

administrative & regulatory law update

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ALRC recommends that tax advice be privileged

The Australian Law Reform Commission (ALRC) has released its long awaited report in relation to Legal Professional Privilege, including whether privilege should be extended to taxation advice from accountants.

The ALRC report, entitled "Privilege in Perspective: Client Legal Privilege", recommends that legislation be enacted to extend professional privilege to taxation advice provided by professional accountants. The ALRC calls this "Client Legal Privilege" and recommends that the new laws allow a person under investigation to refuse to disclose a "tax advice document" to the ATO.

A "tax advice document" is defined by the ALRC report to be a "confidential document created by an independent professional accounting adviser for the dominant purpose of providing a client with advice about the operation and effect of tax laws".

The ALRC report says that "source documents" such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers) should not be privileged, even where those documents are provided to a tax agent for the purpose of obtaining tax advice.

The ALRC says that the protection provided by the privilege should also not apply to "tax contextual information" supplied by a client to a tax agent for the purpose of providing advice. Information excluded from the privilege on this basis includes:

- facts or assumptions that have occurred or have been advanced by the person creating the tax

advice document;

- descriptