. Hence the same test, the dominant purpose test, should apply at pre-trial and trial procedures. Branson J in *Port Adelaide Wool* placed the emphasis on the *necessity* of the communications to a fair trial.[126]

> The documents required to be discovered by O 15 of the *Federal Court Rules* are not limited to documents which would be admissible in evidence: *Commonwealth v Northern Land Council* at 23.[127] However, the fact that evidence will not be able to be adduced, over objection, if it would result in disclosure of the contents of a confidential document will, in my view, ordinarily be telling as to whether the production of that document can be said to be *necessary* for the fair disposal of the proceedings.[128]

Foster J in *Esso* felt disinclined to the follow the line of reasoning in these previous cases. Foster emphasised that the Federal Court is bound by the decisions of the High Court, and therefore in this instance, to the sole purpose test pronounced in *Grant v Downs.* Foster J reasoned that the *Evidence Act 1995* altered the test only in trial proceedings; he ruled that the sole purpose test is the correct test for pre-trial discovery.[129] Therefore, documents that meet the dominant purpose test, if not otherwise excluded from production, must be produced to the ATO.

Esso appealed the case to the Full Federal Court, on the basis that a number of related questions had been given differing answers by other members of the Federal Court.[130] Esso put three arguments before the court; each focusing on the issue that the dominant purpose test should be the test applied to discovery and inspection processes. A majority of 3:2 in the Full Federal Court[131] upheld Foster J's decision, that the common law sole purpose test was the correct test for pre-trial processes, and that Order 15 rule 15 of the *Federal Court Rules* could not be used to circumvent a High Court decision. The Full Federal Court rejected all three arguments put forward by Esso Australia Ltd. The Court found the statutory language to be clear, and that the *Evidence Act 1995* was restricted to the adducing of evidence before the court. The Court highlighted the fact that the legislative change to the privilege test does not

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126 *Trade Practices Commission v Port Adelaide Wool Company Pty Ltd & Anor* (1995) 60 FCR 366. Branson J's reasoning was followed by Sackville J in *BT Australasia Pty Ltd v State of New South Wales* (1996) 140 ALR 268. Her honour expanded on decision in *Sparnon v Apand Pty Ltd* (1996) 68 FCR 322.

127 (1991) 30 FCR 1.

128 (1995) 60 FCR 366, 370 (citations included) (emphasis in original).

129 (1997) 37 ATR 470, 475.

130 Esso Ltd referred the Court to the decision of the Full Federal Court in *Adelaide Steamship Co Ltd v Spalvins* (1998) FCA 144; 81 FCR 360; *Telstra Corporation v Australis Media Holdings* (No 1) (1997) 41 NSWLR 147; and the NSW Court of Appeal decision in *Akins v Abigroup Ltd* (1998) 43 NSWLR 539.

131 *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1998] 83 FCR 511. Majority judgment: Black CJ, Sundberg and Finkelstein JJ; with Beaumont and Merkel JJ dissenting.

apply throughout Australia.[132] But that 'there is but one common law of Australia;'[133] in this case, the High Court decision in *Grant v Downs,* and that it is for the High Court to decide whether the common law test should be changed. Furthermore, they agreed that Court does have discretionary powers in *Federal Court Rules,* but that those powers must be exercised for the fair disposition of the case before them, and not as a means to circumvent a High Court decision.

Esso appealed to the High Court.[134] On the same day as the High Court judgment in *Esso* was handed down,[135] the High Court in *Mann v Carnell*[136] again applied the common law 'sole purpose test' to pre-trial processes. *Mann* was heard in the Australian Capital Territory Federal Court, where the *Evidence Act* applies to court proceedings. The High Court, ruled that the Full Federal Court in *Mann*[137] was incorrect in applying the *Evidence Act* rules *derivatively* to discovery and interlocutory processes.

Esso asked the High Court to revisit the sole purpose test established in *Grant v Downs* and to bring it into line with the *Evidence Act* and the common law of England, Canada, New Zealand and Ireland.[138] The High Court commenced by stating that they all agreed with the findings of the Full Federal Court.[139] The majority judgment then turned to *Grant v Downs,* and it is on the overruling of this case, that McHugh and Kirby JJ dissented from the majority judgment.

> The power to disturb settled authority is, as Gibbs CJ said, one to be exercised with restraint, and only after careful scrutiny of the earlier course of decisions and full consideration of the consequences.[140]

The majority noted that in announcing the sole purpose test, the majority judgment in *Grant v Downs* did not 'expressly consider the dominant purpose test and as an alternative possibility, or give reasons for rejecting such a test.'[141] It simply was not in issue; nor had the sole

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132 At the time of the decision, the *Evidence Act 1995* applied only to the Federal Courts, the Australian Capital Territory, and New South Wales. Tasmania enacted the *Evidence Act 2001*; Victoria enacted *Evidence Act 2008*; and the Australian Capital Territory enacted its own *Evidence Act 2011;* the Northern Territory enacted the *Evidence (National Uniform Legislation) Act 2011*. Queensland, South Australia and Western Australia have yet to adopt uniform evidence law.

133 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562-3.

134 *Esso Australia Resources Ltd v The Commissioner of Taxation of the Commonwealth of Australia* [1999] 201 CLR 49 (Majority judgment: Glesson CJ, Gaudron, Gummow JJ; with Callinan J in agreement; and McHugh J and Kirby J dissenting).

135 December 21, 1999.

136 (1999) 201 CLR 1 (Glesson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ).

137 *Carnell v Mann* (1998) 89 FCR 247 (Higgins, Lehane and Weinberg JJ).

138 (1999) 201 CLR 49, 56 (Majority judgment: Glesson CJ, Gaudron, Gummow JJ).

139 Ibid 58; (1999) 201 CLR 49, 73-4 (McHugh J); (1999) 201 CLR 49, 83 (Kirby J); and (1999) 201 CLR 49, 99-100 (Callinan J).

140 Ibid 71 (Majority judgment: Glesson CJ, Gaudron, Gummow JJ).

141 Ibid 67.

purpose test rested upon a principle that had been worked out in a succession of cases. Rather *Grant v Downs* overturned what was, until then, accepted principle.[142] Thus the majority judgment in *Esso* was again searching for a balance between the two competing public policy considerations and for a degree of certainty.

> The search is for a test that strikes the appropriate balance between two competing considerations; the public policy reflected in privilege itself, and the public policy that, in the administration of justice and investigative procedures, there should be unfettered access to relevant information. Additionally, whatever test is adopted must be capable of being applied in practice with reasonable certainty and without undue delay and expense in resolving disputed claims.[143]

The majority judgment rejected the view that the sole purpose test was in practice a bright-line test easily understood and capable of ready application.[144] Rather they found it to be too absolute and too rigid; so much so, that *one* relatively unimportant purpose could defeat the privilege. They cited previous decisions where courts had manoeuvred around the sole purpose test, in order to avoid its literal interpretation and stated that "[i]f the only way to avoid the apparently extreme consequences of the sole purpose test is to say that it should not be taken literally, then it loses it supposed virtue of clarity."[145]

The High Court in *Grant v Downs* had been concerned that large corporations and public authorities could 'privilege' their documents 'merely because *one* of their intended destinations was the desk of a lawyer.'[146] In addressing this concern, the majority judgment, in *Esso* was of the view that the sole purpose test went to the other extreme[147] and penalised corporations. Corporations by necessity must communicate internally, via written reports. A corporation 'cannot …think or write or act except by certain machinery, which is, so to speak, extraneous to itself.'[148] Their Honours' conclusion was that the common law should adopt the dominant purpose test.

> The dominant purpose test should be preferred. It strikes a just balance, it suffices to rule out claims of the kind considered in *Grant v Downs* and *Waugh*, and it brings the common law of Australia into conformity with other common law jurisdictions.[149]

The majority judgment declared that the dominant purpose test should apply to both judicial processes, and in relation to search warrants and other information-gathering powers, so long as the privilege has not been displaced by statute. The Court observed that a claim for privilege 'is not conclusively established by the use of a verbal formula' and that 'a court has

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142 Ibid 71.
143 Ibid 72.
144 Ibid.
145 Ibid.
146 Ibid 67 (Majority judgment: Glesson CJ, Gaudron, Gummow, JJ).
147 Ibid 72.
148 *Mayor and Corporation of Bristol v Cox* (1984) 26 Ch D 678, 682.
149 (1999) 201 CLR 49, 73 (Majority judgment: Glesson CJ, Gaudron, Gummow, JJ).

the power to examine documents in cases where there is a disputed claim' or in 'appropriate cases there is also the power to allow cross-examination of a deponent of an affidavit claiming privilege.'[150] The *Esso* decision removed the complexity of having competing tests operating at the crucial and pre-trial stage, for the recognition of privilege. The Court did not however define what it meant by 'dominant' purpose.

Callinan J was in agreement with the majority judgment however, he was more critical of the sole purpose test.

> I do not think that I would have decided *Grant v Downs* in the way in which the majority did. I do not, with respect, regard it as stating a convenient test, or a wholly fair one in accordance with the underlying rationale for legal professional privilege, of candour by clients in communications with legal advisers, or one which necessarily emerged as a result of full considered arguments by the parties.[151]

McHugh J in his dissenting judgment was concerned that the dominant purpose test would limit the information available to the court.

> But whatever the disadvantages of using the sole purpose test it has one great advantage over the dominant purpose test: it has a greater potential to lead to the production of documents that lead to other forms of evidence that will be admissible. Add to that advantage, the inevitable cost and expense of applying a dominant purpose test, and the case for overruling *Grant v Downs* is not persuasive.[152]

Kirby J also dissented. He saw the arguments of the parties as finely balanced;[153] however he reasoned that the sole purpose test should be maintained and he cited the warning he had raised in *Propend:*

> …a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into 'disrepute', principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.[154]

Kirby J was also concerned with the power of corporations to abuse the privilege and argued a return to the fundamental purpose of privilege - the protection of the individual.

> Once the privilege is seen as founded upon a notion of fundamental human rights, the idea of expanding the ambit of the privilege for the documents of corporations and administration receded in urgency. ..If anything, the human right of equal access to the courts argues against an expansion of a privilege which, as a matter of practicality, will diminish such a right or at least its utility.[155]

The fear expressed by the dissenting judgments of McHugh and Kirby JJ that less material would be available to the courts as a result of the removal of the sole purpose test, and that there would be an increase in the amount of litigation at the interlocutory stage, remains to be

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150 Ibid 70.
151 Ibid 105.
152 Ibid 80-1.
153 Ibid 81.
154 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 581.
155 (1999) 201 CLR 49, 92 (citations omitted).

tested. The dissenting judges were also concerned that the broadening of the doctrine does not necessarily further the administration of justice by promoting candour in the lawyer-client relationship,[156] rather it has the effect of protecting the dissemination of legal advice within large corporations and public authorities, and protecting non-legal information that is incorporated within legal advice documents.

The dominant purpose test itself has proven to be a strong hurdle to surmount. The emphasis is on the purpose of the communication at the time the communication or documentation 'is brought into existence'.[157] The *intention* is that of the author of the document or the person or authority under whose direction the author created the document.[158] Thus 'the dominant purpose is to be assessed from the standpoint of the party causing the communication to be created.'[159]

Kirby J in rejecting the dominant purpose test, in *Esso*, referred to the difficulty of determining a person or corporations' intention. He referred to the 'complexity of human motivation;' the difficulties involved in 'the exploration of the mind of another human being;' and the fact that '[h]uman motivation is rarely linear.'[160] The matter he argued, is further aggravated when referring to the intention of a corporation.

> Because corporations, associations and administration must necessarily act through human agents, the agent must be ascertained as must his or her authority to act. Then it is necessary to classify that person's purpose on the occasion in question.[161]

Dual purpose documents create additional difficulty in determining the dominant purpose. The existence of a number of purposes will not necessarily negate the privilege; a number of cases have dealt with this issue.[162] In both *Waugh*[163]and *Sparnon*[164] the Courts found that where there are two purposes of equal weight then the dominant purpose test would not be satisfied.[165]

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156 Ibid 78 (McHugh J); (1999) 201 CLR 49, 91 (Kirby J).

157 *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* [2007] FCA 933 [16]. (Unreported judgment of Tamberlin J).

158 *Grant v Downs* (1976) 135 CLR 657, 677 (Barwick CJ).

159 *Cadbury Schweppes Pty Ltd v Amcor Limited (No 3)* [2008] FCA 1668.

160 (1999) 201 CLR 49, 84.

161 Ibid.

162 *National Employers' Mutual General Insurance Association v Waind* (1979) 141 CLR 648, 656; *Aydin v Australian Iron & Steel Pty Ltd* [1984] 3 NSWLR 684, 687; *Guardian Royal Assurance v Stuart* [1985] 1 NZLR 596, 599; and *Levin v Bouyce* [1985] 4 WWR 702, 710.

163 *Waugh v British Railway Board* [1980] AC 521.

164 *Sparnon v Apand* (1996) 68 FCR 322.

165 *Waugh v British Railway Board* [1980] AC 521, 532

The purpose test for privilege is but one area of conflict between the statutory rules in the *Evidence Act* and the common law rules; issues still remain in the realm of the operation of waiver, and on the crime/fraud and other exceptions to privilege. [166]

5.8 A rights based justification of client legal privilege: *Daniels*

The Full Federal Court in the 2001 case of *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd*[167] was faced with deciding whether the Australian Competition and Consumer Commission (ACCC) could compel a solicitor to disclose information protected by client legal privilege in the course of an investigation under section 155 of the *Trade Practices Act 1974* (Cth). In finding that the provision impliedly abolished client legal privilege, their Honours focused on the wording of the provision, in particular the phrase 'to the extent that the person is capable of complying with it.'[168] Lindgren J:

> In my view, in par 155(5)(a) of the Act, "to the extent" clearly means "to the full extent", and "capable" seems to mean *at least* "immediately physically able without unreasonable practical difficulty and without in any respect acting unlawfully or committing a legal wrong". Accordingly, to take the most straight forward case, a client in possession of a privileged communication from the client's solicitor, such as a written advice, would be obliged to produce it in response to a notice given to the client under s 155(1)(b) of the Act.[169]

Moore J cited a number of cases dealing with the meaning of the words 'is capable of doing so' commencing with Carr J's interpretation in *De Vonk v Commissioner of Taxation*[170] 'the word 'capable' in this context must mean 'having the ability, power or fitness for some …activity' or 'having the ability, strength'…'[171] Moore went on to consider the *Pyneboard* decision and the fact that the *Baker v Campbell* case had been heard a little over a month before the judgment was given in *Pyneboard.*

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166 The *Evidence Act 1995 (Cth)* section 125(1)(b) creates an exception to privilege when there has been 'a deliberate abuse of power' as well as exceptions connected with the execution of wills and the intentions, or competence in law, of a client or a party who has died; preventing the execution of a court order and preventing the enforcement of a secret trust. It is beyond the scope of this thesis to analyse these exceptions, along with other exceptions to the rule such as: a lawyers' exception to recover a fee for services provided, or self-defence charges for malpractice or misconduct; or an exception to protect internal, or external, or national security. The vast array of rules on waiver both at common law and in legislation, are also beyond the scope of this thesis.

167 [2001] 108 FCR 123; FCA 244 (Wilcox, Moore and Lindgren JJ).

168 This phrase is very similar to section 8C of the *Taxation Administration Act 1953* (Cth). Sections 8C and 8D of the *Taxation Administration Act 1953* (Cth) replaced section 224 of the *Income Tax Assessment Act 1936* (Cth). As Wilcox J noted in *Donovan v Commissioner of Taxation* (1992) 34 FCR 355, 364: 'I noted the High Court's decision in *Pyneboard* was given in March 1983 and that ss 8C and 8D were inserted into the *Taxation Administration Act* in the following year.'

169 [2001] 108 FCR 123, 147; FCA 244, [90]; (emphasis in original).

170 (1995) 59 FCR 203.

171 Ibid 211.

> It may be that Mason ACJ and Wilson and Dawson JJ had legal professional privilege in mind when using the words "or otherwise"… the passage was intended to indicate that no privilege was available to resist the disclosure of a communication after the service of a notice under s 155[172]

Furthermore, the Court considered on policy grounds that client legal privilege would impede the investigations of government authorities and thus thwart the very purpose of the statute. The Federal Court in *Daniels* was influenced by the High Court decision in *Pyneboard;* a case primarily concerned with the extent to which section 155 of the *Trade Practices Act 1974* (Cth) abrogated the privilege against exposure to a civil penalty.

> It is significant that sub-s. (5) makes it an offence for a person to refuse or fail to comply with a notice under sub-s. (1) "to the extent that the person is capable of complying with it" for these words in themselves are quite inconsistent with the existence of a privilege entitling the recipient of a notice to refuse to comply, whether of the ground that compliance might involve self-incrimination or otherwise. [173]

Wilcox J went on to interpret the statement and particularly the words 'involve self-incrimination or *otherwise*' to mean that their Honours had intended the statement to include reference to client legal privilege.

> The inclusion of the emphasised words is explicable only on the basis that their Honours wished to make a statement, about the effect of the words used in the paragraph, that went beyond the matter of self-incrimination. This is the way McHugh J, in *Yuill*, understood their Honours.[174]

Moore J agreed, finding that the decision in *Pyneboard* must be taken to indicate that the expression in section 155(5)(a) 'is capable of complying' imposes an obligation that would not permit exceptions.[175] Moore J also considered the purpose for which the power was conferred, stating that a claim for client legal privilege would 'in many instances, create a significant practical impediment to the investigation.'[176]

Wilcox J noted that in *Stergis*[177] and *Donovan* [178] the courts had concluded that the privilege against self-incrimination was not a *reasonable excuse* not to comply with disclosure requirements.[179] Both cases involved section 264 of the *ITAA*, requiring a person to furnish specified information or attend an interview to give evidence and/or produce documents. And both cases concerned the application of sections 8C and 8D to the *Taxation Administration Act 1953* (Cth). These sections create the offences of failing to comply with a request to produce documents, and failing to comply with a request to give evidence; in each case the phrase used is 'to the extent that the person is capable of' doing so. The Courts noted this was

172 108 FCR 123, 142; FCA 244 [70].
173 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 343.
174 [2001] 108 FCR 123, 136; FCA 244, [52].
175 Ibid 142; FCA 244, [71].
176 Ibid 146; FCA 244, [84].
177 *Stergis v Boucher* (1989) 86 ALR 174.
178 *Donovan v Commissioner of Taxation* (1992) 34 FCR 355.
179 [2001] 108 FCR 123, 134; FCA 244, [44].

the same formula as was used in s 155 of the *Trade Practice Act* and therefore considered in *Pyneboard.* Lindgren J generally agreed with the reasoning of Wilcox and Moore JJ.[180]

The High Court granted the Daniels Corporation special leave to appeal.[181] Gaudron J stated: '…what is in issue is what is the better view of section 155', namely whether client legal privilege is or is not a valid answer to a notice under section 155 of the *Trade Practices Act 1974.*

Legal commentator Suzanne McNicol urged the High Court to be decisive.

> …seize the opportunity to pronounce some 'aides in interpretation' on the more general question of statutory abrogation of privilege by necessary implication or intendment. In doing this, it is also hoped that the High Court might express a view on the differences, if any, between legal professional privilege and the privilege against self-incrimination where both privileges are regarded as having the potential to defeat or stultify the purpose for which a coercive and investigative power is conferred.
> …the High Court should dismiss the Daniels Corporation's appeal and endorse the decision of the Federal Court. …Finally, the paper concludes with a strong plea to the High Court to embrace the decision of the Federal Court that legal professional privilege is not a valid answer to a notice served under s155 of the *Trade Practices Act* 1974 (Cth). [182]

The Daniels Corporation drew the High Court's attention to the general practice of the ACCC[183] to accept a claim to client legal privilege as a valid excuse for refusing to answer questions or produce documents in response to a section 155 notice.[184]

Professor Fels, the then Commissioner of the ACCC, noted after Full Federal Court decision had been handed down in March 2001 that:

> The ACCC has rarely sought to override legal professional privilege to seek documents during the course of an investigation. However, this decision means that the ACCC will be able to properly investigate alleged breaches of the Act and determine the seriousness of any breaches without relevant information, documents or evidence being withheld from it under the cloak of legal professional privilege.[185]

Daniels also sought to distinguish the *Yuill* decision, noting the differences in the wording of legislation involved.

> …unlike the *Trade Practices Act*, the *Companies (New South Wales) Code* made specific reference to legal professional privilege in ss 299 and 308. There are no equivalent provisions in the Act. The majority relied on those provisions as indicating Parliament's intention to displace legal professional privilege in all other respects. (*Yuill* (1991) 172 CLR 319 at 324, 334.) If *Yuill's Case* cannot be satisfactorily distinguished, its correctness or at least its reasoning ought to be

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180 Ibid 147; FCA 244, [88].

181 *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* [2001] HCA 72 (7 November 2002).

182 Suzanne McNicol, 'Before the High Court: *Australian Competition and Consumer Commission v The Daniels Corporation Pty Ltd and Another'* (2002) 24 *Sydney Law Review* 281, 281-2.

183 The ACCC March 2008 Guideline on section 155 reads: 'Section 155 does not require a person to produce a document that would disclose information that is the subject of legal professional privilege – s. 155(7B).' However a new Guideline was issued in October 2000 stating: 'However, where the Commission considers that privilege material is relevant to the subject matter of its investigation and should be examined, it will press for the material to be produced.'

184 (2002) 213 CLR 543, 546.

185 Stephen Corones, 'Restrictive Trade Practices' (2001) 29 *Australian Business Review* 249, 251.

> reconsidered. There is tension between the approach of the majority in that case and the Court's approach in other cases concerning fundamental common law rights, both before and after *Yuill's Case. (Baker v Campbell)* (1983) 153 CLR 52; *Bropho v Western Australia* (1990) 171 CLR1; *Coco v The Queen* (1994) 179 CLR 427; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.[186]

The High Court unanimously[187] responded that a client legal privilege as substantive rule of law enables a person to resist the giving of information or the production of documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.[188] The majority judgment in *Daniels* firmly establishes a rights-based justification for client legal privilege, and this was in the context of litigation between a corporation and a government enforcement agency.

> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which in this Court can be traced to *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J, was the foundation for the decision in *Baker v Campbell*.[189]

The majority judgment was adamant that client legal privilege should be not cast as a tool in illegal conduct, nor were they convinced that the privilege would frustrate the purpose of the *Trade Practices Act*.

> The notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the Act should not be accepted.[190] A communication the purpose of which is to "seek help to evade the law by illegal conduct" is not privileged.[191] That being so, it is difficult to see that the availability of legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations.[192]

The majority went on to consider the *Pyneboard* and *Yuill* decisions; concluding that the *Pyneboard* decision was not wrongly decided, but that 'it may be that *Yuill* would now be

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186 (2002) 213 CLR 543, 546.

187 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 (Majority judgment: Gleeson CJ, Gaudron, Gummow and Hayne JJ). McHugh, Kirby and Callinan JJ produced separate judgments while agreeing to allow the appeal.

188 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 552.

189 Ibid 553 (majority judgment: Gleeson CJ, Gaudron, Gummow and Hayne JJ).

190 See *R v Cox and Railton* (1884) 14 QBD 153.

191 *Attorney General (NT) v Kearney (1985)* 158 CLR 500, 513 (Gibbs CJ). See also *Jonas v Ford* (1885) 11 VLR 240; *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382; *R v Bell Ex parte Lees* (1980) 146 CLR 141, 145 (Gibbs J); 151-2, (Stephen J); 161-2 (Wilson J). *Baker v Campbell* (1983) 153 CLR 52, 86 (Murphy J). *Wigmore on Evidence*, McNaughton rev (1961), vol 8, §2298, 577; McNicol, *Law of Privilege* (1992) 104-113.

192 (2002) 213 CLR 543, 557 (citations included).

decided differently.'[193] In reference to *Pyneboard* they disagreed with the approach of the majority in that case,[194] stating that it paid no regard to section 155(2).

> Section 155(2) authorises what would otherwise constitute a trespass. In that respect, it is similar to the search warrant provisions in s 10 of the *Crimes Act* 1914 (Cth) considered in *Baker v Campbell* and, later, in *Propend.* Those decisions, which were subsequent to the decision in *Pyneboard*, respectively held and confirmed that that provision did not authorise the seizure of material to which legal professional privilege attached.[195]

The majority concluded that *Pyneboard* should not be followed, but that it was not nonetheless wrongly decided.[196]

McHugh J preferred to distinguish both *Pyneboard* and *Yuill. Pyneboard* he did not consider as authoritative because the decision in that case could be justified by the presence of section 155(7) in the *Trade Practice Act*, a section abolishing any right to claim that production of documents required might expose a person to a civil penalty; the case did not deal with client legal privilege.[197] *Yuill* he argued was a case concerning legislation whose context, history and purpose was so different from the current case, that the decision would offer no assistance.[198] Kirby J cast doubt on the High Court decision in *Yuill*[199] and its strong influence on the Full Federal Court's decision in *Daniels.*

> In deciding that privilege was overridden by the terms of s 155, the Full Court was greatly influenced by the reasoning of the majority of this Court in *Corporate Affairs Commission (NSW) v Yuill.* An examination of decisions before[200] and after[201] that case suggests that *Yuill* may have been wrongly decided. It appears as an exception to the approach taken by this Court to like problems.[202]

Kirby J expressed the view that the High Court's decision in *Esso*[203] expanded the scope of client legal privilege and that it therefore 'must be weighed in deciding whether the privilege asserted would now truly be compatible with the operation of s 155.'[204] He warned that the potential interference with the operation of section 155 would be further expanded if client

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193 Ibid 560.

194 Mason A-CJ, Wilson and Dawson JJ.

195 (2002) 213 CLR 543, 558.

196 Ibid 560.

197 (2002) 213 CLR 543, 566.

198 Ibid 566.

199 Kirby's Supreme Court of Appeal (NSW) decision in favour of extending privilege in the *Yuill* case had been overruled by the High Court.

200 (2002) 213 CLR 543, 577; Kirby J citing *Potter v Minahan* (1908) 7 CLR 277, 304: *Ex parte Walsh and Johnson: In re Yates* (1925) 37 CLR 93.

201 Ibid (Kirby J citing eg, *Bropho v Western Australia* (1990) 171 CLR 1, 18; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 12; *Coco v The Queen* (1998) 195 CLR 337, 381[89]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 328[121].

202 Ibid 567.

203 Kirby J had dissented from the High Court majority decision in *Esso Australian Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

204 (2002) 213 CLR 543, 574; citing *Baker v Campbell* (1983) 153 CLR 52, 96 (Wilson J) and 122 (Dawson J).

legal privilege were available for communications prepared 'for legal advice by in-house corporate counsel or by joint businesses of legal practitioners and accountants'.[205]

Kirby J went on to refer to privilege as 'an important human right deserving of special protection for that reason.'[206]

> In so far as this Court has dealt with the topic of legal professional privilege, save for *Yuill*, it has consistently emphasised the importance of the privilege as a basic doctrine of the law[207] and "practical guarantee of fundamental rights"[208], not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings.[209] It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by law.[210]

Kirby J emphasised that 'it is comparatively rare for Australian parliaments to abolish legal professional privilege expressly.'[211] Perhaps one can infer from this fact 'a disinclination to do so, occasioned by a realisation of the resistance that the deprivation of such an important civil (an in some cases human) right would occasion.'[212] In comparing the competition legislation in Australia to that of the United Kingdom,[213] the United States,[214] and the European Union;[215] Kirby J noted 'that documents to which legal professional privilege attaches are exempted from production in like circumstances.'[216] Kirby J concluded that it would be difficult to accept the need for a different regime in Australia, especially given the decision of the House of Lords in the *Morgan Grenfell* case.[217]

5.9 Third party communications and legal advice privilege: *Pratt*

The 2004 Full Federal Court in *Pratt,*[218] had to consider third party communications and client legal privilege. The Court emphasised that it was not the nature of the third party relationship with the client, 'an agent, or alter ego of the client …(or) a third party'[219] but the *function* that it performed for the client that formed the basis for privilege; and if that function was to enable the client to make a communication in order to obtain legal advice, then the

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205 Ibid Kirby J cited the *Legal Profession Act* 1987 (NSW) section 47c.

206 Ibid 576 citing *Campbell v United Kingdom* (1993) 15 EHRR 137; and *Foxley v United Kingdom* (2000) 31 EHRR 637.

207 *Goldberg v Ng* (1995) 185 CLR 83, 121 (Gummow J); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 505 (Brennan CJ); 551-2 (McHugh J).

208 *Goldberg v Ng* (1995) 185 CLR 83, 121 (Gummow J).

209 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

210 (2002) 213 CLR 543 (citations included).

211 Two contemporary examples of legislation that expressly abrogate client legal privilege are: the *James Hardie (Investigations and Proceedings) Act* 2004 (Cth), and the *Royal Commissions Amendment Act* 2006 (Cth) amending section 2(5), in response to the decision in *AWB Ltd v Cole* (2006) 152 FCR 382.

212 (2002) 213 CLR 543, 581.

213 *Competition Act* 1998 (UK) s 30.

214 *Antitrust Civil Process Act 1976* (15 USC §§1311-1314).

215 *A M & S Europe Ltd v Commission of the European Communities* [1983] QB 878.

216 (2002) 213 CLR 543, 583-4.

217 Ibid 584.

218 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

219 Ibid 386[105] (Stone J).

privilege should apply. The Court held that the dominant purpose test applies to such communications, and 'the difficulties of proving the relevant purpose should not be underestimated.'[220]

Following on from the Full Federal Court decision in *Pratt Holdings Pty Ltd v Commissioner of Taxation*[221] section 118 of the *Evidence Act*[222] was amended to extend the advice privilege to third-party communications made to the client or lawyer for the dominant purpose of seeking legal advice, or legal services. The *Pratt*[223] case was considered jointly by the Australian, New South Wales and Victorian Law Commissions and a joint report in 2005[224] recommended the legislative change. The Commissioners highlighted that the fact that there is a single rationale for privilege, should not lead to a 'blurring' of the distinction between the two limbs of the privilege, and in this, they expressed their agreement with Stone J, that:

> The High Court's exposition of the rationale for legal professional privilege (*Daniel*[225]*)* is consistent with the appellants' submission that there is a single rationale in Australia for legal professional privilege; the rationale applies to litigation privilege and to legal advice privilege. However, it does not follow from accepting a single rationale that the distinct categories of litigation and advice privilege should no longer be recognised. A single rationale or policy may well be manifested in distinct situations and categorising those situations differently may be a useful analytic device, allowing the formulation of more specific rules to assist in implementing the rationale.[226]

Nevertheless *Pratt* stands in contrast to the narrower application of legal advice privilege to communications with third parties, in England; where the courts have held that legal advice privilege can only be claimed for communications passing between a lawyer and client, made in confidence, for the purpose of obtaining legal advice or assistance; it does not extend to third party communications whether or not, they are to be shown to a lawyer, for the purpose of obtaining legal advice.[227]

5.10 Conclusion

Client legal privilege has been developed through common law, its emphasis has been and continues to be on the *purpose* for which the communications came into existence. The test

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220 Ibid 387[106] (Stone J).

221 Ibid.

222 See *Evidence Amendment Act* (Cth) 2008, (Act No. 135 of 2008) 61 Paragraph 118(c). The New South Wales Act was similarly amended via *Evidence Amendment Act* 2007 (Act 46 of 2007) (NSW), section 3 and paragraph 14.122. The Victorian Act was also amended, via *Evidence Act* 2008 (Act 47 of 2008) (Vic) section 118.

223 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, 369[49] (Finn J) held that 'legal advice privilege is capable of extending to non-agent, third party authored documentary communications', even were no litigation is pending.

224 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005), para 14.122.

225 *Daniel Corporation International Pty ltd v Australian competition and Consumer Commission* (2002) 213 CLR 543, 552 (Gleeson CJ, Gaudron, Gummow, and Hayne JJ).

226 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, 381[85].

227 See *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610.

for the privilege has gone through a number of important phases, commencing with the test that so long as *one* of the purposes was for legal advice or legal services, privilege would apply; to the restrictive *sole purpose* test; and currently to the *dominant purpose* test. Its scope has extended beyond the judicial or quasi-judicial sphere to the investigative sphere, and it is here that it has influenced the way that regulatory agencies use their powers of search and seizure. This development is important to the operation of the tax legislation and the powers of the ATO to compel the disclosure of confidential communications between a taxpayer and tax practitioner.

The common law has increasingly noted the importance of client legal privilege as a fundamental *human right,* despite the fact that Australia does not have a *Bill of Rights*. The courts following on from the *Daniels* case interpret legislation in the light that such a fundamental principle cannot be deemed to be abrogated except by express words or very clear intendment by the Parliament. Client legal privilege as a human right has proved an invaluable aid for taxpayers in restricting the ATO's access to confidential communications between the taxpayer and tax practitioner, so long as they are able to pass the hurdle of the dominant purpose test. This test, though less stringent than the sole purpose test, is not easy to satisfy. The privilege is currently restricted to confidential client and legal adviser communications; communications with tax practitioners who are not lawyers are not protected.

A taxpayer privilege based on the common law client legal privilege requires an understanding of how the privilege developed and how it works both in common law and in legislation, these questions have been largely answered in this chapter. The next chapter will address the question of how client legal privilege applies specifically in the tax arena. It will focus on the way the ATO employs its section 263 and 264 of the *ITAA*, powers of search and seizure in the light of client legal privilege as a fundamental human right.

CHAPTER SIX

The Australian Tax Commissioner's extensive powers of access and investigation

6.1 Introduction

In order to present a case for a taxpayer privilege it is important to investigate the powers of the Australian Tax Commissioner,(Commissioner) his powers of access and investigation, as contained mainly in sections 263 and 264 of the *Income Tax Assessment Act 1936* (Cth) (*ITAA*) and the manner in which Commissioner employs these powers. In the previous chapter we examined the development of client legal privilege in the Australian common law from being a rule of evidence[1] to a substantive right that applies beyond the curial arena to the investigative area[2] where government agencies have the power to compel citizen to disclose information and/or attend and answer questions and to disclose information. Client legal privilege has proven to be the main defence against these coercive powers however this protection is limited to confidential communications with legal advisors. The courts have engaged both the utilitarian and the rights rationale for privilege, with the human rights rationale being more prominent in the later part of the 20th century and early 21st century.[3]

This chapter will examine the Commissioner's extensive and coercive powers of access and investigation. The Commissioner[4] has the function of ascertaining the taxpayer's taxable income and administering the taxation laws. The Commissioner's functions are facilitated by the key legislative instruments provided in the *ITAA:* section 263, the access power, and section 264, the information gathering power. Client legal privilege is one of the key constraints to the Commissioner's powers therefore a number of high profile cases involving the sections and the operation of the privilege are examined. A doctrinal methodology is adopted for most of this chapter.

The scope and the operation of the sections 263 and 264, has been shaped by the courts, over a number of cases. The case law shows that the sections can be employed to make wide-ranging inquiries and to make those inquiries before any dispute may arise between the Commissioner and the taxpayer. However, while the courts have concluded that privilege against self-incrimination has been abrogated by the *necessary implication* of section 264 of the *ITAA* and sections 8C and 8D of the *Taxation Administration Act 1936* (Cth) (*TAA*), client legal privilege has not suffered the same fate. The courts in abrogating the privilege against

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1 See *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

2 See *Baker v Campbell* (1983) 153 CLR 52.

3 See for example, *Commissioner of Taxation v Citibank* (1989) 20 FCR 403, 437 (French J.) and *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 552 (Majority judgment: Gleeson CJ, Gaudron, Gummow and Hayne JJ).

4 January 1 2013 saw Chris Jordan AO appointed as the 12th Commissioner of Taxation.

self-incrimination reasoned that the privilege unduly frustrated the investigations of the Commissioner.

Given the extensive powers of the Commissioner, the principle of 'lawful violation' and the problems associated with it are examined. The application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 39B of the *Judiciary Act 1903* (Cth) are investigated to ascertain the Commissioner's obligation to provide: procedural fairness: reasonableness in decision making processes and fulfilling taxpayers' legitimate expectations. The question of whether the use of section 263 and 264 powers when there are pending legal proceedings, can constitute a contempt of court, is also addressed. An examination of these issues and how they are resolved impacts the imbalance of power between the Australian Tax Office (ATO) and the taxpayer, especially in a self-assessment system reliant on voluntary compliance by taxpayers.

6.2 A self-assessment tax system and the taxpayers' burden of proof

Australia has a self-assessment system which has been introduced progressively since 1986. The system relies on voluntary compliance and taxpayer honesty in preparing tax returns**,** with the understanding that the information disclosed will be treated with utmost confidentiality. The total confidentiality of assessments and of negotiations between individuals and the Revenue is viewed by the courts as a vital element in the working of the system.[5] This recognition of the uniquely sensitive nature of the information and endeavours to protect the confidentiality of that information, seeks to address the tension between the unfettered access to taxpayer information, necessary for the administration of the tax system, and the expectation by taxpayers that their affairs remain confidential.

The self-assessment system is reliant on the voluntary compliance of taxpayers. Tax compliance is defined as the accurate reporting of income and the claiming of expenses in accordance with the tax laws. There are two main theories to the understanding of tax compliance issues: the economic or expected utility theory and the behavioural approach.[6] The economics-of-crime theory built on the 1968 work of Becker[7] is based on utility theory and deterrence theory. The utility theory views the taxpayer as a perfectly amoral utility maximiser, who chooses to evade taxes whenever the expected gain exceeds the cost of evasion. The deterrence theory is concerned with the effects of sanctions and threats of

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5 See *R v IRC; Ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, 633 (Lord Wilberforce).

6 John S Hasseldine, Peggy A Hite and Marika Toumi, 'Developing a Tax Compliance Strategy for Revenue Services' (2001) 55(4) *Bulletin for International Fiscal Documentation* 158.

7 Gary S Becker, 'Crime and Punishment: an Economic Approach' (1968) 76(2) *the Journal of Political Economy* 169.

sanctions in discouraging undesirable behaviour; the greater the probability of detection, and the more severe the penalty or sanction, the lower the non-compliance.[8] The behavioural theory draws concepts from the disciplines of psychology and sociology. The taxpayer is not viewed as an independent, selfish, utility maximiser but rather as one who interacts according to their own differing attitude, beliefs, norms, roles and demographic characteristics.[9] Both theories have contributed to an understanding of tax compliance behaviour and the literature in the field is too vast for this thesis to cover effectively. However, McKerchar et al reviewed the literature in the field of compliance, covering economic deterrence, social psychology and fiscal psychology concluding that 'one single theory of compliance behaviour may be inappropriate and that a range of theories appropriate to taxpayer types may be more fruitful.'[10]

The self-assessment system imposes the burden upon the taxpayer to make accurate returns. The ATO generally accepts as correct the taxpayers' calculations of their taxable income and tax liability.[11] The ATO has shifted its emphasis from the technical scrutiny of tax returns, to post-assessment audits and data matching techniques. The Commissioner via section 170(2)(b)(i) and (ii) of *ITAA* can amend an assessment up to four years from its issue, and has the power to impose administrative penalties and interest charges on taxpayers who failed to exercise reasonable care.

The Commissioner has the power under section 167 of the *ITAA* to issue a default assessment: if a person fails to lodge a tax return and the Commissioner believes the taxpayer has derived taxable income; or if the Commissioner is not satisfied with the return lodged. The taxpayer bears the burden of proof that such an assessment was erroneous or excessive and also of showing how it may be corrected. [12]

Section 262A of the *ITAA* requires a person, including a company, carrying on a business, to maintain records that record and explain all transactions and other acts engaged in that are relevant for any of the purposes of the *Act.* Therefore the taxpayer has the burden of

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8 See Michael G Allingham and Agnar Snadmo, 'Income Tax Evasion: a Theoretical Analysis' (1972) 1 *Journal of Public Economics* 323.

9 See Henk Elffers, Russell H Weigel and Dick J Hessing, 'The Consequences of Different Strategies for Measuring Tax Evasion Behaviour' (1987) 8(3) *Journal of Economic Psychology* 311.

10 Margaret Mckerchar, Helen Hodgson and Kalmen Datt, 'Is there a Perception of Revenue Bias on the Part of the ATO in Private Binding Rulings on Large, Complex Issues?' (2008) 23(3) *Australian Tax Forum* 312, 316

11 See Australian Tax Office 'Annual Report 2012.' In the 2011-12 year less than 1% of assessments resulting in objections, and 179 cases proceeded to a hearing in the Administrative Appeals Tribunal or the courts.

12 See *Lucas v* O'Reilly (1979) 36 FLR 102, 110 (Young CJ).

substantiation and record-keeping, any carelessness and inability to corroborate assertions in the return, may lead to heavy penalties.

Section 170(1) of the *ITAA* empowers the Commissioner to amend assessments by making such alterations therein or additions thereto as he thinks necessary. The power to amend assessments is not conditional upon a belief or suspicion of wrong doing, on the part of the Commissioner. Section 14ZZK and 14ZZO[13] of the *TAA* prescribe that the taxpayer has the burden of proving, on the balance of probabilities, that the Commissioner's assessment is excessive, even where, as in *Vale Press Pty Ltd*[14] the Commissioner applied what the taxpayer deemed to be an 'arbitrary percentage' in a sales tax assessment:

> A taxpayer will not, in my view, show the assessment to be excessive merely by showing that the assessment is one made by the Commissioner by applying some arbitrary percentage (if indeed it be the case that the percentage applied by the Commissioner in the present case) was arbitrary. Ultimately the taxpayer will not have shown thereby the assessment to be in excess of the actual substantive liability of the taxpayer.[15]

The High Court *Trautwein*[16] held that where a taxpayer objected to the Commissioner's assessment, the taxpayer must show not only that the assessment is wrong, even if it may be based on guess work by the Commissioner, but also what correction should be made to make it right. A taxpayers' plea that he does not have the necessary records, will not exonerate him from liability. The strong presumption is that the Commissioner's assessment is correct.

> The application of s 39 [the conclusivity of a notice of assessment] is not, in my opinion, excluded as soon as it is shown that an element in the assessment is a guess and that it is therefore very probably wrong. It is prima facie right - and remains right until the appellant shows that it is wrong. If it were necessary to decide the point I would, as at present advised, be prepared to hold that the taxpayer must, at least as a general rule, go further and show, not only negatively that the assessment is wrong, but also positively what correction should be made in order to make it right or more nearly right.[17]

The reasoning for the onus of proof falling upon the taxpayer is that the true facts of the taxpayer's situation often lie uniquely with the taxpayer's knowledge. The government's need to protect the revenue[18] is the most frequently cited reason for placing the burden upon the taxpayer.

6.3 History of sections 263 and 264 of the *ITAA*

The sections date back to the first Commonwealth legislation on income tax namely the *Income Tax Assessment Act (ITAA) 1915* (Cth). The only amendment was in 1918, when the

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13 A taxpayer who is dissatisfied with an assessment made by the Commissioner may object against it in the manner set out in Part IVC of *Taxation Administration Act 1953* (Cth).

14 *Vale Press Pty Ltd v Federal Commissioner of Taxation* (No. 2) (1994) 53 FCR 92.

15 Ibid 100[B-C] (Hill J).

16 *Trautwein v Federal Commissioner of Taxation* (1990) 56 CLR 63.

17 Ibid 88 (Latham CJ.)

18 See *Smiles v Commissioner of Taxation* (1992) 35 FCR 405, 411 (Davies J).

words 'for any of the purposes of this Act' were substituted in place of the words 'for the purpose of ascertaining the taxable income of any person'. Section 264 has remained unchanged from the 1915 *Act.*[19]

In 1933 O. Howard Beale expressed the view that the ATO powers were too wide:

> Much dissatisfaction has from time to time been expressed with the methods of Government Departments and their treatment of the public. These methods are largely the result of legislation vesting in public officials extraordinary administrative and quasi-judicial powers which deprive the citizen of many of the safeguards which the common law has given him. Perhaps the most extreme examples of this sort of legislation are to be found in the Income Tax Acts, some sections of which are exceedingly wide in their application. [20]

Beale questioned the right of the Commissioner to compel a solicitor to disclose professional communications passing between himself and his client, noting that 'the Commissioner, on the other hand, takes the view that s. 87[21] completely overrides professional privilege.'[22] Beale concluded his article with a rally cry:

> Recently, in Sydney, a solicitor was called upon by notice s. 87 (1) (b) to give evidence and produce documents relating to the affairs on one of his clients. He refused to do so on the ground of professional privilege, and a prosecution was ultimately instituted against him under the penal provisions of the Act. For reasons best known to the Commissioner, the prosecution was withdrawn, thereby depriving the profession of the benefit of a decision by the Full Court one way or the other. Perhaps this article will stimulate some other solicitor to take the same stand, with consequent advantage to the whole profession![23]

The 1973 case of *Southwestern Indemnities Limited v Bank of NSW*[24] was the first case to consider either section 263 or 264. Barwick CJ's decision emphasised that the sole limitation or qualification on the application of section 263 is that access be sought 'for the purposes of the Act';[25] he held that section 263 should be given a wide interpretation and ought not to be read down. The Commissioner referred to the Court to the fact that comparable powers in

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19 Section 264 *ITAA 1915:*

(1) The Commissioner may by notice in writing require any person whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority –

(a) to furnish him with such information as he may require; and

(b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

(2) The Commissioner may require the information or evidence to be given on oath and either verbally or in writing, and for that purpose he or the officers so authorized by him may administer an oath.

(3) The regulations may prescribe scales of expenses to be allowed to persons required under this section to attend.

20 O. Howard Beale, "Professional Privilege and the Income Tax Acts" (June 15, 1933) *The Australian Law Journal* 71, 71.

21 The section 87 referred to is the precursor to section 264 of the *ITAA 1936.*

22 Ibid 72.

23 Ibid 73.

24 (1973) 129 CLR 512.

25 Ibid 520.

English legislation had been given a wide interpretation and cited two English judgments[26] to make the point.

Section 263 was amended in 1987. [27] The previous section was redesignated as subsection (1) and two new subsections (2) and (3) added.[28] This amendment 'was consequential upon the decision of the High Court in *O'Reilly.'*[29] The plaintiff in *O'Reilly*[30] had argued that section 263 did not create an obligation to assist the Commissioner with his investigations. The High Court agreed.

> In our opinion s.263 on its proper construction does not impose an obligation on anyone to take positive steps to enable the Commissioner more easily or effectively to enjoy his right of access. [31]

The addition of section 263(3) created an obligation to provide all reasonable facilities and assistance to the Commissioner's effective exercise of the powers of access. Hill J noted that the taxpayer is obliged to render *reasonable* assistance, and that this did not include making copies of communications.

> … it is doubted whether acting under s 263 the Commissioner could require a citizen to make copies of documents and supply them to him, particularly having regard to the specific authority given by the section to the Commissioner to take copies himself.[32]

In the case of electronic files, the Commissioner is entitled to passwords, log in information, and assistance in navigating software.[33]

The 1987 addition of section 263(2) clarified the fact that the 'authority' is not a precondition of entry however, where the occupier requests proof of authority, the written or wallet authority must be produced. Failure to produce the authority upon demand may make

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26 (1973) 129 CLR 512, 514 (A.F. Rath Q.C) citing *Clinch v Inland Revenue Commissioners* [1974] QB 76; *Wilover Nominees Ltd v Inland Revenue Commissioners* [1973] 2 All ER 977.

27 *Taxation Laws Amendment (No. 2) Act, No. 62, 1987* (Cth).

28 (1) the Commissioner, or any officer authorized by the Commissioner 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 authorized 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 subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.

29 *Commissioner of Taxation and Others v Citibank Ltd* (1989) 20 FCR 403, 411 (Bowen CJ and Fisher J) (footnote omitted).

30 *O'Reilly and Others v The Commissioners of the State Bank of Victoria and Others* (1982-3) 153 CLR 1.

31 Ibid 41 (Mason Murphy, Brennan and Deane JJ).

32 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, 206.

33 Australian Taxation Office, 'Taxation Ruling 2005/9: Income tax: record keeping – electronic records.'

subsequent access activities invalid and unlawful. The entry is itself is an encroachment upon the liberty and privacy of the occupier and thus trespass.

> Section 263 will plainly in some, if not all cases, operate to interfere with privacy and in particular that kind of privacy recognised by the rights to quiet possession of land and personal property which are protected by the common law relating to trespass.[34]

Brennan J in *Halliday v Nevill*[35] reviewed the common law on privacy from the 1765 case of *Entrick v Carrington*[36] through to the time of his 1984 decision; emphasising the tension between the right of the individual to privacy, and the right of public officials to enter private property and that it is for the legislature to resolve this tension.

> There is, of course, a tension between the common law privileges that secure the privacy of individual in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement. The contest is not to be resolved by too ready an implication of a licence to police officer to enter on private property. The legislature has carefully defined the rights of the police to enter; it is not for the courts to alter the balance between individual privacy and the power of public officials. It is not incumbent on a person in possession to protect his privacy by a notice of revocation of a licence that he has not given; it is for those who infringe his privacy to justify their presence on his property. There may well be a case for enlarging police powers of entry and search, but that is a matter for the legislature.[37]

6.4 The scope and operation of sections 263

ATO practice is to initially proceed informally and rely upon the co-operation of taxpayers. Section 263 of the *ITAA* provides for the formal request for access, employing very general terms. The only limitation is that it be exercised in good faith for the purposes of the *Act.* Hindrance or obstruction of an officer exercising access powers can lead to prosecution via section 263(3). The access power is not limited to the inquiry of named persons; the inquiry can be at a more general level such as identifying persons engaged in a particular activity. In *Knuckey*[38] the Full Federal Court upheld Sundberg J's[39] decision that the Commissioner, in conducting a work-related expense audit program that focused on tax agents, was acting within the purposes of the *Act*.

Only 'reasonable force' can be used by officers to gain access to premises and documents.

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34 *Commissioner of Taxation v Citibank Limited* (1989) 20 FCR 403, 433 (French J). *See Smorgon v ANZ* (1976) 134 CLR 475, 535 (Mason J). 'Section 263 is a general provision giving the Commissioner a right of access. It makes lawful that which otherwise would be unlawful, e.g. entry upon premises, the examination of a document.'

35 (1984) 155 CLR 1; [1984] HCA 80 (6 December 1984).

36 (1765) 19 St Tr 1029.

37 (1984) 155 CLR 1; [1984] HCA 80[20] (6 December 1984).

38 *Knuckey v Commissioner of Taxation* (1998) 87 FCR 187, 198 (Black CJ, Tamberlin and Goldberg JJ).

39 *Knuckey v Commissioner of Taxation* (1997) 37 ATR 213.

> If the section authorized the Commissioner to gain such access by force, it would bring about the most serious invasion of the ordinary rights of the subject, and the section would not be given that effect unless the clearest words required it.[40]

In *Kerrison*[41] the Commissioner sought access to a taxpayer's boxes that were in the custody of a bank, the bank did not have keys to the boxes, and the taxpayer refused to open the boxes. Bollen J held that 'the Commissioner is entitled to have full and free access to the boxes …and to the contents of the boxes'. [42]

The term 'document' includes hard copy and electronically stored documents.[43] The Commissioner is not entitled to bulk copy all documents, such as email folders or document folders, without first determining their *relevance* to any of the purposes of the *Act*.[44] The Commissioner is required upon request, to provide a copy of all documents copied, scanned or extracted, so that the taxpayer can ascertain whether the documents copied are subject to privilege. The costs involved in providing the Commissioner with full and free access, are usually borne by the taxpayer.[45]

The Courts[46] have interpreted section 263 as arming the Commissioner with a power of entry and search.

> The section does not confer in terms a power of search; but plainly the power of search exists, whether it be an express power or an implied power necessarily arising from the power of full and free access to buildings, places, documents and other papers and the power for that purpose to make extracts from or copies of such books, documents or papers.[47]

Section 263 provides no guidance on how specific the authority needs to be in reference to: the places to be accessed; or the documents or class of documents that may be inspected and/or copied. The 'generality' of the language has caused controversy in a number of cases.[48] In *Citibank* Lockhart J argued that since the section is an encroachment on the privacy of the taxpayer, the authority should provide such detail.

> … where s 263 is invoked, the proper balance between the protection of the citizen from undue invasion of his premises, records and privacy on the one hand, and the protection of the revenue on the other, is secured by requiring not only that the authorising officer, …give due consideration to the particular circumstances which call for the issue of an authority under the section; but by

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40 *Federal Commissioner of Taxation v Australia and New Zealand Banking Group* (1979) 143 CLR 499, 525 (Gibbs ACJ).

41 *Kerrison & Banich Management Pty Ltd v Federal Commissioner of Taxation* (1986) 17 ATR 338.

42 Ibid 349.

43 Australian Taxation Office, above n 33.

44 *JMA Accounting Pty Ltd and Another v Commissioner of Taxation and Others* (2004) 139 FCR 537, 546 [30].

45 The costs are an allowable deduction under section 25.5 of the ITAA 1997.

46 See *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1988) 19 ATR 1462, Pincus J assumed that section 263 granted the Commissioner the power to search.

47 *Citibank Ltd v Federal Commissioner of Taxation* (1988) 19 ATR 1479, 1490 (Lockhart J); this judgment was overturned on appeal.

48 See *Commissioner of Taxation and Others v Citibank Ltd* (1989) 20 FCR 403, 413 (Bowen CJ and Fisher J).

> requiring also that the written authority show on its face the premises to be searched and the books, documents and other papers which are the subject of the search.[49]

On appeal the Full Federal Court disagreed with Lockhart J.

> In the present case his Honour's confinement of the scope of the authority for which s 263(1) provides turned upon the general proposition that the section is an encroachment on liberty and so should be read narrowly. He relied upon the principle that a statute should not be construed as taking away long standing legal rights unless by clear words to that effect.[50]
> …In my opinion, however, it is not open to the Court in the present case to create a new category of rules which would impose a procedural fetter on the exercise of this "wide" statutory power in order to ensure that its repository gives due regard to common law rights.[51]

Bowen CJ and Fisher J while also disagreeing with Lockhart J noted that perhaps it was unfortunate that the legislation did not mandate a degree of specificity on the face of the authority; as such a requirement would enable an occupier to assess the extent and nature of his obligation to facilitate and assist the Commissioner in the search.[52]

The High Court in *Industrial Equity*[53] addressed the question of whether the Commissioner by employing sections 263 and 264 to conduct a random audit was acting 'for the purposes of the Act'. The *ITAA* makes no mention of the phrases 'tax audit' or 'random audit.' The ATO had informed Industrial Equity that it had 'not been chosen for any particular reason' and that 'to a large extent the process is quite random.'[54] The Court decided in favour of the ATO.

> The expression "tax audit" does not appear in the Act. The *Shorter Oxford English Dictionary* defines "audit" as "make an official systematic examination of (accounts)". Such an examination, where a taxpayer's affairs are involved, will be for the purposes of the Act where it is directed to ascertaining the taxable income of a taxpayer.
> …Clearly enough, the resources of the Australian Taxation Office do not extend to auditing the returns of every taxpayer, even if it were thought appropriate to do so: …Inevitably, there will be a random aspect to those who are finally selected for closer examination; but the Commissioner will still be acting for the purposes of the Act so long as he is endeavouring to fulfil his function of ascertaining the taxable income of taxpayers.[55]

Section 263 makes no mention of 'seizure' of documents, computer hardware, or indeed the exclusion of staff from their offices, as was the case in *JMA*.[56] The ATO did not give JMA 'notice of any inspection because of a perceived risk that incriminating documents might be destroyed.'[57] Dowset J compared section 263 to a search warrant.

> Section 263(1) is not equivalent to a search warrant provision. It does not, in terms, authorise the seizure of documents. Rather, it provides for "full and free access" to documents. To my mind that does not create a right of exclusive possession, either of premises or documents, enforceable against the owners, occupiers or bailees. Although the occupier of a building or place must afford

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49 *Citibank Ltd v Federal Commissioner of Taxation* (1988) 19 ATR 1479, 1491.
50 *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 432 (French J).
51 Ibid 434 (French J).
52 Ibid 413.
53 *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649.
54 Ibid 665 (Gaudron J).
55 Ibid 660-1 (Mason CJ Brennan, Deane, Dawson, Toohey, and McHugh JJ).
56 *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537.
57 Ibid 539.

> reasonable assistance, that does not necessarily involve total surrender of control over, or access to premises or documents. The subsection does not authorise the Commissioner or his officers to remove documents from the premises; nor does it authorise the exclusion of any other person from the premises or from having access to document.[58]

Dowset J held that the exclusion of JMA staff from the premises was unlawful; however to the dismay of JMA, he also held that the ATO was entitled to possession of the copies of documents made,[59] subject to any valid claim of client legal privilege.[60] JMA appealed the decision on the grounds of the lawfulness of the search and seizure, and the Full Federal Court in ruled in favour of JMA.

> The cases (also) establish three broad propositions concerning the conduct of a search and seizure, each of which is relevant to the outcome of this appeal. First, a person exercising a power of search and seize (such as that conferred by s263) is only entitled to seize those documents which he is authorised to seize by the relevant power ...Second, both the search and seizure must be reasonably carried out …Third, the repository of the power must do no more than is reasonably necessary to satisfy himself that he has the documents which he is entitled to seize.[61]

6.5 The scope and operation of sections 264

Section 264 is a section that has remained unchanged from the original 1915 *Act;* it too employs very general language; however the section must be exercised for the purpose for which it was granted.

> Section 264, unlike its companion section s 263, does not expressly qualify the power conferred upon the Commissioner as being exercisable only for the purposes of the Act. None the less it may readily be accepted that where a coercive power such as s 264 has been conferred, that power may only be exercised bona fide for the purpose for which it was conferred...[62]

The wide ranging powers of the ATO under section 264 were defined by Mason J in the High Court *Smorgon* case.[63]

> The strong reasons which inhibit the use of curial processes for the purposes of a "fishing expedition" have no application in the administrative process of assessing a taxpayer to income tax. It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging inquiries, and make them long before any issue of fact arises between him and the taxpayer. Such an issue will in general, if not always, only arise after the process of assessment has been completed. It is to the process of investigation before assessment of s 264 is principally, if not exclusively, directed.

Often the materials or evidence required by the ATO are only within the knowledge or possession of the taxpayer, and/or their bank, or tax practitioner. The section provides the Commissioner with three powers. 'Each of the three powers while capable of exercise

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58 *JMA Accounting Pty Ltd and Entrepreneur Services Pty Ltd v Carmody* (2004) 56 ATR 327, 342[61].

59 This decision was reversed by the Full Federal Court.

60 *JMA Accounting Pty Ltd and Entrepreneur Services Pty Ltd v Carmody* (2004) 56 ATR 327, 351[50].

61 *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537, 542-3[16] (Spender, Madgwick and Finkelstein JJ) (citations excluded).

62 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 578[E] (Hill and Lindgren JJ) (citation excluded).

63 *Commissioner of Taxation v Australia and New Zealand Banking Group Ltd (Smorgon)* (1979) 143 CLR 499, 535-6.

independently could, should the Commissioner so desire, be exercised together so that one notice would suffice.'[64] First, section 264(1)(a) empowers the Commissioner to require any person to furnish him with such information as he may require. The section abrogates any contractual and/or equitable obligations of confidentiality that the recipient of a notice might owe to third parties.[65] The section enables the ATO to undertake a 'roving inquiry'[66] and/or a 'fishing expedition' into the income or assessment of taxpayers.[67] The power can be exercised before the existence of a dispute between the taxpayer and the ATO. Thus a notice can be issued for the purposes of a 'preliminary inquiry', to obtain information necessary for further investigations.[68] This enables the ATO to conduct 'real-time' enquiries, enhancing their ability to respond to new and emerging issues.

The section does not require the identification the person or persons in connection with whose income or assessment the request for information is made.[69] Nor is it necessary for the notice to reveal on its face that the Commissioner is entitled to require the information specified; it is enough for the notice or the covering letter to record that the information is required for the purposes of the *Act.*[70]

Section 264(1)(b) has two limbs, with two distinct powers. Firstly, the Commissioner may require any person to attend and give evidence before him concerning his or any other person's income or assessment. Secondly, the Commissioner may require any person to produce documents in his custody or control which relate to the income or assessment of identifiable persons. This section unlike section 264(1)(a) is expressly limited by reference to a particular taxpayer's income or assessment.

6.5.1 A section 264(1)(b) interview

The interview is essentially administrative, and therefore ATO officers are not bound by rules of the evidence. The officers are not exercising a judicial power; they are not making any authoritative or conclusive decisions. The officers are not bound to accept as truth anything said during the course of an examination or even that the interviewee is an honest witness. The examination is limited to an investigation of an identified person or persons' income or assessment. The section itself does not impose any express duty to comply. A statutory duty

64 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, 208 (Hill J).
65 See *Smorgon v ANZ* (1976) 134 CLR 475, 486-90.
66 *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* (1998) 40 ATR 435, 450 (Goldberg J).
67 See *Commissioner of Taxation v Australia and New Zealand Banking Group Ltd (Smorgon)* (1979) 143 CLR 499, 535-6.
68 *ANZ Banking Group v Konza* (2012) 206 FCR 450, 468[40].
69 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, 207 (Hill J).
70 *McCormack v Deputy Commissioner of Taxation* (2001) 114 FCR 574, 589[45] (Sackville J).

to comply is imposed by Part 111, Division 2, of the *TAA.* The penalties for breach of these provisions can include substantial monetary fines and the possibility of imprisonment.[71]

The Commissioner and the interviewee are entitled to legal representation to facilitate the proper conduct of an examination.[72] The ATO is entitled to employ Counsel for the purposes of the interview, though an authorised ATO officer must be in charge of proceedings.[73] The employment of Counsel does not change the private nature of the process, as Counsel 'is bound not to divulge information acquired during the examination.'[74]

6.6 Sections 263 and 264 are independent of each other

Section 263 differs from section 264 in that the right of access can be initiated without a specific authority in writing, while a section 264(1)(b) notice requires the Commissioner to serve a notice indicating to the addressee what is required of them, and the identification of the person or persons whose income or assessment is being investigated.[75] Whilst the two sections must be read together, it does not follow that the powers exercised under the one section must be exercised before the powers under the other. In *Citibank* the proposition that the Commissioner should first ask questions under section 264, before exercising the section 263 access power failed. The sections are to be construed independently.

> Section 264 makes no reference back to s. 263; nor does s. 264 condition the power which it confers upon an exercise of the right of access given by the earlier section, or an attempt to exercise that right. The later section should therefore be construed according to its terms. They are not to be cut down and distorted by making of a vague and indefinite implication based on the existence of the earlier provision.[76]

In 1993 a Joint Committee of Public Accounts[77] expressed concern that neither sections 263 or 264 were conditional upon presenting a prima facie case to a judicial officer, as is the case for search warrants, and it made the following recommendation:

> …s263 of the ITAA be amended to require that the ATO show just cause before being granted a warrant by an appropriate judicial official to access or enter the private property of a taxpayer without permission.

The recommendation was not acted upon; the preferred position of the government was that the ATO settle comprehensive guidelines on the exercise of the power with professional and

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71 See Lisa West, 'The Commissioner's Access and Information Gathering Powers under Sections 263 and 264 of the Income Tax Assessment Act 1936: Some Issues for Tax Advisors, and Criminal Law Practitioners' (2001) 10 *Australian Tax Review* 188, for a comprehensive discussion of the penalties for the refusal or failure to comply with a taxation requirement.

72 See *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524, 529 (Sheppard J).

73 *Grant v Deputy Commissioner of Taxation* (2000) 45 ATR 146, 152[22] (Goldberg J).

74 Ibid 153[25] (Goldberg J).

75 See *Federal Commissioner of Taxation v Australian and New Zealand Banking Group Ltd; (Smorgon)* (1979-80) 143 CLR 499.

76 Ibid 535 (Mason J).

77 Parliament of the Commonwealth of Australia, (November 1993) *Report 326, An Assessment of Tax* 320.

other representative bodies to ensure that they provide a guarantee against unwarranted access.[78] In fact the Commissioner had entered into negotiations with the professional accounting[79] and legal bodies[80] in 1989, and had signalled his preparedness to voluntarily relax some of his powers in return for reasonable cooperation from the professions. The stimulus for these negotiations had been the Federal Court decisions *Citibank*[81] and *Allen, Allen & Hemsley*[82] cases.

6.6.1 Sections 263 and 264 powers interaction with 'procedural fairness' and 'legitimate expectation'

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) section 5 provides for a review of an administrator's decision on the grounds of a breach of procedural fairness. The taxpayer can apply to the Federal Court for a review of the decision making process, but not the *merits* of the decision. A decision by the Commissioner to utilize section 263 and/or 264 powers is a reviewable decision.

Section 39B was introduced into the *Judiciary Act 1903* (Cth) in 1983[83] 'to confer on the Federal Court the full amplitude of the original jurisdiction of the High Court under s75(v) (of the Constitution).' [84] This power cannot be limited or qualified by any statute. The Federal Court has jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The Administrative Appeals Tribunal (AAT) has the function of reviewing a decision of a Commonwealth officer on its *merits*. The AAT substitutes itself for the primary decision maker and may exercise all the powers and discretions conferred upon the decision maker in order to determine what decision should have been made under the relevant legislation. A decision of the AAT is deemed to be a decision of the decision maker. AAT proceedings are

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78 George Gear MP, Statement by the Assistant Treasurer, (9th August 1994) *Detailed Government Response – Major Issues* Press Release 9, 11. For a discussion of Report 326, see Maria Italia, 'Legal Professional Privilege and Accountant-Client Confidentiality. A Comparative Study – Australia and New Zealand.' (1996) 2 (2) *New Zealand Journal of Taxation Law and Policy* 75.

79 The *Guidelines for the Exercising of Access Powers to External Accountants' Papers* were issued by the Commissioner in November 1989.

80 In June 1990, following on from the High Court decision in *Baker v Campbell* (1983) 153 CLR 53, the ATO agreed with the Australian Law Council on the *Guidelines on access to Documents held on a Lawyers' Premises*. The Australian Federal Police and the Law Council of Australia have an agreement about the execution of search warrants on lawyer's offices where the Police are investigating an offence under taxation law. (March 1997). < http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/ExecutionofAFPSearchWarrantsonLawyers%27Premises.pdf.>

81 *Commissioner of Taxation and Others v Citibank Ltd* (1989) 20 FCR 403.

82 *Allen, Allen & Hemsley v Deputy Commissioner of Taxation* (1989) 20 FCR 576.

83 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth).

84 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484, 496 (Morley and French JJ).

not adversarial in the strict sense. 'The tribunal is in the shoes of the Commissioner and may use any material put before it in reaching its decision.'[85]

Procedural fairness is concerned with ensuring that administrators follow particular processes to ensure that their decision making process is fair. The concept evolved in the context of administrative law, with Lord Denning developing the concept of 'legitimate expectations' in *Schmidt v Secretary of State for Home Affairs.*[86] His Lordship determined that the principles of procedural fairness could be extended to those interests that were not classified as 'legal rights'. A 'legitimate expectation' is not itself a legal right. The High Court approved the concept of legitimate expectation in *Heatley v Tasmanian Racing and Gaming Commission.*[87] Its application was defined by Mason J, in the landmark case of *Kioa v West.*

> ...the law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interest and legitimate expectations, subject only to the clear manifestation of a contrary intention.[88]

In *Consolidated Press Holdings*[89] Lockhart J extended the concept to the tax arena.

> …a taxpayer's interest in the confidentiality and secrecy of its financial information was sufficient to impose an obligation of procedural fairness upon the Commissioner when the Commissioner was proposing to show the information to a third party.[90]

The taxpayer has a legitimate and reasonable expectation that the material provided to the ATO would not be communicated to persons outside the ATO without the taxpayer being consulted and being given the opportunity to argue against that course of action.[91]

The validity of section 264 notices have been challenged on the grounds that they were ambiguous, or insufficiently clear in their description of the document or classes of documents required to be provided to the Commissioner. In *May*[92] the appellant challenged the validity of a section 264(1)(a) notice alleging that the Commissioner's 'fishing expedition' was too wide and therefore an improper exercise of his power under the *ITAA.* May's argument was that there had been a denial of procedural fairness because the firm's clients had not been given the opportunity to be heard before the notice was issued. Goldberg J held that notice was valid, it had not been issued for an improper purpose, and that the

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85 *Saunders v Federal Commissioner of Taxation* (1988) 19 ATR 1289, 1296 (Northrop J).

86 [1969] 2 Ch 149.

87 (1977) 137 CLR 487, (Aickin, Murphy, Mason, and Stephen JJ with Barwick CJ dissenting).

88 (1985) 159 CLR 550. See Sir Anthony Mason, 'Procedural Fairness; Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103.

89 *Consolidated Press Holdings Ltd v Federal Commissioner of Taxation* (1995) 57 FCR 348.

90 Ibid 357-8 (Whitlam J).

91 Ibid 355[E] (Whitlam J). See Chapter seven where the issue of legitimate expectations arise in more recent cases involving the Commissioner's *Guidelines* and the legitimate expectations of taxpayers that the Commissioner will act in accordance with the *Guidelines.*

92 *May v Deputy Commissioner of Taxation* (1998) 40 ATR 131.

requirements of procedural fairness did not apply to entitle a taxpayer to be heard prior to the issue of notices.[93] The Full Federal Court confirmed Goldberg J's decision.

> … in *Sixth Ravini Pty Ltd v Deputy Commissioner of Taxation at 362,* Northrop J regarded the conjunction of the inquisitorial and coercive characteristics of the s 264(1) powers as making it difficult to see how the need to comply with the requirements of natural justice could be expected before the Deputy Commissioner issued and served a notice.[94]
> …It is broadly accepted that, traditionally, natural justice both contained and has been confined to two principles: that no person be condemned unheard; and that no person be judge in his or her own cause.[95]
> …The appellant in the present case is inviting us to extend natural justice's scope in a third direction so as to require a person affected by a decision to be given a warning that the decision has been made so that that person may take appropriate steps to protect his or her own interest by challenging the decision if grounds exist for so doing. It is not an invitation we accept.[96]

In denying *May's* application for special leave to appeal,[97] the High Court reinforced that the Full Court of the Federal Court is ordinarily the ultimate court of appeal in tax matters.

> …court has said more than once that the Full Court of the Federal Court is the ultimate court of appeal in taxation matters, subject only to the exceptional cases in which the Court grants special leave to appeal.
> "It follows that a question of fundamental principle must arise for decision in such a matter before this court will grant special leave." (*Federal Commissioner of Taxation v Westfield Ltd* (1991) 22 ATR 400, 402).[98]

In *David Jones*[99] the taxpayer argued that the Commissioner's decision to depart from a 30 year practice without any warning, and with retrospective effect, constituted: an abuse of process; lack procedural fairness and a legitimate expectation which warranted intervention from the Court. O'Loughlin J dismissed the application and cited Issacs ACJ in *Federal Commissioner of Taxation v Clarke.*

> The Act so far trusts the Commissioner and does not contemplate, in my opinion a curial diving into the many official and confidential channels of information to which the Commissioner may have recourse to protect the Treasury.'[100]

However, the Full Federal Court[101] allowed the appeal, finding that O'Loughlin J had erred on the effect of the operation of section 177 of the *ITAA*. It held that section 177(1) does not authorise the assessment process to be conducted in bad faith[102] or protect the Commissioner from inquiry into the bona fides of the exercise of his statutory powers; in those

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93 Ibid.
94 *May v Commissioner of Taxation* (1999) 92 FCR 152, 159 [18].
95 Ibid 161-2 [30].
96 Ibid 162 [31] (Branson, Finn and Kenny JJ).
97 Australian Tax Practice No 136, 16 July 1999.
98 *Federal Commissioner of Taxation v Rowe* (1997) 187 CLR 266, 275 (Brennan CJ, Dawson, Toohey and McHugh JJ).
99 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1990) 90 ATC 4730.
100 (1927) 40 CLR 246, 276.
101 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484 (Morling, Pincus and French JJ).
102 See *Commissioner of Taxation v Stokes* (1996) 72 FCR 160, (Spender, Burchett and Hill JJ).

circumstances, the mere tender by the Commissioner of his notice of assessment does not dispose of the matter.[103] They also found that section 177 does not displace the jurisdiction conferred on the Federal Court by section 39B of the *Judiciary Act 1903* (Cth),[104] finding that in the proper exercise of that jurisdiction in the Federal Court, the 'due making' of an assessment, its amount and all particulars of it are open to inquiry.[105]

6.6.2 Commissioner is required to exercise his powers in a 'reasonable manner'

Though reasonableness is required of the Commissioner in the exercise of his powers, the Court allows the Commissioner a considerable measure of discretion before it will intervene and deem a decision to be unreasonable. In the 2009 case of *Krok*[106] the taxpayer sought a review of the Commissioner's decision to refuse to postpone the date of a section 264(1)(b) interview on the ground of '*Wednesbury'* unreasonableness. The taxpayer argued that the Commissioner's refusal to defer or postpone the interview was so unreasonable that no reasonable person could have reached it; Jagot J disagreed.

> The point is not whether I (or anyone else) would have made the same decision as Mr Trewin (ATO officer) in the circumstances. Review on the ground of *Wednesbury* unreasonableness is confined because of the distinction which must be maintained between judicial and merits review. The decision cannot be vitiated merely because it seems unfair or unreasonable in the ordinary sense of those words. That would involve a merits review disguised as a judicial review which is impermissible.[107]

In the 1988 case of *Perron Investments*[108] the applicants sought a review of the Commissioner's decision to issue section 264 notices, alleging that the demands made in the notices amounted to unreasonable demands and an improper exercise of power. Einfeld J[109] dismissed the applications. On appeal the Full Court of the Federal Court[110] in part reversed Einfeld J's decision and found that the notices to the corporate appellants were invalid and were to be set aside. Hill J noted that the section 264 was an intrusion on privacy, and that therefore the notice should clearly identify the documents required to be produced.

> No doubt in part because of the severe sanctions that may become applicable in the case of a failure to comply with a notice under the section, but in part also because a request to supply information, attend and give evidence or produce books and documents etc is a considerable

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103 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484, 485 and 503.

104 See *Deputy Commissioner of Taxation v Richard Walter* (1994-5) 183 CLR 168.

105 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484, 485.

106 *Krok v Federal Commissioner of Taxation* (2009) 77 ATR 897.

107 Ibid 906.

108 *Perron Investments Pty Ltd v Deputy Commissioner of Taxation* (1988) 20 ATR 504.

109 Ibid.

110 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 (Lockhart, Burchett and Hill JJ) (Fieldhouse, the lawyer for Perron Investments was issued with a section 264 notice).

> intrusion upon the privacy of the individual to whom a notice is addressed, there is a requirement that a notice identify with sufficient clarity any documents which are required to be produced…[111]

Lockhart and Hill JJ decided that section 264(1)(b) only relates to documents in the custody or under the control of the recipient when he receives the notice, and 'does not support a construction that requires copies to be brought into existence.'[112] Both judges decided that the requirement to produce copies was ambiguous and that the ambiguity could mislead the addressee of the notice as to what was required by the notice, thus they held the notice as invalid to that extent. Lockhart and Burchett JJ (Hill J dissenting) found that the invalid parts of the notices could not be severed, thus the result was that the notices themselves were invalidated.

In *One.Tel*[113]in 2000, the applicants appealed against two notices issued by the Commissioner[114] asserting that the first notice lacked clarity, and was unfair in that it required the company to accept assumptions with which it did not agree. One.Tel claimed that it was an abuse of power for the Commissioner to require answers to questions of that sort. Burchett J disagreed noting that the applicants were at liberty, in their response to the questions to point out, if either the attitude or the state of affairs was misrepresented in any of the Commissioner's questions.[115] The second notice requiring the applicants to complete schedules provided by the Commissioner, was held to be beyond the powers conferred by the legislation.

> The statute says nothing of an obligation to perform an exacting task of this kind which calls not for "information" … but for an exercise in possibly approximate judgment of imperfect correspondence of an actual item with a formulation fixed by the Commissioner.[116]

Burchett J in concluding that the second notice was 'wholly bad'[117] warned that a notice should not be exercised in an intrusive manner.

> Not only does a requirement to complete such a form go beyond the provision of information; it involves impermissible uncertainty with respect to what is sought upon pain of significant penalties, and it attempts to impose the Commissioner's assumptions upon the company. It leaves no room for the company to answer by denying the assumptions.[118]

111 Ibid 208 (citation omitted).
112 Ibid 188.
113 *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548.
114 The notices were issued under section 108 of the *Sales Tax Assessment Act 1992* (Cth) - a power essentially equivalent to section 264.
115 *One.Tel Ltd v Commissioner of Taxation* (2000) 101 FCR 548, 549[4].
116 Ibid 561[22] (Burchett J).
117 Ibid 562[26].
118 Ibid 562[25].

The High Court decision in the 2008 *Futuris*[119] case highlighted how difficult it is to prove allegations that the Commissioner's statutory powers have been exercised corruptly or with deliberated disregard to the scope of those powers. The Court[120] cited the 2000 majority decision in *Kordan.*[121]

> The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case. …it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside.[122]

The Full Federal Court held in *Futuris*[123] that the Commissioner had applied provisions of the *ITAA* 'to facts which he knew to be untrue' and it was that circumstance which brought the case 'squarely' within the description of a 'failure to exercise bona fide the power of assessment.'[124] The High Court disagreed; Kirby J warned against over reliance on arguments that the Commissioner failed to exercise his powers in good faith.

> For decades, taxation decisions arising in judicial review proceedings have typically concerned the suggested tentative or provisional character of such decisions or their lack of good faith. This does not justify treating these two categories as covering the entire field of disqualifying legal (or "jurisdictional") error for s 39B purposes. As the two nominated categories of invalidity have arisen in taxation cases for at least eighty years, there is a risk that specialists in taxation law will overlook, or ignore, the considerable subsequent advances in administrative law, in particular within judicial review.[125]

6.7 Sections 263 is subject to client legal privilege

In the 1989 case of *Citibank*, French J employing the concepts of human rights, unequivocally held that section 263 does not override client legal privilege.

> Australia is a liberal democracy with a broad tradition of at least nominal resistance to encroachment upon established rights and freedoms. That view is reinforced by its adherence to the International Covenant on Civil and Political Rights, which relevantly provides in Art 17, inter alia, that:

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119 *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Ltd* (2008) 237 CLR 146.

120 The majority judgment of Gummow, Hayne, Heydon and Crennan JJ.

121 *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) 46 ATR 191, 193 (Hill, Dowsett and Hely JJ).

122 *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Ltd* (2008) 237 CLR 146, 165-6[60] (Gummow, Hayne, Heydon and Crennan JJ) citing *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) 46 ATR 191, 193 (citations excluded).

123 *Futuris Corporation Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 257.

124 Ibid 273 (Heerey, Stone and Edmonds JJ).

125 *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Ltd* (2008) 237 CLR 146, 185[133]. *Futuris* is discussed in greater detail in Chapter seven. The Federal Court in *Commissioner of Taxation v Donoghue* [2015] FCA 337 did act to quash the Commissioner's assessments and penalties, finding that the Commissioner's process of assessment was "affected by conscious maladministration".

> "No-one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence ...."
> The nature of this society and its tradition of respect for individual freedoms, will support an approach to construction which requires close scrutiny and a strict reading of statutes which would otherwise remove or encroach upon those freedoms. But where the natural meaning of the words is clear, the will of the Parliament must be respected.[126]
> The rights or powers conferred by s 263 are therefore limited to the extent that they will not authorise access to or copying of books, documents or papers which attract the common law privilege. Where no practical or realistic opportunity is provided for the assertion and testing of claims of legal professional privilege, then the purported exercise of the right of access travels beyond that limit and is beyond power.[127]

The Full Federal Court stressed that a third party holding documents on behalf of clients must be allowed to protect the privileged status of those documents. Therefore, professionals such as bankers, solicitors and accountants in possession of clients' documents even as gratuitous bailee, must ensure that a claim for client legal privilege which might reasonably be expected to exist is protected and not inadvertently lost. They must take such steps, as a reasonable owner would take of their own property, to protect documents in their possession from unwarranted disclosure or seizure. The Commissioner, in turn, must provide the occupier of the premises a realistic opportunity to make a claim for privilege; this includes providing adequate warning of the nature of the documents being sought and the extent of the search proposed. [128]

6.7.1 The principle of 'lawful violation' and client legal privilege

The principle of 'lawful violation' is a means by which the Commissioner can inspect documents to assess whether they may be subject to client legal privilege. Section 263 provides the Commissioner with a right to inspect and make copies of any records for any of the purposes of the *Act.* In *JMA*[129] the Court held that the power to inspect documents includes the cursory examination of documents to determine whether they might be protected by client legal privilege; this it termed a 'lawful violation'[130] of privilege and not an abuse of power.

> …the mere seizure of a document without it being read will not infringe the privilege …there will be circumstances in which it will be proper for the officer exercising the s 263 power to look at privileged documents, including a document for which privilege is claimed, for the purpose of determining whether it might be covered by the privilege. The document should not be looked at closely; merely enough to enable the officer to decide whether the document may be copied.[131]
>
> …One problem which confronted the officers when conducting the search is that they were faced with a vast number of documents to go through. If the officers had looked at each document carefully they would be there for days. In our opinion, such a search is not required by s 263. At

126 *Commissioner of Taxation v Citibank* (1989) 20 FCR 403, 433.
127 Ibid 437 (French J).
128 Ibid 418-9 (Bowen CJ and Fisher J).
129 *JMA Accounting Pty Ltd and Another v Commissioner of Taxation and Others* (2004) 139 FCR 537.
130 See *Allitt v Sullivan* [1988] VR 621, 640.
131 *JMA Accounting Pty Ltd and Another v Commissioner of Taxation and Others* (2004) 139 FCR 537, 542[14] (Spender, Madgwick and Finkelstein JJ).

> the end of the day the only obligation imposed upon the officers was to conduct the search in a reasonable fashion. Whether or not they were acting reasonably depended upon the circumstances of the case.[132]

This principle of 'lawful violation' as applied in *JMA* presented a number of difficulties: first, the *JMA* decision relied on the 1988 decision in *Allitt v Sullivan,*[133] that case concerned a power being exercised by police armed with a search warrant, something vastly different from section 263 powers. Second, Brooking J in *Allitt* held that the police could inspect the documents to assess whether they were documents identified in the search warrant, not whether the documents were subject to client legal privilege, and he expressed misgivings even on that more limited basis.[134] Third, the *JMA* decision placed the ATO officers in the position of adjudicating on the privileged status of the documents inspected; a role usually reserved for a court.*[135]* And fourth, the ATO officers in viewing the documents, may discover information that they may find it difficult to segregate from information that they had gained elsewhere, in relation to the case. Furthermore, they may become aware of facts that may put them on a train of inquiry that could lead them to being able to obtain admissible evidence to prove the facts discovered. For all these reasons the 'lawful violation' principle seems questionable and undesirable.

JMA made two broad claims: first, that they were denied 'any real or genuine opportunity to make a claim for legal professional privilege' and second, that the documents were copied in such a hurry that 'no proper consideration could have been given by the ATO officers as to whether they were required for the purposes of the *Act'*.[136] The Full Federal Court noted the ATO in exercising the statutory power is required to enable client legal privilege to be claimed, but that '[T]his does not mean that an officer is prevented from conducting his s 263 search until all claims for privilege have been resolved.'[137] It is a question of reasonableness in all of the circumstances. In reference to the examination of documents before being copied, the Court found that except for the impermissible bulk copying of the e-mails and the downloading of a 'work-file' in full without *any* examination; that where an examination, although brief and/or cursory was conducted, that was sufficient and reasonable for the purpose of distinguishing between relevant and irrelevant documents.

6.8 Sections 264 is subject to client legal privilege

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132 Ibid 544 [27] (Spender, Madgwick and Finkelstein JJ).

133 *Allitt v Sullivan* [1988] VR 621

134 Ibid 640.

135 See *Commissioner for Australian Police v Propend Finance* (1997) 188 CLR 501, 513-4 (Brennan J).

136 See *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537, 543[17] (Spender, Madgwick and Finkelstein JJ).

137 Ibid 542[13] (Spender, Madgwick and Finkelstein JJ).

In *Perron Investments*[138] Einfeld J concluded that section 264 cannot be used to gain access to privileged documents and the applicants would not be bound to produce such documents.[139] On appeal[140] the Full Court of the Federal Court agreed with Einfled J that section 264 does not abrogate client legal privilege; however the Court noted that a section 264 notice is not itself invalidated by its failure notify the addressee that the obligations imposed do not extend to documents to which a claim of client legal privilege could be made.[141] The fact that the appellants in this case were sophisticated business people capable of asserting their rights, made their claims that the Commissioner was exercising his power in an intrusive and excessive manner, less credible.[142] Lockhart J commented that the Commissioner should insert a warning in the notice to reflect this taxpayer right;[143] a practice that was later taken up by the Commissioner.

6.8.1 Privilege against self-incrimination: historical justification and questioning its application to corporations

The privilege to refuse to answer incriminating questions applies whenever an answer to a question would tend to expose the person to any kind of punishment. The privilege is capable of application in non-judicial proceedings.[144] The same applied to documentary evidence that the recipient of a section 264 notice may have been required to produce, prior to the 1984 insertion of sections 8 C and 8D to the *TAA*.[145] Furthermore, the privilege protects a witness from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating nature.[146] The rationale for the privilege was explained by the High Court in 1992 in *Environment Protection Authority v Caltex Refining Pty Ltd (Caltex)*[147]

> The privilege against self-incrimination confers an immunity which is deeply embedded in the law. In the end, it is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself.[148]

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138 *Perron Investments Pty Ltd v Deputy Commissioner of Taxation* (1988) 20 ATR 504.

139 Ibid 525. See *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240, 245[10] (Sunberg, Merkel and Kenny JJ) 'Section 264(1)(a) is subject to legal professional privilege.'

140 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187.

141 Ibid 202, (Lockhart J) and 217 (Hill J).

142 Ibid 203.

143 Ibid 200.

144 *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328, 341 (Mason ACJ, Wilson. Dawson JJ).

145 Act No. 123 1984, amending the *Taxation Administration Act* 1953 (Cth).

146 See *Sorby v Commonwealth* (1983) 152 CLR 281, 310 (Mason, Wilson and Dawson JJ).

147 (1992-3) 178 CLR 477.

148 *Environment Protection Authority v Caltex Refining Pty Ltd* (1992-3) 178 CLR 477, 310 (Deane, Dawson, and Gaudron JJ) (citations omitted).

The historical justification for the privilege, noted in 1891 in *Redfern*, was that: 'a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure.'[149] *Caltex* justified the privilege against self-incrimination in terms of human rights.

> In one important sense, the modern rationale for the privilege against self-incrimination is substantially the same as the historical justification - protection of the individual from being confronted by the "cruel trilemma" of punishment for refusal to testify, punishment for truthful testimony or perjury (and the consequential possibility of punishment). Naturally, methods of punishment are now different: modern-day sanctions involve fines and/or imprisonment, rather than excommunication or physical punishment. Further, the philosophy behind the privilege has become more refined - the privilege is now seen to be one of many internationally recognized human rights.[150]

In reference to the application of the privilege to corporations, the Court cast doubt as to its justification.

> …the historical reasons for the creation and recognition of the privilege do not support its extension to corporations. Likewise, the modern and international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument for holding that corporations should enjoy the privilege.[151]

The potential exposure of corporate records was further increased in the 1994 case of *Trade Practices Commission v Abbco Ice Works*[152] - a five member bench of the full Federal Court held that the related privilege against self-exposure to a penalty could not be claimed by a company.

Prior to this decision, the understanding had been that the privilege did apply to corporations, though the High Court had, as noted in *Caltex*, declined thus far to decide the issue.

> Since the decision of the English Court of Appeal in *Triplex Safety Class Co. Ltd. V Lancegaye Safety Glass (1934) Ltd.*[153] holding that a company may claim the privilege against self-incrimination, the tacit assumption of the Australian legal profession has been that the privilege is available to corporations in this country. …But on each occasion that this Court has had an opportunity to consider the question, the Court has been able to decide the case without determining the issue.[154]

6.8.2 Section 264 abrogates privilege against self-incrimination

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149 *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328, 335 (Mason ACJ, Wilson. Dawson JJ) citing *Redfern v Redfern* (1891) P 139, 147 (Bowen LJ).

150 *Environment Protection Authority v Caltex Refining Pty Ltd* (1992-3) 178 CLR 477, 498 (Mason CJ and Toohey J).

151 Ibid 500 (Mason CJ and Toohey J).

152 52 FCR 96.

153 [1939] 2 KB 395.

154 *Environment Protection Authority v Caltex Refining Pty Ltd* (1992-3) 178 CLR 477, 539 (citations included) (McHugh J). See *Pyneboard Pty Ltd v Trade Practices Commission* (1982-3) 152 CLR 328, 335 (Mason ACJ, Wilson and Dawson JJ) 'we are content to assume, without deciding, that the privilege against exposure to conviction for a crime and the privilege against exposure to a civil penalty is available to a corporation in Australia.'

The applicants in *Perron Investments* did not pursue their original contention that a section 264 notice does not override the privilege against self-incrimination. Einfled J doubted that the privilege against self-incrimination was in fact overridden by the section.

> The applicability of self-incrimination to s 264 notices was not pursued by the applicants. Their senior counsel suggested that the High Court had recently intimated a limitation of the availability of this privilege in administrative proceedings, and in the procedures now available to non-judicial officers, such as the Commissioner of Taxation, to ask questions and perform other investigative functions. This does not, however, appear to be accurate.[155]

Parliament can exclude the privilege by express words or necessary implication; as evidenced in the 1982 case of *Pyneboard*[156] where the Court concluded that it was less difficult to show that the privilege against self-incrimination has been impliedly abrogated, where a statute imposes an obligation to answer questions otherwise than on oath, provide information, or produce documents in the course of an administrative investigation, than in the case of an examination on oath before a judicial officer.[157]

Section 264 has no clear express words abrogating the privilege. Prior to the 1984 insertion of sections 8C and 8D into the *TAA*, Hill J in 1989 in *Stergis* had stated: '[A]s the law then stood it was no doubt arguable whether the privilege against self-incrimination was abrogated.'[158] However, sections 8C and 8D in the *TAA*, create offences respectively, of failing to comply with a request to produce documents, and failing to comply with a request to give evidence, 'to the extent that the person is capable of doing so'. Hill J noted this was the same formula as was considered in *Pyneboard,*[159] and he concluded that the privilege against self-incrimination cannot be claimed in response to a notice issued under section 264 of the *ITAA.* The courts will not lightly presume that the Parliament intended to abrogate the privilege;[160] however, Hill and Lindgren JJ in *De Vonk* held that were the privilege against self-incrimination to apply in the face of a section 264 notice it would drastically restrict the Commissioner's ability to fulfil his role of protecting the revenue.

> Clearly it is of the utmost importance that a taxpayer disclose to the Commissioner all sources of income. Failure so to do would constitute an offence. If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.[161]

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155 (1988) 20 ATR 504, 526.

156 *Pyneboard Pty Ltd v Trade Practices Commission* (1982-3) 152 CLR 328.

157 Ibid 343 (Mason ACJ, Wilson and Dawson JJ).

158 *Stergis v Boucher* (1989) 20 ATR 591, 605.

159 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 343.

160 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 580 (Hill and Lindgren JJ).

161 Ibid 583[C-D].

In the 2012 case of *Binetter*[162] the Full Court of the Federal Court held that the recipient of a section 264 notice may not refuse to comply with the notice on the basis of self-incrimination, finding the section abrogated the privilege. The Court followed the *De Vonk* decision as had the primary judge, Robertson J. in finding that sections 8C and 8D of the *TAA* in combination with section 264 strengthened the argument that the privilege against self-incrimination had been abrogated.

> In our view, the decision in *De Vonk* should be followed because it is a unanimous decision of this Court which is not clearly or plainly wrong. It has stood for 17 years and despite subsequent amendments to ss 8C and 8D of the TAA, none of those amendments have sought to interfere *with the position which stands as authority.*[163]

6.9 Sections 263 and 264 and 'contempt of court'

Noting the Commissioner's extensive and coercive powers of access and investigation, the question posed is whether the use of section 263 and/or a section 264 notice, where there are current or pending legal proceedings, can constitute a contempt of court by the Commissioner and cause a serious injustice? The law of contempt applies equally to AAT proceedings.[164] Once the ATO has commenced court proceeding against a taxpayer, access and notice powers to obtain information relevant to those proceedings could amount to contempt, especially if the ATO notice referring to the penalty for non-compliance is viewed by the court as an attempt to achieve by threats an advantage in proceedings, that which could not otherwise have been obtained.[165] Even when the ATO is not a party to the litigation or pending litigation, the ATO must beware of using their access or notice powers in such a way as may cause advantage or disadvantage to a party, or may create a real risk of that occurring. The issue is particularly acute when the administrative enquiries are into the same matters as criminal proceedings. The use of section 264 powers to compel the giving of evidence and/or the production of documents, which are similar to, or may even exceed the powers of a criminal court, can result in an improper interference with the administration of justices and as such could be in contempt.[166]

Sections 263 and 264 cannot be employed by the Commissioner to override the 'implied undertaking principle' established in *Harman*[167] in 1983. The 'implied undertaking' is that the documents will only be used for the purpose for which they were filed or produced. The

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162 *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37.

163 Ibid 47 [30] (Edmonds, Perram, and Jagot JJ) (emphasis in original).

164 Section 63(d) *Administrative Appeals Tribunal Act 1975* (Cth) provides: 'A person shall not do any other act or thing that would, if the tribunal were a court of record, constitute contempt of that Court.'

165 See *Saunders v Deputy Commissioner of Taxation* (1988) 19 ATR 1289.

166 See *Hammond v The Commonwealth* (1983) 152 CLR 188.

167 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

Harman principle provides that information obtained for the purposes of litigation may only be used for that purpose, unless otherwise allowed by the court, or if the information or documents have been read into evidence and thus become public.

In *De Vonk*[168] the taxpayer declined to answer questions in response to a section 264 notice on the grounds that the answers could incriminate him, and that continuing with the inquiry would amount to a contempt of court. The section 264 notice had been issued three days after the taxpayer had been charged with tax-related criminal offences. The Commissioner conceded that the facts to be inquired into during the section 264 interrogation were 'significantly the same as and overlapped with the facts relevant to the offences charged.'[169] The three essential issues before the Court were: first, had the section 264 notice been issued for an improper purpose, namely the gathering of evidence is support of the criminal charges?[170] The Court accepted the affidavit evidence from the ATO officer that the section 264 notice was issued 'for the purposes of the Act and not for the purpose of gathering evidence for use in criminal proceedings pending against the Applicant.[171] The Court ruled that the notice had not been issued for an improper purpose; however, Court urged caution.

> The use of these investigative powers for the collateral purpose of obtaining evidence for use in a prosecution already launched, would be an improper purpose and one which would vitiate the use of the power. It would not, in effect, be a use authorised by the Act.[172]

The second issue concerned the operation of the privilege against self-incrimination and section 264, in the light of the sections 8C and 8D of the *TAA.* The Court reviewed a number of previous judgments and concluded that the privilege had been abrogated.[173] The third issue was whether a section 264 inquiry would be in contempt of court in reference to the criminal charges faced by the applicant? Counsel for the ATO put forward the argument that, just as sections 8C and 8D of the *TAA* abrogated the privilege against self-incrimination they likewise abrogated the operation of contempt of court, Hill and Lindgren JJ disagreed.

> Unless Parliament has acted to authorise an investigation in contempt of court (an authorisation not lightly to be inferred), it must be conceded that the coercive powers of investigation conferred by s 264 could, in a particular case, be exercised in a way which would constitute a contempt. The question, would however, not ordinarily be likely to arise.[174]

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168 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

169 Ibid 584[F] (Hill and Lindgren JJ).

170 The Court noted that sections 3C and 3D of the *TAA* would prohibit disclosure of the information gathered, to a prosecutor or a court in most circumstances.

171 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 579[A] (Hill and Lindgren JJ).

172 Ibid 568[E] (Hill and Lindgren JJ).

173 Ibid 583[A] (Hill and Lindgren JJ).

174 Ibid 585[C] (Hill and Lindgren JJ).

The test to be applied was whether there was a 'real risk' of serious injustice? Hill and Lindgren JJ cited Gibbs CJ's judgment in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[175]

> There is a contempt of court of the kind relevant to the present case only when there is an actual interference with the administration of justice, or 'a real risk, as opposed to a remote possibility' that justice will be interfered with …The essence of this kind of contempt is a 'real and definite tendency to prejudice or embarrass pending proceedings'…[176]
> …putting the questions in an examination under s 264 might, in a particular case, constitute a contempt of court notwithstanding that the answers might not in any way tend to incriminate the person to whom the questions are addressed.[177]

The principles of contempt of court are distinct from and separate to the privilege against self-incrimination, they are concerned with the protection of the effective administration of justice and as such, they are for the courts to administer.

> The decision to refuse to answer a question on the grounds of self-incrimination is a matter for the person to whom the question is put. It remains within the capability of that person to answer. Contempt of court is not a matter for the parties to litigation, or for that matter any person not a party; it is a matter under the sole control of the court itself. If it is a contempt of court to require a person under compulsion to answer a question that person could not excuse the contempt. If Parliament intends to interfere with the administration of justice it should express that intention clearly or unambiguously.[178]

Hill and Lindgren JJ cited Northrop J in reference to section 263 and possible contempt of court.

> In the context of taxation, Northrop J in *Commercial Bureau (Australia Pty Ltd v Allen* (1984) 1 FCR 2002 and *Saunders v Commissioner of Taxation (Cth)* (1981) 33 ATC 4349 was prepared to contemplate that the exercise of powers pursuant to s 263 of the Act to gain access to premises could, in an appropriate case, constitute contempt of court.[179]

Their Honours suggested that a failure on the part of the Commissioner to take account of the possibility of contempt of court from the conduct of a section 264 interrogation 'could invalidate the giving of a notice under s 264 or the exercise of power under it.'[180] They concluded that, as the Commissioner's interrogation had yet to commence, they were not willing to make an order, reasoning that the order would be hypothetical and 'advisory' in nature, and should not be made.[181] Instead they granted a liberty to the respondent to apply to a judge of the Federal Court on a 48 hour notice should the interrogation be commenced and objection taken to specific questions.[182]

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175 (1982) 152 CLR 25.
176 Ibid 56 cited in *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 586[B].
177 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 586[D].
178 Ibid 589 [A] (Hill and Lindgren JJ).
179 Ibid 586 [F] (citation included).
180 Ibid 589 [C].
181 Ibid 589 [E].
182 Ibid 589 [F].

Heery J in the 1999 case of *Watson*[183] applied the decision of the Full Federal Court in *De Vonk*. Heery J cited Deane J in the 1982 case of *Hammond*[184] to reinforce the point that in order for the court to reach a finding of 'contempt of court', there must be a *real risk* of prejudice to the pending proceedings.

> The mere fact that proceedings are pending in a court does not mean that any parallel or related administrative inquiry, conducted for proper administrative purposes constitutes and interference with the due administration of justice in that court.[185]

It is important to note that Deane J had gone on to warn that there should not be an improper interference with the pending criminal case.

> On the other hand, it is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matters involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the production of documents which largely correspond [to] (and, to some extent, exceed) the powers of the criminal court. Such an extra-curial inquisitorial investigation of the involvement of a person who has been committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view, an improper interference with the due administration of justice in the proceeding against him in the criminal court and contempt of court.[186]

The Court in *Watson* ordered an injunction restraining the Commissioner from acting on or giving further effect to the section 264 notice until the hearing and determination of the criminal proceeding or further order.[187] This was facilitated by the Commissioner agreeing not to oppose an adjournment of the section 264 proceeding, should the applicant so request. In such cases the Commissioner is best advised to adjourn the section 264 enquiry, or at the very least take into account in his questioning, whether the interrogation presents a real risk of contempt of court.[188] It is important to note that the *ITAA* makes no provision for either direct use immunity or derivative immunity for answers given, or documents or things produced, the protection in the tax arena is provided by the secrecy provisions in the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth).

6.10 Do the common law privileges frustrate the ATO's investigative powers?

The crux of the issue is whether the common law privileges impair or frustrate investigations by the ATO. In the case of privilege against self-incrimination the culpable information may 'lie peculiarly within the knowledge of persons who cannot reasonably be expected to make

183 *Watson v Commissioner of Taxation* (1999) 96 FCR 48.

184 *Hammond v Commonwealth* (1982) 152 CLR 188.

185 Ibid 206 cited in *Watson v Commissioner of Taxation* (1999) 96 FCR 48, 57 [46].

186 (1982) 152 CLR 188, 206.

187 *Watson v Commissioner of Taxation* (1999) 96 FCR 48, 61[60]. See *X7 v Australian Crime Commission* [2013] HCA 29 (26 June 2011), in reference to the disallowing of the Australian Crime Commission examination of a person charged with an indictable offence.

188 See Australian Taxation office "Access Manual" Chapter 4 Formal Interviews, 4.11. Obtaining Information after Legal Proceedings have been Instituted.

that knowledge available otherwise than under a statutory obligation.'[189] The very object of imposing an obligation to respond or produce evidence that may be incriminatory is to ensure a full investigation. It is in the public interest that there is a full investigation into matters involved in the possible commission of crimes or contraventions of the law.

Privilege against self-incrimination was deemed to be abrogated by the sections 263 and 264 of the ITAA and their interaction with sections 8C and 8D of the TAA.[190] The Court in *De Vonk* referred to the 1948 English case of *Ingram*[191] dealing with taxation law and privilege against self-incrimination.

> It is said that when a man is called on under s 20 (*Finance Act)* to produce his documents, his books, invoices or accounts, or whatever they may be, he is entitled to take objection and say: 'I will not produce this one or that one because it may incriminate me.' It seems to me that that would be stultifying the whole purpose of the section, and the claim for privilege, which, as between subject and subject in an action, may be made, has no application to this class of discovery or production.[192]

In the 1970 case of *Mortimer v Brown*[193] the High Court found the privilege against self-incrimination to have been abrogated by *necessary intendment* by section 250 of the *Companies Act 1961*,

> Following *Mortimer v Brown* the High Court [had in all three cases[194]] … held that the character and purpose of the relevant legislation, namely, the investigation of the conduct of persons who might be concerned, fraudulently or otherwise, to conceal information which ought to be revealed in the public interest, pointed inevitably to the exclusion of the privilege against self-incrimination.[195]

In the case of client legal privilege the argument that the privilege stultifies the operation of the legislation has proven much harder to sustain. The legislature has traditionally been vested with the power to abrogate privilege. The settled rule of construction is that generally worded provisions of a statute only be read as abrogating common law rights or privileges to the extent made necessary by express words or necessary intendment.

> ... it is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.[196]

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189 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer* (2002) 213 CLR 543, 547.

190 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

191 *Commissioners of Customs and Excise v Ingram* [1948] 1 All ER 927.

192 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 582 (Hill and Lindgren JJ) quoting Hill J in *Stergis v Boucher* (1989) 20 ATR 591, 606 citing Lord Goddard in *Commissioners of Customs and Excise v Ingram* [1948] 1 All ER 927, 929.

193 (1970) 122 CLR 493.

194 *Mortimer v Brown* (1970) 122 CLR 493; *Pyneboard Pty Ltd v Trade Practices Commission* (1982-3) 152 CLR 288; and *Hamilton v Oades* (1989) 166 CLR 486.

195 *Re Compass Airlines Pty Ltd* 35 FCR 447, 455 (Lockhart J).

196 *Baker v Campbell* (1983) 153 CLR 52, 116-7 (Deane J).

The argument that client legal privilege impairs investigations is limited, especially when the crime/fraud exception is acknowledged.

> A communication the purpose of which is to "seek help to evade the law by illegal conduct" is not privileged. … it is difficult to see that the availability of legal professional privilege to resist compliance …would result in any significant impairment to the investigation of contraventions of the Act, much less in the frustration of such investigations.[197]

The impairment to investigations argument is further weakened by the fact, as noted by McHugh J that documents protected by client legal privilege 'must be a small percentage of the documents whose production can be required by such notices.'[198] He went on to note that the change from the sole purpose test to the dominant purpose test for client legal privilege resulting from the 1999 *Esso*[199] decision is unlikely to have greatly changed the position.

In the 1991 case of *Yuill*[200] Brennan J saw no distinction between the impairment caused to investigations by the privilege against self-incrimination and client legal privilege. Noting that the privilege against self-incrimination had been abrogated by the legislation, he opined that client legal privilege could be similarly abrogated.

> Equally, I do not think that s. 296(2) of the Code should be construed so as to admit legal professional privilege as an excuse for failing or refusing to comply with a legitimate requirement under s. 295 to produce books. To admit such an excuse would be to impair and, in some cases, to destroy the effectiveness of the mechanism which Pt VII has created in order to enforce the laws governing corporations.[201]

Brennan J's argument in *Yuill* was that the privileges against self-incrimination and client legal privilege are the leading exceptions to the rule of compulsion in relation to evidence and that it would seem unlikely that the legislature would deny one privilege while at the same time preserving the other. Dawson J made a similar argument.

> …privilege (against self-incrimination) is the other leading exception to the rule of compulsion in relation to evidence and it is unlikely that the legislature thought it necessary to deny its protection for the purposes of an investigation under Pt VII, intending at the same time to preserve legal professional privilege, when a claim of legal professional privilege might well hamper an investigation as much as, or more than, a claim of privilege against self-incrimination.[202]

The contrary argument, as explained by Lockhart J in *Compass* in 1992, is that the two privileges have different aims and serve different purposes.

> The privilege against self-incrimination and legal professional privilege both spring from the common law; but they have different origins and arose for different purposes. Legal professional privilege protects from disclosure communications made to and from a legal adviser for the

197 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer* (2002) 213 CLR 543, 557[24] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
198 Ibid 564[45].
199 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.
200 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.
201 Ibid 327.
202 Ibid 335.

> purpose of obtaining legal advice. The privilege against self-incriminations ensures that a person does not expose himself to prosecution by self-incriminatory statements.[203]

The unanimous decision of the Full Federal Court in *Daniels*[204] in 2001, in was that section 155 of the *Trade Practices Act 1974* abrogated legal professional privilege.

> ... the policy considerations that influenced the High Court in *Pyneboard*, in relation to self-incrimination, are equally apposite to legal professional privilege. Conduct that involves a contravention of the Act often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person's lawyer, it may be impossible for ACCC to see the whole picture.[205]

Wilcox J argued that the crime/fraud exception from client legal privilege was not in itself sufficient to ensure that the investigations under the *ITAA* are not frustrated, while Moore J noted a difference between the two privileges based on the types of information sought, and their likelihood of frustrating the investigation.

> It is true that different considerations arise in relation to communications for which a claim for legal professional privilege might be made. Privileged documents, for example, may be sought by a notice under s 155 in circumstances where the documents could ultimately prove to have a limited bearing on whether there had or had not been a contravention of the TP Act. Documents or information resisted on the grounds of the privilege of self-incrimination may be thought, in the ordinary course, to be likely to have a greater bearing on the question of whether there had been contravention.[206]

Moore J agreed with Wilcox J's reasoning that the High Court decision in *Pyneboard*[207] and its interpretation of the expression 'is capable of complying' imposes 'an obligation that is unlikely to permit of any exceptions.'[208]

Sundberg J in *ANZ*[209] in 2001 remarked that, had the matter of legal professional privilege been argued before him, he would have found, following the reasoning of the Full Federal Court in *Daniels* that a section 264 notice was not subject to legal professional privilege.

Prior to the High Court decision in *Daniels*,[210] Lockhart J in *Re Compass Airlines Pty Ltd*[211] rejected the argument advanced by the liquidators that the express abrogation of privilege against self-incrimination in the *Corporations Law* implied the abrogation of client legal privilege. Lockhart J held that the two privileges rested upon different foundations and entail

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203 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447, 454.

204 *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 (Wilcox, Moore and Lindgren JJ).

205 Ibid 137[57] (Wilcox J).

206 Ibid 146[83].

207 *Pyneboard Pty Ltd v Trade Practices Commission* (1982-3) 152 CLR 288.

208 *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 108 FCR 123, 142[71]. Lindgren J agreed with reasoning and judgment of both Wilcox and Moore JJ.

209 *ANZ Banking Group Ltd v Deputy Commissioner of Taxation* (2001) 46 ATR 451.

210 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

211 (1992) 35 FCR 447.

expressions of different public policy principles; Beaumont and Gummow JJ agreed with Lockhart J.

The High Court in *Daniels* unanimously reversed the Full Federal Court decision; and held that client legal privilege did not significantly frustrate an investigation.

> … it is difficult to see that the availability of legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations.[212]

6.11 ATO's shift from keeping the taxpayers' secrets to 'sharing' with other law enforcement agencies

The ATO prides itself on voluntary compliance and keeping the channels of communication open with taxpayers, yet this shift towards sharing information with other law enforcement agencies shows a different attitude. In a self-assessment system, the Commissioner is required to comply with the secrecy provisions to ensure that information gained from invoking either section 263 or 264 is used for taxation purposes, or in compliance with the 'exceptions' provided for in Division 355 of the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth). The exceptions include information that is provided for law enforcement and related purposes, where there is a contravention which is deemed a 'serious offence.'[213] The legislative changes have seen a shift from 'keeping the taxpayers' secrets' to enabling the ATO to actively engage with other law enforcement agencies to combat organised crime.[214]

Section 16 of the *ITAA* imposed strong secrecy rules on ATO officers, and the ATO was initially reluctant to share its information with other government agencies. The first inroads into this secrecy were made by the Costigan Commission[215] which sought amendments to section 16 in order to access information held by the ATO. Costigan himself would later say that he used 'taxation as a weapon against organised crime.'[216] The ATO's initial response

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212 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 560[35] (Gleeson CJ, Gaudron, Gummow and Hayne JJ with McHugh and Kirby JJ in agreement).

213 See *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth) section 355-70 'Exception – disclosure for law enforcement and related purposes.'

214 See Philip Burges, 'Deductions and Illegal Income' (2008) 37 *Australian Tax* Review 7 'The ATO took its secrecy obligations under s 16 of the *Income Tax Assessment* Act1936 (Cth) very seriously and, until the 1980s, there was little chance that the ATO would pass on any incriminating information to law enforcement agencies.'

215 Frank X Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union; Final Report* (APGS, 1984) vols 1-5. The Commission began investigations in November 1980.

216 See Michael D'Ascenzo, 'Taking the Profit out of Organised Crime' (23 June 2011) *Serious Non-Compliance Conference*, Sydney. Note on 4 February 2010, the then Commissioner of Taxation, Michael D'Ascenzo was appointed to the Board of the Australian Crime Commission.

was far from positive, as reported in the ALRC *Privacy* Report[217] and by Commissioner Costigan.[218] This first collaboration between the Costigan Commission and the ATO lead to the uncovering of tax fraud[219] involving profit stripping, or 'bottom of the harbour' schemes, paving the way for legislative changes to the secrecy provisions, and to the active collaboration of the ATO with law enforcement agencies.

As noted by Michael D'Ascenzo in 2011 (as the then Commissioner of Taxation):

> [T]he ATO has made a strong commitment to be an active participant in whole of Government approaches to tackling organised crime. ...
> There are a number of ways in which we can make a valuable, if niche, contribution, particularly in addressing the financial elements of the criminal economy. With most organised crime syndicates, there is a tax effect in their activities. With our vast data holdings and data matching capabilities, as well as our analytic, data mining and interpretative capabilities, we are well placed, for example, to identify unexplained wealth generated from illegal profits and to identify priority targets from a financial wealth perspective.[220]

The courts have recognised the role of the ATO in the investigation of alleged tax offences.

> The courts have a significant responsibility to protect the integrity of the revenue system, by imposing punishments for deliberate and sustained fraud, which are likely to deter others who may be otherwise tempted to indulge in the type of conduct committed by the respondent.[221]

6.12 Conclusion

The Commissioner has the responsibility of ensuring that the revenue is protected and that taxpayers comply with the self-assessment system. He has extensive and intrusive powers of access and interrogation embedded in sections 263 and 264 of the *ITAA.* The powers under the sections have been described as inquisitorial and coercive.[222] Reasonableness is required of the Commissioner in the exercise his powers, in all the circumstances. However, the courts have been prepared to allow the Commissioner a considerable measure of discretion in his

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217 Australian Law Reform Commission, *Privacy* Report No 22 (1983) paragraph 407 citing the then Commissioner of Taxation, Bill O'Reilly: 'The tradition has been one of secrecy in relation to taxation information. This has been seen as encouraging full and true disclosure of income from all sources …it is an inescapable conclusion that the benefits to be obtained from enacting a specific power to disclose information to law enforcement authorities would be far outweighed by the disadvantages resulting from that course.'

218 See Frank X Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union*, Interim Report No 4 (AGPS 1982) vol 1. Costigan described the performance of the ATO and the Commonwealth Crown Solicitor's Office as 'demoralised' and 'inept' with both offices being held equally responsible. Examples of the inept performance on the part of the ATO were its secrecy and lack of cooperation with other investigators, and its apparent reluctance to initiate prosecutions or pursue test cases.

219 See Maria Italia, 'Lawyers and Accountants as "Gatekeepers" to Combat Money Laundering – an International Comparison (2013) 42(2) *Australian Tax Review* 116 for a discussion of the role of tax in fraud and money laundering.

220 Michael D'Ascenzo, above n 216. See also Australian Treasury, *'Improving the Transparency of Australia's Business Tax System'* (April 2013).

221 *DPP (C'th) v Rowson* [2007] VSCA 176, Kaye AJA [42].

222 *Federal Commissioner of Taxation v Australian and New Zealand Banking Group Ltd; (Smorgon)* (1979-80) 143 CLR 499, 535.

decision making, before they will intervene.[223] And though the Commissioner must act in compliance with procedural fairness, he has discretion in complying with the rules of natural justice, especially before the issuing of a section 264 notice.[224] The taxpayer can apply via section 39B of the *Judiciary Act 1903* (Cth) to seek a review of a decision, with the breach of procedural fairness in the making of an administrative decision as one possible ground for such a review.

The Commissioner's powers have few limitations, they must be employed bona fide and for the purposes of tax administration. One of the key limitations to the powers is that they are subject to client legal privilege. The privilege against self-incrimination has been held to be abrogated by *necessary implication* via the operation of the combination of section 264 of the *ITAA* and sections 8C and 8D of *TAA.*[225]

The Commissioner must also ensure that he is not in contempt of court and that he is not using his section 263 and/or 264 powers in substitution of the discovery powers available to the parties, once litigation is pending or indeed in progress. It may be necessary for the Commissioner to restrain from acting on a section 264 notice until the litigation is completed, especially if there are criminal charges involved.[226]

This chapter has reviewed key Federal and High Court decisions on the intersection of the Commissioner's extensive and coercive powers under the *ITAA* and the rights of taxpayers, especially the right to client legal privilege, adopting a doctrinal methodology. The conclusion is that the Commissioner's powers and discretions create an asymmetry of power, in favour of the Commissioner. The next chapter will address the Commissioner's responsibilities to act as a 'model litigant' and other curbs on the Commissioner's powers; both self-imposed as in the case of the voluntary concessions to external accountants[227] and the *Taxpayer Charter*[228] and those imposed by decisions of the courts and their interpretation of the tax legislation.

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223 *Krok v Federal Commissioner of Taxation* (2009) 77 ATR 897, 906.

224 See *May v Commissioner of Taxation* (1999) 92 FCR 152, 163[36].

225 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

226 See *Watson v Commissioner of Taxation* (1999) 96 FRC 48, 61.

227 Australian Taxation Office, 'Guidelines for the Exercise of Access Powers in Relation to External Accountants' Papers' issued 16 November 1989.

228 Australian Taxation Office, *The Taxpayers Charter Your Rights, Your Obligations. How to be Heard,* (January 2014) <https://www.ato.gov.au/About-ATO/About-us/Contact-us/Complaints,-compliments-and-suggestions/Complaints/>.

CHAPTER SEVEN

Curbs on the Commissioner's powers

7.1 Introduction

In the previous chapter the imbalance of power between the taxpayer and the Commissioner with his extensive and intrusive powers of access and interrogation embedded in sections 263 and 264 of the *ITAA* were examined and as was noted one of the few limitations on those powers, is that they are subject to client legal privilege. The ATO as a government agency has not been immune to the rise in public expectations of government standards of performance and transparency experienced in Australia from the mid-1970s.[1] Recognition of a fair and transparent system of tax collection was particularly relevant in a tax system moving towards self-assessment and endeavouring to establish a cooperative relationship between taxpayers and the ATO. The ATO's attitude has shifted from primarily one of deterring taxpayers from breaching the tax laws to one of seeking their co-operation in an ongoing partnership. As noted by then Deputy Assistant Commissioner, Michael D'Ascenzo in 1993:

> We have realised for some time …that voluntary compliance is not achieved by enforcement alone. On the other hand, you cannot hope to achieve voluntary compliance without a strong enforcement arm. What is needed is an integrated approach to achieving voluntary compliance – that is, an approach that combines enforcement, service and education.[2]

This chapter addresses a number of issues that impact on the relationship between the taxpayer and the ATO; ranging from the requirement for the ATO to act as a model litigant operating in an open justice system; to the ATO voluntarily committing to a *Charter*[3] of taxpayers' rights and the granting concessions to external tax accountants.[4] These actions can be interpreted as curbing the Commissioner's extensive power, and responding to calls to redress the imbalance of power between the ATO and the taxpayer. This chapter investigates the High Court under the leadership of Sir Garfield Barwick, following the formalism of the *Duke of Westminster*[5] principle and adopting a strict *literal* approach to interpreting the

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1 Kirsty Unger, 'Ethics Codes and Taxpayer Charters: Increasing Tax Morale to Increase Tax Compliance' (2014) 12(2) *eJournal of Tax Research* 483, 484.

2 Michael D'Ascenzo, 'Behind the Scenes: a Tax Office Insight into Business Audits' (1993) *Presentation to the Taxation Institute of Australia (Queensland Division) State Conference.* Michael D'Ascenzo was the Commissioner of Taxation from 2005 to 2012.

3 ATO "The Taxpayers Charter Your Rights, Your Obligations. How to be Heard." (Charter Booklet) (1997).

4 ATO, 'Guidelines for the Exercise of Access Powers in relation to External Accountants' Papers' issued 16 November 1989.

5 *Inland Revenue Commissioner v Duke of Westminster* [1936] AC 1, 19. Lord Tomlin's dictum was that 'Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.' The *Westminster principle* is that taxing statutes are to be interpreted literally.

general anti-avoidance provision (GAAR) of the *ITAA.* The GAAR cases illustrate how this literalist interpretation of legislation by the High Court frustrated the Commissioner and how ultimately he had to ask Parliament to intervene with new legislation. A taxpayer privilege in part seeks to redress the imbalance of power held by the Commissioner, and though this chapter focuses upon the curbs to the Commissioner's powers, the conclusion is that the imbalance persists.

Law is a social construct and as noted by Raz 'all law must enjoy legitimate authority, or it fails in meeting its inherent claim to authority.'[6] Law is a matter of what has been posited, ordered, decided practiced or tolerated. What laws are in force in a society depends on what social standards are recognised as authoritative, for example legislative enactments, judicial decisions and social customs.

7. 2 The ATO as a 'model litigant'

The imbalance of power in favour of the ATO is partially redressed by the requirement that it act as a model litigant, especially in an environment where it seeks to form a cooperative relationship with taxpayers. The *Judiciary Act 1903* (Cth) confers on the Commonwealth Attorney-General, or persons appointed by him, the power to bring suits on behalf of the Commonwealth; the Attorney–General issued the *Legal Services Directions 2005*[7] which require the Commonwealth and its agencies to behave as '*model litigants*' in the conduct of litigation. The ATO as an agency of the Commonwealth Government has such an obligation. The concept of model litigant is not new, as noted by Griffith CJ in the 1912 *Melbourne Steamship* case.

> It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and *a* fortiori not in criminal proceedings.
>
> I am sometimes inclined to think that in some parts – not all – of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.[8]

Government agency 'powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar.'[9]

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6 Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence'* 1, 15.

7 Issued by the then Attorney-General, Phillip Ruddock, pursuant to his power under section 55ZF *Judiciary Act 1903* (Cth). (October 12 2012). <http://www.comlaw.gov.au/Details/F2012C00691>.

8 *Melbourne Steamship Co. Ltd. v Moorehead* (1912) 15 CLR 333, 342.

9 *Australian Securities and Investments Commission v Meredith Hellicar* [2012] HCA 17, 84 (2 May 2012) (Heydon J).

The Australian *Public Service Act 1999* (Cth) section 13 sets out the ethical framework established in the Australian Public Service Values and the Australian Public Service Code of Conduct; these values and ethics code apply to all federal public servants. The *Public Service Act* requires the testing of federal public servants' knowledge of the code annually and a report is presented to Parliament. The results of the tests have shown a high recognition of the Code of Ethics;[10] and more credibly, the Report on the number of breaches of the code of ethics by ATO officers recorded a progressively decrease in such breaches.[11] Australia is noted as being amongst the first of the Organisation for Economic Cooperation and Development countries to develop an ethical structure to assist public servants.[12]

The Commissioner, in 2012, was chastised by in the Full Court of the Federal Court for not acting as a model litigant.

> Speaking generally… being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. This obligation may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirements of lawyers to act in accordance with their ethical obligations: see notes 2 and 3 to clause 2 of Appendix B to the *Legal Services Directions 2005* made under s 55ZF of the *Judiciary Act 1903* (Cth). That statutory instrument reflects an expectation the courts in our system of justice have of the executive government and its emanations but this is no new subject owing its origin just to that statutory instrument. …In our opinion, counsel representing the executive government must pay scrupulous attention to what the discharge of that obligation requires…[13]

The *Legal Services Directions 2005* are binding on the ATO. The ATO has established the model litigant guidelines in an ATO Practice Statement.[14] However, such practice or policy statements are in the nature of aspirational and ethical statements, and as such do not provide an avenue for any legal enforcement.

> As a model litigant, the ATO, its officers, solicitors and counsel are required to act with complete propriety, fairly and in accordance with the highest professional standards in handling claims. This also requires the ATO not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution.[15]

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10 Australian Public Service Commission, 'Employee Survey Results – State of the Service Series 2010-11' (24 November 2011) 4 <http://www.apsc.gov.au/publications-and-media/current-publications/state-of-the-service/state-of-the-service-2013-14/appendices/integrity-and-code-of-conduct>.

11 Australian Taxation Office, *Guide to Managing Suspected Misconduct in the ATO* (October 2012) Australian Services Union 4 <http://asutax.asn.au/docs/misconductpractitionerOct6.pdf>.

12 Kirsty Unger, above n 1, 487.

13 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 176 [42] (North, Logan and Robertson JJ).

14 Australian Taxation Office, *Practice Statement LA 2007/12: Conduct of Tax Office Litigation in Courts and Tribunals* <http://law.ato.gov.au/atolaw/view.htm?docid=PSR/PS200712/NAT/ATO/00001> (Withdrawn 20 November 2009, replaced with by PSLA 2009/9).

15 Australian Taxation Office, *Your Case Matters*, (3rd ed, December 2012) <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-statistics/Your-case-matters---3rd-edition/>.

The model litigation rules can be employed by taxpayers to negotiate with the ATO, however there is no opportunity for private action by taxpayers to enforce the *Directions.* Only the Attorney-General can bring an action for non-compliance with the *Directions.*[16]

The ATO's argument that it does not consider itself bound by the decisions of a single judge in Federal Court elicited the following rebuke by Allsop J in *Indooroopilly*[17]

> I wish, however to add some comments about the attitude apparently taken by, and some of the submissions of, the appellant [the Commissioner]. From the material that was put to the Full Court, it was open to conclude that the appellant was administering the relevant revenue statute in a way known to be contrary to how this Court had declared the meaning of that statute. …that is, seeing the executive branch of government ignoring the views of the judicial branch of government in the administration of a law of the Parliament by the former. This should not have occurred.[18]

This case resulted in five years of uncertainty for taxpayers. The ATO consistently applied Taxation Ruling 1999/5[19] according to its own interpretation – an interpretation which was contrary to the Federal Court decision by Kiefel J in *Essenbourne v Commissioner of Taxation*.[20] This attitude by the ATO prevailed, despite the fact that a number of subsequent judgments both in the Administrative Appeals Tribunal and before the Federal Court, agreed with Keifel J's reasoning and having variously described her Honour's reasoning as 'clearly correct' or 'not clearly wrong'.[21] Subsequently the ATO indicated that it would not seek special leave to appeal the point to the High Court and would henceforth apply the law as confirmed by the Full Federal Court and withdraw Taxation Ruling 1999/5.

Criticisms of the Commissioner from the bench, for the way in which the legislation is administered are in the extra judicial words of Edmonds J 'few and far between. …because the Commissioner and his officers aspire to best practice and in the main this is achieved.'[22]

> …judicial criticism (though infrequent) of the kind that was made in *Indooroopilly* is not made lightly; it is made with the object of promoting review of the processes, which impelled the court to make the criticism it did, and to ensure that, to the extent possible, it does not happen again. Sensitivity to such criticism should not be allowed to get in the way of the review process.[23]

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16 *Croker v Commonwealth of Australia* [2011] FCAFC 25[19].

17 *Federal Commissioner of Taxation v Indooroopilly Children's Services (Queensland) Pty Ltd* (2007) 158 FCR 325 (Stone, Allsop and Edmonds JJ).

18 Ibid 326-7. Stone J (326[1]) and Edmonds J (348[48]) expressed their agreement with Allsop J's comments re the Commissioner's conduct.

19 This ruling considers *Fringe Benefits Tax Assessment Act 1986* (Cth).

20 (2002) ATC 5210.

21 *Walstern Pty Ltd v Commissioner of Taxation* (2003) 138 FCR 1, 22[87] Hill J: 'I would, as a matter of comity, follow the decision of Kiefel J in *Essenbourne* unless the case was either distinguishable or I was of the view that the decision was clearly wrong. And Merkel J in *Spotlight Stores Pty Ltd v Commissioner of Taxation* (2004) 55 ATR 745, 779[20] 'The Commissioner contended that I should not follow *Essenbourne* or *Walstern* but I am not satisfied those decisions are clearly wrong and, accordingly, propose to follow them.'

22 Justice Richard Edmonds, 'Recent Tax Litigation: A View from the Bench' (2008) 37 *Australian Tax Review* 79, 80.

23 Ibid.

David Vos, the then Inspector-General of Taxation, in his 2006 Report,[24] was also critical of the ATO.

> The ATO sees litigation as means of validating its interpretation of legislation and ensuring that taxpayers comply with its view of the law, rather than as a means of clarifying the meaning of the law, so that "community perceptions that, at times the Tax Office has a 'win at all costs' approach to litigation are justified."[25]

7.2.1 Open justice

The principle of open justice is well recognised in common law,[26] it informs many of the fundamental aspects of common law procedures including the requirements for due process, natural justice, and procedural fairness. The fundamental rule is that judicial proceedings unlike administrative procedures must be conducted in a physically open court.

> It is the ordinary rule of the Supreme court, as of the other courts of the nation, that their proceedings shall be conducted "publicly and in open view" (*Scott v Scott* [1913] AC 417, 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts.[27]

The principle is also enshrined in *International Covenant on Civil and Political Rights*[28] with Article 14 providing that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' In the words of Jeremy Bentham '[p]publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity.'[29] Publicity of court proceedings is the key to public acceptance of criminal sanctions and decisions, as note by Burger CJ.

> To work effectively, it is important that society's criminal process 'satisfy the appearance of justice', the appearance of justice can best be provided by allowing people to observe it.[30]

Publicity of court proceedings and access to filed documents or tendered evidence serves to ensure the integrity and independence of the court; however as noted by Spigelman CJ access to court documents is not a right, it is within the power of the court to control their dissemination.

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24 Commonwealth of Australia, Department of Treasury, David Vos, *The Review of Tax Office Management on the Part IVC Litigation* (7th August 2006).

25 Ibid Key Finding 4.1.

26 *Scott v Scott* [1913] AC 417 is the often cited English case said to be the foundation of the principle of open justice. This English case was soon followed and cited in the High Court case of *Dickason v Dickason* (1913) 17 CLR 50.

27 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

28 Opened for signature 16 December 1966, 999 UTS 171 (entered into force 23 March 1976).

29 John Dowling (ed), *Works of Jeremy Bentham* (1843) vol 4, 316-17; cited in James Jacob Spigelman, 'The Principle of Open Justice: a Comparative Perspective' (2006) 29(2) *University of New South Wales Law Journal* 147, 150.

30 *Richmond Newspapers Inc v Virginia* 448 US 555, 571-2 (1980); cited in James Jacob Spigelman, above n 28, 155.

> Neither the claimants, nor the public at large, have a right of access to court documents. The "principle of open justice" is a *principle*, it is not a freestanding right. It does not create some form of Freedom of Information Act applicable to courts. As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle and not a right.[31]

As observed by Felix Frankfurter J, the relationship between a free press and an independent judiciary should not be understated.

> A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.[32]

In discussing the principle of open justice and the media in his extra judicial writings Spigelman J adopts Adam Smith's 'invisible hand' analogy. 'The media's position can candidly be supported on the basis of Adam Smith's invisible hand. The media can serve the public interest by pursuing its own interest.'[33]

The principle of open justice is subject to exceptions including: the holding of in camera hearings; excluding the public from some or part of a hearing; restricting access to information, such as exhibits in a trial;[34] the making of pseudonym order to prevent the disclosure of the identity of the parties[35] or witness'[36] or the making of non-publication orders of all or parts of the proceedings or the evidence.[37] As noted by Viscount Haldane in *Scott v Scott*:

> While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions. …But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of the Courts of Justice must be to secure that justice is done. …it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule of publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in a particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.[38]

7.2.2 Open justice in the Federal Court

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31 *John Fairfax Publications v Ryde Local Court* (2005) A Crim R 527, 533.

32 *Pennekamp v State of Florida*, 328 US 331, 335 (1946) cited in James Jacob Spigelman, above n 29, 155.

33 James Jacob Spigelman, above n 29, 158.

34 See for example *Seven Network (Operations) Ltd v James Warburton (No 1)* [2011] NSWCA 385 where orders were made to prevent access to documents relating to the remuneration of senior executives.

35 See *P v Australian Crime Commission* (2008) 71 ATR 555, where the applicant is referred to by the pseudonym 'P'.

36 See *Witness v Marsden (2000)* 49 NSWLR 429.

37 See *P v Australian Crime Commission* (2008) 71 ATR 555.

38 *Scott v Scott* [1913] AC 417, 437-8 (Viscount Haldane).

The Federal Court is a court established by statute[39], and section 17(1)[40] gives statutory force to the principle that justice must be administered publicly in open court and gives recognition to the weight of public interest that attaches to that principle.[41] Section 17(4)[42] and section 50[43] provide for encroachments upon that principle, where the court is satisfied that it is necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. Section 50(1) confers a special power on the court to make non-publication orders:

> The Court may, at any time during or after a hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary to prevent prejudice to the administration of justice or the security of the Commonwealth.
>
> The categories of cases where exclusion will be proper are not closed. It will lie in the discretion of the judge, bearing in mind the injunction contained in s.17 (1) and taking into consideration the interests of justice referred to in s. 17 (4).[44]

However, as noted by Spigelman J in his extra judicial writing, the exceptions are few and strictly limited and any new exception are more likely to occur as a result of legislation.

> For over a century it has been the law in England and in Australia that the inherent power of a court of justice to develop new circumstances in which the public may be excluded is spent. Sitting in public is part of the essential nature of a court of law and any new exception to the principle can only be created by statute.[45]

Buckeridge v Commissioner of Taxation[46] concerned the unusual instance of a taxpayer seeking suppression and non-publication orders under section 37AH(1)(a) if the *Federal Court of Australia Act 1976* (Cth), concerning a ruling made by the Commissioner on future conduct, namely a corporate demerger to take place over three years.[47] The Commissioner neither consented nor opposed the orders sought by the taxpayer. McKerracher J cited Perram J's statement that 'commercial sensitivity can be a basis for the making of an order of the present kind.'[48]

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39 *Federal Court of Australia Act 1976* (Cth).

40 Section 17 (1) Exercise of jurisdiction in open court and in chambers.

41 *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 132 (Bowen CJ).

42 Section 17 (4) The Court may order the exclusion of the public or of persons specified by the Court from a sitting of the Court where the Court is satisfied that the presence of the public or of those persons, as the case may be, would be contrary to the interests of justice.

43 Section 50 has been repealed and replaced by Division 2 – Suppression and Non-Publication Orders in the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

44 *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 132 (Bowen CJ).

45 James Jacob Spigelman, above n 29, 151 citing *Scott v Scott* [1912 AC 417; *Dickason v Dickason* (1913) 17 CLR 50; *McPherson v McPherson* [1936] AC 177; and *Russell v Russell* (1976) 134 CLR 495.

46 [2013] FCA 897.

47 The demerger was to be completed by 30th June 2016.

48 *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 3)* [2012] FCA 1430[35].

> The terms or the orders as proposed, in my view, strike a balance between the importance of open justice on the one hand and achieving the objectives of the TAA 1953 on the other.
> It is significant, in my view, in the exercise of discretion, that this appeal does not relate to past actions which might be the subject of an assessment but, rather, to a future course of conduct which is contemplated. It does not relate to public matters (to the extent confidentiality is sought) nor is there any other obvious public interest in the subject matter of this particular appeal.[49]

7.3 Redressing the imbalance between taxpayers rights and the ATO powers

The Joint Committee of Public Accounts (the Committee) published Report 326 titled 'An Assessment of Tax' in November 1993; the Report presented the Committee's findings of an inquiry into the relationship between the ATO and taxpayers. The Committee noted that there was no formal statement of taxpayers' rights despite the ATO having investigatory powers which are 'more extensive and less well supervised than any criminal law enforcement agency.'[50] In an attempt to redress this imbalance of powers the Committee recommended that a charter of rights of taxpayers be established by the ATO setting out the common law rights of taxpayers and the standards of service that taxpayer could expect. The *Charter*[51] was developed as a result of extensive and exhaustive consultation with: ATO staff; State and Federal Parliaments; the general public and professional tax practitioners. The ATO was the first Australian government agency to develop a charter of rights and responsibilities to supplement the Australian Public Service Values and Code of Conduct.[52] The *Charter's* focus was on administrative matters, there was no consideration of taxation law or policy changes. The Committee rejected calls for an independently administered legally binding Charter[53] and ruled out adopting the United States[54] model of a legislatively enforceable *Bill of Taxpayer Rights.* The *Charter* has as noted by Bevacqua, succeeded in raising ATO service standards and improving its relationship with taxpayers, though becoming increasingly ineffectual.

> …the evidence suggests that the Australian Taxpayers' Charter is becoming increasingly out-dated and ineffectual in redressing any imbalance between taxpayer rights and ATO powers.[55]

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49 [2013] FCA 897[11] [12] (McKerracher J). The order is to operate until 30 June 2016.

50 Joint Committee of Public Accounts '*Report 326: An Assessment of Tax'* (1993) 307, <http://www.aphref.aph.gov.au-house-committee-reports-1993-1993_pp213a%20(2).pdf>.

51 ATO '*The Taxpayers Charter Your Rights, Your Obligations. How to be Heard'* (Charter Booklet) (1997). The Charter is regularly updated and supplemented by other ATO publications.

52 Kirsty Unger, above n 1, 488.

53 See Duncan Bentley, 'A Taxpayers Charter: Opportunity or Token Gesture' (1995) 12 *Australian Tax Forum* 1, 23 'Taxpayers could be forgiven for taking a cynical attitude towards a charter which purport to uphold their rights against the ATO, where the author and interpreter of the charter, and the primary judge as to when breaches have occurred, is the ATO itself.'

54 *Taxpayer Bill of Rights* in 1988, this was later revised by a second version in 1996.

55 John Bevacqua, 'Redressing the Imbalance – Challenging the Effectiveness of the Australian Taxpayers' Charter' (2013) 28 *Australian Tax Forum* 377, 398-99.

The *Charter* is an ATO departmental initiative, it is not a document brought into existence under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It has been argued that taxpayers as a result of the *Charter* have a legitimate expectation of a particular form of treatment by the ATO. However taxpayers have been unsuccessful in the courts, in establishing that a departure by the ATO from standards enunciated in *Charter* could constitute a failure of duty of care or entitle the taxpayer to damages; as illustrated in *Harris v Deputy Commissioner.*

> (a) the taxpayer did not identify a duty of care owed to him by the defendants [ATO]. Such a duty could not be established by reference to proclamations such as the Tax Payers Charter, which merely expressed aims of treating taxpayers fairly and reasonably; and
> (b) the taxpayer did not identify any act or omission that would entitle him to damages. A departure from a standard set out in documents such as the Tax Payers Charter did not give persons affected by the departure a right to recover tort damages. Further, there was no basis for a tort liability in the ATO or its officers arising out of their lawful exercise of functions under the ITAA 1936, and the pleadings did not state that the ATO acted outside the scope of the ITAA 1936. [56]

The Joint Committee of Public Accounts made three other important recommendations; first, the establishment of a dedicated Taxation Ombudsman;[57] second, the examination of the common law right of client legal privilege being extended to communications between taxpayers and their professional taxation advisers; and third, the establishment of a Small Claims Tribunal.[58] The Special Tax Adviser to the Ombudsman commenced operations in April 1995, fulfilling the first recommendation. The Small Taxation Claims Tribunal commenced hearings in 1996, fulfilling the third recommendation. The second recommendation is encompassed in the Commissioners' *Guidelines for the Exercising of Access Powers to External Accountants' Papers.*[59]

In February 2014, Ali Noroozi the Inspector General of Taxation, called for public submissions on whether there is a need to create a taxpayer bill of rights with enforceable remedies. However in a radio interview, he conceded that the path to a taxpayer bill of rights

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56 (2001) 47 ATR 406, 407 (Grove J).

57 In 2003 the *Inspector-General of Taxation Act* established an independent statutory agency to review the administration of tax laws by the ATO.

58 Commonwealth of Australia, Joint Committee of Public Accounts, *Report 326*; *An Assessment of Tax A Report on an Inquiry into the Australian Tax Office*, 314-31. (November 1993) <http://www.aphref.aph.gov.au-house-committee-reports-1993-1993_pp213a%20(2).pdf>.

59 Australian Taxation Office, *Guidelines to Accessing Professional Accounting Advisors' Papers* (issued 16 November 1989, reviewed 30 June 2010). The *Guidelines* form part of the ATO *Access and Information Gathering Manual,* available on the ATO website. <https://www.ato.gov.au/General/Gen/Guidelines-to-accessing-professional-accounting-advisors--papers>.

could be a long one, or indeed ruled out by the Federal Government if it is perceived as a threat to tax revenues. [60]

7.3.1 Commissioner's *Guidelines* – a voluntary concession to taxpayers' confidential communications

The Commissioner via the *Guidelines* has acknowledged that tax accountants and tax lawyers provide essentially the same services to taxpayers.[61] The *Guidelines* provide that taxpayers should be able to consult with their professional tax practitioner on a confidential basis to ensure full and frank discussions take place and for advice to be communicated on that basis.[62] The rationale for the guidelines is essentially similar to the utilitarian rationale provided for client legal privilege. The *Guidelines* on access to papers held by external accountants provide for full and free access by ATO officers to source documents,[63] while restricting access to restrictive source documents,[64] and non-source documents,[65] to the most 'exceptional circumstances'.

> Thus, advice papers created prior to or contemporaneously with a relevant transaction or arrangement because they shed light on the transaction or arrangement, may themselves represent a record of what has actually occurred. However, such advisings are likely to canvas the issues in circumstance in which a need for candour is a necessary element. Access to such documents will only be sought in exceptional circumstances. Those documents are referred to in these Guidelines as restricted source documents.

The Commissioner decides what are deemed to be exceptional circumstances. Section 7.2 of the *ATO Manual* provides guidance as to what constitutes exceptional circumstances including: where there are reasonable grounds to believe that a tax offence has been committed, or that fraud, evasion or any other illegal activity has taken place and where the ATO takes the view that GAAR provisions apply to the transaction or arrangement in question.

The Commissioner's *Guidelines* provide only limited protection to taxpayers, they are voluntary concessions made by the Commissioner, subject to modification by the Commissioner, and not enshrined in law. The *Guidelines* unlike client legal privilege apply the more restrictive *sole purpose* test to documents subject to protection. The *Guidelines* are in essence an internal document designed to guide the activities of ATO officers. The

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60 ABC Radio National, 'Tax Watchdog examining Bill of Rights for Taxpayers', *AM News Program*, 10 February 2014 (Peter Ryan) <http://www.abc.net.au/news/2014-02-10/tax-watchdog-examining-bill-of-rights-for-taxpayers/5248872>.

61 See Maria Italia, 'Ethics and Tax Practitioners: Accountants and Lawyers, a Comparative Study – Australia and the United States of America' in Chris Evans and Abe Greenbaum, *Tax Administration Facing the Challenges of the Future* (1998, Prospect Media Pty Ltd).

62 Australian Taxation Office, '*Access and Information Gathering Manual.*'

63 See *Guidelines* section 2.1.

64 Ibid section 2.2.

65 Ibid section 2.3.

Commissioner in a number of addresses to tax practitioners had expressed concern that the concession is being abused by practitioners and has indicated that the concession may be withdrawn.[66]

7.3.2 The courts' interpretation of '*exceptional circumstances*'

The courts have considered the application of the Commissioner's *Guidelines* in instances where the Commissioner has claimed that exceptional circumstances exist that enabled the *lifting* of the concession. The cases include *Deloitte*,[67] *One.Tel*,[68] *White Industries*[69] and *Stewart.*[70] Deloitte argued that there was a *legitimate expectation* created by the Commissioner's '*Guidelines*'[71] that the Commissioner would not seek confidential material, except in *exceptional circumstance*. Goldberg J acknowledged that the Commissioner is required to take the guidelines in the *Access Manual* into account, before he issues a section 264 notice, and that failure to do so may provide the taxpayer with grounds for judicial review of the decision. However, he held in *Deloitte* that the guidelines had been taken into proper consideration;[72] and that it is for the ATO officer, and not the Court, to determine whether the appropriate weight had been given to the terms of the *Guidelines.*[73] His Honour went on to state that section 264 is subject to client legal privilege or any administrative quasi privilege arising from the *Guidelines*, and that the purpose of the *Guidelines* is*:*

> to provide by analogy with legal professional privilege a measure of protection, except in exceptional circumstances, to clients of professional accounting advisers in respect of disclosure of confidential taxation advice given to them by their professional accounting advisers.[74]

Goldberg J concluded that '[N]o privilege, whether legal professional privilege or privilege by way of analogy in relation to accounting or tax advice, is impinged upon or intruded into by the notices or a proper response to them.'[75]

Goldberg J expressed his dissatisfaction with the *guideline's* classification of documents.

> I have considerable difficulty, in any event, in fitting the information sought into any of the categories of source, restricted source and non–source which apply to documents.
> …This information comes closest, by analogy, to the notion of "recording a transaction or arrangement entered into by a taxpayer" and "the conception, implementation and formal

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66 See Michael Carmody, (the then Commissioner of Taxation) 'ATO Directions and Operations' (Paper presented at Taxation Institute of Australia NSW Convention, Canberra, 21 March 1996).
67 *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* (1998) 40 ATR 435.
68 *One Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548.
69 *White Industries Australia Ltd v Commissioner of Taxation* (2007) 160 FCR 298.
70 *Stewart v Deputy Commissioner of Taxation* (2010) 194 FCR 194.
71 See Australian Tax Office, "Chapter 07 - Access to Professional Accounting Advisors' Papers", ATO Access Manual.
72 See (1998) 40 ATR 435, 458.
73 Ibid 458.
74 Ibid 455.
75 Ibid 456.

> recording of a transaction or arrangement", in that it requires information not of an advice nature, but rather of an objective factual nature.[76]

The documents in this case related to the identification of the taxpayers who participated in the arrangements in question. Therefore the documents were classified, by Goldberg J as source documents, to which the Commissioner should have ready access. Client legal privilege does not entitle a lawyer to refuse to provide the name of a client except where the disclosure of the name will result in the disclosure of legal advice or privileged communications.[77]

In *One.Tel*[78] Burchett J was more forceful in his pronouncement that the *Guidelines* must be followed. *One.Tel* focused on the definition of what constitutes 'exceptional circumstances'. The Commissioner contended that exceptional circumstances, in accordance with the *Guidelines*, were established by reference to the GAAR provisions. The applicant had been given the opportunity to make a submission prior to the decision to issue the notice to *lift* the accountant's concession. The applicants responded to the Deputy Commissioner's letter and therefore Burchett J noted that 'they expressly recognised the issue' of 'the possible application of the anti-avoidance provisions of the law' and that they had addressed the issue in their careful argument. 'They did not ask for further particulars'[79] Hence the applicants knew the issues that they would have to combat. One.Tel contended that it was not open to the Deputy Commissioner to regard the possible application of anti-avoidance provisions as an 'exceptional circumstance'. Burchett J found for the Deputy Commissioner, reasoning that it was a matter for the Deputy Commissioner to decide whether application of Part IVA constitutes an exceptional circumstance.[80]

Lindgren J in *White Industries*[81] addressed the issue of whether the *Guidelines* are an enactment for the purposes of the *Administrative Decision (Judicial Review) Act 1977* (Cth).

> What is important, however, is that the Guidelines are not an "enactment", and the decision does not, by reason of them or of any enactment, immediately affect legal rights and obligations. [82]
> …They are calculated to create an expectation that they will be adhered to by the Commissioner. However, that expectation does not convert a non-reviewable decision into a reviewable one.[83]

Lindgren J reasoned that the decision to issue a section 264 notice is an administrative decision made under an enactment; he cited Davies and Einfeld JJ to reinforce the point.

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76 Ibid 455.
77 *Bursill v Tanner* (1885) 16 QBD 1, 4-5.
78 *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548.
79 Ibid 568[43].
80 Ibid 564[45].
81 *White Industries Australia Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298.
82 Ibid 315[75].
83 Ibid 316[78].

> The ADJR Act is thus concerned with decisions which, being authorised or required by an enactment are given force or effect by the enactment or by a principle of law applicable to the enactment.[84]

The decision to lift the accountant's concession, in this case however, was made in the exercise of a right in the Federal Court pursuant to Order 33 rule 12 of the *Federal Court Rules*. Therefore, because the decision to lift the accountant's concession was not made pursuant to the Commissioner's access and information-gathering powers, it was not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Nonetheless, given that the decision to lift the concessions is a decision made by an officer of the Commonwealth, the Federal Court has jurisdiction to hear any judicial review of proceedings under section 39B of the *Judiciary Act 1903* (Cth). Hence in this case the applicants received consolation from Lindgren J's decision that the Court could hear their claims, especially since the Commissioner had failed to convince the Court that the applicant's claims did not have reasonable prospects of success. However, before the hearing took place the case was settled by the parties, out of court.

Deloitte, One.Tel and *White Industries* illustrate the interplay between the *Guidelines*, legitimate expectation, and procedural fairness. The ATO acknowledged in those cases that they need to consider and follow the *Guidelines* as part of their decision making process. The guidelines can create a legitimate expectation on the part of taxpayers that the ATO will act in accordance with them. The emphasis in the *Guidelines* themselves is on a consultative approach to dealing with issues of client privilege, and is therefore more conducive to procedural fairness.

7.4 The Barwick High Court stifles the Commissioner's litigation against anti-avoidance schemes

The general anti avoidance rule, (GAAR) section 260 of the *ITAA 1936* (Cth) operated until 1981, it facilitated the other taxing provisions of the *Act* by negating the avoidance arrangements, thus enabling the taxing provisions to operate as intended.[85] The provision remains in the Act[86] but is effectively, replaced by Part IVA, enacted in 1981.[87] The words in section 260 were simple and carried the risk that they could be broadly interpreted and thus extend beyond what Parliament intended. The 1970's and early 1980's were a turbulent

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84 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 172 cited in *White Industries Australia Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 218, 318[97].

85 See Gaetano T Pagone 'Part IVA: the General Anti-Avoidance Provisions in Australian Taxation Law' (2003) 27 *Melbourne University Law Review* 770.

86 The section does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.

87 *Income Tax Laws Amendment Bill* (No. 2) 1981.

political time in Australia, dubbed the 'schemes era'.[88] The 'literal' interpretation of section 260 was an attempt by the High Court to rein in the wide application of the section and make it reasonable and predictable. However, this literal approach by the High Court under the leadership of Barwick CJ,[89] became biased towards the taxpayer, and enabled avoidance to flourish.[90] Taxpayers were able to *choose* an arrangement, arguably with underlying commercial objectives, that enabled them to gain a benefit whilst minimising the tax payable. This was amply illustrated in the High Court cases, commencing with *Keighery,*[91] *Mullens,*[92] *Sultzkin*[93] and culminating in *Cridland.*[94] In *Keighery*, Barwick acted as counsel for the taxpayer. The latter three cases were all during the reign of Sir Garfield Barwick as Chief Justice of the High Court and all served to confine the seminal *Newton*[95] case to its facts and render section 260 ineffective as a general anti- avoidance provision. Garfield Barwick was counsel for the taxpayer in *Newton*, a case that the Commissioner appealed to the Privy Counsel and ultimately won. The Privy Council in *Newton* drew a distinction, for the purposes of section 260, between arrangements implemented in a particular way so as to avoid tax, and transactions capable of reference to ordinary business or family dealings. Lord Denning explained the 'predication test' thus:

> In order to bring the arrangement within the section you must be able to predicate – by looking at the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer or shares *cum* dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Div. 7 tax, see *W. P. Keighery Pty. Ltd. V. Commissioner of*

88 See Australian Taxation Office 'Working for all Australians 1910-2010: A Brief History of the Australian Taxation Office' Chapter Eight: The 1980's 172.

89 Sir Garfield Barwick was appointed as Chief Justice of the High Court on 27 April 1964 and held the position till his retirement in January 1981 he was succeeded by Sir Harry Gibbs on 12 February 1981.

90 Sir Garfield Barwick, *A Radical Tory* (1995, Federation Press) 229 'I do not countenance fraudulent dealings, or give effect to sham transactions or the destruction of records. But clearly I did not accept the view that there was a moral duty to pay tax. Further, I held the view that it is for Parliament in passing laws imposing taxation to make its meaning as unambiguously clear and certain as the use of language will permit. In the event of ambiguity in such legislation, the citizen, not the executive government, should have the benefit of that construction of the language of the statute which is most favourable to his or her interest.'

91 *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66 (Dixon CJ, Kitto and Taylor JJ; Webb J dissenting). Barwick was counsel for the taxpayer.

92 *Mullens v Federal Commissioner of Taxation* (1977) 135 CLR 290 (Barwick CJ and Stephen J, with McTiernan J dissenting).

93 *Sultzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314 (Barwick CJ, Stephen and Aickin JJ).

94 *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330 (Barwick CJ, Stephen Mason, Jacobs and Aickin JJ).

95 *Newton v Federal Commissioner of Taxation* [1958] UKPCHCA 1.

> *Taxation ((1958) 32 A.L.J.R. 118; 11 A.T.D. 359).* Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax,[96]

The test required a consideration of the particular transaction to determine whether the objectively ascertainable purpose of the transaction was to avoid taxation. No inquiry into the actual motive or purpose (whether subjective or objective) of the participants in the transaction was necessary.[97] The *Keighery* case had been decided before the *Newton* case, and in the words of Pagone[98] the citation of *Keighery* by Privy Council, in fact announced the birth of the *choice principle*.

Mullens, *Sultzkin* and *Cridland* all extended the application of the 'choice principle' at the expense of the *predication test* announced in *Newton.* In *Sultzkin* Barwick CJ held:

> …the choice of the form of transaction by which a taxpayer obtains the benefit of his assets is a matter for him: he is quite entitled to choose that form of transaction which will not subject him to tax, or subject him only to less tax than some other form of transactions might do. *Inland Revenue Commission v. Duke of Westminster* ([1936] A.C. 1), too easily forgotten, is still basic in this area of the law. There is no room in that area for any doctrine of economic equivalence. To the legal form and consequence of the taxpayer's transaction, which in fact has taken place, effect must be given...[99]

Arguably the most 'artificial' of the cases was *Cridland*[100] in which thousands of university students, on the payment of $1 each, became entitled to the benefits offered by the tax laws to primary producers to average out their income between good and lean years. The university students by virtue of their being beneficiaries of a trust which carried on a business of primary production, were given the same tax benefit. Mason J noted the problems with section 260 stating that 'its defects and deficiencies have been apparent for so long.'[101]

> The High Court of Australia interpreted the tax laws literally and decided in favour of the taxpayer in virtually all tax avoidance cases that came before it during the 1970s. Sutton comments that the High Court's decisions had a major impact on the Commissioner's role so as to render his judgements about whether tax avoidance had taken place no longer appropriate. Instead the Commissioner could only "check whether the letter of the law had been obeyed." This gave an open invitation to certain taxpayers to keep pushing the boundaries of tax avoidance further and develop more daring schemes.[102]

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96 Ibid 8-9, (citations omitted). Note, Sir Garfield Barwick was counsel for the taxpayer, and his advocacy and arguments were subjected to overt criticism by the Privy Council.

97 See Gaetano T Pagone, above n 85, 772.

98 Ibid 774.

99 (1977) 140 CLR 314, 319.

100 *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330. The university students were in this case able to take advantage of a section 157(3) of the *ITAA 1936*, a section enacted for the benefit of primary producers.

101 Ibid 337-8 Mason J, cited Kitto J, in *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577, 596.

102 Robert Whait, 'Developing Risk Management Strategies in Tax Administration: the Evolution of the Australian Tax Office's Compliance Model' (2010) 10 (2) *ejournal of Tax Research* 436, 443-4, citing Adam Sutton, 'Bottom of the Harbour Tax Evasion Schemes', in *Stains on a White Collar: Fourteen Studies in Corporate Crime and Corporate Harm*, eds. Peter Grabosky and Adam Sutton, 4. (Footnotes omitted).

Murphy J in the 1980 case of *Commissioner of Taxation (Cth) v Westraders Pty Ltd*, warned of the dangers of the over literalist interpretation of tax legislation

> It has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is so absolutely literalistic that is has become a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only by legislators who consider that their Acts are being mocked, but even by those who benefit. In my opinion, strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.[103]

As Chief Justice of the High Court from 1987 to 1995, Mason CJ adopted a more *purposive* approach to interpreting legislation.

> No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of the words. Statutory interpretation calls for reference not only to context, scope and purpose of the statute but also to antecedent history and policy as well as community values.[104]

7.4.1 Parliament's two-pronged response to Australia's tax avoidance climate

In 1981 the Commonwealth Parliament introduced section 15AA into the *Acts Interpretation Act 1901* (Cth)[105] the section provides for a purposive interpretation of legislation.

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The section received only a lukewarm reception and was followed in 1983 with section 15AB; a section that sought to clarify the principles that were to be applied to interpretation and the extent to which various forms of international, parliamentary and executive material could be used in determining the purpose(s) of the legislation.[106]

Specifically in the tax arena, the Parliament introduced Part IVA to the *ITAA.* Part IVA was designed to overcome the difficulties that the literal interpretation of the section had created. The four broad categories of limitations on the scope of section 260, as exposed by judicial decisions, were identified in the Explanatory Memorandum to the 1981 amendments as:

> (a) The "choice principle" is an interpretative rule according to which section 260 will not apply to deny to taxpayers a right of choice of the form of transaction to achieve a result if the Principal Act itself lays open to them that form of incidence of tax and this is so notwithstanding that the transaction in question is explicable only by reference to a desire

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103 (1980) 144 CLR 55, 80.

104 See Sir Anthony Frank Mason CJ, 'Changing the Law in a Changing Society' (1993) 67 *Australian Law Journal* 568, 569.

105 *Statute Law Revision Act 1981* (Cth) section 115.

106 For a fuller explanation of section 15AB see Jocelynne A Scutt, 'Statutory Interpretation and Recourse to Extrinsic Aids' (1984) 58 *Australian Law Journal*, 483, 488-94.

to attract the operation of a particular provision of the Act and so achieve a reduction in liability to tax below what it would have been if that course had not been taken

(b) The section is expressed in such a way that the purposes or motives of the persons entering into an arrangement are not to be enquired into in deciding whether the section applies to the arrangement. Rather, the "purpose" of an arrangement is to be tested only by examining the effect of the arrangement itself.

(c) It is unclear whether an arrangement to which the section is found to apply must be treated as wholly void or whether it can be treated as only partly, void, i.e., to the extent necessary to eliminate the sought-after tax benefit.

(d) The section does not, once it has done its job of voiding an arrangement, provide a power to reconstruct what was done, so as to arrive at a taxable situation. [107]

This tax avoidance climate was further aggravated by the 'bottom of the harbour'[108] schemes exposed by the 1981 *Costigan* Commission.[109] Tax avoidance is broadly concerned with conduct that is prima facie lawful, in that it complies with the literal meaning of the law, but exploit inconsistencies and anomalies to produce tax benefits that are considered unacceptable to the government.[110] By comparison the 'bottom of the harbour' schemes involved illegal tax evasion. The government's response was to enact legislation to: make tax evasion a serious criminal act;[111] amend its secrecy provisions[112] by enabling the ATO to share information with other law enforcement agencies; establishing the Taxation Review Committee - the Committee that produced the *Asprey Review* in 1975[113] targeting the literal interpretation of tax legislation by amending the *Act Interpretation Act 1901* (Cth)[114] and recruiting the assistance of tax practitioners.

> The Government then waged war on tax avoidance and had the support of the Law Council of Australia and the Institute of Chartered Accountants (ICA). The Law Council reminded lawyers that they should act as professional advisors only and not as entrepreneurs in promoting schemes. The ICA had an ethical ruling in place that a member should not associate himself with any

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107 *Income Tax Laws Amendment Bill (No. 2) 1981*, Explanatory Memorandum, 2.

108 These schemes essentially involved the stripping of a company's assets and accumulated profits before its tax liability fell due, and then transferring the company to someone of limited means. Thus the company, usually along with its records, fell to the 'bottom of the harbour', leaving the creditors including the Australian Tax Office empty handed.

109 Frank C Costigan (Chairman), '*Royal Commission on the Activities of the Federated Ship Painters and Dockers Union' Final Report* (1984) APGS Canberra.

110 See Chris Atkinson, 'General Anti-avoidance Rules: Exploring the Balance Between the Taxpayer's Need for Certainty and the Government's Need to Prevent Tax Avoidance' (2012) 14(1) *Journal of Australian Taxation* 1, 5–6, citing Lord Nolan in *Commissioner of Inland Revenue v Willoughby* [1997] 4 All ER 65, 73.

111 *Crimes (Taxation Offences) Act 1980* (Cth) and amending the *Crimes Act 1914* (Cth) in 1982 making it an offence to defraud the Commonwealth. Enacting the *Taxation (unpaid Company Tax) Assessment Act 1982* (Cth) which controversially operated retrospectively to enable the collection of avoided taxes.

112 Section 16 of the *ITAA.*

113 Kenneth William Asprey and Ross Waite Parsons, *Commonwealth Taxation Review Committee (Asprey Committee) Full Report, (*AGPS, 31 January 1975). This Report set out the three principles of tax policy reform as 'fairness, efficiency and simplicity'.

114 The *Act Interpretation Act 1901*(Cth) was amended to include Section 15AA.

> arrangements involving documents or accounting entries that were intended to misrepresent the true nature of the transaction or depend on a lack of disclosure.[115]

The Explanatory Memorandum, described the role of Part IVA as:

> …an effective general measure against those tax avoidance arrangements that – inexact though the words be in legal terms – are *blatant, artificial or contrived*. In other words, the new provisions are designed to apply where, on an objective view of the particular arrangements and its surrounding circumstances, it would be concluded that the arrangement was entered into for the *sole or dominant purpose* of obtaining a tax deduction or having an amount left out of assessable income.[116]

Part IVA was not making a complete break from the past, but rather was intended to give effect[117] to the GAAR provisions of section 260 as embodied in the Privy Council decision in *Newton. Newton's* attempt to delineate between tax mitigation and tax avoidance, illustrated just how elusive the definition of tax avoidance is.

> This definition brings us no closer to knowing what constitutes tax avoidance, because all it says is "tax avoidance arrangements are those arrangements that look like tax avoidance arrangements." Nevertheless, the definition highlights the difficult of exhaustively defining tax avoidance, or indeed, the difficulty of defining tax avoidance in terms of legal rules at all.[118]

Section 260 was an all or nothing provision, it only allowed for the annihilation analysis, it did not authorise the Commissioner to embark upon a hypothetical reconstruction, and therefore was not sufficiently flexible to deal with complex tax avoidance schemes. Part IVA provided the Commissioner with a wider and more flexible range of powers. The legislation, by necessity, relies on broad terms and principles, it cannot be expected to foresee every issue that may arise, it operates as a guide to conduct, and in this way it gives a measure of certainty to taxpayers.

Part IVA will inevitably rely, to some extent, on the Commissioner's discretion. The Commissioner is charged with interpreting and applying the tax legislation, and collecting the taxes due. Unlike many provisions in the tax law, Part IVA does not apply automatically; rather the Commissioner must make a determination under section 177F that Part IVA applies. Such a determination leads to the cancellation a tax benefit obtained by the taxpayer and mandatory fines equal to fifty per cent of the shortfall amount.[119] For a determination to

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115 Margaret McKerchar and Cynthia Coleman, 'Avoiding Evasion: An Australian Historical Perspective' in J Tiley, *Studies in History of Tax Law* (2010) 5, Hart Publishing Ltd. 389.

116 *Income Tax Laws Amendment Bill (No. 2) 1981* (Cth), Explanatory Memorandum, 2. (Emphasis added).

117 See *Income Tax Laws Amendment Bill (No. 2) 1981* (Cth), Explanatory Memorandum, 3.

118 Rebecca Prebble and John Prebble, 'Does the use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study' (2011) 55 *St. Louis University Law Journal* 21, 23.

119 The fine is reduced to 25% of the shortfall, where the position taken was 'reasonably arguable' schedule 1 section 284-160 *Taxation Administration Act 1953* (Cth).

be made all three of the following factors must be present:[120] first, there must be a *scheme*,[121] given that the term is widely defined this does not usually present a problem; second, the taxpayer must obtain a *tax benefit*. Taxpayers have defended their position by demonstrating that there was no tax benefit for them, but rather any advantage gained was part of the normal commercial or personal arrangements. Only after the two questions had been answered in the positive, was consideration of the purpose of the scheme entertained. This third step being that having regard to the eight objective criteria in section 177D(b), a reasonable person can conclude that the *sole or dominant purpose* for entering into or carrying out the scheme must have been to enable the taxpayer to obtain the tax benefit. The inquiry into purpose itself involves two steps. First identifying those facts that fall within the eight categories of section 177D(b). Second an evaluation of whether the facts identified point a reasonable person to the conclusion that the taxpayers entered into the scheme with the dominant purpose of obtaining a tax benefit.

> Taxation is part of the cost of doing business, and business transactions are normally influenced by cost consideration. Furthermore, even if a particular form of transaction carries a tax benefit, it does not follow that obtaining the tax benefit is the dominant purpose of the taxpayer in entering into the transaction.[122]
> …revenue law considerations influence the form of most business transactions, and the presence of a fiscal objective does not mean that a person entered into or carried out a scheme for the dominant purpose of obtaining a tax benefit.[123]

No inquiry into the actual or subjective dominant purpose of the taxpayer in entering into the scheme, nor of the dominant purpose of the scheme itself, is entertained. Furthermore, the dominant purpose to obtain a tax benefit for the taxpayer, need not be the dominant purpose of the taxpayer, it can be that of a promoter of a tax scheme, or a legal or accounting adviser.[124]

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120 Section 177A defines a scheme; s 177C identifies a tax benefit; and s 177D provides a list of eight matters, all of which need to be considered in the objective determination of the purpose of the scheme. See *Federal Commissioner of Taxation v Hart* (2004) 216 CLR 217, 241 (Gummow and Hayne JJ) 'The Act requires that *all* of the eight matters listed in s 177D(b) be considered in deciding what conclusion would be reached about the purpose of the relevant persons.' (Emphasis in original).

121 Section 177A(1) defines a scheme to mean '(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and (b) any scheme, plan, proposal, action, course of action or course of conduct.' Callinan J in *Federal Commissioner of Taxation v Hart* (2004) 216 CLR 217, 256[86] notes 'First, a 'scheme (see subsection 177A(1) must be identified. Then, it has to be found that the amount would have been included, or might reasonably be expected to have been included, in assessable income of a taxpayer *but for* the scheme.' (Emphasis added).

122 *Federal Commissioner of Taxation v Hart* (2004) 216 CLR 217, 227 (Gummow and Hayne JJ).

123 Ibid citing *Federal Commissioner of Taxation v Spotless Services* (1996) 186 CLR 404, 423 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

124 See *Commissioner of Taxation (Cth) v Consolidated Press Holdings Ltd* (2001) 207 CLR 235, 264 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). 'Attributing the purpose of a professional advisor to one or more of the corporate parties in the present case is both possible and appropriate. In some cases, the actual parties to a scheme subjectively may not have any purpose, independent of that

As with most tax appeals the burden of proof falls upon the taxpayer, and in tax avoidance cases this may prove to be an onerous task indeed.

> The burden may require a taxpayer to prove a negative. Such a task may be especially difficult and obtuse where that which is to be disproved is not only a negative but a negative in the context of a hypothesis. A taxpayer who has obtained a tax deduction impugned under Part 1VA may need, for example, to disprove that, in the hypothesis of the transaction not having occurred, it is not reasonable to expect that a tax deduction would not have been obtained.[125]

7.4.2 Part IVA not the panacea

In 1999 the Ralph Review[126] recommended that Part IVA be amended in several respects.

> The operation of the existing reasonable hypothesis test (in section 177C) be improved by ensuring that the counterfactual to a tax avoidance scheme reflects the commercial substance of the arrangement.
> Currently, in order to demonstrate the existence of a tax avoidance scheme, the Commissioner of Taxation is required to construct a reasonable alternative transaction or counterfactual which does not give rise to the tax benefit. In some tax avoidance cases promoters of the scheme have argued that the reasonable alternative to the scheme may be that the taxpayer would not have done anything. The recommendation will confirm that this is not the case. For example, if the sale of property had an attached tax benefit, the alternative transaction would be constructed on the basis that the sale of property, without the tax benefit, would have taken place.[127]

The then Liberal Government initially accepted the recommendations, however the reforms were held in abeyance until November 2010, with the then Labor Government enacting changes to Part IVA in 2013.[128]

The 1990's saw a growth in *mass marketed tax effective schemes*; schemes that were typically sold by way of prospectuses and in some cases through information memoranda. The ATO responded with a draft tax ruling in 1997[129] declaring that the schemes were tax avoidance arrangements, and that the schemes related tax deductions would be disallowed. The ATO followed up with a number of successful high profile Federal Court cases attacking the schemes.[130] It also responded to calls by Commonwealth Ombudsman[131], the Australian

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of a professional advisor, in relation to the scheme or part, of the scheme, but that does not defeat the operation of section 177D.'

125 Gaetano T Pagone, above n 85, 778.

126 John Ralph, Review of Business Taxation to Australian Government Treasury, *A Tax System Redesigned* (July 1999) < http://www.rbt.treasury.gov.au/publications/paper4/prelim/termsofreference.htm>.

127 Ibid Chapter 6, Tax System integrity, Recommendation 6.4, 246.

128 *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013 (Cth).*

129 Australian Taxation Office, *Income Tax: Afforestation Schemes Draft Ruling, TR 97/D17*. The ruling specifically addressed afforestation schemes. *TR2000/8* (June 14, 2000) replaced the draft ruling. <http://law.ato.gov.au/atolaw/view.htm?docid=DTR/TR97D17/NAT/ATO/00001> (Finalised by Australian Taxation Office, 'Taxation Ruling 2005/9: Income Tax: Record Keeping – Electronic Records').

130 Australian Taxation Office, *Mass Marketed Investment Schemes – A Historical Overview*, (1 April 2012) <https://www.ato.gov.au/General/Tax-planning/In-detail/Mass-marketed-schemes/Mass-marketed-investment-schemes---a-historical-overview/?page=4> 'The Federal Court heard nine cases involving mass marketed investment schemes which were part of the Commissioner's 14th February 2002 settlement offer. In all nine cases the Courts confirmed the Commissioner's view that the deductions are not allowable.'

National Audit Office[132] and the Senate Economics Reference Committee[133] to increase public education about the schemes and to settle promptly with unsophisticated taxpayers[134] caught up in schemes, allowing them concessions and reduced tax interest penalties.[135] It also produced a number of product rulings in an effort to increase the certainty for taxpayers.

More than ten years passed from the 1981 legislation introducing Part IVA and the Commissioner bringing a Part IVA case before the High Court. That case was *Peabody,*[136] wherein the High Court espoused that the 'reasonable expectation test' must be more than a mere possibility.

> A reasonable expectation requires more than a possibility. It involves a prediction as to the events which would have taken place if the relevant scheme had not be entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable.[137]

The High Court, in *Peabody,* held that the taxpayer did not obtain a tax benefit in connexion with the scheme, emphasising that the existence of a tax benefit is dependent upon objective facts; and that in this instance, the tax benefit was only an incidental result of a larger scheme, whose primary objective was not to avoid tax. The Commissioner was more successful in his High Court appeal in *Spotless,*[138] with the Court upholding the Commissioner's assessments. The High Court held that Part IVA is to be construed and applied according to its terms, the High Court described as a 'false dichotomy' references to on the one hand, 'a rational commercial decision' and on the other, 'obtaining of a tax benefit as the dominant purpose of the taxpayers in making their investment.'[139] The Court noted that tax decisions regularly dictate the way a particular transaction is effected, and the suggestion

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131 Commonwealth of Australia Ombudsman, *The ATO and Budplan: Report of the Investigation into the Australian Taxation Office's Handling of Claims for Tax Deductions by Investors in Tax Effective Financing Scheme known as Budplan* (9 June 1999). <http://www.ombudsman.gov.au/files/investigation_1999_04.pdf>. Report under section 35A of the *Ombudsman Act 1976*, June 1999.

132 Australian National Audit Office, *The Australian Taxation Office's Management of Aggressive Tax Planning*, Audit Report No. 23, (January 2004).

133 Commonwealth of Australia, Senate Economics Reference Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection.* Final Report, February 2002.

134 See Australian Taxation Office, *Tax Office Announces Settlement Offer for Mass Marketed Scheme Investors*, 18 May 2008 <http://www.igt.gov.au/content/reports/GIC_for_Groups/appendix_4.asp>.

135 See Australian Taxation Office, *Settlement offer for certain Mass Marketed Tax Effective Investments Agricultural Arrangements*. Fact Sheet (13 June 2002). Appendix 4, A4.34 'Promoters, financial planners, tax agents and others who gave tax advice for a fee on a regular basis were not automatically entitled to a full remission of penalties or interest…'.

136 *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

137 Ibid 385 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See *Dunn v Shapowloff*, [1978] 2 NSWLR 235, 249 (Mahoney JA).

138 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 (Brennan CJ, Dawson, Toohey, Gaudron, Kirby, and McHugh JJ).

139 These statements were noted approvingly by Gummow and Hayne JJ in *Federal Commissioner of Taxation v Hart (2004)* 216 CLR 217, 239[51].

that there was a difference between obtaining the maximum return on money invested after the payment of all costs including tax and the obtaining a tax benefit as defined by the *ITAA*, was a 'false dichotomy'.

> A person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.[140]

The Court concluded that the scheme was adopted by the taxpayers to obtain the maximum return of money invested, with the dominant purpose of obtaining a tax benefit. The decision hinges on the identification, amongst the various purposes, of the purpose which is dominant, in relation to a particular arrangement that is structured or done in a particular way, having regard to the surrounding circumstances.

> The facts of the present case show much more than a switch of investments resulting in a tax benefit. The elaborate nature of the scheme and its attendant circumstances lead inevitably to the conclusion that the scheme was not merely tax driven but that its dominant purpose was to enable the taxpayer to obtain a tax benefit by participating in the scheme.[141]

'The distinction between normal commercial transactions and schemes of tax avoidance was never clear cut …there is no strict dichotomy between commercial considerations and tax considerations.'[142]

> The decision of the High Court in *Spotless Services* was something of a watershed in relation to tax minimisation, marking a decisive break from the authorities as to the scope and effect of the former s 260 of the ITAA 1936, influenced as they were by the *Duke of Westminster* doctrine.[143]

Following the 2004 High Court unanimous decision for the Commissioner in *Hart,*[144] there was for a number of years, a dearth of High Court cases involving Part IVA.

7.4.3 High Court questions the Commissioner's tactics

2010 saw the ATO increase its litigation of Part IVA, with nine cases having been decided by the Federal Court or the High Court, in that year alone. As noted by Robert Allerdice: 'The Commissioner was successful in three cases, partially successful in one case, unsuccessful in four cases, and would have been unsuccessful in the other cases had it been necessary for the judge to decide the matter on Pt IVA'[145] In a number of these cases the Commissioner had appealed the decision of either the Administrative Appeals Tribunal or the judgment of a single judge in the Federal Court. Of the four cases where the Commissioner was initially

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140 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 (Brennan CJ, Dawson, Toohey, Gaudron, Kirby, and McHugh JJ) 415.

141 Ibid 425.

142 *Federal Commissioner of Taxation v Consolidated Press Holding* (2001) 207 CLR 235, 267-8[104] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

143 *Hart v Federal Commissioner of Taxation* (2001) 48 ATR 317, 340[57].

144 *Federal Commissioner of Taxation v Hart* (2004) 216 CLR 217.

145 Robert Allerdice, 'Upping the Ante on the Anti-Avoidance Provisions?'(2010) 45 (8) *Taxation In Australia* 8, 8 (citations omitted).

unsuccessful, he appealed three of the cases, and in one case issued a statement stating that no appeal would be made.[146] The Commissioner was increasingly pushing the boundaries of Part IVA and his tactics added to the *uncertainty* surrounding the general anti-avoidance provisions. The Commissioner used the anti-avoidance provisions as a tactic to gain access to documentation that might otherwise not be subject to discovery, or in the case of the *Accountants Guidelines* created an 'exceptional circumstance' and hence enabled access to accountant's advice documents. The Commissioner's tactics were criticised in the extra judicial writings of Richard Edmonds J.

> The Commissioner's apparent zeal to rely on Part IVA as an alternative ground of assessment or as a ground of last resort is no doubt motivated by its perceived in terrorem effect (in particular the penalty regime its application triggers) and/*or the forensic advantages in relation to discovery and other interlocutory processes that might not otherwise be secured.* In a number of cases I have seen, the Commissioner's relevant redress should have been confined to reliance on a specific anti-avoidance provision or, if one did not exist, to promote its introduction, rather than rely on the 'backstop' of Part IVA. The consequence of him not doing so has, in my view, led to greater uncertainty in its application.[147]

The Commissioner was unsuccessful in a number of cases because the Court found that, if the taxpayer had not entered into the scheme they may not have done anything at all and therefore there was no tax benefit associated with the scheme. In *AXA,*[148] *RCI*[149] and *Futuris*[150] the Court found that the taxpayer had not obtained a tax benefit; in each case the taxpayer demonstrated that, *but for* the identified scheme, it would have done nothing or would have done something that produced a tax outcome at least as favorable as the one achieved under the scheme. The crux of the issue is the Commissioner's perceived weakness in the 'tax benefit' concept, raising concerns about the reduced effectiveness of the provisions in combating tax avoidance arrangements. The Commissioners failure to attain Special Leave to appeal the Full Federal Court decision in *RCI* was fuel for the Commissioner to turn to the Parliament to amend the law. The Parliament appeased the Commissioner with its 2013 amendments, changing the test for deciding whether a tax benefit was associated with the scheme. Parliament sided with the Commissioner on the very issue that the High Court was

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146 In *Federal Commissioner of Taxation v News Australia Holdings Pty Ltd*, (2010) 79 ATR 416, the Commissioner decided not to appeal the decision of the Full Federal Court.

147 Justice Richard F Edmonds 'Part IVA and Anti-Avoidance – Where are we now?' (2002) 12, (1) (4) *Revenue Law Journal* 1, 11 (citations omitted and emphasis added).

148 *Federal Commissioner of Taxation v AXA Asia Pacific Holding Ltd* (2010) 189 FCR 204 (Dowsett, Edmonds and Gordon JJ) the Court found that there had been an 'arms-length transaction' between the parties and that the facts did not support the Commissioner's alternative postulate. The Commissioner was refused leave to appeal to the High Court in *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* [2011] HCA Trans 63 (11 March 2011).

149 *RCI v Federal Commissioner of Taxation* (2011) 84 ATR 785, 781(6) (Edmonds, Gilmour and Logan JJ).

150 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2012) 205 FCR 274, 294[79] (Kenny, Stone and Logan JJ).

not prepared to so accommodate him. As evidenced in 2012 by the comments of the then, Labor Assistant Treasurer, Senator Mark Arbib.

> In recent cases, some taxpayers have argued successfully that they did not get a 'tax benefit' because, without the scheme, they would not have entered into an arrangement that attracted tax. …For example, they could have entered into another scheme that also avoided tax, deferred their arrangements indefinitely or done nothing at all. Such an outcome can potentially undermine the overall effectiveness of Part1VA and so the Government will act to ensure such arguments will no longer be successful.[151]

7.4.4 The Commissioner sought legislative assistance: amendments to Part IVA

Part IVA Schedule 1 deletes the current sections 177CA and 177D from the ITAA and substitutes new sections 177CB and 177D in their place. Section 177CB tests whether a tax effect (previously referred to as tax benefit) would have occurred, or might reasonably be expected to have occurred if the scheme had not been entered into or carried out in either of the following two circumstances. First, would one or more of the tax effects have occurred if the taxpayer had not entered into the scheme in question? Or second, would one or more of the tax effects have occurred if the taxpayer had undertaken a course of action that was a reasonable alternative to the scheme entered into? The two limbs are now described as separate and distinct *alternative tests* upon which the existence of a tax benefit can be demonstrated; providing the Commissioner with two alternative bases with which to approach transactions. The Explanatory Memorandum[152] cites the Federal Court decisions in *Peabody* and *Consolidated Press Holdings*[153] as cases that have viewed the two limbs as alternatives. The Explanatory Memorandum also points out that the two limbs have been viewed in a number of recent decisions, (naming *Futuris* and *Trial Brothers Steel & Plastics*[154]) as representing ends of a spectrum of certainty within which acceptable postulates must lie. It concludes that: 'the competing constructions of section 177C have yet to be directly considered by a court.'[155]

The first limb, referred to in the Explanatory Memorandum, is the 'annihilation approach', namely what 'would have' happened *but for* the scheme, is to be determined based solely on the events and circumstances that actually happened or existed, other than those things that

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151 Honourable Mark Arbib, '*Maintaining the Effectiveness of the General Anti-Avoidance Rule'* (Press Release, No. 010, 1 March 2012. <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/010.htm&pageID=003&min=mva&Year=&DocType>.

152 *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit shifting) Bill 2013* Explanatory Memorandum.

153 Ibid 1.36 cites *Peabody v Commissioner of Taxation* [1993] FCA 74 at [36] and *Commissioner of Taxation v Consolidated Press Holdings* [1999] FCA 1199.

154 Ibid 1.46 *Futuris* [2012] FCAFC 32 at [54], [59] [62] and [79]; *Commissioner of Taxation v Trail Brothers Steel & Plastics Pty Ltd* [2010] FCAFC 94 at [26] and [29].

155 Ibid 1.44.

formed part of the scheme itself).[156] This first limb is expected to be relied upon in relation to tax benefits arising out of mass marketed tax schemes, where the scheme in question does not produce any material non-tax results or consequences for the taxpayer.

The second limb, the 'reconstruction approach' has attracted much controversy because of its exclusion any tax costs in an alternative postulate.

> There is a risk that a 'disregard tax' rule could potentially be open to abuse by the Commissioner, as it could empower him to construct an alternative postulate that involves what is clearly an excessive amount of tax—for example by taxing the same economic gain twice. …However, it is far from clear how the purpose test would displace a statutory assumption that tax should be disregarded or how the courts would interpret such a rule.[157]

The exclusion of tax outcomes in an alternative postulate means that it is no longer possible to successfully argue that the Commissioner's alternative would be unreasonable on the grounds that the tax costs associated with it were too high.[158] This assumption directly counteracts the decisions in *RCI*[159] and *Futuris.*[160] This second approach can be used when the annihilation approach is unsuccessful, as for example when an income scheme or withholding tax scheme, produces or shelters economic gains for the taxpayer. Under the reconstruction approach there must be a postulate that is a reasonable alternative to the scheme. A taxpayer will be deemed to have obtained a tax benefit in connection with a scheme if it can be demonstrated that a relevant tax effect would have flowed from the application of the taxation law to the facts remaining, once the scheme is assumed away (annihilation approach), or would have flowed to the alternative postulate (reconstruction approach).

The amended section 177F(1) requires the application of Part IVA to commence with a consideration of whether a person participated in the scheme for the sole or dominant purpose of securing for the taxpayer a particular tax benefit in connection with the schemes. The

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156 Section 177CB (2).

157 Commonwealth of Australia, House of Representatives Standing Committee on Economics, '*Advisory Report on the Tax Laws Amendment (Counter Tax Avoidance and Multinational Profit Shifting Bill 2013'* (March 2013). The Parliament of the Commonwealth of Australia, 39-40. Submission 7: Corporate Tax Association (citations omitted). <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=economics/profitshiftingbill/report.htm>.

158 This essentially was the argument made in *RCI v Federal Commissioner of Taxation* (2011) 84 ATR 785, 847[145].

159 Ibid.

160 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2012) 205 FCR 274 (Kenny, Stone and Logan JJ).

amendments emphasis the central role of the dominant purpose test as the 'fulcrum'[161] upon which Part IVA turns.

Ultimately, it will be for the courts to clarify the interpretation and application of these amendments. Meanwhile the Commissioner has succeeded in convincing the Parliament to amend the legislation in ways that he believes will strengthen the anti-avoidance provisions; enable arguments that he had put in previous cases to prevail and give in his opinion, greater certainty to the law. Other than the Explanatory Memorandum, there is little guidance provided to the taxpayer on how the new amendments will operate, creating greater uncertainty in the law, and they 'bring into question much of the jurisprudence that has developed over many years to guide taxpayers on the practical operation of the anti-avoidance provisions.'[162] The reaction from the tax commentators, especially accounting associations, has been along the lines that section 177C was working well and the problem, if there was one, was that the Commissioner was pushing the boundaries of the anti-avoidance provisions.[163]

> In responding to a number of court cases the Commissioner of Taxation has lost when applying Part IVA in recent times, there is a real risk that the Government, via these amendments, has over-reacted and given the Commissioner too much power to raise tax and penalties in the context of alleged income tax avoidance. This is a position held by several submissions including from The Tax Institute, the Corporate Tax Association (CTA), and the Law Council of Australia (LCA) – that the failures of the current GAAR or Part IVA may have been more to do with the ATO's poor case selection or management, or extending it to situations where the rule was not intended to apply.[164]

The amendments have once again strengthened the already powerful hand of the Commissioner and may lead to an unnecessarily wary approach by taxpayers to legitimate tax planning.

7.5 *Project Wickenby*

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161 *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit shifting) Bill 2013* Explanatory Memorandum, 1.125.

162 Duncan Bentley, 'Getting (even More) Serious about Schemes to Avoid Tax by Strengthening the General Anti-avoidance Provision' (2013) 19(6) *Asia Pacific Tax Bulletin* 388, 393.

163 See Commonwealth of Australia, Senate Economics Committee, *Views on Schedule 1: The General Anti-Aviodance Rule* (2013). Provides summary of submissions by representative accounting and tax professional bodies to the proposed legislation. <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2010-13/tlabcounteringtaxavoidance2013/report/~/media/wopapub/senate/committee/economics_ctte/completed_inquiries/2010-13/tlab_countering_tax_avoidance_2013/report/c02.ashx>.

164 House of Representatives Standing Committee on Economics, '*Advisory Report on the Tax Laws Amendment (Counter Tax Avoidance and Multinational Profit Shifting Bill 2013'* (March 2013). Parliament of the Commonwealth of Australia 62.

Project Wickenby[165] was a cross-agency taskforce established in 2006 to protect the integrity of Australia's financial and regulatory systems; culminating in the High Court case *Hogan v Australian Crime Commission.*[166] The case considered a number of important issues including: the Federal Court's power to make non-publication orders pursuant to section 50 of the *Federal Court of Australia Act 1976* (Cth); the ATO's access to documents prepared by external tax accountants that would have been protected by the *Guidelines* had they been in the possession of the taxpayer and/or the external accountant; the sharing of documents between government agencies and the operation of the crime/fraud exception. The protracted litigation commenced in February 2006, with Mr Stewart, an accounting adviser to actor Paul Hogan making an application in the Federal Court to restrain the Australian Crime Commission (ACC) from using or disseminating documents that it had obtained under a warrant.[167] Mr Stewart was claiming client legal privilege for the seized documents. The ACC responded that that the documents were made in furtherance of a crime or fraud, and therefore were not covered by client legal privilege.

In June 2007, Mr Hogan sought orders that the ACC provide discovery in relation to its argument that the crime/fraud exception applied to the seized documents. In August Emmett J ordered the ACC to conduct inquiries and produce a list of documents concerning the inferences said to support the crime/fraud exception. This list became known as the 'Inference Schedule'. In July 2008, the ACC conceded that the documents were subject to client legal privilege and abandoned its reliance on the crime/fraud exception to privilege. The ACC was ordered to return the privileged documents to Mr Hogan and destroy any information which was derived from or reproduced the contents of those documents.[168]

Mr Hogan then sought relief from the High Court to effectively reinstate the section 50 orders of non-disclosure with respect to the 'Inference Schedule' and the 'Accounting Advices' and dismiss the applications made by the media companies[169] to inspect the documents.

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165 Australian National Audit Office, *Report No 25 2011-12 Administration of Project Wickenby* 13. 'The name 'Wickenby' does not refer to any individual involved in, or related to, the project. Rather it refers to an airfield in the north of England, and was simply the next on the list of airfields, which was the family of entities being used at the time by the Governance of Operations Committee of the Australian Crime Commission to generate names for investigations.'

166 (2010) 250 CLR 651.

167 Pursuant to a section 29 notice of the *Australian Crime Commissions Act 2002* (Cth).

168 Mr Hogan did not succeed in another application that the ACC ensure that persons with knowledge of the privileged material no longer be involved in Operation Wickenby.

169 See *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 662. Nationwide News Pty Ltd and John Fairfax Publications had joined the case in August 2008 and filed a motion to inspect the documents and vacate the section 50 orders.

Prior to this case, the leading decision on section 50 was *Australian Broadcasting Commission v Parish,* in which Bowen CJ noted:

> It is not possible to define in advance the degree of prejudice to the administration of justice, which will justify the making of an order under s. 50. The collation of the alternative phrase "security of the Commonwealth" suggests Parliament was not dealing with trivialities. The case where failure to make an order under s. 50 would lead to the destruction of the very subject matter of the suit would seem to be the kind of case which might ordinarily attract the exercise of discretion. The refusal to make an order in such a case might well defeat the purpose of achieving justice between the parties and disappoint the public interest in having the court deal responsibly with the confidential affairs of citizens.[170]

The High Court in *Hogan* cited Bowen CJ's decision in *Parish* and decided that the case before them was not analogous to the *Parish* case,[171] therefore without expressly rejecting the test formulated by Bowen CJ in *Parish*, they were able to formulate an alternative test, based on the 'necessity' of making or withdrawing non-publication orders.

> If it appears to the Federal Court, on the one hand, to be necessary to make a particular order forbidding or restricting the publication of particular evidence or the name of a party or witness, in order to prevent either species of prejudice identified in s 50, or, on the other hand, that that necessity no longer supports the continuation of such an order, then the power of the Federal Court under s 50 is enlivened. The appearance of the requisite necessity (or supervening cessation of it) having been demonstrated the Court is to implement its conclusion by making or vacating the order. The expression in s 50 "may …make such order" is to be understood in this sense.[172]

The High Court went on to discuss the application by the media companies to view the documents pursuant to Order 46 rule 6(3) of the Federal Court Rules, and decided that since the documents had been tendered and admitted into evidence,[173] the section 50 non-disclosure order had been vacated, and the media companies could inspect the documents. Emmett J noted 'I do not consider that the applicant has established that it was *only because* of the expectation that s 50 orders would continue in perpetuity that the other material in question was tendered.'[174] Therefore the High Court held that: the placing of material in evidence was a forensic decision engaging the principles of open justice; the *price* of that decision might be the subsequent disclosure of that material, and the subsequent embarrassing publicity.[175]

The litigation continued on in *Stewart*[176] focusing on the documents obtained by the ACC then handed to the tax office and the application of the Commissioner's *Guidelines* to those

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170 (1980) 43 FLR 129, 133.

171 *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 667[42] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

172 Ibid 664[32] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

173 Ibid 667[40] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

174 Ibid 665[36], citing Emmett J in *P v Australian Crime Commission* (2008) 71 ATR 555, 568-9 (emphasis added).

175 Ibid 667[43] citing Merkel J in *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435, 444 (emphasis added).

176 *Stewart v Deputy Commissioner of Taxation* (2011) 194 FCR 194.

documents. The case illustrates the very limited protection offered by the *Guideline;* the *Guidelines* do not impact on the search and seizure activities of other government agencies, nor do they apply to documents obtained from sources other than the taxpayer and/or their tax accountant. Perram J reasoned that although the *Guidelines* are but a statement of the Commissioner's policy, a decision thereunder is nevertheless to be exercised in accordance with the rules of procedural fairness, as an instance of the Commissioner's power of general administration under section 8 of the *ITAA 1936* (Cth).[177] However, the text of the *Guidelines* clearly relates to documents in the possession of the taxpayer or the taxpayer's external accountant, and not to documents in the hands of third parties.[178] The Court held that this is so 'even where that third party has taken possession by some compulsory process.'[179]

> The necessary consequence is that the guidelines did not apply to the documents provided by the ACC to the ATO. There could be, in that circumstance, nothing procedurally unfair in accessing the documents. Fairly construed, the guidelines and the ATO's correspondence with Mr Hogan could not reasonably have engendered any view on his part that access would not be had to the documents without first giving him an opportunity to argue to the contrary. [180]

Project Wickenby after a slow start, achieved substantial results, both directly in terms of money collected and successful civil and criminal prosecutions against celebrities in particular,[181] and indirectly through its deterrence impact.[182] Whistleblowers within the ATO criticised the ATO's handling of Project Wickenby, however the result for them was not what they had expected - they found themselves under investigation from the ATO.

> The ATO has been accused of abusing its power and squandering taxpayers' money on futile court cases designed simply to chase revenue rather than enforce the law. The claims are made by a group of Tax Office staff who raise a raft of concerns about the tactics used by the ATO in its crackdown on so-called high wealth individuals. The whistleblowers say that instead of acting on their complaints, the Tax Office turned its sights on them.[183]

7.6 Conclusion

177 (2011) 194 FCR 914, 203[27].

178 (2011) 194 FCR 914, 211[61].

179 *Steward v Deputy Commissioner of Taxation* (2011) 94 FCR 914, 211[61].

180 Ibid (Perram J).

181 *Morning Herald, 20 July 2007:* the first conviction under Project Wickenby was in July 2007 when Mr Glen Wheatley was jailed for two and a half years. See Sydney Morning Herald, 31st July 2012 'The Project Wickenby taskforce has been delivered a victory, as a jury convicted tax scheme promoter Robert Agius and Sydney accountant, Kevin Zerafa, of conspiring to defraud the Commonwealth. …Some $1.275 billion had been identified in tax liabilities in audits.' Robert Agius was sentenced to eight years and eleven months in August 2010, and Robert Zerafa was given a three-year suspended sentences and 500 hours of community service.

182 See Australian National Audit Office, Audit Report No 25 2011-12 'Administration of Project Wickenby' 16: 'An indirect deterrence impact is indicated by qualitative factors such as: generally positive media reporting of the project; court sentencing judgments about the serious nature of tax fraud; and professional bodies advising that some tax agents and accountants have warned their clients not to participate in secrecy haven schemes because of the project.'

183 ABC Television Channel 2, 'A Whistle Blower inside the ATO Says it has Abused its Power and Wasted Money in a Crackdown on High Wealth People', *7.30 Report,* 9 April 2012 (Leigh Sales) <http://www.abc.net.au/7.30/content/2012/s3473563.htm>.

The ATO has extensive coercive powers under the *ITAA*, creating a vast power asymmetry with the rights of taxpayers and therefore its actions are duly scrutinized by various agencies including the Special Tax Adviser, the Australian Ombudsman, the Australian National Audit Office, and the Senate Economics Reference Committee. The Commissioner has been rebuked for: not acting as a model litigant, by judges of the Federal Court;[184] criticised for taking the stance that he does not see himself as bound by the decisions of a single judge of the Federal Court[185] and allegations of pursuing litigation against individuals on the basis that they are public identities. These criticisms illustrate the robust democracy within which the ATO operates and the checks and balances that exist therein. Richard Edmonds J in his extra judicial writings has noted that these criticisms, especially from the bench are 'few and far between' because the Commissioner does 'aspire to best practice and in the main this is achieved.'[186]

Open justice is fundamental to judicial proceedings; ultimately it is for the courts to balance the *privacy* concerns against the public's right to know. Administrative procedures can be conducted behind closed doors, where the identity of the parties and sensitive commercial matters can be withheld from the public. The ATO has instigated procedures whereby it provides the taxpayer with information regarding proposed actions, thereby facilitating the taxpayer's ability to argue the case why such action should not be taken. For example, in reference to the application of the Commissioner's *Guidelines for Exercising Access to External Accountants' Papers* the ATO has instigated procedures that enable a taxpayer to make a submission to the Commissioner *prior to* the decision to issue a notice to lift the accountant's concession.[187]

Successive Australian Governments, both Labour and Liberal, have shown a preference for autonomy in reference to the ATO's administering of the *ITAA* and the granting of protections to taxpayers. The *Taxpayer's Charter* and the *Guidelines for Exercising Access to External Accountants' Papers* are two prominent cases in point.[188] The *Charter* has been criticised for being the document that purports to uphold taxpayers' rights against the ATO,

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184 See North, Logan, and Robertson in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 176 [42].

185 See Allsop J in *Federal Commissioner of Taxation v Indooroopilly Children's Services (Queensland) Pty Ltd* (2007) 158 FCR 325, 326-7.

186 Justice Richard Edmonds, above n 147, 80.

187 See *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548, 568[43] (Burchett J).

188 In the case of the Charter the Joint Committee of Public Accounts Report 326, 'An Assessment of Tax' (1993) recommended that the Charter be an ATO sponsored document rather than a legislated Charter of taxpayers' rights.

yet it is authored, interpreted, and adjudicated by the ATO itself.[189] The *Guidelines for Exercising Access to External Accountants' Papers* are voluntary concessions made by the Commissioner. However, being voluntary concessions and not enshrined in law, has meant that taxpayers' communications with their external tax accountants, (let alone their employee accountants) do not enjoy the same rights as communications with a legal advisor under client legal privilege. The *Guidelines* provide very limited protection to confidential communications between taxpayers and their tax accountant, as illustrated in the *Hogan* litigation. The Commissioner can attain confidential taxpayer communications from other government agencies. Hence the asymmetry of powers between the ATO and the taxpayer persists.

The general anti-avoidance cases during the reign of Sir Garfield Barwick as Chief Justice of the High Court, illustrated how the 'literal interpretation' of the law can frustrate the Commissioner's efforts to protect the revenue, and enable avoidance to flourish. Parliament assisted the Commissioner by amending the *Act Interpretation Act 1901* (Cth) thus encouraging a 'purposive approach' to the interpretation of legislation and by enacting Part1VA of the *ITAA* in 1981.

The growth of mass marketed schemes in the 1990's, saw a growth in Product Rulings by the ATO, as an effort to provide a measure of certainty for taxpayers caught between promoters and ATO pursuing the taxpayer via Part1VA. In the early 2000's anti-avoidance litigation, taxpayers were increasingly successful in courts. The Commissioner interpreted his failure before the courts as a fault in the 'tax benefit' test and convinced Treasury and the Parliament that legislative amendments could resolve the issue and protect the Revenue. Parliament hesitated, but eventually acted in 2013[190] and introduced the two alternative tests, the 'annihilation approach' and the 'reconstruction approach' to ascertain the gaining of a 'tax benefit'; arguably the most controversial issue in the new legislation was that any tax costs of an alternative postulate must be disregarded.

The ALRC in its report *Privilege in Perspective- Client Legal Privilege and Federal Investigations*[191] called for a statutory client privilege for taxpayer communications with their external tax practitioner. The report examined the United States legislation[192] and New

189 See Duncan Bentley, above n 53, 23.

190 *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit shifting) Act 2013* section 177CB.

191 Australian Law Reform Commission, Report 107, 2007.

192 *Internal Revenue Service Restructuring and Reform Act 1998*, Pub L No 105-206, 112 Stat 685. The Act inserted §7525 into the Internal Revenue Code.

Zealand legislation[193] granting differing levels of privilege to taxpayer communications with their non-lawyer tax practitioner, and made a number of recommendations. The next chapter will examine the history, the case law and the practical consequences of the legislation introduced in both the United States and New Zealand. It will also examine the United Kingdom's experience with taxpayers' confidential communications.

193 *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005.*

CHAPTER EIGHT

Taxpayer privilege in the United States, New Zealand and the United Kingdom

8.1 Introduction

The two previous chapters have examined the extensive powers of the Australian Commissioner of Taxation and the very limited curbs to his powers, noting that there is an asymmetry of powers in favour of the Commissioner. Australia does not have a taxpayer privilege and next chapter makes the case for reform in this area by identifying the key criteria for an effective taxpayer privilege. This chapter will critically examine the legislated taxpayer privilege in both the United States and New Zealand, to determine what lessons Australia can take from their experiences.

This chapter adopts a doctrinal methodology in critically examining the operation of client legal privilege in the tax arena of this group of four familial common law jurisdictions. The United Kingdom is traditionally seen as the parent jurisdiction within this group. The experiences of the United States, New Zealand and to a lesser extent, the United Kingdom in granting differing levels of protection to taxpayer-tax practitioner communications are scrutinised. Both the United States and New Zealand in introducing their dedicated legislation emphasised the importance of having 'a level playing field' in the provision of tax advice, highlighting that the key is the protection of confidential communications and not the qualifications of the adviser. Client legal privilege has developed through the common law, with certainty, clarity and permanency, as the key criteria. These same criteria will be used to assess the United States and New Zealand legislation, and to inform the call for an Australian taxpayer privilege.

The first part of this chapter examines the political environment that influenced the introduction of the legislation in the United States. The section notes that the Internal Revenue Service (IRS) has been perceived as having a reputation of overzealous enforcement of their powers over taxpayers. Tax lawyers and tax accountants have engaged in 'turf wars' to secure and/or extend their provision of tax services. The lobbying by both sides leading up to the introduction of the legislation has influenced the quality of the legislation with the result being a highly compromised and flawed taxpayer privilege. There are lessons that need to be heeded in Australia.

The *Internal Revenue Service Restructuring and Reform Act 1998*[1] (*Reform Act*) extended the common law attorney-client privilege to the taxpayer-tax practitioner relationship. The

[1] Pub L No 105-206, 112 Stat 685.

Reform Act has three significant limitations, each creating its own difficulties, and resulting in a 'privilege' that is far from certain in its scope and operation. As emphasised by Rehnquist J in *Upjohn Co. v United States*[2] clarity and predictability are essential criteria for the operation of the privilege.

> But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the Courts, is little better than no privilege at all. [3]

Taxpayers in the United States have a number of *Constitutional Amendments* that protect their rights, as was seen in chapter four of this thesis. The *Reform Act* also known as the third *Taxpayers' Bill of Rights,* created a number of additional protections.

The second section critically examines the 2005[4] New Zealand statutory right of non-disclosure for tax accountants. New Zealand had the advantage of examining the experience in the United States and the crippling effects of the three key limitations in the *Reform Act*. New Zealand opted for a statutory tax practitioner privilege that retained for the Parliament the power to exert control over its scope and operation. The legislation is very detailed and prescriptive, creating a number of limitations; limitations that fail to create the 'level playing field' aspired to in the introduction of the legislation. Furthermore, the New Zealand courts[5] have adopted a narrow interpretation to the ambit of the privilege, resulting in a right that is significantly narrower in scope than client legal privilege. New Zealand taxpayers have the protection of the *Bill of Rights Act 1990* as was noted in chapter four of this thesis. The ALRC in its investigation into client legal privilege recommended a 'New Zealand style' right of non-disclosure for Australian taxpayers;[6] the next chapter will examine that recommendation, along with the submissions made to the ALRC by the key legal and accounting professional bodies. The thesis notes the shortcomings in the operation of the New Zealand system, and seeks to avoid those shortcomings in Australia.

The third section examines the United Kingdom's *Taxes Management Act 1970* (TMA) which contains a number of provisions that apply to the operation of client legal privilege. A number of pivotal decisions by the House of Lords are examined, to gain an understanding of how the privilege operates in the tax arena. Lord Sumption's proposal for a taxpayer

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2 449 US 383 (1981).

3 449 US 383, 393 (1981).

4 *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* (NZ).

5 See *Blakely v Commissioner of Inland Revenue* (2008) 23 NZTC 21,865 and *ANZ National Bank Ltd v Commissioner of Inland Revenue* (2008) 23 NZTC 21,918.

6 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations,* Report 107 (December 2007) Recommendation 6.6, 306-7.

privilege, based on a functional or utilitarian argument, is grounds for optimism for British taxpayers, even though it was a dissenting judgment in the 2013 *Prudential*[7] case.

> … advice on tax law from a chartered accountant will attract privilege in circumstances where it would have done so had it been given by a barrister or solicitor. They are preforming the same *function*, to which the same legal incidents attach.[8]

As was noted in chapter four, British taxpayers have the protection of the *Human Rights Act 1998* and they can appeal to European Court of Justice.

8.2 The rationale(s) for client legal privilege in a self-assessment tax system

The operation of a self-assessment, as is the case in all four jurisdictions,[9] depends on taxpayers' voluntary compliance with the law and taxpayer honesty in preparing tax returns. Revenue bodies generally have extensive and intrusive powers to gain access to information and to require any person to answer questions relating to the taxable income of a named, or even an unnamed person.[10] Powers aimed at ensuring that the Revenue bodies are ably equipped to carry out their function of collecting the revenue due.[11] The courts in all four jurisdictions have upheld these broad inquisitorial powers.

> Our system of federal taxation relies on self-reporting and the taxpayer's forthright disclosure of information. The government's power to compel disclosure of relevant information is the flip side of that coin. The summons power is the looming threat that helps keep the taxpayer honest, and the more honest taxpayers there are, the more equitably the tax burden is shouldered. Because the IRS's investigatory power is the linchpin in our system, courts are reluctant to restrict it "absent unambiguous directions from Congress."[12]

Chapter three employed the utilitarian rationale to justify client legal privilege. The privilege can also be justified by a humanistic rationale, as was discussed in chapter four. Namely, that it is desirable to create certain privileges out of respect for personal rights such as privacy and

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7 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1.

8 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 131[114] (emphasis added).

9 See *26 United States Code* §6201 for the United States; for New Zealand see *Taxation Administration Act 1994* section 92(1); for the United Kingdom see *Taxes Management Act 1970* section 91(1) and for Australia see *Income Tax Assessment Act 1936* (Cth) section 166A(1).

10 The *Australia Income Tax Assessment Act 1936* (Cth) sections 263 and 264 are arguably the widest powers, with tax officers having 'full and free access to all buildings and places, at all times', this includes private dwellings, without the need to apply to a justice for a warrant. The United Kingdom (*FA* 2008, section 113 Schedule 36*)* United States (US Code, Title 26, § 7602) and New Zealand (section 16(4) *Taxes Administration Act 1994)* require Revenue officers to either gain the consent of the occupant to search private premises, or obtain a summons or a search warrant.

11 In *Her Majesty's Revenue and Customs v Charman* [2012] EWHC 1448 (Fam) (29 May 2012), the HMRC argued that there is a public interest in the *right* amount of tax being paid. 'It is unfortunate, however, that other HMRC publications and edicts suggest that HMRC's role is to collect the *maximum* amount of tax.' See Keith M Gordon, 'Family Fortunes' *Tax Adviser Magazine* (October 2012) <www.taxadvisermagazine.com>.

12 *Valero Energy Corp v United States* 569 F.3d 626, 633[16] (7th Cir. 2009) (Evans J) (citations excluded).

autonomy. This right-based rationale protects privacy and access to justice. Client legal privilege is now more commonly asserted in the courts, to be a fundamental human right.[13]

The two rationales - utilitarian and humanistic, are not mutually exclusive and can work together to provide the full range of benefits that the privilege gives rise to. It must always be remembered that the recognition of privilege, whatever rationale is employed, may hinder the discovery of truth and therefore should not be broadly construed.[14]

The erosion of client legal privilege and/or the limiting of the privilege to 'pure legal advice' in a commercial environment where the line between 'business advice' and 'legal advice' is by no means clear makes the taxpayers' task more difficult. Tax accountants have little to gain if client legal privilege is eroded; it may level the playing field, but to the disadvantage of taxpayers. Loughery suggested one such solution namely: 'to widen the professional groups whose advice would be covered by LAP (legal advice privilege) while restricting the scope of LAP for every group.'[15] Her argument is based on a rebalancing of the public interest considerations around the role of privilege in shielding information from the scrutiny needed, against the public interest arguments for privilege.

8.3 The United States Congress reacts to criticisms of IRS heavy handed behaviour

President Clinton, though initially reluctant, signed into law the *Reform Act* on July 22nd 1998. There was testimony by taxpayers to Congress of maltreatment by IRS agents; problems that had persisted despite the 1996 Congress enacting a second *Taxpayers' Bill of Rights.*[16] The 1996 legislation had created the National Commission on Restructuring the IRS. The year long audit of the IRS found that the IRS was fraught with mismanagement, oversight problems and that it was unaccountable to Congress and the American people. The Commission determined it necessary to overhaul the IRS and change the culture from pro-government to pro-taxpayer.[17] It is against this backdrop that the 1998 *Reform Act* came about.

> Last September, this Committee heard three days of IRS horror stories …We learned that an IRS District Director can take a taxpayer's home with the stoke of a pen; …We learned of the complete absence of taxpayer due process when the IRS takes a taxpayer's home; and an absence of due process when the IRS takes a taxpayer's business. …We learned that there is an "us versus

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13 See for example *R (on the application of Morgan Grenfell & C Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, 606-7 (Lord Hoffman).

14 *Foster v Hall* 29 Mass 89, 97 (1831). 'It (privilege) is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'

15 Joan Loughrey, 'An Unsatisfactory Stalemate: R (on the application of Prudential Plc) v Special Commissioner of Income Tax' (2014) 18(1) *International Journal of Evidence & Proof* 65, 76.

16 2 Pub L No 104-08 110 Stat 1452.

17 Adriana Wos-Mysliwiec, 'The Internal Revenue Restructuring and Reform Act of 1998: Does it Really Shift the Burden of Proof to the IRS?' (1999-2000) *St John's Journal of Legal Comment* 301, 302.

> them" mentality at the IRS. "Just scratch any taxpayer hard enough and you will find a tax cheat."[18]

However, as it transpired, many of the alleged abuses by IRS agents failed to materialise in subsequent inquiries and court actions. A Senate investigation conducted in 1999 concluded that there was insufficient evidence justify prosecutions against IRS officers.

> Generally, we found no corroborating evidence that the criminal investigations described at the hearing were retaliatory against the specific taxpayer. In addition, we could not independently substantiate that IRS employees had vendettas against these taxpayers. Our investigation did find that decisions to initiate the investigations were reasonably based on the information available to IRS at the time and were documented in agency files when they were made. Further, we found no evidence that IRS employees had acted improperly in obtaining and executing the search warrants.[19]

Criticism of the IRS, in the United States, is not new.[20] May 2013, saw the acting IRS Commissioner, Steve Miller resign amid allegations that IRS officers were targeting conservative political groups, particularly member of the 'Tea Party' causing President Obama to state: 'Americans have a right to be angry about it, and I am angry about it.'[21] President Obama announced the appointment of White House budget official David Werfel as the next acting IRS Commissioner.

8.3.1 The *Internal Revenue Service Restructuring and Reform Act 1998*

The *Reform Act*[22] heralded a number of major changes including the establishing of organizational units serving particular groups of taxpayers with similar needs and the creation of the IRS Oversight Board within the Treasury Department.[23] It shifted the burden of proof with respect to a factual issue in any court proceeding from the taxpayer to the IRS, provided the taxpayer first introduced credible evidence with respect to the factual issue and satisfied four conditions.[24] The *Reform Act* prohibited 'financial status' audits[25] and prohibited IRS employees from contacting anyone other than the taxpayer with respect to a tax liability without first providing the taxpayer reasonable notice.[26] The *Reform Act* importantly

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18 Hearings before the Committee of Finance United States Senate, on 105th Congress, Second Session on HR 2676, January 28, 29 and February 5, 11, and 25 1998. Prepared Statement by Robert S Schriebman, 385. The Committee had conducted hearings in September 1997, and January/February 1998.

19 United States, General Accounting Office, Report to the Chairman, Committee on Finance, Senate, 'Tax Administration: Investigation of Allegations of Taxpayer Abuse and Employee Misconduct' (1999) reprinted in *Tax Notes Today* 90-13 (Tax Analysts Document Number 2000 – 11630).

20 See House of Representatives Report N 82-2518 (1953) known as the 'King Report'.

21 Associated Press, 'Obama Says He Didn't 'know anything' About Probe into IRS Targeting' *FoxNews* 16 May 2013 <http://www.foxnews.com/politics/2013/05/16/obama-to-meet-with-treasury-officials-over-irs-scandal/>.

22 The *Reform Act* was also referred to as the *Third Taxpayers' Bill of Rights*.

23 *Internal Restructuring and Reform Act 1998, § 1101* amending *IRC § 7802.*

24 Ibid *§3001(a)* adding *IRC § 7491*.

25 Ibid *§3412* adding *IRC § 7602(d).*

26 *IRC* §7602(c).

extended via section 7525 of the Internal Revenue Code (IRC), the attorney-client privilege to communications between taxpayers and tax practitioners authorised to practice before the Service.[27] The thesis will concentrate on the extension of the common law client legal privilege to taxpayers via section 7525.

8.3.2 The 'turf wars' result in Congress enacting a highly compromised and flawed tax practitioner-client privilege

The politics behind the new IRC section 7525, involved both the 'turf war' between tax attorneys and accountants over tax work and the unacceptably aggressive behaviour by IRS officials.[28] Tax work traditionally had been performed by lawyers however; accounting firms had grown their tax practice at the expense of tax lawyers. Lawyers retaliated making a complaint against Arthur Andersen for the unauthorised practice of law;[29] a similar complaint was also made against Deliotte & Touche.[30] The lawyers' complaint was grounded in the ethical policies of the Model Rules of Professional Responsibility,[31] the accounting profession responded citing their statutory authority to write tax opinions and litigate in the Tax Court.[32] The Texas Supreme Court's Committee on the Unauthorized Practice of Law, after questioning the parties, chose not to pursue the complaint further.

The American Institute of Certified Public Accountants' (AICPA) Michael Mares testifying before the National Commission for Restructuring the IRS argued that financially sensitive information required the protection of privilege.

> Taxpayers expect privacy and confidentiality in discussing tax matters with their advisers. As a matter of public policy, a taxpayer has the right to expect that if the tax adviser selected is authorized to practice before the I.R.S., all information the adviser has regarding the taxpayer's tax matters will be accorded the same protection of privacy, regardless of the specific professional classification of the advisor.[33]

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27 IRC *§7525*. This thesis will concern itself with *§*7525.

28 For a fuller discussion of the politics behind the tax practitioners' privilege, see Alyson Petroni, 'Unpacking the Accountant-Client Privilege under I.R.C. Section 7525' (1998-9) 18 *Virginia Tax Review* 843, 847.

29 See Sheryl Stratton, 'Unauthorized Practice Complaint against Arthur Andersen Dismissed' (August 17, 1998) *Tax Notes* 765.

30 Ibid 767: 'the inquiry naming Deloitte is said to have made a simple, nonspecific allegation that the firm is engaged in the unauthorized practice of law.'

31 American Bar Association, *Model Rules of Professional Conduct.* (February 2013) <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html>.

32 United States, Treasury Department Circular 230 (Rev 8-2011) Catalog No 1658R *Regulations Governing Practice before the Internal Revenue Service* (12 June 2014) <http://www.irs.gov/pub/irs-pdf/pcir230.pdf> Authorises attorneys, certified public accountants, enrolled agents and enrolled actuaries to practice before the IRS. Practice includes providing tax advice; preparing tax returns; writing tax opinions; corresponding with the IRS; appearing before the Office of Appeals of the IRS; and litigating in the Tax Court.

33 Hearings before the Committee of Finance United States Senate, 105th Congress, Second Session, H.R.2676, January 28, 29 and February 5, 11, and 25 1998, 312.

In their testimony before the Committee: Treasury; the Department of Justice and the Federal Bureau of Investigation, all opposed the enactment of the privilege.[34] The IRS shared their concerns, adding 'that it could cause more audits to be thrown into the court system and more summonses to be issued.'[35] IRS counsel Deborah Butler stated: 'seeking information will be done earlier in the process, either through discovery or through third-party summonses when the Service is told that the taxpayer's business purpose is privileged.'[36]

Congress faced with such opposing views, enacted in the words of Rice, a highly compromised privilege.

> The tax practitioner privilege is the product of pressure from accounting firms that have long desired an accountant/client privilege so that they can take over the tax work that is currently being performed by lawyers. That pressure, however, ultimately proved to be unsuccessful because of considerable counterpressure from the legal profession. The 'half-loaf' privilege that was negotiated is, in reality no loaf at all. Because the tax practitioner privilege is not absolute, it will not be able to achieve the client candor that it was designed to encourage.[37]

Rice[38] argued that accountants should have waited for the courts to extend the full protection of the attorney-client privilege to tax practitioners in accordance with Article V, Rule 501 of the Federal Rules of Evidence.[39] Article 5 leaves the development of privilege rules to the judiciary under 'the principles of the common law as they may be interpreted …in the light of reason and experience.' Alternatively, Rice argued, Congress could have addressed the entire privilege landscape through a comprehensive revision to Article V of the Evidence Code. Accountants may have been left waiting a long time, before the Courts decided to change their view and recognise a federal accountant-client privilege and Congress has on a number of occasions baulked at revising Article V.[40]

8.3.3 Section 7525 compared to client legal privilege

The *Reform Act* 1998 added section 7525 titled '*Confidentiality Privileges Relating to Taxpayer Communications'* to the IRC.

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between

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34 Sheryl Stratton, 'Accountant-Client Privilege Proposal Sliced and Diced' (June 1, 1998) *Tax Notes* 1097, 1097 citing Treasury Associate Tax Legislative Counsel Christopher S Rizek.

35 Ibid 1098, citing Deborah A Butler, IRS Assistant Chief Counsel (Field Service).

36 Ibid 1101, Deborah A Butler, IRS Assistant Chief Counsel (Field Service).

37 Paul R Rice, 'The Tax Practitioner Privilege: a Sheep in Wolf's Clothing' (1998) 80 (5) *Tax Notes* 617, 617.

38 Ibid 618.

39 United States, Federal Rules of Evidence, Article V. Privileges. Rule 501. Privileges General (2014) <http://federalevidence.com/rules-of-evidence>.

40 See Edward J Imwinkelreid, 'Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary' (2006-07) 58 *Alabama Law Review* 4.

> a taxpayer and any federally authorised tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.[41]

The tax practitioner-client privilege is based on the common law attorney-client privilege; the provision does not modify or expand the existing attorney-client privilege, it extends it (with three significant exceptions) to federally authorised tax practitioners (these practitioners will be referred to as Certified Public Accountants - CPAs). The designation of the privilege as the tax practitioner-client privilege is inappropriate - the privilege is for the protection of the client and not the CPA.

The three significant limitations to section 7525 are: first, it can only be asserted by a CPA authorised to practice before the IRS and must relate to federal tax matters.[42] Second, it may only be asserted in noncriminal tax matters before the IRS and only in noncriminal tax proceeding brought by or against the United States.[43] And third, the privilege does not apply to any written communication by tax practitioners or other representatives of a corporation, in connection with the promotion of the direct or indirect participation of such a corporation in any tax shelter.[44] Communications regarding tax return preparation remain unprivileged as was the case in the prior law.[45]

Clarity and predictability are the essential hallmarks of an effective privilege. Unfortunately, neither is evident in section 7525. Section 7525, as noted by John Gergacz, with its many exceptions, is far from absolute.

> However, unlike the privilege, the protective scope of § 7525 is severely restricted. Although a taxpayer may structure tax adviser communications within the requirements of § 7525, they may not be protected because of unknowable circumstances that may arise in the future. Thus, the confidentiality promise of § 7525 should not be overvalued. Although § 7525 may act as a post-communication shield, it cannot be relied upon at the actual time of the communications due to its restrictions.[46]

8.3.4 Applying the common law attorney-client privilege to section 7525

Section 7525 extends the common law attorney-client privilege for communications with CPAs therefore the court must 'look to the attorney-client privilege to inform its

41 IRC § 7525(a)(1) (2006).

42 Tax advice from a foreign tax advisor would not be privileged, nor would tax advice on foreign, state or local taxes, regardless of who provided the advice. See United States Senate Report No 105-174, 105th Congress 2d Session, 70 (1998).

43 IRC §7525(a)(2)(A)-(B) (2006).

44 IRC §7525(b) (2006). Tax Shelters are defined in § 6662(d)(2)(C)(iii). See Dan L Mendleson and Donald L Herskovitz, 'The New CPA- Client Confidentiality Privilege' (1998) 29 (10) *Tax Adviser* 676, 677: 'A last minute amendment added Sec 7525(b) to prevent the confidentiality privilege from applying to certain written communications regarding corporate tax shelters.'

45 See *Couch v United States*, 409 US 322, 335-6 (1973) (Powell J) '…there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.'

46 John Gergacz, 'Using the Attorney-Client Privilege as a guide for Interpreting I.R.C. § 7525' (2005-06) 6 *Huston Business & Tax Law Journal* 240, 247.

interpretation of the taxpayer-federally authorized tax practitioner privilege.'[47] The common law attorney-client privilege provides the frame of reference against which section 7525 tax may be developed.

> Because the scope of the tax practitioner-client privilege depends on the scope of the common law protections of confidential attorney-client communications, we must look to the body of common law interpreting the attorney-client privilege to interpret, the § 7525 privilege.[48]

Section 7525 being based on common law attorney-client privilege must also be construed narrowly,[49] to avoid impeding the court's search for truth. The party seeking to invoke the privilege has the burden of establishing all of the essential elements of the privilege.

The section 7525 privilege does not arise automatically, it must be asserted by the taxpayer, or their CPA on their behalf.[50] Circular 230 defines 'tax advice' in terms of practice before the IRS; focusing therefore upon the interaction between the practitioner and the IRS rather than on communication between the practitioner and the client. The CPA is often involved in providing both 'business' and 'tax advice' with the two often intermingling; again the resolution to this issue lies common law. The courts have struggled to distinguish between 'business advice' and 'legal advice', the line between two is often blurred. The courts have sought to divine the 'primary' purpose of the communication, if the primary purpose is to provide legal advice in reference to a business matter and disclosure of the communications would reveal that legal advice, privilege applies.[51]

8.3.5 Section 7525 pitted against IRS powers

An IRS summons[52] is subject to client legal privilege, and once the privilege has been established, the IRS has the burden of showing that the privilege was defeated by an exception such as the crime-fraud exception.

Congress has granted the IRS broad inquisitorial powers to investigate *possible* violations the tax laws, and the courts have upheld those powers.[53] IRS investigations are not limited to cases where there is probable cause; the purpose of the *Code* is not to accuse but to

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47 *Doe v KPMG, LLP*, 325 F Supp 2d 746, 752[3] (ND Tex, 2004) (Sanders J).

48 *United States v BDO Seidman*, 337 F 3d 802, 810[13 - 14] (7th Cir, 2003) (Ripple J).

49 See *Valero Energy Corp v United States*, 569 F 3d 626, 630[4]-[6] (7th Cir, 2009) (Evans J): 'This circumscribed reading of the tax practitioner-client privilege is in sync with our general take on privileges, which we construe narrowly because they are in derogation of the search for truth.'

50 See Internal Revenue Manual, '25.5.5.4.3[B] Privileged Communications and Summons.'

51 See *In re Ford Motor Company*, 110 F 3d 954, 966[19] (3d Cir, 1997) (Becker J): 'The documents do not contain merely factual material nor do they detail mere business decisions. …At all events, disclosure of the documents would reveal that legal advice.'

52 *United States Code*, Title 26, § 7602.

53 See *United States v Bisceglia*, 95 S Ct 915, 918[1] (1975*)* (Burger CJ): 'Thus, § 7601 give the Internal Revenue Service a broad mandate to investigate and audit 'persons who *may be* liable' for taxes and §7602 provides the power to 'examine any books, papers, records, or other data which may be relevant …'

investigate. Nor need a summons name the taxpayer under investigation, the IRS have the power to issue 'John Doe' summons.[54] Once a summons is challenged then the court has the role of scrutinising the summons to determine if it has been issued for a legitimate purpose and is not meant 'to harass the taxpayer or put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.'[55]

Section 7525 makes no mention of the 'work product' of the accountant,[56] though the original House of Representative's version of the *Bill* would have applied the same common law protections as the attorney-client privilege.[57] The work product doctrine prevents an adversary from benefiting from the efforts of an opponent. It protects materials that are assembled or prepared in anticipation of litigation, unless the adversary can demonstrate that the documents are *indispensable* and there are no other means of obtaining them. The doctrine protects the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative in the litigation.[58]

Section 7525 privilege protects communications between the taxpayer and their CPA in anticipation of civil litigation; communications connected to tax advice, tax planning and opinion letters. The IRS has demonstrated a *voluntary* restraint in accessing accountant work papers via its Internal Revenue Manual rule 4024.[59] Such work papers can include: records of interview of witnesses; notes on particular documents and notes or research on litigation strategy. A voluntary restraint by the IRS falls far short of the work product doctrine applicable to the attorney-client relationship.

8.3.6 Waiver of tax accrual work papers and section 7525

The waiving of privilege, even inadvertently, is a very real issue for section 7525. The limitation that the 'tax advice' privilege applies only in relation to IRS interactions compounds the problems with waiver; as the privilege may be waived in the process of complying with financial statement disclosure requirements, or disclosure of the 'tax advice'

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54 *United States v Bisceglia,* 95 S Ct 915, 920[4] (1975) (Burger CJ) discussing section 7601: 'Plainly, this language is inconsistent with an interpretation that would limit the issuance of summons to investigations which have already focused on a particular return, a particular named person or a particular transaction.'

55 *United States v Bisceglia,* 95 S Ct 915, 919[2] (1975) (Burger CJ).

56 *Doe v Wachovia Corporation,* 268 F Supp 2d 627, 637[6] (WDN C, 2003) (Thornburg J): 'Section7525 does not protect work product, and nothing in the statute suggests that these nonlawyer practitioners are entitled to privilege *when they are doing other than lawyers' work* …' (emphasis in original) (citations omitted).

57 See Theodore A Sinars, 'Code Sec. 7525 Privilege – Whither goest Thou' (2009-10) 11 *Journal of Tax Practice & Procedure* 21, 25.

58 *Federal Rules of Civil Procedure* 26(b)(3)(B).

59 Internal Revenue Manual 4024 contains special procedures that must be followed before an examiner may summon an accountant workpapers.

to third parties such as banks, leasing companies or sureties. In *Textron*[60] the Court concluded that any attorney-client privilege or tax practitioner privilege that attached under section 7525 was waived when Textron provided its tax accrual work papers to an independent auditor. However, the disclosure to the auditor did not waive the attorney's work product privilege because there was no likelihood that the independent auditor was a conduit to the adversary; the disclosure to the auditor, does not substantially increase the opportunity for potential adversaries, (the IRS in this case) to obtain the information.[61] The IRS appealed, and the Court of Appeal, Opinion en Banc presented by Boudin J[62] vacated the decision and held that that the attorney work product doctrine did not shield tax accrual work papers from IRS summons. Textron's work papers were prepared to support financial filings and gain auditor approval; the compulsion of the securities laws and auditing requirements assure that they will be carefully prepared, even though not protected.[63]

This Court of Appeal, three-two split decision, attracted much controversy in the tax community.[64] A number of practitioner bodies had presented 'amici' arguments to the Appeal Court for the protection of tax accrual work papers, as noted by Torreulla J in his dissenting judgment; this decision could lead to lawyers providing *oral* rather than written advice.

> …as argued to us by amici, the Chamber of Commerce of the United States and the Association of Corporate Counsel, if attorneys who identify good faith questions and uncertainties in their clients' tax return know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid putting it in writing, thus diminishing the quality of representation.[65]

The concern is that the majority's new rule will have ramifications that will affect the form and detail of documents that the attorney prepare when seeking to convince auditors of the soundness of a corporation's reserves.[66] The decision has been criticised from both sides, on the one hand it is deemed to create uncertainty in relation to the waiver of work product

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60 *United States v Textron*, 507 F Supp 2d 138, (DRI, 2007).

61 Ibid 153[19] (D.R.I. 2007) (Torres J) noted that under the 'American Institute of Certified Public Accountants, Code of Professional Conduct Section 301 *Confidential Client Information*, the audit firms had a professional obligation 'not [to] disclos[e] any confidential client information without the specific consent of the client.'

62 Lynch Chief Judge and Howard J concurred with Boudin J, while Torruella J and Lipez J dissented.

63 *United States v Textron*, 577 F 3d 21, 31-32 (1st Cir, 2009): *Accounting for Uncertainty in Income Taxes, an Interpretation of FASB Statement No 109* requires entities that prepare their financial statements in accordance with US generally accepted accounting standards to record a reserve for uncertain tax positions.

64 See for example Kathryn Keneally and Charles Rettig, 'The IRS Takes a Controversial Position on Uncertain Tax Positions' (2010) 12 *Journal of Tax Practice & Procedure* 15.

65 *United States v Textron*, 577 F 3d 21, 36-37 (1st Cir, 2009).

66 Ibid 37.

protection, and other hand it is criticised as inappropriately favouring privilege over transparency.[67] Textron as a corporation faced a common dilemma:

> Corporations face difficult choices as auditors and lawyers strive to carry out their separate and sometimes conflicting responsibilities in the post-Sarbanes world. Corporations whose independent auditors request disclosure of information ordinarily protected by attorney-client privilege or by the attorney work product privilege must decide whether to disclose the information and risk waiving applicable privileges and protections or to withhold such information and risk receiving a qualified audit opinion or even a disclaimer of opinion.[68]

8.3.7 Section 7525 - limited to federal tax-related litigation with the IRS

As noted the legislation created three significant limitations to the operation of section 7525. Second, the section can only be invoked against the IRS access provisions; it does not apply to other regulatory bodies and their powers to access or to compel information from taxpayers. Therefore, when the Securities and Exchange Commission conducts an investigation the 'tax advice' materials would not be privileged and would indeed be subject to discovery.

Limiting the privilege to tax-related litigation before a 'Federal Court' also causes concern, as once 'protected communications' are deemed to have been waived, even when disclosed in the context of another type of federal proceeding or proceedings in another court, they are waived for all purposes.[69] Furthermore, the privilege does not apply to state tax issues, thus if 'tax advice' is disclosed in a hearing before a State Court, it will be become part of the public record and the IRS can subsequently access that advice. Given that state taxing authorities share information with the IRS,[70] the privilege can be circumvented by obtaining the privileged information from those state authorities or other federal regulatory agencies, with which the IRS has information sharing agreements.

8.3.8 Section 7525 - restricted to noncriminal tax matters

Section 7525 clearly states that the privilege 'may not be asserted' in criminal investigations. The CPA is not authorised to practice criminal law therefore confining the privilege to noncriminal tax matters on its face seems logical. The IRS has the discretion to decide when

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67 See Claudine V Pease-Wingenter, 'The Application of the Attorney-Client Privilege in Tax Accrual Workpapers: the Real Legacy of United States v Textron' (2008) 8 *Houston Business and Tax Law Journal* 337.

68 Ricardo Colón, 'Caution: Disclosures of Attorney Work Product to Independent Auditors May Waive the Privilege' (2006) 52 *Loyola Law Review* 115, 116.

69 See *Re Sealed Case*, 877 F 2d 976 (DC Cir, 1989) where the Tax Court followed the rule of the District of Columbia Circuit that once the privilege is waived for one purpose, even if in the context of an unrelated proceeding or investigation, it is waived for all purposes.

70 IRC 26 USC §6103. Confidentiality and Disclosure of Returns and Return information; (d) Disclosure to State tax officials and State local law enforcement agencies; and (h) Disclosure to certain federal officers and employees for purpose of tax administration, etc. See also *McQueen v United States* 5 F Supp 2d 473, 487 (SD Tex, 1998): allowing the disclosure of federal return information to the Department of Justice to help the IRS obtain search warrants.

and whether a case is to be tried as a civil action, or is to be referred to the Department of Justice as a criminal action (or to special agents for criminal investigations). Cases may commence as a civil action but then be progressed to a criminal action and the tax practitioner will not necessarily be able to pinpoint when a matter has 'crossed the line' from civil to criminal.

The AICPA Tax Division advice to CPA's is that when they become aware that a current or former client could be exposed to allegations of fraud or other criminal misconduct, the CPA should cease their own investigations and advise the taxpayer to consult with an attorney before the taxpayer takes any action. The CPA should be aware that any communication between the CPA and the client could be subject to an investigative summons or grand jury subpoena.[71]

> In these circumstances what Congress hath giveth, it hath retroactively taketh away. We do not believe that there are any reported cases on this scenario as yet but this is how the statute reads. Thus, in cases of "eggshell audits"[72] nonattorney representatives must be extremely careful in choosing what is in the best interest of their clients for representation purposes.[73]

In *United States v BDO Seidman, LLP,*[74] the government successfully argued that the crime/fraud exception should apply to section 7525; the advice given was alleged to be in furtherance of civil tax fraud. The IRS was only required to present sufficient evidence to 'give colour to the charge' that the communication was made in furtherance of a crime or fraud by showing 'some foundation in fact.'[75]

8.3.9 Section 7525 - tax shelter exception

Congress made a last minute, hasty decision to remove the protection of section 7525 in the context of corporate tax shelters. This limitation has caused the most controversy. Initially, it led to taxpayers arguing that the limitation does not apply to advice given to 'individuals' engaged in tax shelters.[76] However this loophole was closed in 2004,[77] when section 7525(b)

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71 American Institute of Certified Public Accountants, Tax Division '*Client Criminal Matters and the CPA: Practice Guide'* (January 2011) 10.

72 Ibid 11: 'An "eggshell audit" is a civil examination in which the taxpayer has previously engaged in conduct, such as errors on a past return or the failure to file a return …which if known by the field agent, might result in criminal investigation. These examinations are fraught with complications for the taxpayer and the practitioner (in other words, they are "walking on eggshells') as they balance cooperating with the field agent in order to avoid a criminal referral and remaining silent to protect the taxpayer from self-incrimination or consenting to a search.'

73 Theodore A Sinars, above n 58, 24.

74 *United States v BDO Seidman*, 492 F 3d 806 (7th Cir, 2007).

75 Ibid 820 (Ripple J).

76 See for example *United States v BDO Seidman*, 225 F Supp 2d 1651 (7th Cir, 2002). See Angela Ahern, 'Note: Are Tax Shelters Clients' Identities Protected by Section 7525 Privilege or Left Out in the Cold? *United States v BDO Seidman'* (2003-4) 57 *Tax Lawyer* 779, 788: 'Congress explicitly chose to exclude corporations, but not individuals, from the section7525 privilege in connection with tax shelters' (citations excluded).

was expanded so as to deny privilege status to any communication with any 'person' in connection with the promotion of direct or indirect participation in any tax shelter.

A 'tax shelter' is defined as any entity, investment, plan, or arrangement which has a *significant purpose* of avoiding or evading federal income tax,[78] thus it applies a lesser test than the usual dominant purpose test. The exception applies only to written communications. In *BDO Seidman*[79] the Court stated that *oral* communications between a practitioner and client remain within the general rule of privilege; and that the written communications must relate to the direct or indirect participation in a tax shelter as defined in the legislation.

The section's use of the word 'promotion' has also created controversy. The Conference Report on the 1998 legislation sought to clarify the meaning by stating that 'the promotion of tax shelters [is not a] part of the routine relationship between a tax practitioner and a client,' and should not 'adversely affect such routine relationships.'[80] However, how broadly the courts define 'promotion' will impact on the privilege. In *Countryside*[81] the Court held that that tax advice given as part of a close and routine relationship was not promotion and therefore survived the tax shelter exception. In *Valero*[82] the court employed a broad definition of promotion; one that encompassed advice given by a taxpayer's 'long–time advisor.'[83] The taxpayer in *Valero* attempted to confine the tax shelter exception to mass marketed or pre-packaged products. The Court did not agree stating 'the language is broad and encompasses any plan or arrangement whose significant purpose is to avoid or evade federal taxes.'[84]

The IRS's main tactic to halt potentially abusive tax shelters is to require the registering of shelters and the disclosure of the sale and/or promotion of tax shelters.[85] IRC sections 6111 and 6112 require promoters to keep customer lists, copies of all promotional materials and opinion letters. Therefore, as noted in *BDO Seidman* the client can have very little expectation of confidentiality.

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77 *American Jobs Creation Act 2004*, Pub L No 108-357, enacted October 2004, broadened the scope of the limitation in section 7525(b) to (A) 'any person'.

78 Section 6663(d)(2)(C)(iii) *Internal Revenue Code 1986,* as amended by the *Taxpayers Relief Act 1996* 2 Pub L No 104-108, Stat 1452.

79 *United States v BDO Seidman,* 492 F 3d 802 (7th Cir, 2003).

80 House of Representatives Report No 105-199 at 269 (1998) cited in *Valero Energy Corp v US,* 569 F 3d 626, 634[18] (7th Cir, 2009) (Evans J).

81 *Countryside Ltd Partnership v Commissioner of Internal Revenue,* 132 Tax Court 347, 353-4 (2009).

82 *Valero Energy Corp v United States,* 569 F 3d 626, 632 (7th Cir, 2009) (Evans J).

83 Ibid 634[19].

84 Ibid 632[14-15] (Evans J).

85 See Donald L Korb, "Shelters, Schemes, and Abusive Transactions: Why Today's Thoughtful U.S. Tax Advisors Should Tell Their Clients to "Just Say No" 851 *PLI/Tax* (2008) 859, 863.

> Congress has determined that tax shelters are subject to special scrutiny, and anyone who organizes or sells an interest in tax shelters is required, pursuant to I.R.C. § 6112, to maintain a list identifying each person to whom such an interest was sold. This list-keeping provision precludes the Does from establishing an *expectation of confidentiality* in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege.[86]

Nor are lists of clients kept by a third party such as a Bank, protected from disclosure to the IRS.[87] The IRS has aggressively attacked accounting firms with administrative summons to hand over the names of clients purchasing tax shelter products.[88]

8.3.10 Status quo: no privilege for tax return preparation

Congress stated that 'information that is communicated to an attorney for inclusion in a tax return is not privileged because it is communicated for the purpose of disclosure.'[89] The transmittal of the information to the IRS operates as a waiver of the privilege.[90] The tax practitioner bears the onerous burden of proving that each document and communication was not intended to be divulged to the IRS and was in fact 'legal' advice and not 'accounting or business' advice. It is also important to note that a significant portion of tax shelter information will end up on tax returns and therefore will not be protected.

The courts have allowed client legal privilege for communications that have taken place during return preparation, but did not form part of the return or were not divulged on the return.

> There can, of course be no question that the giving of tax advice and the preparation of tax returns …are basically matters sufficiently within the professional competence of an attorney to make them prima facie subject to the attorney-client privilege.[91]

The Court in *Schlegel* distinguished between documents forming part of the tax return and 'other communications' between the attorney and the client, where the decision is left to the attorney, as to whether the information should be disclosed to the IRS.

> …aside from the information incorporated in the income tax return which was sent to the government, the oral conversations between the defendant and his attorney regarding preparations of the return and any written materials prepared by the defendant solely for the purpose of delivery to his attorney for the preparation of his return are within privilege[92]

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86 *United States v BDO Seidman,* 337 F 3d 802, 812[23] (7th Cir, 2003) (Ripple J).

87 *Doe v Wachovia Corporation,* 268 F Supp 2d 627, (WDNC, 2003) (Thornburg J).

88 See *United States v BDO Seidman,* 337 F 3d 802, (7th Cir, 2003); *United States v KPMG, LLP* 316 F Supp 2d 30, (DDC, 2004); and *United States v Arthur Anderson,* (2003) WL 21956404.

89 House of Representatives, 'Conference Report No. 105-599, 105th Congress, 2d Session 267' (1998).

90 See *United States v Frederick,* 188 F 3d 496, 501[10] (7th Cir, 1999) (Posner CJ).

91 *Colton v United States,* 306 F 2d 633, 637[4] (1962) (Lumbard CJ).

92 *United States v Schlegel,* 312 F Supp 177,179-80[4] (1970) (Urbom J).

The judgment of Posner CJ in *Frederick*[93] was the first to reference section 7525, even though the communications in question occurred before the statute went into effect. Posner concluded that the tax practitioner privilege was no broader than the attorney-client privilege.

> Nothing in the new statute suggests that these nonlawyer practitioners are entitled to privilege when they are doing other than lawyers' work; and so the statute would not change our analysis even if it were applicable in this case, which it is not[94]

In this case Fredericks was qualified as both an accountant and a lawyer, preparing tax returns for his clients and representing them in IRS investigations. Posner held that 'a dual-purpose document – a document prepared for use in preparing tax returns *and* for use in litigation – is not privileged'[95] under the attorney-client privilege or the tax practitioner privilege.

Kaplan characterises this expansion of the scope of 'accountants work' by the courts as effectively 'eviscerating' the scope of section 7525, concluding that as 'currently interpreted, section 7525 offers little comfort to taxpayers.'[96]

> …the preparation of a tax return is hardly the equivalent of the rote transposition of numbers from a workpaper onto a tax return. On the contrary, tax return preparation considerations require a deep understanding of tax law, an understanding of how that law may permit or require the company to characterize a particular transaction, how the IRS may respond to that characterization, and how a court might rule in the event of a dispute.[97]

8.3.11 Legislative incursions into client legal privilege post 9/11

Post 9/11 the United States law on client legal privilege has been affected by a number of both legislative incursions and other regulator rules that have diminished the operation of the privilege.

> In particular the events of September 11, 2001, the corporate scandals involving such mammoth corporations as Enron and WorldCom have shaken our confidence in the federal government's ability to protect the welfare of its citizens.[98]

The *USA Patriot Act (2001)* and the *Sarbanes-Oxley Act (2002)* have impacted on the relationship between corporations and their legal counsel. The Securities and Exchange Commission rules promulgated under section 307 of the *Sarbanes-Oxley Act* set the minimum standards of professional conduct for attorneys. The Corporate Sentencing Guidelines provided for lenient treatment in return for self-reporting of securities law

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93 *United States v Frederick*, 188 F 3d 496, (7th Cir, 1999).

94 Ibid 502[16[-[17] (Posner CJ).

95 *United States v Frederick*, 188 F 3d 496, 501[13] (7th Cir, 1999) (Posner CJ).

96 *United States v Schlegel*, 312 F Supp 177,179-80[4] (1970) 209.

97 Steven Z Kaplan, 'Privilege meets Transparency: Can we Practice Safe Tax?' (2006) 58 *The Tax Executive* 206, 207.

98 Tom D Snyder, 'A Requiem for Client confidentiality? An Examination of Recent Foreign and Domestic Events and their Impact on the Attorney-Client Privilege' (2004) 50 *Loyola Law Review* 439, 440.

violation; both have the potential to seriously erode the attorney-client privilege and the work-product doctrine. The Department of Justice's sentencing guidelines have heavily incentivized prosecuted corporations to waive any existing privilege, further undermining the operation of the privilege.[99]

8.3.12 Lessons from the United States *Reform Act*

The extending of the common law client legal privilege to tax practitioners provided the potential to create a more competitive environment for tax advice and more certainty and predictability for taxpayers. However in a survey of tax practitioners[100] over 80% did not agree that the privilege had 'enhanced' their ability to 'grow' their practices by 'levelling the playing field'.[101] The main problems with the US legislation are to be found in the three key limitations embedded in the legislation; problems that arose due to the 'turf wars' between accountants and lawyers, and the perceived aggressive behaviour of IRS agents. The Australian Tax Office (ATO) has not experienced the level of criticism directed at the IRS, nor the number of inquiries into their operations. However, the turf wars between the professions in Australia are clearly visible. The ALRC in their report on privilege[102] received submissions from both professions arguing their respective cases. Hugh Macken, the then president of the Australian Law Society, warned the ALRC that extending privilege to registered tax advisors could spell the end of privilege.

> …extending client legal privilege to registered tax advisers – even in a limited way with regard only to tax advice – erodes the concept, so much so "that you might as well not have it at all." [103]

The first limitation in the US legislation confining the privilege to actions involving the IRS severely limits the scope of the protection. Confidential communications need to be protected against access by *any opposing party* or regulatory body. Such protection would diminish the possibility of the IRS gaining access to confidential communications via other regulatory bodies with which they have information sharing agreements.

Second, there is no need to confine the privilege to civil litigation. Accountants are not authorised to practise criminal law. The emphasis needs to be on the protection of confidential communications from the date of their creation and beyond; therefore should the Revenue authority choose to move from a civil to a criminal prosecution, the previously

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99 Ibid, for a fuller discussion of the issues - see also Paul D Paton, 'Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post Enron era' (2006) 84 *Canadian Bar Review* 533.

100 See Christine C Bauman and Anna C Fowler, 'The Expanded Taxpayer Confidentiality Privilege: A Review and Assessment of IRC Section 7525' (2002) 14 *Advances in Taxation* 37: The authors surveyed over 1097 practitioners and educators.

101 Ibid 50.

102 Australian Law Reform Commission, above n 6.

103 Ibid 6.235.

deemed confidential communications should remain privileged. Once a case becomes a criminal case then a lawyer will take over the running of the case, and should the assistance of the tax accountant continue to be required by the lawyer and/or client, then the common law rules for third party communications connected to anticipated or ongoing litigation, known in the US, as the '*Kovel* rule'[104] would apply to protect communications between the parties. Friendly J used the analogy of the client speaking a foreign language with employment of accounting terminology.

> Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.[105]

The third limitation excluding advice connected with the promotion of, or participation in, tax shelters is redundant. A survey of more than 1,000 tax practitioners found that 43% agreed that the 'scope of the privilege is greatly limited' by the tax shelter exception and would apply infrequently.[106] Furthermore, the crime/fraud exception developed through the common law[107] serves to exclude from the protection of client legal privilege, any communication brought into existence for the purpose of requesting or providing legal advice in furtherance of a crime or fraud. This same rule has been applied to section 7525.[108]

In reference to tax return preparation the common law has evolved a number of rules governing the protection of confidential communications. These common law rules on waiver are sufficient to ensure that documents forwarded to the Revenue will be deemed to have waived their confidential status. Any source documents or documents that form part of the calculations of items in the return are similarly waived. It is important that the Revenue authority have full and free access to this information, so that it can fulfil its statutory duty to collect the taxes due. It is the *confidential* communications between the taxpayer and tax practitioner - the thought processes and advice of the tax practitioner that require the protection of privilege.

8.4 New Zealand: client legal privilege and the tax laws

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104 See *United States v Kovel*, 296 F 2d 918 (2d Cir, 1961).

105 Ibid 922[1-3].

106 See Jared T Meier, 'Understanding the Statutory Tax Practitioner Privilege: What is Tax Shelter "Promotion"?' (2011) 78 *University of Chicago Law Review* 671, 672.

107 See *United States v Zolin*, 491 US 554, 563 (1989).

108 See *United States v BDO Seidman*, 337 F 3d 802, 806 (7th Cir, 2003).

Prior to the 1958 amendments to the *Inland Revenue Department Act 1974*[109] the legislation was silent on the operation of client legal privilege in the tax arena. The judgment in *Commissioner of Inland Revenue v West-Walker*[110] was therefore a pivotal moment. The Court made a number of important pronouncements: first, it emphasised that the privilege belongs to the client and unless waived by the client, the legal advisor must uphold it. Second, it stressed that the privilege prohibits from disclosure communications: oral, written, mechanical or electronically recorded, between a client and legal adviser for the purpose of obtaining legal assistance, when the legal adviser is acting in his/her professional capacity. Third, although the privilege exists at common law, it can be abrogated by statute; but only by a statute which does so by clear words or necessary implication. And fourth and importantly, the Court held that the privilege does not depend for its application upon the existence of judicial or quasi-judicial proceedings - it exists on the grounds of public policy, therefore it applies in the administrative context of tax law.

> That a principle so long and so well-established, and so essential in the interests of justice, should be abrogated by the legislature in an indirect way is not to be expected. …I am of the opinion therefore, that the Commissioner of Taxes must exercise the powers given by the section subject to the common law privilege protecting communications with solicitors which has been established in order that legal advice may be safely and effectively obtained. I do not think that the statutory provision overrides the common law rule.[111]

As a result of the case, the New Zealand Parliament partially codified client legal privilege for the lawyer-client relationship, via section 20(1) of the *Taxation Administration Act 1994 (TAA).* Section 20 of the *TAA*, is a *partial* codification of the law because it is silent on the application of the litigation privilege. The New Zealand Law Society in their submission[112] to the *Commissioner of Inland Revenue's Search Powers*[113] argued that the Commissioner needs to acknowledge that documents or communications that are privileged at common law[114] but outside the scope of section 20 will also be protected from disclosure under the section 16 *TAA* access powers. Third party communications are firmly entrenched in the common law litigation privilege, making it difficult to argue that section 20 of *TAA* implicitly abrogates third party communications from litigation privilege.

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109 The *Inland Revenue Department Act 1974* was the forerunner to the *Taxation Administration Act 1994.*

110 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.

111 Ibid 208 (Fair J).

112 New Zealand Law Society, Submission to Inland Revenue Department, Draft Operational Statement ED 0152: *The Commissioner of Inland Revenue's Search Powers,* 24 June 2013. <http://www.lawsociety.org.nz/__data/assets/pdf_file/0006/68865/l-IRD-ED0152-The-Commissioner-of-Inland-Revenues-Search-Powers-24-6-13.pdf>.

113 Inland Revenue Department 'Draft Operational Statement ED 0152: The Commissioner of Inland Revenue's Search Powers' 30 April 2013.

114 See *Guardian Royal Exchange Assurance v Stuart* [1985] 1 NZLR 596. Furthermore, the New Zealand *Evidence Code* sections 55 and 57 codify litigation privilege.

The courts have made a number of decisions about the application of client legal privilege: first, they have applied the *dominant purpose*[115] test for communications related to the seeking or giving of legal advice. Second, in *Miller v Commissioner of Inland Revenue* [116] the High Court held that client legal privilege extends to communications between a salaried solicitor and their employer client, so long as the solicitor is acting in the capacity of a legal advisor. And third, in *Commissioners of Customs and Excise v Ingram*[117] Lord Goddard CJ distinguished client legal privilege from the privilege against self-incrimination; finding that there is no privilege against self-incrimination in relation to the Commissioner's information-gathering powers, as such a privilege would 'stultify the whole purpose' of the revenue's information-gathering powers.

8.4.1 The Law Commission's waxing and waning on client legal privilege

The Law Commission conducted a number of inquiries into the operation of client legal privilege in general and its operation in the tax arena specifically. Law Commission Report 55, 'Evidence' was published in 1999, following the report of the Commission of Inquiry into *Certain Matters Relating to Taxation* (known as the 'Wine-Box Inquiry') published in 1997. The Wine-Box Inquiry had recorded various difficulties that arose with privilege in the course of that Inquiry.[118] The "difficulties" included: blanket claims for client legal privilege; tactics to delay proceedings with inappropriate claims for privilege or generally frustrating the Inland Revenue Department (IRD) officers in their duties.[119] The conclusions of the Inquiry were drastic and should they have been accepted by the Government would have ended the role of privilege in tax matters.

> The view of the Commission is that privilege should be abolished. Such a course will undoubtedly have many opponents and extensive consultation will need to be held with the Law Commission, the IRD and professional and commercial bodies during the course of which the various arguments for and against the abolition can be examined and considered in detail.[120]

8.4.2 New Zealand's right to non-disclosure

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115 See *Guardian Royal Exchange Assurance v Stuart* [1985] 1 NZLR 596. See also *Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2004*: Explanatory Note, 10 states 'the non-disclosure right will apply to communications between a tax advisor and a client for the *dominant purpose* of providing or receiving tax advice' (emphasis added).

116 (1997) 18 NZTC 13,001.

117 [1948] 1 ALL ER 927. See *Singh v Commissioner of Inland Revenue* (1996) 17 NZTC 12,471.

118 See Adrian Sawyer, 'New Zealand: the Wine-Box Inquiry: Never Mind the Findings but what about the Recommendations?' (1998) 52 *Bulletin for International Fiscal Documentation* 58. And Adrian Sawyer, 'The Wine-Box Inquiry in New Zealand: Round Two – A 'Gutted Report' but no 'Knockout Punch' (2001) 55 *Bulletin for International Fiscal Documentation* 114.

119 New Zealand, Commission of Inquiry into Certain Matters Relating to Taxation, *Report of the Wine-Box Inquiry* (Department of Internal Affairs, (NZ, 1997) <http://trove.nla.gov.au/work/24375426?q=+&versionId=29435656> 3.1.61.

120 Ibid 3.1.61: 3.1.63.

The New Zealand legislation came into effect in June 2005,[121] the right of non-disclosure is contained in sections 20B to 20G of the *TAA 1994.* The right of non-disclosure belongs to the taxpayer, and must be claimed by the taxpayer or the taxpayer's tax practitioner, on their behalf. The non-disclosure right does not affect the operation of client legal privilege,[122] nor does it affect communications between a legal advisor and a third party for the purpose of preparing for existing or contemplated litigation. The right of non-disclosure applies only to confidential tax advice documents it does not apply to *oral* advice. The right of non-disclosure is completely distinct from the common law client legal privilege,[123] retaining for Parliament complete control over the development of the non-disclosure right.

The aim of the legislation was set out by the Honourable Dr Michael Cullen, the then Minister for Revenue, in the first reading of the Bill.

> Although it will be subject to a number of exclusions, it will place the status of communications from non-legal tax advisors, such as accountants, closer to that of tax advice provided by lawyers, who do not have to disclose their advice to the Inland Revenue Department. Advisors such as accountants should also be able to give candid and independent advice to their clients without having to disclose it to the Inland Revenue. The benefit of enabling this to occur is that legal and accounting advice will be treated in a similar way. In both cases such advice can promote voluntary compliance with the tax system and thus help to reduce compliance and administrative costs.[124]

Thus the legislation had the modest aim of bringing the respective statuses of the legal and accounting professions closer together and providing a degree of consistency with the treatment of taxpayers. It was not intended to provide the same protection as client legal privilege rather it had the 'intention of creating a similar yet separate privilege.'[125] The Commentary on the *Bill* provided the following explanation of why the legislature considered it inappropriate to extend the common law client legal privilege to accountants:

> Inland Revenue needs to be able to access sufficient information to be able to administer the Revenue Acts properly. Much relevant and useful documentation about taxpayers' affairs is held by accountants because of the role that they play in preparing financial statements and tax returns. They are the largest single group of tax agents and advisors and are responsible for a very large percentage of tax returns filed with Inland Revenue. Because of this central role in the administration of the tax system, a blanket extension of legal professional privilege to accountants is not appropriate.[126]

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121 *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005 No 79 Public Act* (New Zealand) 21 June 2005 inserted Sections 20B to 20G in the *Tax Administration Act 1994.*

122 *Taxation (Base Maintenance and Miscellaneous Provisions Bill 2004)*: Explanatory Note, 2: 'The right of non-disclosure does not affect legal professional privilege.'

123 See *Blakely v Commissioner of Inland Revenue* (2008) 23 NZTC 21,855, 21,869.

124 Honourable Dr Michael Cullen, '*Taxation (Base Maintenance and Miscellaneous Provisions Bill 2004)*: First Reading' (2004) 622 *Hansard* 18,054.

125 Keith Kendall, 'Designing Privilege for the Tax Profession: Comparing the I.R.C. § 7525 with New Zealand's Non-Disclosure Right' (2011) 76 vol X1 *Huston Business and Tax Law Journal* 75, 97.

126 *Taxation (Base Maintenance and Miscellaneous Provisions Bill 2004): Commentary on the Bill,* (Wellington, November 2004) 41.

8.4.3 Tax Advice as defined by the *TAA 1994*

The legislation does not define the term 'tax advice' rather it sets out in section 20B(2) the requirements needed for a *document* to qualify as a 'tax advice document.' A successful claim for non-disclosure for a document is dependent on the document being a 'confidential document' at the time of the 'Information Demand'. The *TAA* does not define 'confidential' however the *Officials Report* by the IRD and Treasury state that the meaning of 'confidential' should be determined in accordance with case law, particularly that relating to client legal privilege.[127] The section refers to books and documents and rather than 'communications'. Section 20B(2) in defining a tax advice document employs the terminology 'for the *main purpose* of instructing a tax advisor'; this may be an unfortunate result of the plain English drafting in the legislation as explained by Sawyer.[128] The courts have consistently used the *dominant* purpose test for client legal privilege.

Section 20B(2)(c) excludes from the definition of tax advice document, a document created for: 'a purpose of committing, or promoting or assisting the committing of an illegal or wrongful act'. The IRD Standard Practice Statement (SPS 05/07)[129] states that an illegal or wrongful act not only includes tax evasion but extends to tax advice provided 'in the course of committing some other illegal or quasi-illegal act, such as a wider act of fraud or some other crime'.[130] As noted by Kendall 'it is not immediately clear where illegality begins and ends in this context.'[131] Furthermore, section 20F(3)(d) specifically excludes from protection advice relating to debt recovery issues, thus ensuring that the IRD's tax collection powers are not impeded by the right of non-disclosure.

The IRD SPS 05/07 provides that once a document's eligibility for protection has been established,[132] the taxpayer must claim protection in compliance with the procedure and timeframe set out in section 20D. The claim must be made on the prescribed form – IR 519

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127 New Zealand Inland Revenue Department and the Treasury, Policy Advice Division, *Taxation (Base Maintenance and Miscellaneous Provisions) Bill – Official' Report to the Finance and Expenditure Committee on Submissions on the Bill* (2005) 119.

128 See Adrian Sawyer, 'New Zealand's Tax Rewrite Program – in Pursuit of the (elusive) Goal of Simplicity' (2007) 4 *British Tax Review* 405.

129 New Zealand Inland Revenue Department, 'Non-Disclosure Right for Tax Advice Documents' – SPS 05/07.
< http://www.ird.govt.nz/technical-tax/standard-practice/general/sps-gnl-0507-nondisc-rights.html>.

130 Ibid.

131 Keith Kendall, 'Prospects for a Tax Advisor' Privilege in Australia (2005) 1(3) *Journal of the Australasian Tax Teacher Association* 9.

132 New Zealand Inland Revenue Department, 'IR 520 -Tax Contextual Information Disclosure' (August 2005) provides guidance on what documents are *not* included in the definition of tax advice documents.

form.[133] Where a claim is made within the requisite timeframe, it is prima facie accepted as being a tax advice document and only ceases to be such if: a District Court or relevant Court or Taxation Review Authority, rules that the document is not so; the taxpayer or advisor withdraws the claim or the approved advisor group informs the Commissioner that the tax advisor does not qualify as a member. A claim that a document is a tax advice document can only be made by the taxpayer, or their authorised tax practitioner, even where a third party notice is concerned. Where the IRD takes issue with a claim, it or the taxpayer can apply to the relevant court or authority for an order to determine the status of the document.

The IRD reasoning is that the Commissioner should have access to the facts, but not to the tax practitioner's opinion of the facts. Nonetheless, much of what is classified as 'tax contextual information' would qualify as privileged information, under client legal privilege. As noted by Coleman and Trombitas, this limitation on the protection afforded by the right of non-disclosure can be significant because 'facts are king' in a dispute and 'many tax disputes are won or lost on the facts.'[134]

The non-disclosure right only protects advice concerning 'the operation and effect of tax laws' in New Zealand, therefore it does not include tax legislation in other jurisdictions, or other non-tax laws in New Zealand. The legislated definition of a 'tax advisor' includes tax practitioners in public practice and in-house professionals who are involved in 'tax advisory or planning work' for their employers. They are required to be members of either the NZICA or the Tax Agents' Institute of New Zealand,[135] and therefore subject to the code of conduct and the disciplinary processes of the approved group.

8.4.4 The courts' narrow interpretation of the ambit of the non-disclosure right

The first case to consider the ambit of the non-disclosure right was *Blakely v Commissioner of Inland Revenue.*[136] Hubble J, hearing the case in the District Court, noted that the legislation was a compromise between competing aims: 'public interest affecting privacy on

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133 The form stipulates the necessary details required for a valid claim. Each part of the document and each attachment or appendix must be considered separately for the purpose of a non-disclosure claim.

134 James Coleman and Eugen Trombitas, 'Disputes with the IRD' (2009) *New Zealand Law Society* 5.

135 The Institute of Chartered Accountants of New Zealand was approved on 30 June 2005, by the then Deputy Commissioner Service Delivery Naomi Ferguson. Naomi Ferguson took up her appointment as Commissioner and Chief Executive of Inland Revenue in July 2012. The Institute of Chartered Accountants of New Zealand joined with the Institute of Chartered Accountants of Australia to form the new Chartered Accountants of Australia and New Zealand, in October 2013, this new body and CPA Australia are recognised as approved bodies under the legislation. Inland Revenue Department SPS 05/07 at para 20 warns in-house advisors of the need to be particularly cautious to distinguish between transactional and advisory material.

136 (2008) 23 NZTC 21,865.

the one hand and the ascertaining of tax liability on the other.'[137] The IRD requested the names of clients of an accounting firm who had received advice in relation to two types of transactions that the Commissioner considered to constitute tax avoidance arrangements. The accountant Mr Blakely, refused to comply with the notice, claiming that to provide the details of clients, would be tantamount to disclosing the content of the tax advice provided; advice which is protected by section 20B of the TAA. The District Court disagreed and found for the Commissioner. Mr Blakeley then appealed the decision to the High Court.[138] Hansen J in the High Court compared the right of non-disclosure to client legal privilege.

> The statutory protection created for tax advice documents is …significantly narrower than the scope of legal professional privilege …Sections 20B – 20G TAA [1994] provide taxpayers with a new but strictly circumscribed right to resist the exercise by the Commissioner of wide ranging information powers.[139]
> The right of non-disclosure …is much more confined than legal professional privilege. Unlike legal professional privilege, it is not a response to public interest considerations. It is …a creature of statute. It protects defined parts of a limited category of written communications.'[140]

Hansen J reasoned that a list of client names could not, by itself, constitute protected tax advice, and that indeed the names were unlikely to be privileged even under client legal privilege.[141]

The initial 2005 non-disclosure right applied to documents at the investigation and dispute phases entered into by, or with the IRD, it did not extend to preventing disclosure of documents during litigation; this defect was subsequently rectified by legislation in 2009.[142] *ANZ National Bank Ltd v Commissioner of Inland Revenue*[143] concerned discovery in court proceedings, prior to the 2009 amendment to the legislation. ANZ argued that tax advice documents should be non-discoverable on the grounds of public interest because disclosure would harm the accountant-client relationship of confidence. The Court of Appeal rejected ANZ's argument and ordered full discovery.

> The ANZ's request for blanket protection is contrary to Parliament's clear legislative intent (in sections 20 and 20B *TAA 1994*) …not to extend privilege to cover accountant's advice. There is not before the Court evidence that the relationship between the ANZ and its accountant tax advisors would be adversely affected unless confidentiality is ordered.[144]

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137 *Commissioner of Inland Revenue v Blakeley* (2008) 23 NZTC 21,681, 21,864.
138 *Blakeley v Commissioner of Inland Revenue* (2008) NZHC 223; 23 NZTC 21,860.
139 (2008) NZHC 223[13].
140 (2008) NZHC 223[18].
141 The Court referenced the Australian case *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 24, 251, 'that the client's identity would be privileged if its disclosure would mean disclosure of the privileged advice.'
142 *Taxation (International Taxation, Life Insurance, and Remedial Matters)* 2009, (NZ) effective October 6th 2009.
143 (2008) 23 NZTC 21,918.
144 Ibid [29].

The ANZ was unsuccessful in its appeal.[145] The Appeal Court found that Commissioner's interest in the tax advice provided by the accountants was not in what the accountant's thought of ANZ's tax position, but in what the advice revealed about the *purpose* of the arrangements and the commerciality of them; therefore the Commissioner was entitled to discovery of the documents.[146] The Court stated that 'tax advice provided by a lawyer may attract legal professional privilege but such advice provided by a non-lawyer, as is the case here, does not.'[147]

The Court of Appeal in *Blakeley* and *ANZ* significantly read down non-disclosure right, applying a narrowly defined the set of circumstances to which the confidentiality applies. In doing so, the Courts are not promoting the stated objectives of the legislation; objectives, that had been clearly emphasised by Cullen in the first reading of the Bill,[148] namely the promotion of voluntary compliance; treating lawyers' and accountants' tax advice in a similar manner and reducing compliance and administrative costs. [149]

8.4.5 The lesson's from New Zealand's statutory right of non-disclosure

New Zealand in creating their statutory right of non-disclosure, sought to avoid the limitations created in the United States by section 7525.[150] First, the New Zealand legislation by not naming any counterparties to whom the right of non-disclosure is limited enables the right to apply against *all* counterparties. This limits the possibility of the IRD circumventing the legislation by accessing information via other regulatory bodies.

Second, the legislation does not explicitly limit the right of non-disclosure to civil proceedings. The common law crime-fraud exception applies to the right of non-disclosure, in the same way as it does to client legal privilege. However, the broadly worded exclusion of tax advice documents, in section 20B(2)(c) is wider than the crime-fraud exception, and has the potential to exclude valuable documents from the non-disclosure right. Kendall argues that there is no need to limit the right to civil proceedings because of the New Zealand practice of employing civil action in tax matters.

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145 *ANZ National Bank Ltd v Commissioner of Inland Revenue* [2009] NZCA 150. (Young, Hamond and O'Regan JJ).

146 Ibid 150[31].

147 Ibid 150[8].

148 Honourable Dr Michael Cullen, '*Taxation (Base Maintenance and Miscellaneous Provisions Bill 2004*: First Reading' (2004) 622 *Hansard* 18,054.

149 See Riaan Geldenhuys and Eugen Trombitas, '*Blakeley v Commissioner of Inland Revenue* and the Non-Disclosure Right: A Decision out of Context' (2008) 14 *New Zealand Journal of Taxation Law and Policy* 303, 311.

150 See Keith Kendall, above n 125, 101.

> The majority of offenses under New Zealand income tax law are pursued as civil offences and prison is almost never sought as a penalty.[151] …It would appear, however, that even in a criminal proceeding, the tax advice document would still be protected by the non-disclosure right, so long as the book or document did not have as a purpose the commission of any illegal act.[152]

Third, the New Zealand legislation makes no mention of the exclusion of 'tax shelters'[153] from the tax advice privilege. However whether tax advice on tax shelters would be caught up by the section 20B(2)(c) catch-all phrase of 'illegal activity' remains an open question, especially given the views expressed by the IRD in their SPS 05/07.[154]

> Unlike tax evasion, tax avoidance is not illegal; rather it 'is often within the letter of the law but against the spirit of the law.' For this reason, it may be viewed as 'wrong', which raises the issue of whether advice regarding tax avoidance arrangements may be seen as promoting or assisting the commission of a 'wrongful act'.[155]

The tax advice privilege is limited to legal practitioners and tax practitioners licensed to practice in New Zealand, and then only in disputes concerning New Zealand's tax law; thus creating in the words of Australia's Reeve J 'a more limited professional privilege.'[156]

New Zealand's creation by legislation of a separate tax practitioner privilege, divorced from the common law, means that any developments or refinements in the common law of client legal privilege will not automatically be reflected in the right of non-disclosure. Therefore, the right of non-disclosure 'runs the risk of case law on this privilege developing separately from legal professional privilege, with the resultant complexity and inefficiency.'[157] The Courts' narrow interpretation of the right of non-disclosure and the Courts' view of the right as 'a creature of statute'[158] compared to client legal privilege being 'a response to public interest considerations,'[159] demonstrates a constricted judicial approach.

8.5 The United Kingdom's *Taxes Management Act* (1970) grants HMRC extensive and intrusive powers.

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151 See Ranjana Gupta, 'How Perceptions of the Tax Evasion as a Crime and Other Offences Mirror the Penalties' (2007) 13 *New Zealand Journal of Tax Law and Policy* 607, 609 cited in Keith Kendall, above n 125.

152 Keith Kendall, above n 125, 103-4 (citations included).

153 New Zealand like Australia does not require promoters to register tax shelters with the Revenue Authority. Both countries have introduced a civil penalties scheme for promoters of tax avoidance arrangement. In New Zealand the *TAA 1994* section 138L governs civil penalties. In Australia the civil penalties for promoters is in Division 290 of Schedule 1 of the *TAA 1953* (Cth). See also Rachel Tooma, 'New Tax Laws to deter Promoters of Tax Exploitation Schemes' (2006) 2 (1) *Journal of the Australasian Tax Teachers Association* 158.

154 New Zealand Inland Revenue Department, 'Non-Disclosure Right for Tax Advice Documents – SPS 05/07' 17(6) *Tax Information Bulletin* 23, 28.

155 Andrew Maples, 'The Non-Disclosure Right in New Zealand: Lessons for Australia?' (2008) 1 *Journal of the Australasian Law Teachers Association* 351, 356 (citation excluded).

156 *Petroulias v Federal Commissioner of Taxation* [2011] ATR 110, 126[54].

157 Andrew J Maples and Robin Woellner, 'Privilege for Accountants' Tax Advice in Australia – Brave New World or House of Straw?' (2010) 25 *Australian Tax Forum* 143, 163.

158 *Blakeley v Commissioner of Inland Revenue* (2008) NZHC 223[18].

159 *Blakeley v Commissioner of Inland Revenue* (2008) 23 NZTC 21,965[18].

Her Majesty's Revenue and Customs (HMRC) agency has been granted extensive and intrusive powers to inspect business records; require information; enter premises; raise assessments; and impose fines. Sections 20 to 20D of the *Taxes Management Act 1970 (TMA)* were extensively amended as a block of provisions by section 57, Schedule 6, of the *Finance Act 1976*. 'These provisions constitute a detailed code regulating to whom, by whom and subject to what threshold requirements, both procedural and substantive, such notices can be given.'[160] The HMRC's 1976 amended powers were held up to scrutiny in the 1980 *Rossminster*[161] case, involving raids by the HMRC on a financial services business and the houses of two tax advisers, under section 20C. The action caused much disquiet in the business community. As Lord Denning noted in granting Rossminster's appeal for judicial review, the HMRC acted with military precision.

> It was a military style operation. It was carried out by officers of the Inland Revenue in their war against tax frauds. Zero hour was fixed for 7 a.m. on Friday, July 13, 1979. Everything was highly secret. The other side must not be forewarned. There was a briefing session beforehand. Some 60 officers or more of the Inland Revenue attended.[162]

The officers did not inform the persons whose premises were searched of the nature of the offences alleged against them, nor did the search warrant contain particulars of the alleged offences. Nevertheless the House of Lords decided (Lord Salmon dissenting)[163] that the warrants were strictly and exactly within the authority of section 20C(1). Lord Salmon, described section 20C as 'an altogether unnecessary power which, in my view, dangerously encroaches on individual liberty.'[164] Lord Browne warned that the section should be construed strictly, as the powers it grants the HMRC are 'very wide and may involve very serious interference with …the liberties of individuals.'[165]

8.5.1 Is client legal privilege abrogated from the *TMA* by necessary implication?

The 1976 *TMA* amendment included the addition of section 20B(8) known as the 'lawyers' privilege'. The section does not oblige a barrister advocate or solicitor to deliver or make available, *without his client's consent*, any document with respect to which a claim to privilege could be maintained. The HMRC following this amendment assumed that it had the

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160 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 585[A] (Blackburn J).

161 *IRC v Rossminster* [1980] AC 952 (MR Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Scarman, Lord Denning, Browne, Goff, Eveleigh, Park and Woolf).

162 Ibid 968. Lord Denning, allowed the Rossminster's appeal for judicial review quashed the warrant, and made the declaration that the revenue officers were not entitled to remove and were bound to deliver up to the applicants all documents and other things found at and taken from the applicants premises and all copies thereof.

163 Ibid (Lord Wilberforce, Viscount Dillhorne, Lord Diplock and Lord Scarman).

164 Ibid 1071.

165 Ibid 977.

ability to obtain from a *taxpayer* any information about that taxpayer's tax liability, provided that that information was *relevant* to the liability and was *reasonably required* by the Inspector. It was the inspector's opinion which mattered and increasingly over the years inspectors were of the opinion that 'information' includes 'advice' obtained by the taxpayer about arrangements being entered into.

The *TMA 1970* section 20(1) made no mention of client legal privilege. It fell to the Court in the 2003 *Grenfell*[166] case to decide whether the privilege had been abrogated by necessary implication. There was no dispute that Grenfell had been completely open about the way that the 'scheme' operated, and that they did not conceal any relevant transactions. Grenfell claimed client legal privilege under section 20B(8) for legal advice received concerning whether the scheme would work. The case was an exercise in 'statutory interpretation in which different courts came to diametrically opposite views.'[167] All five judges involved in the cases in the Divisional Court[168] and the Appeal Court[169] stated that they were satisfied that section 20(1) *abrogated* client legal privilege by necessary implication. Indeed this had been the general consensus amongst tax professionals since the 1976 amendments. Nevertheless, it did create the curious situation that communications in the hands of a lawyer could be protected from disclosure, while the same (or copies of) communications in the hands of the client were not protected from disclosure.[170] All five judges in the House of Lords[171] concluded that client legal privilege as a *fundamental human right* could be overridden only by express words or necessary implication and that it was not a necessary implication from the structure of the *TMA* as a whole, that the privilege was intended to be overridden in respect of a notice under section 20(1). Lord Hoffman stressed that client legal privilege is a single privilege for the benefit of the client, whether the documents are in the client's hands or that of the lawyer.[172]

Judges faced with difficult cases are required make a choice. 'One judge could decide one way and other judge another way without either being obtuse or guilty of intellectual

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166 *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563.

167 John Tiley, 'Professional Privilege and the Tax Man' (2002) *Cambridge Law Journal* 540.

168 [2000] STC 965 (Buxton LJ and Penry-Davey J).

169 [2001] STC 497 (Schiemann, Sedley L.JJ and Blackburne J).

170 *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563, 609[22] 'The irrationality of such a scheme was commented upon by Advocate General Sir Gordon Slynn in *A M & S Europe Ltd v Commissioner of the European Communities* (Case 155/79) [1983] QB 878, 913-14 'If one considers the real purpose of the protection …I can for my part see no justifiable distinction between such documents in the hands of the lawyer and in the hands of the client.'

171 Ibid (Lords Nicholls, Hoffmann, Hope, Hobhouse and Scott).

172 Ibid 614 [37].

dishonesty.'[173] Lord Hoffman in his extra judicial writings has explained the phenomenon in terms of the adversarial nature of trials.

> Normally, however, the House [of Lords] will decide what the law is according to what it thinks is a fair and sensible conclusion and the reasoning in the speeches will support the result in the usual polemical style which judges feel it necessary to adopt in order to persuade their colleagues and the public that no other answer is possible. Such a judgment is bound to carry a certain moral authority and usually it is not politically easy to reverse it by legislation. The only department of government which seems to have no inhibitions in this respect is the Inland Revenue. But in other areas, judicial decisions are fairly immovable.[174]

In *Grenfell* HMRC 'relied on five provisions of the code as demonstrating a general principle that where the LPP was protected a specific provision was included to that effect: with the corollary that there was a general premise that otherwise LPP was not protected.' HMRC's argument was that purpose of section 20B(8) was to eliminate the conflict created by the duty of confidentiality of the lawyer to the client. Lord Hoffmann did not agree, he was of the opinion that the provisions had been enacted to ensure that HMRC was unable to obtain from a client's legal adviser, documents that it was unable to obtain from the client.

HMRC referred to section 20C(4) and contended that: 'if Parliament intended to preserve LPP in general, why did it specifically provide for its preservation in respect of documents in the possession or power of a lawyer?'[175]

> …I do not consider that even cumulatively they come anywhere near giving rise to an implication that LPP was intended to be excluded. In my opinion, the revenue stand or fall by the express references to LPP in sections 20B(8) and 20C(3). If these are consistent with the preservation of LPP for documents in the hands of the taxpayer, the other provisions are no more than makeweights.[176]

Lord Hoffman referred to the House of Commons, Standing Committee debates introducing the 1976 amendments citing Joel Barnett, the then Chief Secretary to the Treasury, that the purpose of the amendments was to preserve the privilege.

> I should make it quite clear …that the purpose of this part of the schedule (referring to the section 20 provisions) is not to require privileged and confidential documents to be handed over to the Inland Revenue. That is certainly not the intention.[177]

HMRC reasoned that it is important for them to have access to the taxpayer's legal advice in those cases in which liability may turn upon the *purpose* with which the taxpayer entered into a series of transactions, particularly in reference to the anti-avoidance provisions. Lord

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173 Lord Leonard Hoffman, 'The Separation of Powers' Combar Lecture 2001, (2002) *Judicial Review* 137, 138.

174 Ibid.

175 *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563, 609[22].

176 Ibid 609[20].

177 Ibid 591[34].

Hoffman did not agree, nor did he consider it necessary to decide whether the legal advice sought by HMRC constituted *relevant* information for the purposes of section 20.

> Apart from the exceptional case in which it appears that the client obtained legal advice for the purpose of enabling himself better to commit a crime (*R v Cox and Railton* (1884) 14 QBD 53) this is not thought a sufficient reason for overriding LPP. The court must infer the purpose from the facts.[178]

Nor did Lord Hoffman accept the HMRC's assertion that the public interest in the collection of the revenue could provide the necessary justification to override the privilege; noting 'that the European Court of Human Rights had said that LPP is a fundamental human right which can be invaded only in exceptional circumstances'.[179] Thus Lord Hoffman and the other four Lords found for *Grenfell,* allowed the appeal and quashed the notice.

8.5.2 *TMA 1970* and the tax practitioner's right of non-disclosure

In *Grenfell* only passing reference was made to the 'accountants' privilege' which been introduced in 1989 following the recommendations of the *Keith Committee;*[180] indeed Lord Hoffman's reasoning was predicated on the assumption that lawyer-client advice was a special category. The *Keith Committee* had noted the intrinsic difficulty and indeed unfairness in affording a different treatment to tax advice given by solicitors, as against precisely the same tax advice given by other tax practitioners. The *Keith Committee* recommended that privilege should be extended to duly appointed tax agents, providing tax advice, and Parliament enacted section 20B(9) - (11) in 1989. The protection for an auditor's work papers was provided for in section 20B(9)(a) while a similarly worded section 20B(9)(b) provides a non-disclosure right for tax practitioners. Lord Hoffman's view in *Grenfell,* was that 'section 20B(9) is a curious provision which appears designed to protect the proprietary interests of the tax accountant in his working papers …It had nothing to do with LPP.'[181]

Following *Grenfell,* the *Finance Act 2008* removed any lingering doubt over privilege for confidential communications with legal advisers by amending section 20B(8) to read: that an information notice does not require *any person* to provide privileged information. This of course does nothing to resolve the quandary caused by sections 20B(9)(a) or (b), given that communications with auditors, or between tax accountant and client are not deemed to be

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178 Ibid 592[38].

179 Ibid 592[39].

180 United Kingdom, *Report of the Committee on Enforcement Powers of the Revenue Department,* (Cmnd 8822 HMSO London, 1983) presided over by Lord Keith of Kinkel.

181 *Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and another* [2003] 1 AC 563, 572-3[19].

'privileged communications', but rather fall under the rubric of confidentiality and the accountant's duty of confidentiality to their clients.

Lord Hoffman's decision in *Grenfell* is not without its critics, Dixon, then a member of the HMRC Solicitor's Office, though acknowledging the power of Lord Hoffman's decision concluded that the:

> …balance struck between candour and privacy by the Keith Committee is doubtless more rational than that superimposed on the TMA regime by *Morgan Grenfell.* However, the unavailability of the ideal position does not of itself justify greatly increasing the range of documents immune from disclosure to the Revenue (by extending the privilege to tax agents). It does not justify increasing the risk of avoidance schemes succeeding for want of relevant evidence.[182]

This is not a conclusion with which the author agrees.

The 2008 amendments to the *TMA* have resulted in an unhelpful increase in the zeal of the HMRC in seeking information from taxpayers and third parties; as evidenced in *Her Majesty's Revenue and Customs v Charman*[183] where the HMRC was unsuccessful in gaining access to documents which had been filed or brought into being as part of divorce ancillary relief proceeding. The public interest in favour of full and frank disclosure by divorcing couples and the parties' duty of confidentiality protects such documents with the cloak of privilege.

8.5.3 Two Court of Appeal decisions in *Three Rivers* create confusion

Two Court of Appeal decisions in the *Three Rivers Cases*[184] narrowed the definition of *'client'* for client legal privilege purposes, and limited the scope of privilege to communications seeking or obtaining advice pertaining to *legal rights and obligations,* causing much trepidation and concern amongst the business community. The Appeal Court restricted the category of employee to be regarded as the 'client' of external lawyers for privilege purposes, noting:

> …information from an employee stands in the same position as information from an independent agent. It may, moreover, be a mere matter of chance whether a solicitor, in a legal advice privilege case, gets his information from an employee or an agent or other third party. It may also be problematical, in some cases to decide whether any given individual is an employee or an agent and undesirable that the presence or absence of privilege should depend upon the answer, [185]

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182 Dennis Dixon, 'Legal Professional Privilege and Advice from Non-Lawyers' (2010) 1 *British Tax Review* 83, 100.

183 [2012] EWHC 1448 (Fam) (29 May 2012).

184 *Three Rivers District Council and Other v Governor and Company of the Bank of England (Disclosure) (No 5)* [2003] EWCA Civ 474; QB 1556*; and Three Rivers District Council and Other v Governor and Company of the Bank of England (Disclosure) (No 4) (Three Rivers No. 4 CA)* [2004] EWCA Civ 218; [2004] QB 916.

185 *Three Rivers District Council and others v Governor and Company of the Bank of England, (No 5)* [2003] EWCA Civ 474; [2003] QB 1556, 1574[18] (Longmore LJ).

The House of Lords in hearing the appeal by the Bank[186] decided that the employee/client point was not an issue in the case before them and Lord Scott decided that he would refrain from expressing a view on the issue.

> First the issue is a difficult one with different views, leading to diametrically opposed conclusions, being eminently arguable. Second, there is a dearth of domestic authority. …Third, whatever views your Lordships may express, and with whatever unanimity, the views will not constitute precedent binding on the lower courts. The guiding precedent on the issue will continue to be the Court of Appeal judgment in *Three Rivers (No 5).*[187]

Lord Scott concluded by stating: '[N]othing that I have said should be construed either as approval or disapproval of the Court of Appeals ruling on the issue in *Three Rivers (No 5).*'[188] All four Lords[189] agreed with Lord Scott and declined to express a view on the issue. The House of Lords noted that the intervening parties on behalf of the legal profession including: the Attorney General; the General Council of the Bar of England and Wales and the Law Society of England and Wales, all expressed concern that the definition of 'client' was overly restrictive.[190]

The House of Lord's decision however, did restore the scope of client legal privilege to all confidential communications between a lawyer and client that are directly related to the professional services of the legal adviser. Lord Scott extended the definition of legal advice to 'advice as to what should prudently and sensibly be done in the relevant legal context.'[191] The Lords were particularly critical of the Appeal Court's acceptance of the argument 'that legal professional privilege is an outgrowth and extension of litigation privilege;'[192] with Lord Carswell stating: '[T]here is no priori reason why legal professional privilege should be regarded as stemming from litigation rather than more generally from the giving of legal advice, or vice versa'.[193] Lord Carswell was also critical of the Appeal Court's doubts on the justification for legal advice privilege;[194] doubts that in his opinion were ill founded. His Lordship cited the written submission by the Law Society justifying legal advice privilege in

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186 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610.

187 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610, 653-654[47].

188 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610, 654[48].

189 Lord Rodgers, Baroness Hale, Lord Carswell and Lord Brown.

190 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610, 645[21] (Lord Scott).

191 Ibid 651[38] (Lord Scott) citing *Balabel v Air India* [1988] Ch 317 (CA), 330 (Taylor LJ).

192 Ibid 668[88] (Lord Carswell).

193 Ibid 669[89].

194 See *Three Rivers District Council and others v Governor and Company of the Bank of England (Disclosure) (No 4) (Three Rivers No. 4 CA)* [2004] EWCA Civ 218; [2004] QB 916 at 930[25]. The case concerned the Bingham Inquiry which was not an *adversarial* procedure therefore, the case concentrated on the legal advice leg of privilege.

drawing up a will, and more generally in family law matters and added his own observation that lawyers advising on tax matters would along with their clients be 'very dismayed to think that information they have made available to their lawyers might not remain confidential'.[195] Lord Rodger also referred to the importance of privilege in tax advice.

> A client's financial or tax position, or the financial or tax position of members of his family, may well be relevant to the way in which he asks his solicitor to structure a property transaction …People have a legitimate interest in keeping such matters private.[196]

The Appeal Court's restriction of the definition of 'client' in the corporate setting has not been influential in subsequent English cases and the fears raised by the decision have not materialised. It is interesting to note that in the Australian context the definition of 'client' has itself diminished in importance given the decision in *Pratt*[197] that legal advice privilege extends to third party communications for the dominant purpose of enabling the obtaining and receiving of legal advice.

8.5.4 *Prudential*: the functional/status question

The *Prudential*[198] case involved the HMRC seeking access to confidential tax advice provided by a multi-national accounting firm[199] - advice that had it been provided by a tax lawyer would have been protected by client legal privilege. A *TMA* section 20 notice had been served on Prudential requiring the production of documents related to a tax avoidance scheme that they had entered into. At first instance, Charles J reluctantly decided in favour of the Commissioner, though acknowledging the strength of Prudential's claim.[200] Charles J felt bound by the precedent espoused Dillon LJ in *Wilden Pump*[201] wherein the Court of Appeal had rejected the functional approach to client legal privilege in favour of an approach that attached greater significance to the professional status of the adviser. Prudential appealed. The Court of Appeal unanimously dismissed the appeal,[202] noting that even if they were not bound by *Wilden Pump*, they would refuse the appeal on two grounds: first, the need to for

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195 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48 (11 November 2004); [2005] 1 AC 610, 677[105] (Lord Carswell).

196 *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, 656[55] *(*Lord Rodger*).*

197 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, discussed in Chapter five of the thesis.

198 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 (23 January 2013).

199 Pricewaterhouse Coopers LLP.

200 *R (on application of Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin); [2010] STC 161[70].

201 *Wilden Pump Engineering Co v Fusfeld* [1985] FSR 159 (CA).

202 *R (on application of Prudential Plc) v Special Commissioner of Income Tax* [2010] EWCA Civ 1094; [2010] STC 2802, the lead judgment was given by Lloyd LJ with whom Stanley Burton LJ and Mummery LJ concurred.

legal certainty, especially where the rule for client legal privilege is an absolute rule and second, a concern not to interfere with Parliament's intentions.

Prudential appealed to the Supreme Court,[203] where they advanced the argument that legal advice privilege exists for the benefit of the client and that there is no principled basis for restricting legal advice to advice coming from a lawyer as opposed to a tax accountant. Prudential argued that because of changed social circumstances, namely the practice that legal advice was provided by professionals other than lawyers; it was simply a matter of logic that if the subject matter of the communication meets the description of legal advice then it should attract client legal privilege. The counterclaim by the HMRC was that there existed an embedded assumption within the common law that client legal privilege only applies to advice from lawyers[204] and therefore any change was a policy matter best left to Parliament.

8.5.5 Lord Sumption's 'functional' argument for a tax accountant client privilege

The opening paragraph of Lord Sumption's dissenting decision in *Prudential*[205] proposed an alternative formulation for deciding when client legal privilege applies.

> In my opinion the law is that legal professional privilege attaches to any communication between a client and his legal adviser which is made (i) for the purpose of enabling the adviser to give or the client to receive legal advice, (ii) in the course of a professional relationship, and (iii) in the exercise by the adviser of a profession which has as an ordinary part of its function the giving of skilled legal advice on the subject in question. The privilege is a substantive right of the client, whose availability depends on the character of the advice which he is seeking and the circumstances in which it is given. It does not depend on the adviser's status, provided that the advice is given in a professional context.[206]

Lord Sumption commenced from the position that English law had always taken a functional approach towards client legal privilege and he noted that the expansion of the categories of lawyers (in-house salaried legal advisers and foreign lawyers) whose advice may attract privilege 'has been the natural consequence of the functional character of the test combined with the law's pragmatic willingness to recognise the changing patterns of professional life.'[207] He added that to a substantial degree the status of the adviser 'has not been a relevant

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203 *R (on application of Prudential Plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 (23 January 2013).

204 See *Slade v Tucker* (1880) 14 Ch D 824, 828 Sir George Jessel MR referred to legal advice privilege: 'confined to communications between a client and his legal adviser, that is between solicitor and client or barrister and client'.

205 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 31-47 (23 January 2013). Lord Clarke agreed with Lord Sumption. While Lord Neuberger, Lord Hope, Lord Walker, Lord Mance and Lord Reed, formed the majority decision, in favour of the HMRC. The Institute of Chartered Accountants in England and Wales had intervened in the Court of Appeal proceedings, arguing that the tax advice provided by accountants is the same as tax advice provided by lawyers. The Law Society and the Bar Council also intervened, arguing against an extension of privilege to non-lawyers.

206 Ibid 31[114] (emphasis added).

207 Ibid 36[122].

consideration for 250 years.'[208] Lord Sumption categorised the arguments against extending privilege to tax accountants as consisting of three distinct points.

> The first is a classic "floodgates" argument, namely that it would involve an extension of scope of the privilege which would considerably increase the number of persons whose advice qualified. The second argument is that recognising the privilege attaching to accountants' advice would directly conflict with statute. The third is that fixing the boundaries of the privilege for legal advice from non-lawyers and determining the conditions on which it was exercisable were inherently legislative processes.[209]

Lord Sumption then cogently responded to all three arguments. In response to the 'policy' argument Lord Sumption argued that the recognition of privilege was not an issue of social, economic or other issue of macro-policy which are classically the domain of parliament, and that client legal privilege is a creature of the common law, 'therefore the majority were stepping outside the judicial role by inappropriately restricting the principled application of the common law for reasons of policy.'[210] In agreeing with Lord Sumption, Lord Clarke added the remark that: 'some accountants may be able to give more specialised legal advice than some solicitors.'[211]

All the Lords in this case agreed that Lord Sumption had presented the case for legal advice privilege for chartered accountants in a clear and principled manner.

> There is no doubt that the argument for allowing this appeal is a strong one, at least in terms of principle, as anyone reading Lord Sumption's judgment can appreciate. …it is hard to see why, as a matter of pure logic, that privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field.[212]

However, the majority was of the view that such an extension would lead to uncertainties and unknown consequences in the operation of the law (the 'floodgates' argument) and having decided that this was a 'policy' issue it would be best left to Parliament. Is this another example, as noted by Lord Devlin, of courts protesting that it is for Parliament to change the law?

> The strongest argument for judicial activism is not that it is the best method of law reform but that, as things stand, it is in a large area of law the only method. The judges who made the common law must not abrogate altogether their responsibility for keeping it abreast of the times. Of course they can protest, as they frequently do that it is for Parliament to change the law. But these protestations ring hollow when Parliament has said, as loudly as total silence can say it, that it intends to do nothing at all.[213]

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208 Ibid 36[122].
209 Ibid 39[127].
210 Ibid 42[131].
211 Ibid 48[142]
212 Ibid 12[39] (Lord Neuberger).
213 Patrick Arthur Devlin, 'Judges and Lawmakers' (1976) 39(1) *Modern Law Review* 1, 12.

Lord Neuberger, in presenting the majority decision in *Prudential* noted that Parliament had legislated in the field and declined to extend the privilege to accountants; choosing to treat lawyers as the only profession whose advice attracts privilege. He reasoned that an extension of legal advice privilege 'to professions other than lawyers may only be appropriate on a conditional or limited basis.'[214] His Lordship referred to the 1983 recommendations of the *Keith Committee*[215] to extend the privilege to tax advice by expert accountants, with two qualifications.

> The first was that the privilege should be overridden where it 'would …unreasonably impede the ascertainment of facts necessary to the proper determination of the taxpayer' tax liabilities, being facts not otherwise capable of ascertainment" (para 26.6.5). The second was that LAP (legal advice privilege) should not extend to advice given by in-house professional advisers (para 26.6.13). It would be open to Parliament to impose such types of restriction or condition: it would not realistically be open to the courts.[216]

Lord Hope, in agreeing with the majority decision, referred to the ALRC's report[217] on privilege and its support for the New Zealand model of creating a separate 'tax advice privilege' rather than simply extending the common law client legal privilege to accountants giving tax advice.[218]

Andrews characterised the dissentients in *Prudential* as 'surprisingly activist' and found their conception of the 'common law difficult to reconcile with the customary opinion that judicial changes should not occur in respect of technical topics where the legislature has already refrained from further intervention' and that 'neither dissentient regarded the modern pattern of legislation and failed legislative proposals as a constitutional veto on the development of the common law in this field.'[219] As noted by Kirby J in his extra-judicial writing, the label of 'judicial activist' is often used by traditionalists to denounce those judges who exercise their lawmaking powers in their decision making.

> …we ask not whether there is judicial activism. Of course there is. It is the very essence of the brilliant system of law that the ancient English judges developed and bequeathed to us. The real debate is, and should be, when faced with inescapable choice, whether judges should take this step or that. Whether they should prefer this meaning to the other. Whether they should accept this interpretation and reject the opposite. In short, the debate about judicial activism is largely a

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214 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 16[65] (23 January 2013).

215 United Kingdom, above n 180.

216 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 18[65] (23 January 2013).

217 Australian Law Reform Commission, above n 6.

218 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 at 19[88] (23 January 2013).

219 Neil Andrews, 'Consultation with Non-Lawyers is not Privileged at Common Law' (2013) 72(2) *Cambridge Law Journal* 284, 286.

> phoney debate. Judicial activism has become a code phrase for denunciation and demonisation, mainly by people of a conservative social and professional disposition.[220]

The government indicated immediately following *Prudential* that it did not intend to review the law on legal professional privilege.[221]

8.5.6 Disclosure of Tax Avoidance Schemes (DOTAS)

The regime known as DOTAS was introduced by the *Finance Act 2004*,[222] this legislation requires promoters of arrangements to disclose the details of arrangements to the HMRC. The requirement is not restricted to mass-marketed schemes. The legislation in section 314 provides protection for client legal privilege in relation to confidential communications with lawyers,[223] but not for tax accountants. The legislation has similarities with the tax shelter disclosure requirement of the United States.[224] The *Finance Act 2013* provided the HMRC with stronger powers to force tax avoidance scheme members to provide information to tax scheme promoters and for the promoters (except legal advisors) in turn to pass information about clients involved in the scheme, onto HMRC.

8.5.7 The lessons from the United Kingdom's limited right of non-disclosure

The amended section 20B(8) of *TMA 1970* protects from disclosure to HMRC privileged communications between a lawyer and client, whether the documents are in the hands of the lawyer or client. Whereas section 20B(9)(a) and (b) provides for a more limited protection of confidential communications in the hands of the auditor or tax practitioner; the HMRC can access the information in the hands of the client. Uncertainty is also created by a lack of clarity as to what documents are protected or whether confidential *oral* communications come under the protection.

The *Keith Committee*[225] in 1983 commenced its deliberations, on the basis that legal advice privilege was limited to lawyer-client communications, and concluded that a limited statutory privilege should be extended to advice on tax law by tax experts, such as tax accountants.[226] This led to the 1989 addition of sections 20b(9)(a) and (b) into the *TMA Act 1970*. To date this is the only action taken by the English Parliament to 'level the playing field' between tax accountants and tax lawyers, but this is a very limited protection. The Office of Fair Trading

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220 Michael D Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 578.

221 See Joan Loughrey, above n 16, 74.

222 *Finance Act 2004* (UK) sections 306-19.

223 Ibid section 314 and the *Tax Avoidance Schemes (Promoters, Prescribed Circumstances and Information) (Amendment) Regulation 2004* (SI 2004/2613) reg 2.

224 In the United States, legislation requiring promoters of tax shelters to register with the IRS and to maintain lists of tax shelter investors have existed in some form since 1984. See *IRC* § 6112.

225 United Kingdom, above n 180.

226 Ibid 26.65 and 26.6.13.

in its 2001 report on *Competition in Professions* expressed the view that on efficiency and competition grounds the privilege could be extended to other professionals providing legal advice.

> …where advice could equally be provided by members of another profession, there is a case on efficiency and competition grounds for either *a reduction in the scope of the privilege of legal adviser or a limited extension of privilege to others* in order to remove the distortion of competition that favours the lawyer. The example raised in the course of the review is tax advice, where accountants feel themselves at a disadvantage to lawyers.' [227]

Parliament did not heed this recommendation; it did however, as noted by Lord Neuberger[228] statutorily provide for privilege for communications with patent attorneys;[229] trade mark agents;[230] and licensed conveyancers.[231]

Prior to the House of Lords decision in *Grenfell*[232] tax practitioners took some comfort from section 20B(9)(b), believing that it created some protection for their confidential communications; especially given the similarity of the wording with section 20B(8), protecting lawyer-client communications. Both sections protected confidential communications so long as those communications were in the hands of the professional providing the advice. The 2008[233] amendment of the *TMA* which extended the protection of confidential lawyer-client communications to documents in the hands of the client, dispelled that illusion of a level playing field.

The House of Commons Public Bill Committee in their deliberations on the *Finance Act 2008* discussed extending legal advice privilege to tax advice given by accountants via an amendment to the *TMA*[234] it did not however carry through with such an amendment. The House did amend the *TMA* to protect lawyer-client communications:

> Information giving tax advice is protected in law for auditors, tax advisers or lawyers while it is in the hands of those professionals. Information in the hands of the taxpayer is protected in law only if it is advice given by a lawyer.[235]

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227 Office of Fair Trading, *Competition in Professions*, (March, 2001) QFT38, 11-12[47] (emphasis added).

228 See *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 11-12[35-36] (23 January 2013).

229 *Copyright, Designs and Patents Act* (1988) section 280.

230 *Trade Mark Act* (1994) section 87.

231 *The Administration of Justice Act* (1985) section 33.

232 *Regina (Morgan Grenfell &Co Ltd v Special Commissioner of Income Tax and another* [2003] 1 AC 563.

233 *Finance Act (2008)* Schedule 36, paragraph 21.

234 United Kingdom, Parliamentary Debates *House of Commons*, 10 June 2008. <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080610/debindx/80610-x.htm> cols 606-608.

235 Ibid col 609 (Jane Kennedy).

The Committee members had received submissions from the Institute of Chartered Accountants in England and Wales (ICAEW) and other accounting bodies, arguing that the legislation unnecessarily favoured tax lawyers.

> The issue represents a long-standing complaint and this is an opportunity to do something about it. …Particularly in the context of tax advice, the line between the two professions is relatively narrow. What is accountancy advice and what is simple tax advice is not always clear. There is some crossover between what the two professions do and there appears to be an advantage to the legal profession. That raises a concern because, by and large, it is big businesses and wealthier private clients who go to the legal profession for tax advice;
> …Were we to start afresh in this field it would be very difficult – and I speak as a lawyer – to justify the way that works at the moment.[236]

The response by the Finance Secretary revealed her ambivalence about the legislation and the pressure exerted by the Ministry of Justice to preserve the privilege for lawyers.

> The hon. Member for South-West Hertfordshire will know from the tone that I have taken in replying to him on the question of legal privilege that my heart is not entirely in the position, but the protection for legal privilege is very important. If we extended it as widely as suggested in the conversations that I have had with those making representations, I would be concerned that we would extend it too widely, but perhaps the hon. Gentleman will allow me to give the issue further thought.[237]

The disparity in protection provided for lawyer-client communications compared to accountant-client communication is not new, nor is it an issue that is likely to wane. In the 2013 case of *Prudential* the ICAEW again argued for the protection of confidential tax accountant-client communications and two of the five Lords[238] agreed with the case they put forward. Lord Sumption's dissenting opinion in that case provided a very sanguine argument for a taxpayer privilege.

8.6 The lessons for Australia

Australia can examine the introduction and operation of taxpayer privilege in similar common law jurisdictions with a view to identifying issues and possible weakness in the clarity and certainty of laws, and consider possible improvements were it to introduce its own taxpayer privilege. In all four jurisdictions, the Revenue bodies have extensive and intrusive powers and the courts have given a wide interpretation of those powers, in order to enable the Revenue authority to collect the taxes due and to protect the revenue. The tension is between the taxpayer's interest in having candid communication with their chosen tax practitioner protected from disclosure and the Revenue's interest in fully informing itself as to the facts and circumstances of transactions it wishes to tax. The main restriction on those powers has been the common law operation of client legal privilege. The United States and New Zealand

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236 Ibid cols 606-607 (Mr. Gauke).
237 Ibid col 610 (Jane Kennedy).
238 Lord Sumption and Lord Clarke.

have sought to 'level the playing field' with limited success in their legislated taxpayer privilege.

The experience in the United States resulted in a 'less than certain' privilege for the clients of CPAs. The politics surrounding the creation of the legislation, the turf wars[239] and the alleged heavy handed tactics of the IRS, will need to be taken into account, in Australia. The three key limitations to the United States tax-practitioner privilege have resulted in a very limited privilege for taxpayers. New Zealand in creating their statutory right of non-disclosure, sought to avoid those limitations, but created its own problems with legislation that is over prescriptive in its operation.

A key difference between the United States and New Zealand legislation is that the United States legislation explicitly adopted the common law client legal privilege as its starting point, while the New Zealand rule is completely separated from the common law. This is an issue that will need to be considered by Australia, as it involves a significant and conscious policy choice, resulting in substantially differing legal impacts; the view of this thesis is that the adoption of the common law of client legal privilege leads to greater certainty and protection for taxpayers.

The United Kingdom has legislated a very circumscribed non-disclosure right for auditors and tax accountants,[240] and the House of Lords declined to extend client legal privilege to tax accountants, therefore in this regard it is more akin to the current position in Australia.

The next chapter will analyse the ALRC proposal to extend a 'New Zealand style' privilege to taxpayers, and will adopt a reform methodology to argue for a taxpayer privilege that provides clarity and certainty in its scope and operation.

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239 See Lord, Salina, 'Lawyers vs Accountants: Should Accountants be able to Claim Privilege?'(22 May 2013) *Financial Services, Litigation and Dispute Resolution,* Australia: 'In both the United Kingdom and Australia, a professional grudge match is beginning to emerge which as the potential to become as divisive as a Manchester United v Liverpool football match.'

240 The United Kingdom legislation is limited to section 20B(90-(11) of the *Taxes Management Act 1970* which protects documents which are the property of the advisor and are in the hands of the advisor.

CHAPTER NINE

The legal reform required for creating a taxpayer privilege for Australia

9.1 Introduction

This thesis began, with chapter two conducting a historical analysis of the common law of client legal privilege, tracing it to the reign of Elizabeth 1 in the 16th century. During this period the legal profession was the only profession providing legal advice, therefore appropriate for the period, the recognition was restricted to the legal profession. The rationale for client legal privilege is not easily discerned in the early case law, because the decisions were rarely reported, and when they were, judges rarely gave clear reasons for the decision. The initial theory that the privilege belonged to the barrister and served to protect their professional honour, may have been influenced by Roman law. However, by the 17th century the common law view was that the privilege served the interests of the client. *Minet v Morgan*[1] in 1873 settled the law, both in terms of client's right to claim the privilege to resist disclosure of confidential communications and that privilege applied to both communications involved in seeking legal 'advice' and communications in pursuit of 'litigation'. The privilege in both instances was *absolute* and *permanent,* and could only be removed by via waiver by the client, or by the crime-fraud exception.

Chapter two commenced the debate between what has been referred to as the 'traditional view' that judges do not make law rather, 'the judge merely *finds* pre-existing law; then he *declares* what he finds.'[2] This declaratory theory of judicial decision making was espoused by the famous 17th century judge, Sir Matthew Hale, amongst others. The opposing view, espoused by Jeremy Bentham, and others, is the 'judicial creativity' or 'positivist theory' namely, that judges do make the law; thus the common law existed *because it* was the product of judicial will - laid down by judges, not discovered. This debate on the role of judges in law-making, is returned to on a number of occasions in the thesis, notably in Chapter eight wherein Neil Andrews[3] characterised the dissenting Lords in the *Prudential*[4] case as 'surprisingly activist.' Andrews also found their conception of the 'common law difficult to reconcile with the customary opinion'. Kirby J in his extra judicial writings has

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1 (1873) 8LR Ch 361.

2 Beryl Harold Levy, 'Realist Jurisprudence and Prospective Overruling' (1960) 109(1) *University of Pennsylvania Law Review* 1, 1 (emphasis in original).

3 Neil Andrews, 'Consultation with Non-Lawyers is not Privileged at Common Law' (2013) 72(2) *Cambridge Law Journal* 284, 286.

4 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 18[65] (23 January 2013) Lord Clarke and Lord Sumption were the dissenting judges.

noted that the label of 'judicial activist' is often used by traditionalists to denounce those judges who exercise their lawmaking powers in their decision making.[5] Lord Sumption in his dissenting judgment in *Prudential,* argued that the court has a duty to declare the law as it sees it and that in *Prudential,* there was a need to protect confidential communications between a taxpayer and their tax accountant, in the same manner, as the privilege protects client-lawyer communications.

Chapter three focused on the utilitarian rationale for client legal privilege. The chapter analysed the impact of 17th century British philosopher John Locke's[6] theory of individualism - that everyone serves the common good by pursuing their self-interest. The utilitarian theory emphasises that the test for client legal privilege is functional; it aims to protect confidential communications between parties involved in a confidential relationship hence, the doctrine places the emphasis on the function served by the adviser, rather than on the 'qualification' of adviser.

Wigmore's 1920's treatise on privilege[7] is based on the empirical assumption that privilege *causes* the client to engage in full and frank communications with the legal adviser, and that such conduct would not occur *but for* the existence of privilege. However, empirical evidence is limited and it is questionable whether empirical evidence alone can provide answers to the behavioural impact of the privilege on clients and professionals alike. Wigmore's formula for privilege is still referred to by the courts.[8] The utilitarian rationale for privilege presents a privilege that is permanent and absolute, providing certainty for clients in their confidential communications.

Chapter four examines Locke's theory of individualism within a theory of rights, with its emphasis on the privacy and autonomy of individuals to enable their free self-expression. The two theories, utilitarian and humanistic, are not mutually exclusive and can be combined to gain a more complete understanding of privilege.[9] The chapter also refers to the *Constitutional Guarantees* and/or *Bill of Rights* roles in protecting privacy rights. Australia is the only one of the four jurisdictions examined that does not have a national Bill of Rights.

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5 Michael D Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 578.

6 John Locke, *The Second Treatise of Government* (Salus Populi Suprema Lex Esto, first published 1690, 1764 ed).

7 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada* (Little, Brown, 2nd ed, 1923).

8 See in *Jaffe v Redmond*, 518 US 1 (1996) and *Swindler & Berlin v United States*, 524 US 399 (1998).

9 See Note, 'Developments in the Law: Privileged Communications' (1985) 98 *Harvard Law Review* 1450.

However, the High Court has in a number of cases,[10] interpreted the *Australian Constitution* by implication, as providing a number of human rights for Australian citizens.

Chapter five highlighted the key cases in the Australian common law development of client legal privilege. Essentially there were two main controversies regarding the operation of privilege. First, whether privilege as a rule of evidence is restricted to the curial context, or whether as a substantive rule it applies to all processes where there is compulsion to disclose information. This question was resolved by the High Court in the 1983 case of *Baker v Campbell,*[11] wherein the majority found that in the absence of a clear expression of legislative intent to the contrary, search warrants cannot authorise the violation of client legal privilege, therefore client legal privilege is not restricted to the curial context.

The second issue concerned the appropriate 'test of purpose' to be applied: the *one* of the purposes test; the *sole* purpose test[12] or as was decided by the High Court in 1999 in *Esso Australian Resources Ltd v Commissioner of Taxation*[13] the *dominant* purpose test. In reference to both issues the High Court was influenced by decisions of other common law jurisdictions; namely New Zealand in reference to the first issue,[14] and a series of judgments in common law jurisdictions in reference to the second issue.[15]

The Australian courts had mainly adopted a utilitarian rationale for privilege to apply. However, the 2002 High Court decision in *Daniels*[16] firmly established a right-based rationale for privilege, holding that client legal privilege is a right that cannot be easily displaced, except by *clear words or necessary implication*. In the legislative context, client legal privilege involving Federal Court matters was codified by the *Evidence Act 1995* (Cth). The legislation followed on from the recommendations of the Australian Law Reform Commission (ALRC) and implemented a *dominant* purpose test for the adducing of evidence before Federal Courts.

Chapter six notes that the self-assessment system of taxation which was progressively introduced in Australia from 1986, relies on voluntary compliance and taxpayer honesty in preparing tax returns**,** with the understanding that the information disclosed will be treated with utmost confidentiality. It imposes the burden upon the taxpayer to make accurate

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10 See eg, *Communist Party v Commonwealth* (1951) 83 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; and *Mabo v State of Queensland [No 2]* (1999) 175 CLR 1.

11 (1983) 153 CLR 52.

12 *Grant v Downs* (1976) 135 CLR 657.

13 (1999) 201 CLR 49.

14 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.

15 *Longthorn v British Transport Commission* [1959] 2 All ER 32; *Holm v Superior Court*, 42 Cal 2d 500 (1954); and *Guardian Royal Exchange Assurance of New Zealand v Stuart* [1985] 1 NZLR 596 (CA).

16 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543.

returns. The information upon which the returns are based is essentially in the hands of the taxpayer or their advisor, therefore the Commissioner is given extensive and coercive powers of access and investigation, in order to protect the revenue.

The chapter examines the scope and the operation of the sections 263 and 264, of the *Income Tax Assessment Act 1936* (Cth) (*ITAA*); the sections have been shaped by the courts, over a number of cases. The case law shows that the sections can be employed to make wide-ranging inquiries and to make those inquiries before any dispute may arise between the Commissioner and the taxpayer.[17] The conclusion is that the Commissioner's powers and discretions create an asymmetry of power in favour of the Commissioner in his dealings with the taxpayer. The Commissioner's powers have few limitations: they must be employed bona fide; for the purposes of tax administration and are subject to client legal privilege. This underlines the importance of client legal privilege in the tax context.

Chapter seven focuses on the curbs on the Commissioner's powers. The chapter addresses a number of issues including: the requirement for the Commissioner to act as a 'model litigant'[18] operating in an open justice system; the Commissioner's granting of concessions to external tax accountants;[19] the ATO's *Charter*[20] of taxpayers' rights; and the High Court under the leadership of Sir Garfield Barwick frustrating the Commissioner by choosing to adopt a strict *literal* approach to interpreting the general anti-avoidance rule (*GAAR*) (section 260) of the *ITAA*. The general anti-avoidance cases examined illustrate how this literalist interpretation of the legislation ultimately resulted in the Commissioner seeking the assistance of Parliament. Parliament did change the *GAAR* and provide other legislative support on a number of occasions.[21] This served to again emphasise the asymmetry of power demonstrated throughout this thesis and the importance of protecting confidential taxpayer-tax practitioner communications

Chapter eight examined the legislation introduced in the United States and New Zealand to extend the privilege to taxpayer-tax practitioner communications and to determine what lessons Australia can take from their experiences. In reference to the United Kingdom the

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17 See *Smorgan v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475.

18 *Legal Services Directions 2005* (Cth) (October 12 2012). <http://www.comlaw.gov.au/Details/F2012C00691>.

19 Australian Taxation Office, *Guidelines to Accessing Professional Accounting Advisors' Papers* (issued 16 November 1989, reviewed 30 June 2010). <https://www.ato.gov.au/General/Gen/Guidelines-to-accessing-professional-accounting-advisors--papers>.

20 ATO "The Taxpayers Charter Your Rights, Your Obligations. How to be Heard." (Charter Booklet) (1997).

21 See the two pronged action by Parliament in1981 introducing section 15AA into the *Acts Interpretation Act 1901* (Cth) and Part IVA into *ITAA* and then in 2013 the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013 (*Cth*).*

chapter examined a number of pivotal House of Lords decisions on the operation of client legal privilege in the tax arena. The thesis has demonstrated that it is timely and beneficial for both taxpayers and the taxation system to introduce a taxpayer privilege for Australia. This simply extends an existing privilege, in very limited fashion, and addresses the asymmetry identified in the power relationship with the Commissioner.

This Chapter sets out the legal reform that is required in Australia to establish an effective taxpayer privilege and establishes the guiding principles for a legislated taxpayer privilege. The chapter analyses the ALRC 2007 Report[22] and its recommendation for a 'New Zealand style' tax advice privilege, along with government's response to the Report, embodied in the Honourable Bill Shorten 'Discussion Paper: Privilege in relation to Tax Advice.'[23] The Discussion Paper called for submissions. The Chapter addresses the Law Council of Australia's submission with its arguments against extending privilege to tax practitioners, and examines the Institute of Chartered Accountants of Australia's (ICAA) submission supporting the ALRC recommendation. The chapter draws together these arguments and concludes that there is a clear basis for a legislated taxpayer privilege that the Federal Government can implement.

9.2 The Australian Law Reform Commission's inquiry into client legal privilege

On 29 November 2006 the then Australian Attorney-General, the Honourable Phillip Ruddock invited the ALRC to inquire into client legal privilege in the context of federal investigatory bodies with coercive information-gathering powers, and its impact on Commonwealth investigations. The inquiry was in part prompted by the extensive claims to privilege made by the Wheat Board in the Royal Commission into the 'Oil-for-Food'[24] program and the public furore that it caused.[25]

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22 Australian Law Reform Commission, 'Report 107, Privilege in Perspective: Client Legal Privilege in Federal Investigations' (2007).

23 Commonwealth of Australia, Department of Treasury, '*Privilege in relation to Tax Advice"* Discussion Paper (April 2011).

24 Commonwealth of Australia, '*Inquiry into certain Australian Companies in relation to the UN Oil-for-Food Programme'* established in November 2005, under the *Royal Commissions Act* 1902, and overseen by the Honourable Terence R H Cole. See Rosalind Croucher 'Human Right or Handbrake on the Truth?' (2007) *Reform Issue* 90, 99, 'Extensive claims to privilege by the Wheat Board delayed the investigation by nearly a year, enraged the Royal Commissioner Terence Cole, and led to the amendment of the *Royal Commissions Act* 1902 (Cth).'

25 Marr, David and Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald* (online), 16 April 2006. <http://www.smh.com.au/news/national/deceit-by-the-truckload/2006/04/14/1144521506851.html>. The legal professions' abuse of client legal privilege in the McCabe 'tobacco litigation' is discussed in Matthew Harvey and Suzanne Lemire, 'Playing for Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics' 34(1) *Monash University Law Review* 163, 173 'the

The Law Council of Australia argued that the Inquiry was designed to address the tensions surrounding client legal privilege, in a climate in which 'government agencies often (were) claiming that client legal privilege claims can delay and frustrate their primary functions, thus highlighting the distrust by regulators that client legal privilege is being abused in order to conceal information from investigators.[26] The extent of the problem is not really known, and probably overstated; the lengthy privilege disputes in the Oil-for-Food Inquiry and the James Hardie Investigation[27] are the often cited examples of abuse.

> Beyond these examples, there is little evidence to suggest that abuse, or questionable conduct, is widespread. ASIC, the ACCC and ATO have variously declared suspicions that client legal privilege is abused from time to time,[28] but have stopped short of declaring that abuse is widespread.[29]

The ALRC Inquiry was asked to consider the following questions:

> (i) would further modification or abrogation of legal professional privilege in some areas be desirable in order to achieve more effective performance of Commonwealth investigatory functions?
> (ii) would it be desirable to clarify existing provisions for the modification or abrogation of legal professional privilege, with a view to harmonising them across the Commonwealth statute book?
> (iii) would it be desirable to introduce or clarify other statutory safeguards where legal professional privilege is modified or abrogated, with a view to harmonising them across the Commonwealth statute book? And
> (iv) any related matter.[30]

Professor Rosalind Croucher was appointed the Commissioner responsible for the ALRC Report.[31] The ALRC had to balance the public interest in enabling full and frank disclosure between clients and their legal advisor in order to receive accurate legal advice, against the public interest in ensuring efficient and effective investigations by federal investigatory bodies. The ALRC identified forty-one federal bodies with coercive investigatory powers, as

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confidentiality associated with the lawyer/client relationship can operate as a screen to reduce the likelihood that abuse be discovered. It is only where abuse has failed that it is revealed.'

26 Nick Parmeter, '*Perspectives on the ALRC Review of Client Legal Privilege and Federal Investigatory Bodies'* 2 (Paper presented at the 6th Australian Business Law Workshop, Canberra, 17 November 2007).

27 See *James Hardie (Investigation and Proceedings) Act 2004* (Cth) section 4, which abrogated client legal privilege in relation to certain material, allowing its use in investigations of the James Hardie Group and in any related proceedings.

28 See comments in ALRC *Discussion Paper No. 73, Client Legal Privilege and Federal Investigatory Bodies*, September 2007, paras 6.38-6.39, 8.65, and 8.67.

29 Nick Parmeter, above n 26, 3.

30 Australian Law Reform Commission, above n 21,Terms of Reference.

31 Ibid the List of Participants for the Inquiry comprised the following: Professor David Wisbrot (President); Professor Rosalind Croucher (Commissioner in Charge); Professor Les McCrimmon (Commissioner); Justice Berna Collier (from October 2007); Justice Robert French (part-time Commissioner); Justice Susan Kenny (part-time Commissioner) and; Justice Susan Kiefel (part-time Commissioner until September 2007).

well as Royal Commissions of Inquiry.[32] The ALRC noted that there are few instances in which the legislation addressing the powers of the federal bodies specifically addresses the application of privilege, and where privilege is addressed there is inconsistency in terminology and scope.[33]

The ALRC set out to examine: the rationale(s) for privilege; clarify areas of existing uncertainty; develop procedures for making and resolving client legal privilege claims and to base its recommendations on a clearly principled basis. The ALRC described the doctrine not as 'legal professional privilege' but as 'client legal privilege 'reflecting the terminology of the uniform *Evidence Acts* and expressing the privilege as based in the *relationship* of the client with his or her lawyer.'[34] The ALRC emphasised the importance of client legal privilege, noting the High Court's description of privilege in *Daniels*[35] as 'an important common law right'[36], and as 'a human right'[37].

The Commission recommended forty-five changes to the handling of claims for client legal privilege. Many of the recommendations focus on streamlining the process for handling claims and deterring or punishing abuses of privilege. The Final Report was presented to the Honourable Robert McClelland MP, the then Liberal Government, Attorney-General of Australia, on 21 December 2007 and tabled in Parliament on 13 February 2008. The key recommendations of the Inquiry include:

(a) the enactment of a statute of general application to cover aspects of the law and procedure governing client legal privilege claims in federal investigations;
(b) the setting out of procedures with respect to the making and resolution of client legal privilege claims; and
(c) the extension of privilege, in defined circumstances, to include tax advice – the tax advice privilege.[38]

The recommendation for the enactment of a single federal client legal privilege Act is based on the need 'to clarify the existing scattered federal provisions on the application of privilege to federal coercive information-gathering powers and to inject greater consistency with respect to the procedures for privilege claims.'[39] Submissions[40] to the Inquiry highlighted

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32 Ibid *Executive Summary* 25. Included in the forty-one federal bodies with coercive information gathering powers are the Australian Tax Office; the Australian Federal Police; the Australian Crime Commission; the Commonwealth Director of Public Prosecutions; the Australian Securities and Investment Commission; the Australian Competition and Consumer Commission and the Australian Prudential Regulator Authority.

33 Ibid 26.

34 Ibid 27 (emphasis in original).

35 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

36 Ibid 553[11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

37 Ibid 553[86] (Kirby J).

38 Australian Law Reform Commission, above n 22, *Executive Summary* 29.

39 Ibid.

concerns with the practice and procedures for claiming privilege and sought greater transparency and clearer guidelines, to address the problems identified. In response the ALRC recommended that that there be: 'a model scheme for resolving privilege disputes which is to include a number of specified features.'[41] Amongst the specified features to be included in the legislation are: public notification by federal bodies about the application of privilege to their coercive information-gathering powers; provision of reasonable opportunity to claim privilege; details of claims to be provided upon request by a federal body; the certification of the claim by a lawyer, upon request by a federal body and allowing a federal body the discretion to offer a claimant the opportunity to agree to an independent review process.

9.2.1 The ALRC Recommendations

The ALRC Report proposed as its key recommendation the codification of client legal privilege by a single specific federal statute.

> Recommendation 5-1:
> The Australian Parliament should enact legislation of general application to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations (hereafter referred to as federal client legal privilege legislation in accordance with the recommendations of this Report.)[42]

The government has yet to respond to this key recommendation.

The ALRC conducted a thorough investigation into the operation of the privilege and it called for and received submissions from stakeholders and the public. An examination of the rationale(s) for client legal privilege was central to the ALRC review, as it sought to identify: common principles that should apply to all the investigative agencies involved; clarify areas of uncertainty and identify improvements to processes for the making and handling of claims for privilege. The submissions to and consultations conducted by the ALRC identified as key themes: the practice and procedure involved in the making of claims for client legal privilege; a need for greater transparency, and clearer guidelines and procedures. The investigative agencies' concerns focused on the ethical responsibilities of lawyers in making and maintaining claims of privilege and not abusing the process; again the focus was upon practice and procedure.

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40 Ibid *Appendix 2. List of Submissions* (116 submissions) and *Appendix 3. List of Consultations* (51 consultations).

41 Ibid *Executive Summary* 30. Chapter 8 *Practice and Procedure* Recommendations 8.1 – 8.22; 368 – 487.

42 Ibid Chapter 5 '*Client Legal Privilege in Federal Investigations'* 224.

The ALRC examined the arguments for and against the abrogation and/or modification of privilege, including the adoption of a 'qualified privilege,'[43] concluding that 'any abrogation of client legal privilege will occur only in a few exceptional circumstances'[44] namely, within Royal Commissions.

Chapter 6 of the ALRC Report titled 'Modification or Abrogation of Privilege?' went on to consider the extension of the privilege to 'other professionals, who while not lawyers, provide what amounts to legal advice.'[45] After examining the legislation introduced in the United States and New Zealand on tax advice, the common law in the tax arena in the United Kingdom, and the workings of the accountants' concession[46] in Australia, the ALRC called for the creation of a tax advice privilege, based on the New Zealand right of non-disclosure.[47]

The ALRC Recommendation 6-6 was narrowly based, applying only to ATO investigations. The explanation for this may lie in the terms of reference set for the ALRC namely, the investigation of federal agencies with information gathering powers. It was further restricted in that it applied only to tax advice documents prepared by an independent external tax adviser. The recommendation was for the tax advice privilege to be implemented within the single federal statute codifying client legal privilege.

9.2.2 ALRC Recommendation 6-6 - Tax Advice Privilege

> Recommendation 6-6:
> Federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation is not required to disclose a document that is a tax advice document prepared for that person.
> A 'tax advice document' should be defined as a *confidential* document created by an *independent professional accounting adviser* for the *dominant purpose* of providing that person with advice about the operation and effect of tax laws.
> A 'tax advice document' does not include 'source documents', such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers). Source documents, even where given to a tax agent for the purpose of obtaining tax advice, will not be protected by the privilege.
> An independent professional accounting adviser must be a registered 'tax agent' for the purpose of s 251 A of the *Income Tax Assessment Act 1936* (Cth) or a nominee or employee of a registered tax agent, who is a qualified tax accountant.

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43 Client legal privilege is an absolute privilege, under the common law, providing the client with certainty and predictability, in advance of any action, that certain disclosures will remain confidential. A 'qualified privilege' (See 6.189 – 6.6.202) is one where the parties would be allowed to argue for the disclosure of information, and the judge(s) would exercise discretion, in making their decision. The ALRC's view (See 6.202) was that a qualified privilege is not an appropriate model for dealing with claims of client legal privilege in the context of federal investigations.

44 Australian Law Reform Commission, above n 22, Chapter 6; 6.151.

45 Ibid 6.203. In 6.204 the ALRC reiterated that patent attorneys are allowed the privilege under the *Patents Act 1990* (Cth).

46 Australian Taxation Office, above n 19.

47 For a discussion on the 'transplanting of laws across jurisdictions' see for example William Ewald, 'Comparative Jurisprudence (II): the Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489.

> No privilege should apply to '*tax contextual information*' given for the purpose of providing tax advice. 'Tax contextual information is information about:
> (a) a fact or assumption that has occurred or is postulated by the person creating the tax advice document;
> (b) a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document;
> (c) advice that does not concern the operation and effect of tax laws.
> No privilege should apply where a tax advice document is created in relation to the *commission of a fraud or* offence or the commission of an act that renders a person liable to civil penalty; or where the person or the accounting adviser knew or ought reasonably to have known that the document was prepared in furtherance of a deliberate abuse of power.
> Claims that a document is a tax advice document must be made in accordance with the procedures set out in Recommendations 8-3 to 8-5. Resolution of claims should be in accordance with the procedures set out in Recommendations 8-6, 8-7, 8-11 and 8-14.
> Claims that a document is a tax advice document may be required to be certified by a lawyer in accordance with the procedure set out in Recommendation 8-3.[48]

The ALRC recommendation for the creation of a 'tax advice privilege' to protect the confidentiality of tax advice given by *independent* professional accounting advisers from the information-gathering powers of the Commissioner of Taxation, is 'underpinned by the compliance rationale'[49] for client legal privilege; acknowledging the important role played by tax practitioners in assisting taxpayers to comply with the tax law.

The first point to be made is that this recommendation to create a taxpayer privilege is found at the end of Chapter 6 entitled, '*Modification or Abrogation of Privilege?'*[50] The main focus of the chapter is on whether modification of the privilege is necessary or desirable; the problems that arise from the application of the privilege in a general sense and in its application to federal investigations more specifically. The final section of the chapter investigates whether the privilege should be extended to other professions providing legal advice. This fact emphasises the Law Council of Australia's argument that the inquiry was not intended to consider extending privilege to tax practitioners.

> …it is not appropriate to consider extending privilege to other professions within this review, the terms of reference for which were primarily directed at producing recommendations that would diminish protection of legal advice and increase regulatory control over the legal profession.[51]

The Law Council went on to argue that should the extension of privilege to other professions be considered, it should be the subject of a separate and much more rigorous review that should consider: the role of advisers in other professions play in the system of the

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48 Australian Law Reform Commission, above n 22, 306-7 (emphasis added).

49 Ibid *Executive Summary* 31. Chapter 6 *Modification or Abrogation of Privilege* Recommendation 6.6; 286 – 308.

50 Ibid Chapter 6 *Modification or Abrogation of Privilege.*

51 Law Council of Australia, Response to the Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege and Federal Investigatory Bodies*, [36] Report 107, 29 March 2008 <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/clpsubmar2008.pdf>.

administration of justice; the duties they owe to that system and the regulatory systems under which their duties and roles are discharged; introducing regulatory regimes comparable to those that govern lawyers and clarifying the position of practicing lawyers who are also tax agents.

Professor Rosalind Croucher highlighted that the creation of a 'tax advice privilege' was a targeted one, designed to protect the confidentiality of tax advice given by independent professional accounting advisers from the information-gathering powers of the Commissioner of Taxation. The recommendation was made in the context of the Terms of Reference for the Inquiry, which concerned the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies. Two basic contentions were made by the ALRC in support of the tax advice privilege: first, that it considered 'the 'compliance rationale' to be a significant part of the current basis for the doctrine of client legal privilege in serving the administration of justice'[52] and that this rationale applies equally to the complex area of tax law. And second, that because registered tax advisers[53] are authorised to give advice with respect to taxation law – advice that might be considered as coming within the ambit of 'legal work'- clients ought to have the benefit of privilege with respect to such communications.[54]

The ALRC in recommending that the tax advice privilege be introduced via legislation, was concerned that extending the common law client legal privilege to tax advice privilege, as was the case in the United States, could create unforseen issues and chose to give Parliament, rather than the courts, control over the operation and scope of the privilege, in line with the New Zealand regime.

> Linking an accountants' advice to client legal privilege could lead to extensions of the protection afforded to the advice provided by tax accountants that are inconsistent with its rationale (compliance rationale).[55]

The ALRC emphasised that the tax advice privilege should not create barriers to the investigation of offences outside the areas of general compliance with tax law; and it noted the concerns expressed in the submissions by a number of federal agencies, including the

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52 Australian Law Reform Commission, above n 22, 6.275.

53 Ibid 6.282 'In line with submissions received, the ALRC has amended its original proposal to allow that an independent professional adviser must be a registered 'tax agent' or a nominee or employee of a registered tax agent, who is a qualified tax accountant.

54 Australian Law Reform Commission, Rosalind Croucher, '*Discussion Paper on Privilege'* (15 July 2011) letter to the General Manager, Tax Division, The Treasury, Commonwealth Government.

55 Australian Law Reform Commission, above n 22, Chapter 6 *Modification or Abrogation of Privilege*, 6.278.

Australian Crime Commission[56] and the Insolvency and Trustee Service of Australia[57] that the privilege could impact the effectiveness of their investigations.

The ALRC Recommendation coming as it did before the amendment to the New Zealand legislation in 2009[58] extending the right of non-disclosure to discovery in litigation proceedings, also fails to provide this valuable protection. The ALRC expressed its support for the New Zealand model and therefore for the legislating of a separate 'tax advice privilege,' albeit within the single statute for client legal privilege. However, in three key aspects its recommendation differs from the New Zealand regime, and in all three instances creates a compromised privilege for Australian taxpayers. First, the New Zealand legislation applies equally to *internal* tax accountants providing independent tax advice. Second, the New Zealand legislation does not specifically restrict the operation of the right of non-disclosure to documents sought by the Revenue authority. Third, there is no mention of a requirement for certification by a lawyer in reference to claims that a document is a tax advice document, as in Recommendation 8.3.

Recommendation 8.3(2) addresses to the ALRC's certification requirement:

> If a federal body so requests:
> (i) the particulars of the privileged documents and the basis for the claims are to be verified on oath or affirmation by the person making the claim; and /or
> (ii) where the person is legally represented in the federal investigation or has otherwise received legal advice in relation to making a claim for privilege, the person's lawyer is to certify that having reviewed the documents the subject of a privilege claim, that in his or her opinion, based on the client's instructions, there are reasonable grounds for the making of the claim. A federal body may request such certification by the lawyer in the absence of requesting particularisation of the communications over which privileged is claimed;[59]

This additional protection that a federal body may request that a lawyer certify that there are reasonable grounds for a claim of client-accountant privilege is justified by the ALRC on the grounds that deciding 'whether advice meets the dominant purpose test is often a matter of

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56 Australian Crime Commission, Consultation LPP 47, to Australian Law Reform Commission, above n 21, (26 October 2007)

57 Insolvency and Trustee Service Australia, Submission LPP 62, to Australian Law Reform Commission, above n 22, (20 June 2007). The Insolvency Practitioners Association in their Submission LLP 109, 6 November 2007, opposed the extension of privilege to accountants, even if limited as proposed by the ALRC in the207 Report.

58 *Taxation (International Taxation, Life Insurance, and Remedial Matters) Act* 2009 (NZ) effective October 6th 2009. This amendment was made following on from *ANZ National Bank Ltd v CIR* (2008) 23 NZTC 21,918.

59 Australian Law Reform Commission, above n 22, Chapter 8. *Practice and Procedure,* 414-15. This Recommendation has been criticised by the Law Council of Australia, who argue that verification on oath by a party claiming client legal privilege should apply only in exceptional circumstance; and that certification by a lawyer should also only be made in exceptional circumstances and not as a matter of course. See Law Council of Australia, above n 51, 45-6.

some complexity, and should be determined by a lawyer rather than an accountant.'[60] The ICAA does not support this additional requirement; arguing that the justification for this requirement does not appear compelling and 'would prove to be overly cumbersome and practically difficult to comply with on a day-to-day basis.'[61] Tax practitioners have the requisite skill to determine whether the advice satisfies the dominant purpose test. Furthermore the current ATO concessions for accountants' work papers do not require an oath or affirmation. The requirement has the potential to add to compliance costs without enhancing the integrity of the process.

The ALRC recommendation does follow the New Zealand approach in applying the dominant purpose test:[62] defining 'tax advice documents'[63] and 'tax contextual information'. However, both the New Zealand legislation and the ALRC Recommendations' having placed their emphasis upon documents rather than communications has meant that confidential *oral* communications are not protected.[64] The Commissioner's powers under section 264(1)(a) and section 264(1)(b) of the *ITAA* respectively, whereby the 'Commissioner may by notice in writing require any person … to furnish him with such information as he may require' and 'attend and give evidence' would appear to be relatively unhampered by the proposed tax advice privilege.[65] The ICAA argued in its submission to the ALRC that a record of *oral* advice should be included in the definition of a 'tax advice document' and therefore be protected by the privilege.

> …it must follow that neither the tax agent nor the client should be compelled to disclose oral advice under questioning under section 264 (1)(b) of the Income Tax Assessment Act or under

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60 Australian Law Reform Commission, above n 22, Chapter 6. *Modification or Abrogation of Privilege*, 6.286.

61 Institute of Chartered Accountants in Australia, Submission LPP 89, 26, to Australian Law Reform Commission, above n 22.

62 The New Zealand legislation employs the term 'main purpose', though the Courts have interpreted it to mean dominant purpose. This decision by the ALRC to adopt the dominant purpose test is an improvement on the ATO accountants' concessions which still apply a *sole purpose* test.

63 The ALRC recommendation however, applies only to tax documents created by an independent professional accounting adviser.

64 Institute of Chartered Accountants in Australia, Submission to, Commonwealth Government Department of Treasury, above n 22, 27: ICAA argued that the definition of a 'tax advice document' should be amended to include: the client's communication to the tax agent requesting the tax advice, together with any other documents giving instructions in respect of it. Note also that the US legislation protects tax practitioner-client communications whether oral and/or in writing.

65 The same analysis applies to the New Zealand section 17 powers in the *Tax Administration Act 1994.* Section 17 gives the Commissioner of Inland Revenue the power to request a person to furnish him with any information the Commissioner of Inland Revenue may require as well as to produce for inspection any books or documents.

> any other Commonwealth statutory power where a lawyer who had given the same advice could not be so compelled.[66]

By comparison client legal privilege applies to confidential written and oral communications and therefore protects a wider range of materials, with the emphasis on communications.[67] The restriction of protection to written advice, when in many instances the same advice may be communicated orally, is at odds with the utilitarian rationale for the privilege, namely the encouraging of candid communications so that clients may receive the best advice in order to fulfil their compliance obligations. There is no compelling reason why the choice of format the advice takes – written or oral – should affect a claim to privilege.

With reference to *tax contextual information*, the ALRC emphasised that: 'it should be very clear in the operation of this privilege that only the advice itself will be protected, and not any other information that may form part of the accountant's file or briefing.'[68] This in effect means that documents that would be protected under client legal privilege would fail the hurdle set for 'tax contextual information,' and in many instances provide a road map for the ATO to gauge the advice sought and/or received.

The ALRC was of the view that the common law crime/fraud exception to client legal privilege[69] and/or the position adopted in the *Evidence Act 1995* (Cth) in reference to crime/fraud are sufficiently robust to deal with tax advice for illegal purposes. This is in contrast to the controversy created in the United States with its exception for tax advice in connection to 'tax shelters' and the New Zealand exemption of 'advice for the purpose of committing an illegal act'.[70] Nor did the ALRC adopt the New Zealand exemption for advice relating to the IRD debt recovery powers.[71] The ATO in their submission to the ALRC supported the United States model of excluding communications regarding to tax shelters or the 'participation in potential tax avoidance schemes.'[72]

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66 Institute of Chartered Accountants in Australia**,** above n 61. Note: where the oral advice has been recorded or documented it would be covered by privilege; furthermore, there are difficulties with relying on 'memory of oral advice.'

67 The United States legislation by extending the common law client legal privilege to tax practitioner-client communications, encompasses confidential *oral* communications within its sphere of protection.

68 Australian Law Reform Commission, above n 22, Chapter 6. *Modification or Abrogation of Privilege*, 6.281.

69 See, *Clements Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* [2001] FCA 1858. North J held that advice received to further tax avoidance was in 'furtherance of an illegal or improper purpose'.

70 See *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* (New Zealand) section 20B(2)(c).

71 Ibid section 20F(3)(d).

72 Australian Law Reform Commission, above n 22, Chapter 6. *Modification or Abrogation of Privilege*, 6.285.

The ALRC Recommendation is for a very narrow and constricted right of non-disclosure, applying as it does only in the context of ATO investigations. This leaves open the possibility for the ATO to access tax advice documents via the indirect route - from other investigative agencies with whom it has information sharing agreements. Nor does this Recommendation address the issue of the status of 'tax advice documents' in cases where the ATO decides to escalate a case from negotiations to a civil or criminal court case. The exclusion of tax advice by tax practitioners in the employment of a business is a further unnecessary limitation, especially when it can be demonstrated that the tax practitioner acted independently and in a professional capacity. Client legal privilege in Australia does apply to advice by lawyers in the employee of a client, where they can demonstrate that they acted independently and in a professional capacity.[73]

9.3 Developments since the ALRC 2007 Report - the Tax Agents Services Regime

There have been two key developments in the Australian tax arena, following on from the ALRC 2007 Report. First, the *Tax Agents Services Act 2009* (Cth) and second, the long awaited government response to the ALRC 107 Report, in the form of the Honourable Bill Shorten's 'Discussion Paper: Privilege in relation to Tax Advice.'

The ALRC Report failed to gain support from the then Liberal/National Government, and given that the Report in the words of the Law Council of Australia 'is actually proposing a mechanism for *restricting* the discretion of Parliament to abrogate privilege … (it) may not be particularly appealing to Government.'[74]

> The executive Government's concern about not increasing the class of privilege-holders because it may limit the ability of the ATO to determine the facts or circumstances of transactions it wishes to bring to tax, perhaps explains the lack of progress following the Australian Law Reform Commission report recommending a statutory privilege for accountants' taxation advice. …A desire to protect the revenue also explains the limitations on the proposed statutory privilege recommended in that report, (limitations) that, even were such a statutory privilege introduced in Australia, it likely would be substantially qualified.[75]

The *Tax Agent Services Act 2009*[76] was enacted by the then Labour Government. The *Tax Agent Services Act* reinforced the role of tax agents in assisting taxpayers to discharge their obligations under the federal taxation laws. The object of the *Tax Agent Services Act* as set out in sections 2-5, are to ensure that 'tax agent services' are provided to the public in

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73 See *Trade Practices Commission v Sterling (1979)* 36 FLR 244, 245 (Lockhart J).

74 Nick Parmeter, above n 26, 12 (emphasis in original).

75 Toby Knight, 'Developments in Legal Professional Privilege.' Paper presented at Victoria 1st Annual Tax Forum, the Tax Institute (10 -11 October 2013) 5[7].

76 The *Tax Agent Services Act No. 13. 2009* (Cth) superseded the provisions that were formerly in the *Income Tax Assessment Act 1936* (Cth) section 251L which covered the privileges and duties of registered tax agents and formed part of the basis of the consideration of a tax advice privilege in the ALRC's Report 107.

accordance with appropriate standards of professional and ethical conduct. This is to be achieved by:

(a) establishing a national Board to register tax agents and BAS[77] agents; and
(b) introducing a Code of Professional Conduct for registered tax agents and BAS agents; and
(c) providing for sanctions to discipline registered tax agents and BAS agents.[78]

A National Board - the Tax Practitioners' Board replaces the state-based Boards of Review. The Board has power to impose sanctions, including civil penalties, further safeguarding against potential abuse. The Code of Conduct was embedded in the *Tax Agent Services Act 2009,*[79] and provides for loss of registration and/or financial penalties. Subdivision 60E of the *Tax Agent Services Act* provides for the investigation of agents: thus the Board is actively policing the profession.

Under the *Tax Agent Services Act*, only registered taxation agents may provide a 'tax agent service'. Section 90-5 defines a 'tax agent service' as one that relates to:

i. ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
ii advising an entity about liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
iii. representing an entity in their dealings with the Commissioner.

The service must also be provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

i. to satisfy liabilities, obligations that arise, or could arise, under a taxation law;
ii. to claim entitlements that arise or could arise, under a taxation law.

On June 30 2013, continuing professional education became a requirement for renewal of registration as a tax agent. 'It is essential for registered agents to maintain their knowledge and skills in order to provide competent and contemporaneous services to clients.'[80] The Board in investigating any breaches of the *Tax Agent Services Act* has discretion as to its procedures and is not bound by the rules of evidence.[81] The Board has the power to request in writing: the production of documents or things;[82] to require witnesses to appear before it and

77 BAS agents prepare Business Activity Statements, for business involved in the collection and payment of the Goods and Services Tax.

78 The *Act* replaces criminal penalties with civil penalties and injunctions that will benefit agents and the integrity of the tax system, by providing appropriate consequences for misconduct and by providing effective disincentives to act inappropriately.

79 The Code of Conduct is set out in Part 3 –The Code of Professional Conduct Division 30 of the *Tax Agent Services Act, No. 13. 2009.* The Tax Practitioners Board published an Explanatory Paper - TPB 01/2010 issued 16 December 2010.

80 See Tax Practitioners Board, 'Explanatory Paper TPB (EP) 04/2012, pp12 -14. See also TPB(1) 19/2014 on January 13, 2014. Illustrating three mechanisms that agents may use to manage conflicts of interest: avoiding conflicts of interest; controlling conflicts of interest; and disclosing conflicts of interest

81 *Tax Agent Services Act 2009* (Cth) section 60-95 (4).

82 Ibid section 60-100.

give evidence or produce documents or things[83] and the power to take evidence on oath or affirmation.[84] Failure to comply with a lawful request by the Board may be an offence under sections 8C and/or 8D of the *Taxation Administration Act* 1953 (Cth). A person is not excused from complying on the ground that doing so might tend to incriminate the person or expose the person to a penalty. The Board can apply to the Federal Court for an injunction to restrain or require certain conduct.[85] The tax agent can apply to the Administrative Appeals Tribunal for the review of decisions by the Board.[86]

The *Tax Agents Services Act 2009* coupled with the *Tax Agents Service Regulations 2009* provide a wide range of safeguards and protection mechanisms to minimise the risk of potential abuse by registered tax agents, and sets the appropriate framework for any future taxpayer privilege.

Walpole and Salter identified how the Australian approach to the regulation of tax agents has 'subtly shifted the principal allegiance that taxpayer representatives have, from their clients alone to compliance with the law and the wishes of the revenue authority.'[87] The authors note that the new legislation 'directly influence(s) the agency relationship, making the responsibility to government explicit.'[88] They point specifically to the Explanatory Paper on the *Code of Professional Conduct*[89] issued by the Board as emphasising the perspective of the ATO and '[T]he supremacy of the law and the duty of ensuring proper compliance rather than the client's wish when they are in conflict'.[90] The authors also refer to the work of Dabner[91] on the experience of tax practitioners in the United Kingdom; interviews with tax practitioners suggested that the tightening of controls on tax practitioners may damage the relationship between them and the Revenue authority. Walpole and Salter conclude that '[T]ime will tell'[92] whether the new regime will undermine the relationship between the tax practitioners and the ATO. A legislated taxpayer privilege would assist in redressing the

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83 Ibid section 60-105.

84 Ibid section 60-110.

85 Ibid *Subdivision 70* - Miscellaneous section 70 A –Injunctions.

86 Ibid *Subdivision 70 –B* Administrative Review.

87 Michael Walpole and David Salter, 'Regulation of Tax Agents in Australia' (2014) 12(2) *eJournal of Tax Research* 335; 336.

88 Ibid 338.

89 Tax Practitioners Board, Explanatory Paper, 01/2010 Code of *Professional Conduct* (16 December 2010). <http://www.tpb.gov.au/TPB/Publications_and_legislation/EP/0402_TPB_EP_01_2010_Code_of Professional_Conduct.aspx>.

90 Michael Walpole and David Salter, above n 87, 346.

91 Justin Dabner, 'Constraints on the 'Partnership' Model – what really shapes the relationship between the Tax Administrator and the Tax Intermediaries in Australasian and the United Kingdom' (2012) 4 *British Tax Review* 526, cited in Michael Walpole and David Salter, above n 87, 356-7.

92 Michael Walpole and David Salter, above n 87, 357.

balance and ensuring that tax practitioners by encouraging candid communications with clients, are able to foster compliance with the law and act in the best interests of their clients and the tax system.

9.4 Discussion Paper: *Privilege in relation to Tax Advice*

In April 2011 the then Labour Government's Assistant Treasurer and Minister for Financial Services and Superannuation, the Honourable Bill Shorten issued a Discussion Paper entitled *Privilege in relation to Tax Advice*[93], placing the ALRC Report 107 and in particular the recommendation that privilege be extended to tax agents, to the fore of public debate, once again.

> This discussion paper considers this recommendation (Recommendation 6-6, ALRC Report 2007) in greater detail by exploring the implications of such a privilege for the tax and accounting profession, as well as the consequences of establishing a limited privilege on the advice and documents prepared by these professionals.[94]

The discussion paper posed a number of questions on both the appropriateness of establishing a tax advice privilege and issues relating to how the privilege would apply:

> If a 'tax advice privilege' is established:
> - Which model would best serve the policy objectives underpinning a tax advice privilege taking into account international experience and information requirements necessary to administer the tax system fairly?
> - Should a tax advice privilege provide the same protection to communications with tax agents as legal professional privilege does for communications with lawyers?
> - To which communications should a tax advice privilege apply, and what exclusions should apply?
> - What procedures should be put in place to provide an appropriate balance between protecting client information, and ensuring that the information gathering functions of the Tax Office are not unduly delayed or frustrated?
> - Should a tax advice privilege apply only in respect of the coercive information gathering powers of the Tax Office, or also to other bodies such as the Australian Crime Commission?
> - What would be the appropriate vehicle for a tax advice privilege? For example, should the provisions be in the *Taxation Administration Act 1953?*[95]

Senator Mathias Cormann, the then Liberal opposition spokesman for Financial Services, 'asked why we have to have yet another review on a subject that's already had a clear recommendation from the ALRC.'[96] In April 2013 the Senator put out a statement that 'if the opposition wins government in September it will consult with accountants and other relevant

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93 Commonwealth of Australia, above n 23.

94 Commonwealth of Australia, above n 23.

95 Commonwealth of Australia, above n 23, 2.

96 Andrew Main, 'Accountants, Lawyers take Pot Shot at Each Other over Professional Privilege' *The Australian* (online), 18 April 2011. <http://www.theaustralian.com.au/business/opinion/accountants-lawyers-take-potshot-at-each-other-over-professional-privilege/story-e6frg9if-1226040589753>.

stake holders before making a final decision'.[97] The Liberal/National Coalition did win the election in September 2013; however the issue has yet to be raised by the Senator, in his position as Minister for Finance.

A taxpayer privilege would respond to the questions posed by the Discussion Paper as follows: a statutory privilege that enables a taxpayer privilege to adopt and follow the common law of client legal privilege is preferred,[98] as this would enable the new privilege to adopt all the features of client legal privilege, that have been shaped by the common law and to develop in line with client legal privilege. A statutory privilege would be required as the complexity of the law can more comprehensively enact an integrated set of principles, rules and processes. It can also be argued that as client legal privilege is a common law principle, it is within the power of the courts to extend the principle to all qualified tax practitioners.[99]

A taxpayer privilege should provide the same protection as client legal privilege, and protect all 'confidential communications' between the taxpayer and tax practitioner. Source documents would continue to be available to the ATO, as they fail to meet the test of confidentiality and indeed the dominant purpose hurdle. The procedures in place between the ATO and lawyers for access to documents on lawyers' premises[100] can equally apply to documents in the hands of tax practitioners.

The ATO powers under sections 263 and 264 are subject to client legal privilege and a should be subject to a taxpayer privilege. The crime/fraud exception developed in the common law[101] of client legal privilege would apply equally to taxpayer privilege. Tax practitioners do not and should not have license to represent clients in civil or criminal courts - they can and do work assisting lawyers in court proceedings to ensure that their clients receive the best advice and representation available. The legislation would need to provide certainty for taxpayers by ensuring the continued protection of 'confidential tax communications' between tax practitioners and their clients, particularly where the ATO, the Australian Federal Police

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97 Sally Rose, 'Public Accountants' Last-Ditch Pitch for Privilege' *Financial Review* (online), 2 April 2013. <http://www.afr.com/news/policy/tax/public-accountants-lastditch-pitch-for-privilege-20130402-ilrs2>.

98 The United State tax practitioner's privilege is based on the common law of client legal privilege.

99 See Lord Sumption's dissenting decision in *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 31-47 (23 January 2013).

100 In June 1990 the ATO agreed with the Australian Law Council on the 'Guidelines on access to Documents held on a Lawyers' Premises.' See Australian Tax Office, "Chapter 6 – Legal Professional Privilege" ATO Access Manual.

101 See Chapter two of the thesis arguments on the crime/fraud exception and its historical development in *Regina v Cox and Railton* [1884] 14 QBD 153.

or Department of Public Prosecutors decide to escalate the negotiations to civil or criminal court action.

The self-assessment tax system is reliant upon taxpayers' voluntary compliance with the tax law and taxpayer honesty in accurately completing their tax return. Given that often the materials or evidence required by the Commissioner are often only within the knowledge or possession of the taxpayer, their bank, and/or tax adviser, the Commissioner requires powers of access and investigation that enable the protection of the country's revenue.[102] Hence the burden of proof is upon the taxpayer and should continue to be so. Tax law is complex as has been long recognised, in the words of Deane J:

> …successive administrations have allowed the Act to become a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in search to identify the provisions relevant to a particular case.[103]

Sections 263 and 264 of the *ITAA* do provide the Commissioner with extensive and coercive powers of access and investigation.[104] The Commissioner's powers have few limitations; they must be employed bona fide; for the purposes of tax administration and are subject to client legal privilege. The common law has confined client legal privilege within narrow limits; as the privilege is an obstruction to the fact-finding process, excluding access to communications that would otherwise have been disclosed. Nonetheless there is a vast power asymmetry, in favour of the Commissioner. Successive Australian Governments, both Labour and Liberal, have shown a preference for autonomy in reference to the Commissioner's administering of the *ITAA* and in the granting of protections or rights to taxpayers. The *Taxpayer's Charter* and the *Guidelines for Exercising Access to External Accountants' Papers* are two prominent cases in point, as has been noted in Chapter seven of the thesis.

The taxpayer privilege should apply against *all counterparties*, as is the case with client legal privilege, and arguably with the New Zealand right of non-disclosure.[105] The Commissioner does have information sharing agreements with other regulatory agencies, as was illustrated in *Stewart.*[106] The Commissioner in that case, was successful in gaining access to confidential taxpayer-tax practitioner communications, (that would have been protected under the

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102 See Chapter six of the thesis discussion on self-assessment and voluntary compliance.

103 *Hepples v Commissioner of Taxation* (1992) 173 CLR 492, 511.

104 See *Federal Commissioner of Taxation v Australian and New Zealand Banking Group Ltd; (Smorgon)* (1979-80) 143 CLR 499; discussed in Chapter six of the thesis.

105 See Chapter eight of the thesis.

106 See *Steward v Deputy Commissioner of Taxation* (2011) 94 FCR 914, and the discussion in the thesis Chapter seven, on the 'Project Wickenby'.

Guidelines) from the Australian Crime Commission.[107] Thus, restricting the taxpayer privilege to disputes against the Commissioner in the exercising of the information gathering powers does not provide an equivalent protection of confidential communications to that provided by client legal privilege.

The appropriate mechanism would be a federal statute dealing specifically with a taxpayer privilege; as the ALRC recommendation for a single federal act for client legal privilege[108] has yet to be responded to by the Government. The privilege should be established by a separate *Act* and not a provision within the *TAA* which may be interpreted as being within the responsibility of the Commissioner of Taxation to administer, and hence create a perception of bias.[109]

The *Discussion Paper* building as it does upon the ALRC recommendation fails to address the issue of a taxpayer privilege for litigation in progress or reasonably anticipated. In the case of the ALRC this shortcoming can be traced to the terms of reference for the Inquiry, however, in terms of the 'Discussion Paper' this excuse is not relevant. It is important to address both limbs of client legal privilege, as tax agents can and do represent their clients in civil action before the Administrative Appeals Tribunal[110] and in negotiations with the ATO. As mentioned the ATO in many instances has the discretion to pursue a matter as either a civil or criminal action. In practice cases may commence as negotiations and then morph into civil or criminal proceedings.[111] The continued protection of confidential communications in these instances needs to be provided for. Without such protection the tax practitioner cannot assure the taxpayer that their confidential communications will remain confidential; clarity and predictability are essential criteria for an effective privilege.

9.5 Lawyers' response to the ALRC proposal for a tax advice privilege

The Law Council of Australia response to ALRC Report 107 made clear their opposition to the recommendation to extend privilege to tax advisers.[112] In July 2011 the Law Council made a submission in response to the Honourable Bill Shorten's Discussion Paper[113] arguing: that the lawyer's duty to the Court; the role lawyers play in the system of

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107 *Steward v Deputy Commissioner of Taxation* (2011) 94 FCR 914, 211[61] (Perram J). The Court held that the Commissioner could access the confidential information that the Australian Crime Commissioner had gained through the exercise of a search warrant.

108 Australian Law Reform Commission, above n 22, Chapter five, Recommendation 5.1.

109 This perception of bias has been discussed as an issue with the *Taxpayer's Charter* in Chapter seven.

110 The *Evidence Act 1995* (Cth) applies to proceedings before the Administrative Appeals Tribunal, and the Act provides for both limbs of privilege in sections 118 and 119.

111 Where a case commences as a civil action and then morphs into a criminal action, the taxpayer can apply to the courts for a stay of civil trials until the criminal trial concludes.

112 Law Council of Australia, above n 51.

113 Law Council of Australia, '*Privilege in relation to Tax Advice'* (29 July 2011).

administration of justice; the uniqueness of that role and the lawyer's professional duties concerning conflicts of interest; are all matters that:

> …the Discussion Paper does not address and it is apparent that they have not been considered in its gestation. Accordingly, the Law Council remains of the view that the proposed extension of privilege should not be taken up at this time.[114]

In reference to the rationale for privilege, the Law Council highlights that client legal privilege is the right of the client and an obligation of the lawyer, with critically linked liabilities and responsibilities (inseparable from the privilege itself).[115] The Law Council stresses that the lawyer's duty to the court is critical.

> … fundamental to the rationale for client legal privilege, because it serves to emphasise that the lawyer's duty is first and foremost to protect the administration of justice and to act as an officer of the Court. That duty is an important check and balance in the system. No other profession is subject to the same duties.[116]

The Law Council argues that '[w]hilst tax agents are subject to the jurisdiction of the Tax Practitioners Board, there is no over-arching higher duty to the system.'[117]

In *Prudential*[118] Lord Sumption gave such an argument very little weight and pointed out that it is unclear what relevance lawyers' relationship with the court has in the context of legal advice privilege. Indeed Lord Sumption notes that, privilege had developed when lawyers had notoriously low standards and were subject to scarcely any supervision by the courts.[119]

The Law Council argued that an extension of privilege to tax agents may create difficulties with where to draw the boundaries, as much of tax law depends upon other areas of law notably: contract law; property law and intellectual property law, all areas in respect of which non-lawyers are not permitted to provide advice.

> Many recent tax law decisions have depended on the application of basic principles in property law and contract. A thorough knowledge of principles in these areas is essential for taxation advisers.[120]

The Law Council concludes that the extension of privilege, even a restricted version, 'to other professions simply on the basis that they are authorised to provide advice and administrative assistance in relation to a discrete legal framework is fraught with difficulty.'[121] To

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114 Ibid 7.
115 Ibid 9.
116 Ibid10.
117 Ibid.
118 *R (on application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1, 37[126].
119 Ibid 38[126].
120 Geoffrey Hart, 'The Impact of Property Law and Contractual Principles in Taxation Law' (2004) 14 *Revenue Law Journal* 92.
121 Law Council of Australia, above n 113, 11.

accentuate their case they pointed to the decisions in *Just Jeans v Federal Commissioner of Taxation*[122] and *Sinclair and Commissioner of Taxation.*[123]

The Law Council noted that *Just Jeans* illustrates that accountants are not permitted to advise on areas of intellectual property and/or goodwill which were the key concepts in the case. The issues of goodwill, and sale and lease back arrangements as 'accounting concepts' are very familiar to accountants, so it could be expected that the lawyers in the case would have referred to the accountants involved for advice about the accounting treatment of the concepts, hence the caution from Slater QC is appropriate.

> The facts are often obscure, and the contextual legal issues unclear. Accountants and lawyers are to paraphrase Shaw,[124] "divided by a common language", and accountants explanations can often serve only further to confuse lawyers, and vice versa. …when the statute uses language adopted from other legal, or from accounting, concepts and contexts, care must be taken to construe the language used in the light of its use and context in the fiscal statute – not the context and purpose served by its use elsewhere. …it is only by following precautions of this nature, in relation to both legal and accounting concepts, that the right road will be taken from the intersection of tax, legal and accounting concepts.[125]

In *Sinclair and Commissioner of Taxation*[126] the Deputy President of the Administrative Appeals Tribunal, S.A. Forgie found that Sinclair's accountant, though a Fellow of the Tax Institute could not give *legal advice* regarding the taxation implications of the arrangement.[127]

Taxation law does not exist in a vacuum; the transactions entered into by taxpayers will necessarily involve other areas of law, especially contract law, property law, and corporations' law. These are all areas of law with which accounting practitioners are familiar. The line between: giving *tax advice; legal advice* and engaging in *legal practice* is far from clear. Accountants run the risk of being sued by their clients for any loss suffered and they will not be covered by their professional indemnity insurance if they have been found to have engaged in *legal practice*, though no clear statutory definition of what constitutes 'legal practice' exists. The accountant also runs the risk of being prosecuted for contravention of the *Legal Profession Act*[128] relevant to the state in which they practised. This issue is a problem

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122 (1986) 17 ATR 562; reversed in *Federal Commissioner of Taxation v Just Jeans Pty Ltd* (1987) 18 ATR 775. FCR 110.

123 [2010] ATTA 902.

124 The reference here is to the renowned writer George Bernard Shaw.

125 A. H. (Tony) Slater QC, 'The Nature of Income: The Intersection of Tax, Legal and Accounting Concepts' (2007) 36 *Australian Tax Review* 138, 158-9.

126 [2010] ATTA 902.

127 Ibid [92] citing Section 2.2.2(1) of the *Legal Profession Act 2004* (Vic) provides that 'A person must not engage in legal practice in jurisdiction unless the person is an Australian legal practitioner' section 2.2.2(2) provides for a number of qualifications to the prohibition - but none apply to an accountant.

128 CPA Australia's website warns: 'an accountant or secretary in public practice acting bona fide in the performance of normal accountancy or secretarial service has nothing to fear from section 2.2.2 [of the

in all the jurisdictions discussed;[129] and it is not only accountants who run this risk, as noted by Neave JA in *Law Institute of Victoria Ltd v Marc:*[130] as a matter of public policy, Courts are also required to give weight to the legitimate exercise of professional work of non-lawyers. This case was decided on a distinction between the 'giving of abstract information as to legal rules' and 'the tailoring of advice affecting legal rights', deeming the latter to be legal practice.

In the tax arena, the legislation has specifically granted tax agents the power to give advice on tax law and to represent clients in administrative hearings.[131] However as Wallis notes from the decision in *Sinclair*:

> accountants have long believed that they are entitled to give advice, including legal advice about the operation of the income tax laws. In *Sinclair,* the Deputy President simply highlighted a problem that has existed for many years. Accountants have no legal basis for this belief, even if the advice is provided in relation to the preparation and lodging of a tax return.[132]

Wallis points out that this is an area in which 'a legislative cure that protects both tax practitioners and consumers is required'.[133] Wallis has called for action and made suggestions to resolve some of the issues:

> tax practitioners should be entitled to safe harbours that allow them to engage in legal practice to the extent that the legal practice is relevant to making a statement in relation to taxation laws (and similar laws within the states).
>
> …Practitioners, who have become aware of the situation, are concerned about their exposure. What is needed is strong leadership and commitment to obtaining a solution sooner rather than later. The looming debate over privilege should be viewed as an opportunity to address both problems at the same time.[134]

Legal Profession Act 2004 (Vic) which establishes the lawyers' reserve] but he or she will be treading on dangerous ground if they extend their services to include the preparation of such documents as Memoranda and Articles of Association, Powers of Attorney, Contracts, Partnership and other Agreements and the like which are clearly the province and responsibility of client's legal advisers, and this is so even if the work performed consists merely of the completion of duplicated or printed forms by filing in blank spaces.' See <http://www.cpaaustralia.com.au/cps/rde/xchg/cpa-site/hs.xsl/members-handbook-public-pp3.html>. Cited in Francesca Barlett and Robert Burrell, 'Understanding the "Safe Harbour": The Prohibition on Engaging in Legal Practice and its Application to Patent and Trade Marks Attorneys in Australia' (2013) 24 *Australian Intellectual Property Journal* 74, 80.

129 The practice of law in New Zealand is governed by the *Lawyers and Conveyancers Act 2006* (NZ); in the United Kingdom it is governed by the *Legal Services Act 2007* (UK)*;* in the United States each State has its own statute to govern the practice of law.

130 (2008) 21 VR 1. This case involved a conveyancing business and whether the preparation of statements under section 32 of the *Sale of Land Act 1962* necessarily involves giving of legal advice contrary to section 314 of the *Legal Practice Act 1996* (replaced by the *Legal Profession Act 2004 (Vic).*

131 See section 251L *Income Tax assessment Act 1936* (Cth); superseded by the *Tax Agents Service Act 2009* (Cth). See Chris Wallis, 'Accountants cannot give Legal Advice: what that means for them, their Clients and the Lawyers' (2011) 45(10) *Taxation in Australia* 601, 602: 'Section 251L: never entitled tax agents to engage in legal practice or to practise law; it prohibited a person, other than a registered tax agent, from demanding or accepting a fee for a number of things, including give advice about a taxation law on behalf of a taxpayer.'

132 Chris Wallis, above n 131, 601.

133 Ibid.

134 Ibid 604.

9.5.1 The Law Council solution: refine the Commissioner's 'accountants' concession'

The Law Council proposed refinements to the Commissioner's *Guidelines* as the 'most appropriate mechanism to promote full and frank discussions between taxpayers and their tax agents.' The Law Council agreed with the ATO that the 'sole purpose' test that applies to the accountants' concession was the appropriate test. The proposed refinements suggested by the Law Council of Australia are:

> - Extend the Guidelines to cover requests for advice from a tax agent and to communication of the advice irrespective of its form.
> - Remove the application of Part IVA as an "exceptional circumstance" allowing the ATO to access material otherwise protected by the concession, unless the taxation advice is given to facilitate the commission of a crime, fraud or civil offences or in pursuit of an illegal or improper object.
> - Build in procedures for resolving disputes as to exceptional circumstances into the alternative dispute resolution procedures for resolving claims under the concession.
> - Amend the Guidelines to provide greater clarity in relation to issues of waiver under the concession.[135]

The Law Council's refinements would be a welcome improvement to the accountants' concession, however a taxpayer privilege, would make the concessions redundant.

The Law Council's primary concern is that the common law client legal privilege is not weakened by the creation of a statutory regime for tax advice. From their view point 'there is no warrant for treating legal advice in relation to tax matters in some different manner to other legal advice, and there was nothing in ALRC 107 that suggested any need to do so.'[136] This concern is typical of a professional body protecting 'their patch' and can be regarded as part of the 'turf wars' between accountants and lawyers.

Chris Jordan, the Commissioner of Taxation, is also of the view that accountants do not need a taxpayer privilege.

> The federal government doesn't need to grant tax agents a special privilege that will allow information shared between them and their clients to be protected. …If we trust advisers and advisers and taxpayers are being transparent then there's probably no need to push down the road of legal privilege. …I am willing to commit to certain changes in the tax office that I think will be better in terms of providing clarity quicker.[137]

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135 Law Council of Australia, above n 113, 16.

136 Law Council of Australia, above n 113, 20.

137 Nassim Khadem, 'No need for Tax Advice Privilege, says ATO's Chris Jordan' *Business Review Weekly*, (online), 15 March 2013. <http://www.brw.com.au/p/professions/no_need_for_tax_advice_privilege_nH2n7C18nvXookeCxPOemM>. The Commissioner is referring to a new tax law design unit that will work with Treasury on policy and drafting laws and a separate appeals unit that aims to change the perception that the ATO appeals process lacks independence.

Board of Taxation[138] Chair, Mrs Teresa Dyson, is also of the opinion that 'accountants don't need the same legal professional privilege as lawyers;'[139] she reasons in agreement with the Law Council, that the argument about having a 'level playing field' 'come(s) from a misunderstanding of the basis of privilege in the first place.'[140] The accountants' concessions in her view provide 'a fairly broad concession and does largely follow the same sort of principles that legal professional privilege does'.[141] Dyson does concede that there is scope for greater transparency and clarity in the decision making processes of the Commissioner in applying or waiving the concession.

9.6 The ICAA arguments for a taxpayer privilege

The ICAA in their submission to the *Discussion Paper* emphasised that they had consulted widely with their members across Australia to inform their response.[142] Their focus was on the limitations of the existing accountants' concession; the global trend already underway in relation to the adoption of a tax advice privilege framework for the clients of non-lawyers and the broad parameters of what should occur in Australia. The ICAA argue that the historical concerns that only lawyers should provide 'legal advice' and that tax practitioners lack the appropriate regulation, in comparison to lawyers, have been fully addressed by the introduction of the Tax Agents Services Regime.

The *Tax Agents Services Bill 2008 Explanatory Memorandum*[143] provides that 'giving a taxpayer advice about a taxation law' falls within a tax agents' service. Furthermore section 90-5 of the *Tax Agents Service Act 2009* makes it clear that it is not necessary to be a member of the legal profession to provide advice on tax law. The legislation also provided for the establishment of the Tax Practitioners' Board with broad legislative powers to ensure that registered tax agents meet strict governance standards.

The public policy rationales that underlie client legal privilege apply equally to tax practitioners providing advice on tax law. 'Non-lawyer tax advisors provide the bulk of

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138 The Board of Taxation is a non-statutory advisory body tasked with advising the Treasurer on improving the general integrity and function of the taxation system. The current Commissioner of Taxation, Chris Jordan, was a past Chair of the Board.

139 Nazism Kadeem, above n 137.

140 Ibid.

141 Ibid.

142 Institute of Chartered Accountants in Australia, above n 61.

143 Commonwealth of Australia, House of Representatives, Tax Agents Services Bill, Explanatory Memorandum (14 November 2008). <http://www.comlaw.gov.au/Details/C2008B00260/Explanatory%20Memorandum/Text>.

advice to Australian taxpayers on the operation of revenue law.'[144] As acknowledged by the Honourable Bill Shorten, in a speech to the ICAA in April 2011,[145] the breadth and depth of tax advice provided by tax practitioners supports the notion that they represent 'the consigliores of suburban prosperity'. The Australian tax system is based on self-assessment, thus voluntary compliance is critical to the efficient operation of the system, and perceptions of fairness, including access to confidential tax advice, are critical to the community's sense of equality and justice.

The ICAA argues that 'the current accountants' concession is ineffective and as such is rarely relied upon by either taxpayers or tax advisors.'[146] The concessions are too narrow and poorly defined to be remedied by redesign. ICAA members raised two major concerns with the scope of the accountants' concession in practice:

> i) The accountants' concession does not afford confidentiality to clients' communications to their accountants or even clients notes of their discussions with or advice from their accountant (advisor), which reflects a very narrow administrative approach.
> ii) The limitations on the scope of the accountants' concession has also become problematical in recent years as a result of the frequency with which ATO audit teams now raise Part IVA or suggest they have concerns about the possible application of Part IVA during the course of their fieldwork.[147]

The Commissioner's *Guidelines*[148] provide examples of what constitute 'source', 'non-source' and 'restricted documents', they do not provide definitions, and thus lack clarity, causing far-reaching practical implications for both practitioners and taxpayers. The lack of a clear definition for 'exceptional circumstances' that enable the ATO 'to lift the concession' is acutely felt by ICAA members.

> The overwhelming experience of our members has been that ATO officers use the so-called 'exceptional circumstances' override as a threat to coerce taxpayers into the provision of documents, with the implicit message that taxpayers will not succeed in seeking any internal ATO review of the ATO officers' requirement. While we believe that such strategies would of course not be sanctioned by the Tax Commissioner, or senior ATO officers, they nonetheless do exist in practice during the 'cut and thrust' of difficult and complex compliance audits of both individual and business taxpayers.[149]

ICAA members' experience is that often ATO officers do not possess sufficient knowledge of the effect, interpretation, and practical application of the *Guidelines*. Where matters have

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144 Institute of Chartered Accountants in Australia, above n 61, Executive Summary, page 1. 'There are more than 60,000 registered tax agents in Australia serving the needs of around 70 percent of the population.'

145 Honourable Bill Shorten, 'No.011 Address Institute of Chartered Accountants 2011 National Tax Conference, Melbourne - the Mechanics of the Tax System' (6 April 2011).

146 Institute of Chartered Accountants in Australia, above n 61, Executive Summary, page 2.

147 Institute of Chartered Accountants in Australia, above n 61, 8, citing the ICAA 'Submission on the Inspector-General of Taxation's Work Program 2011 Review Topics Submission' (1 March 2011 [2.11.2]

148 Australian Tax Office, above n 19.

149 Institute of Chartered Accountants in Australia, above n 61, 9.

escalated, the fact that an ATO officer sits in judgement of what constitutes 'confidential communications' is not in keeping with best governance practice. 'The more appropriate position would be for an independent arbitrator to assess the merits of each party's claims …without any actual or perceived conflicts of interest.'[150] The administration of claims is itself burdensome and out of proportion, especially when compared to the procedures involved in making a claim for client legal privilege.

ICAA members report that 'there seems to be no formal process followed by the ATO to give taxpayers a 'reasonable and realistic' opportunity to claim the accountants' concession.'[151] Rather, a claim for the concession to be applied, leads to adverse treatment by the ATO officers.

> Members have received feedback from ATO officers that the raising of accountants' concession claims will be seen as indicative of a lack of co-operation by the taxpayer in their dealing with the ATO and used by the ATO to justify a more forceful approach by the ATO to review of those taxpayers. This seems to be at odds with the granting of a concession.[152]

The limitations of the accountants' concession by comparison with key features of client legal privilege include: the Commissioner's *discretion* to lift the accountants' concession; the limitation of the concession to *external* independent professional accounting advisors; the *sole purpose test* applied to the documents and the fact that the concession focuses on the *protecting documents* from access, rather than protecting 'communications'. All serve to render the concessions inferior to the protection offered by client legal privilege.

The ICAA 'argues that achieving the correct policy outcome necessitates the introduction of a statutory regime that is properly considered by the government and ultimately implemented by the Parliament.'[153] The ICAA supports the ALRC Recommendation 6-6, and hence the New Zealand right of non-disclosure. However the ICAA 'does not support the need for privilege claims to be certified by a lawyer [at the request of the ATO].[154] The ICAA 'also raises concern in regards to the ALRC recommendation that the scheme only applies to information sought by the ATO.'[155] The concern, shared with this thesis, is that such a narrow application creates the potential for abuse, especially where the information can be sought by other government agencies - agencies that have information sharing agreements with the ATO. The New Zealand legislation overcomes this issue by ensuring that the right of non-disclosure applies to all counterparties. Finally the ICAA in its very commendable

150 Ibid 10.
151 Ibid 11.
152 Ibid12.
153 Ibid 5.
154 Ibid 26.
155 Ibid.

submission suggests its own list of what documents should be included in the definition of a 'tax advice document':

> - any document containing the advice in any form;
> - the clients communication to the tax agent requesting the tax advice, together with any other documents giving instructions in respect of it;
> - drafts or working papers created in the course of preparing advice (but recognising the distinction between 'tax advice documents' and 'source documents');
> - a copy, summary or other record of the advice created by the client or another party where the advice, if prepared by a lawyer, would be privileged if copied, summarised or otherwise recorded; and
> - a recording of verbal advice whether prepared by the tax advisor or client.[156]

9.7 Key criteria for a legislated taxpayer privilege

Drawing together the concepts identified in preceding chapters of this thesis and taking into account the arguments identified within this chapter, there are a number of criteria essential to a legislated taxpayer privilege for Australia, or a blueprint for Australia going forward.

- One, a taxpayer privilege needs to be clear, certain and result in consistent and predictable outcomes, [157] and not impose unnecessary burdens or costs on taxpayers.[158] Such a taxpayer privilege would create confidence in the tax system and encourage compliance with the tax laws; an essential ingredient in our voluntary self-assessment system.[159]
- Two, a taxpayer privilege 'based on the common law' client legal privilege, would benefit from the historical development of the law, its judicial review, academic commentary, organic future developments and parliamentary intervention. It would also mean that the law can adapt to changing practices, in this regard it would work in the same way as the United States tax-practitioner privilege.
- Three, the privilege should serve to protect 'confidential communications' and not be focused on protecting documents per se. Confidential tax advice whether it is provided in writing or is communicated orally should attract the same protection.[160]

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156 Ibid 27.

157 For a contrary argument re the clarity and simplicity of the common law of client legal privilege, see Ronald J Desiatnik, 'Legal Professional Privilege and the Pratt Holdings Saga' (2006) 80 *Australian Law Journal* 462 'legal professional privilege is one of the common law's most venerable doctrines, having "emerged in the 16th century as the natural exception to the then novel right of testimonial compulsion", it is not surprising that, originally having been simple and easily applied, many now view it as being quite the opposite.' (Citation excluded).

158 See Rule of Law Institute of Australia, '*Submission on 'Discussion Paper – Privilege in relation to Tax Advice*' (27 July 2011).

159 See thesis Chapter seven and the discussion on the law being a social construct, referencing the work of Joseph Raz.

160 Oral tax advice is rare, more often it is recorded or documented, and where it is not documented it could indicate something 'dubious' about the communication.

The emphasis is on the intention to maintain the confidentiality of communications,[161] thus documents that are forwarded to the ATO as part of a tax return, would fail to meet the 'confidentiality' test, as would communications where the requisite intent to maintain confidentiality was absent or waived. Sensitive financial information requires the protection of privacy.[162] The tax office needs access to documents that form the basis of the tax return, namely source documents. The ATO has a range of powers to ensure that it can gain access to documents, either by voluntary disclosure or via its information gathering powers under sections 263 and 264 of the *ITAA*. 'The facts and circumstances of a transaction are routinely obtained by the ATO in a risk review or audit without the necessity of obtaining access to advice documents.'[163] The main restriction to the ATO access and disclosure powers is that they are subject to client legal privilege - they should be equally subject to a taxpayer privilege.

- Four, the emphasis needs to be on the provision of 'independent' tax advice, thus advice from tax practitioners acting independently and in their professional capacity, should attract protection whether they are in the full-time employment of the client or acting as an external practitioners.[164] Again the common law that has developed around the practice of law by salaried lawyers[165] would serve to resolve any issues involving independence.
- Five, confidential communications between a taxpayer and their chosen tax practitioner should be protected from disclosure to any *opposing party*. That protection should not be limited to the information gathering powers of the ATO, but against all counterparties. This would reduce the incidence of the ATO gaining access to information from other State or Federal agencies with coercive information

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161 This was the second of Wigmore's four key criteria for the recognition of privilege, see Chapter three, 3.7.1: Wigmore's utilitarian formula for privilege.

162 See discussion in Chapter three referring to confidentiality as central to the taxpayer-tax practitioner relationship if 'sensitive' financial issues are to be fully explored and structured to comply with the law. See also, thesis discussion in Chapter four referring to *Foxley v United Kingdom* (2000) 31 EHRR 637, 647 expressing doubt that 'exceptional circumstances' (to lift privilege) would include the public interest in the collection of financial information by the Revenue.

163 Rule of Law Institute of Australia, above n 160, 4.3(iv).

164 This was an issue that the ICAA identified as requiring further consideration in the design process should the government decide to proceed with the introduction of a tax advice privilege regime. Institute of Chartered Accountants in Australia, above n 63, 25, 'The application of privilege to tax law advice provided by in-house tax advisors.'

165 *Waterford v Commonwealth* (1987) 163 CLR 54, HCA 25[6] (24 June 1987) (Mason and Wilson JJ): 'The common law, in the view that we have taken, recognizes that legal professional privilege attaches to confidential, professional communications between government agencies and their *salaried legal officers* undertaken for the *sole purpose* of seeking or giving legal advice or in connexion with anticipated or pending litigation.' (Emphasis added, at the time of the judgment the 'sole purpose test' applied to client legal privilege).

gathering powers[166] especially where they have information sharing agreements in place. It would also reduce the incidence of waiver of information, whereby the provision of information to one agency whether as a result of the exercise of coercive information gathering powers, or in compliance with legal requirements, means that the 'privileged' status would be lost.

First, no counterparty should be able to gain access to communications that are deemed to be 'privileged tax advice' provided by a tax practitioner. Second, arrangements need to be put in place to protect the disclosure of information to one agency, solely for the use of information in that action or to fulfil a legal requirement, from access by other parties.[167] There is a vast amount of case law on client legal privilege and waiver: on what amounts to intentional or unintentional waiver; partial waiver; the role of 'fairness' in deciding issues of waiver; whether a waiver in one circumstance means that the privilege is lost in subsequent action and/or in relation to other parties. Therefore basing the taxpayer privilege on the common law client legal privilege would mean that judicial pronouncements made in this area would apply to the taxpayer privilege.

Another difficult issue to be resolved in this context for corporations is the disclosure of tax accrual work papers to independent auditors. The auditors may need access to confidential tax advice, in order to satisfy themselves that the figures disclosed in the financial statements are reliable.[168] A corporation that resists an auditor's call for access to legal advice, risks a 'qualified auditor's report' of their annual financial statements, and the market consequences that may flow from such a report.

- Six, there is a need to draw a clear boundary between the provision of tax advice by tax practitioners and engaging in legal practice. As noted by Wallis, the provision of tax advice is nothing more or less than the provision of legal advice.

  There is little scope to argue that:
  - giving legal advice does not involve engaging in legal practice; or

166 See *Stewart v Deputy Commissioner of Taxation* (2011) 194 FCR 194, wherein confidential tax advice documents accessed under warrant by the Australian Crime Commission were made available to the ATO.

167 See Geoff Healy and Andrew Eastwood, 'Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission' (2005) 23 *Company and Securities Law Journal* 375, 382: discussing the now defunct *Companies (NSW) Code* 1981 'In the authors' view, s299(2)(d) of the code and its equivalent provision in the ASIC Act should be interpreted as meaning that even if a person discloses a privileged communication during an examination, that does not amount to a waiver of privilege in subsequent litigation.'

168 See the discussion on waiver of tax accrual work papers and section 7525 of the United States *Reform Act* in Chapter eight of the thesis.

- giving advice about legislation is anything other than legal advice.[169]

'Tax agent services' under the *Tax Agents Act 2009* (Cth)[170] include the provision of tax advice and representing an entity in their dealings with the Commissioner. Hence there may be a need to amend the legislation in each of the States governing the practice of law,[171] to create an exception or 'safe harbour' from the prohibition to practise law for tax practitioners providing advice on tax legislation and in representing taxpayers in administrative actions against the Commissioner.

Tax practitioners are entitled to represent their clients in administrative actions before the Commissioner however, problems arise when the Commissioner decides that a matter shifts from negotiation, to a civil or criminal court. This is a decision that the Commissioner makes at his discretion, and it is not always clear to all the parties when an action shifts from the civil to the criminal arena. The term 'once privileged, always privileged'[172] is particularly apt at this juncture, as taxpayers need to be confident that their confidential communications with their tax practitioner will in fact be protected, if they are to engage in full and frank discussions.

Tax practitioners similarly need to be assured that disclosure of confidential communications cannot be required of them or their client.[173] The legislation should serve to protect 'confidential communications' between the tax practitioner and the client from waiver once the action enters the civil or criminal courts. The tax practitioner is not, and should not be, authorised to practise in civil or criminal courts. It is not uncommon for tax practitioners to continue to act for their clients alongside a legal adviser, when a case enters the courts. The common law that has developed on third parties providing advice and/or preparing documents for litigation, would apply in these instances. Furthermore, in this regard the decision in *Pratt*[174] extending client legal privilege to non-agent third parties, focusing on the nature and *function* which the third party performs, rather than the agency relationship with the client or the lawyer, should prove beneficial to taxpayers. *Pratt* emphasised that if the 'function is

169 Chris Wallis, above n 130, 602.

170 See section 90-5 of the *Act.*

171 In Victoria it would be the *Legal Professions Act 2004* section 2.2.2.

172 See *Pearce v Foster* [1885] QBD 114, 199-20 (Sir Balliol Brett MR) in Chapter two of the thesis.

173 This is an area in which the application of the common law rules on waiver, and section 123 of the *Evidence Act 1995* (Cth) have created uncertainty, and clouded the assurance of 'once privileged always privileged.'

174 *Pratt Holdings Pty Ltd and Another v Commissioner of Taxation* (2004) 136 FCR 357. The *Pratt* case was dealing with legal advice privilege, and extending that privilege to third parties notwithstanding that they were not acting as 'agents' of either the client or the lawyer. See Chapter five of the thesis.

to enable the engaging party to make the communication necessary to obtain legal advice which it requires, then privilege should attach to the documentary communication authored by the third party.'[175] Section 117(1) of the *Evidence Act 1995* (Cth) maintains the privilege in respect of third parties.

- Seven, the taxpayer should continue to bear the burden of proof that the tax position adopted is in accordance with tax laws, and hence would need to provide the necessary documentation to prove their case. Furthermore, where the ATO issues an amended assessment, the taxpayer would still bear the burden of proving that the amended assessment was excessive.[176]
- Eight, placing the emphasis on the 'confidentiality' of communications, and relying on the common law that has developed around that concept obviates the need to include the New Zealand practice of giving the Revenue access to 'tax contextual information' - a practice that introduces unnecessary complications into the system. The taxpayer faced with civil and/or criminal penalties should they fail to comply with the law, or provide wrong, misleading or false information, has all the necessary incentive to provide the Revenue with all the relevant information, in order to discharge their compliance obligations. Tax practitioners are also subject to severe civil penalties under the *Promoter Penalties* regime.[177] Though the scheme has been operation since 2006, only three prosecutions have been reported, though more cases are being investigated by the Commissioner. The substantial penalties imposed in the *Barossa Vines*[178] case caused concern amongst tax practitioners.
- Nine, the creation of a taxpayer privilege would require federal legislation, as the Australian courts have not shown an appetite to extend client legal privilege to tax

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175 Ibid 368[41] (Finn J).

176 See discussion on onus of proof in Chapter six of the thesis. Specifically section 6.2 'A self-assessment tax system and the taxpayers' burden of proof'.

177 *Taxation Administration Act 1953* (Cth) Division 290 of Schedule 1 introduced in 2006. The ATO's management of the Scheme is explained on the ATO website by Tim Dyce, Deputy Commissioner, Aggressive Tax Planning. <https://www.ato.gov.au/Media-centre/Speeches/Other/Administration-of-the-Promoter-Penalties-Regime-and-recent-Court-decisions/> The three prominent cases referred to are firstly *Federal Commissioner of Taxation v Ludekens and Another* [2013] FACAFC 100. The case was first heard by a single judge, and Middleton J ruled that the ATO had not made its case. The ATO appealed to the Full Federal Court, where Allsop CJ, Gilmour and Gordon JJ reversed the decision. The High Court refused to hear an appeal to it by Ludekens. The second case was *Commissioner of Taxation (Cth) v Barossa Vines Ltd &Ors* [2014] FCA 20, heard by Besanko J, who awarded civil penalties of $625,000 against Barossa Vines Limited and $125,000 each against the four individual respondents. The third case was *Federal Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34 heard by Edmond J finding in favour of the Commissioner.

178 *Commissioner of Taxation (Cth) v Barossa Vines Ltd &Ors* [2014] FCA 20.

practitioners, though arguably they have the power to do so. As the *Prudential*[179] case in the United Kingdom demonstrated the courts are reluctant to act in what they deem to be 'tax policy'[180] issues, preferring to leave them to the elected representatives of the people – the Parliament.

- Ten, the legislation should also ensure that claims for privilege are heard by an independent arbiter, and remove any perceived conflict of interest on the part of the ATO, as currently experienced with the accountants' concession. The mere legislating of the accountants' concession, even with the modifications suggested by the Law Council, is not a suitable resolution, as the concessions are too narrow and poorly defined to be an effective incentive to taxpayers to engage in full and frank discussions with their tax practitioner.
- Finally, confidential tax advice whether provided by a tax practitioner or a lawyer should attract the same protection. Accountants in the Australian tax system provide the majority of tax advice on both an annual tax return basis and the more routine relationship with clients. As noted by the Honourable Bill Shorten:

> When one speaks to accountants, I truly believe one speaks to a trusted confidant of so many Australian families.
> …You are the *consigliore* of suburban prosperity; of kitchen table budgets; of holidays foregone and school fees paid; of the nursing home chosen and the beach house not bought; of the margins by which a small business prevails; or goes under.[181]

The *Tax Agents Services Act 2009* (Cth) has served to make tax practitioners subject to the discipline and scrutiny of an independent National Tax Practitioners Board; weakening the lawyers' historical objection to extending privilege to non-lawyers because they are not subject to appropriate regulation. As noted by Lord Neuberger in *Prudential*[182] in reference to arguments that legal advice privilege should be limited to lawyers because of the special position that they hold in the legal justice system:

> …to modern eyes, it is hard to see why the connection between lawyers and the courts, and in particular the reliance which judges place upon lawyers to act properly, is a good reason in principle for limiting LAP to the legal profession. One can see why the argument might have carried real weight 150 years ago, but for the point to convince today would require something more than such a general statement.[183]

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179 *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* (2013) UKSC 1.

180 Ibid 13[52] (Lord Neuberger).

181 Honourable Bill Shorten, 'No.001 Address Institute of Chartered Accountants' Parramatta (13 February 2013).

182 *R (on the application of Prudential plc and Another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* (2013) UKSC 1.

183 Ibid 13[43] Lord Neuberger, President of the Supreme Court, finally concluded that 'legal advice privilege' should be limited to legal advice by lawyers.

> … It is also true that solicitors and barristers owe a formal duty to the court but (i) that duty only would be relevant in connection with litigation, whereas LAP goes much wider, and (ii) every professional person involved in litigation can fairly be said to have a duty to the court.[184]

9.8 Conclusion

A taxpayer privilege should provide an absolute and permanent privilege for taxpayers,[185] so that they can confidently predict at the time of making the communication with their chosen tax practitioner, that the privilege will apply to their confidential communications, and that those privileged communications cannot be accessed by any counterparty. The protection offered by a taxpayer privilege can effectively be based upon the common law client legal privilege, as is the case, in the United States. A dedicated statute by the federal government would be required to create the privilege, as the government has not yet responded to the ALRC call to codify client legal privilege into a single statute, and to make the tax advice privilege a part of that statute. The response by the Labor Government in 2011 was basically to call for more submissions on the ALRC proposal to create a separate tax practitioner privilege. The Liberal/National Government, elected in 2013, has not addressed the issue and has shown no interest in the issue to date. Nor have the courts shown an appetite to delve into what they see as a 'tax policy' issue.

The common law client legal privilege has developed through case law from the 16th century to current times. It has morphed from being the privilege of the lawyer, to being the privilege of the client.[186] The privilege is a substantial right, not simply a rule of evidence, and as such it is not confined to judicial or quasi-judicial proceedings but also operates at the investigative stage, such as sections 263 and 264 of the *ITAA*, to protect privileged communications.[187] The privilege has two limbs, advice privilege and litigation privilege. The litigation privilege extends to communications with third parties made for the purpose of litigation or reasonably pending litigation. It serves to protect the legal advisers' brief.[188] The *Pratt*[189] decision discarded the 'agency' requirement for the protection of communications with third parties, affirming that the focus is on the '*purpose*' of the communications, rather than the relationship between the parties. The test for privilege has developed from the 'sole purpose'[190] test to the 'dominant purpose'[191] test. The emphasis is clearly on 'confidential' communications, rather than on the protection of documents per se.[192]

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184 Ibid 13[44].
185 See Minet v Morgan (1873) 8 LR Ch 361: discussed in Chapter two of the thesis.
186 See *Minet v Morgan* (1873) 8 LR Ch 361.
187 See *Baker v Campbell* (1983) 153 CLR 52.
188 *Southwark Vauxhall Water Co v Quick* [1878] 3 QBD 315, 320 (Brett LJ).
189 *Pratt Holdings Pty Ltd and Another v Commissioner of Taxation* (2004) 136 FCR 357.
190 See *Grant v Downs* (1976) 135 CLR 674.

The rationale(s) for a taxpayer privilege are akin to the rationale(s) for client legal privilege. The utilitarian rationale[193] for client legal privilege provides that clients should be able to consult with their advisers on a confidential basis to ensure full and frank discussions take place, and the adviser using their legal skills, is able to provide the client with the best advice, or where necessary conduct litigation for the client, or indeed avoid litigation altogether. The tax legislation is extremely voluminous and complex. Taxpayers require the assistance of tax practitioners in order to fulfil their compliance obligations. The self-assessment tax system is reliant on the voluntary compliance of taxpayers in calculating their tax obligations; interpreting the tax law; exercising reasonable care in completing their tax return and maintaining the appropriate records. The utilitarian rationale provides the incentive for candour in the taxpayer-tax practitioner communications; it rests on the behavioural assumption that *but for* the assurance of confidentiality the taxpayer would refrain from either consulting with or making full and frank disclosures about often sensitive financial matters, to their tax practitioner.

The humanistic rationale is that it is desirable to create certain privileges out of respect for personal rights, such as privacy and personal autonomy.[194] The rights based rationale protects privacy and access to justice. The highly sensitive financial and confidential nature of communications between taxpayers and their tax practitioner require privacy and the relationship is one that should be fostered as it can lead to a more compliant taxpayer and a more effective tax regime.[195] Client legal privilege has come to be described as a 'fundamental human right.'[196] The two rationales – utilitarian and humanistic, are not mutually exclusive,[197] they can work together to enhance the clarity and predictability of the privilege.

Tax practitioners providing tax advice, are performing 'a tax agent service' under the *Tax Agents Act 2009*, and as such they need to be reassured that in doing so they are not deemed to be 'practising law' and run the risk of being in contravention of the various State statutes

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191 See *Esso Australian Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49.

192 Compared to the New Zealand right of non-disclosure of tax advice documents.

193 For a discussion of the utilitarian rationale see Chapter three of the thesis.

194 *See* Edward J Imwinkelreid, 'An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis' (1994) 73 *Nebraska Law Review* 511, 543-4, discussed in Chapter four of the thesis.

195 The literature on tax compliance is vast and beyond the scope of this thesis. See Michael Walpole and David Salter, above n 88, 338 'The literature is not entirely consistent on the subject of how tax agents influence compliance…'.

196 See for example *R (on the application of Morgan Grenfell & C Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, 606-7 (Lord Hoffman).

197 See Note, above n 8, 1504.

governing the practice of law. A legislated taxpayer privilege needs to clarify this area of the law. It also needs to ensure that privileged tax advice does not lose its privileged status once the Commissioner decides to employ the courts to resolve a matter. The tax advice should be able to withstand challenges from any counterparty. The same protections that apply to client legal privilege, should apply to tax advice privilege.

9.8.1 Thesis limitations and areas for future research

The thesis has its limitations and there are issues that remain to be explored in the future. The thesis restricted itself to the four jurisdictions of Australia, New Zealand, the United Kingdom and the United States. Canada with its 'secret professionelle' in the civil law of Quebec stands out as a jurisdiction worthy of investigation and comparison. The thesis concentrated on 'taxpayers' and though corporations are amongst the most prominent taxpayers embroiled in litigation, the thesis did not fully address the question of the role of the 'human rights' justification for privilege in relation to corporations. Furthermore the asymmetry of powers in favour of the Commissioner of Taxation does not necessarily hold when the taxpayer is a multinational corporation. The 'waiver' of privilege is an area of law that was deemed to be beyond the scope of this thesis, nonetheless it is an important area for future research. The thesis has emphasised the legal advice leg of privilege, as this is the area that impacts most upon the taxpayer–tax practitioner relationship, given the restrictions on legal practice, notwithstanding that tax practitioners do represent taxpayers in negotiations with the ATO and in Tribunals.

The hypothesis of this thesis is that it is timely and beneficial to both taxpayers and the tax system to legislate a taxpayer privilege for Australia. The arguments presented have shown this to be true and the criteria for an effective taxpayer privilege can be implemented by a Federal *Act* of Parliament.

Addendum

Sections 263 and 264 of the *Income Tax Assessment Act 1936* were repeals effective from 1 July 2015.[198] The statutory powers of the Commissioner have been consolidated with existing powers within Division 353 of Schedule 1 to the *Taxation Administration Act 1953* and reads as follows:

> Division 353 -- Powers to obtain information and evidence
> 353-10 Commissioner's power
> (1) The Commissioner may by notice in writing require you to do all or any of the following:
> (a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a * taxation law;

[198] *Treasury Legislation Amendment (Repeal Day) Act 2015.*

(b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;

(c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.

Note: Failing to comply with a requirement can be an offence under section 8C or 8D.

(2) The Commissioner may require the information or evidence:

(a) to be given on oath or affirmation; and

(b) to be given orally or in writing.

For that purpose, the Commissioner or the officer may administer an oath or affirmation.

(3) The regulations may prescribe scales of expenses to be allowed to entities required to attend before the Commissioner or the officer.

353-15 Access to premises, documents etc.

(1) For the purposes of a * taxation law, the Commissioner, or an individual authorised by the Commissioner for the purposes of this section:

(a) may at all reasonable times enter and remain on any land, premises or place; and

(b) is entitled to full and free access at all reasonable times to any documents, goods or other property; and

(c) may inspect, examine, make copies of, or take extracts from, any documents; and

(d) may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.

(2) An individual authorised by the Commissioner for the purposes of this section is not entitled to enter or remain on any land, premises or place if, after having been requested by the occupier to produce proof of his or her authority, the individual does not produce an authority signed by the Commissioner stating that the individual is authorised to exercise powers under this section.

(3) You commit an offence if:

(a) you are the occupier of land, premises or a place; and

(b) an individual enters, or proposes to enter, the land, premises or place under this section; and

(c) the individual is the Commissioner or authorised by the Commissioner for the purposes of this section; and

(d) you do not provide the individual with all reasonable facilities and assistance for the effective exercise of powers under this section.

Penalty: 30 penalty units.

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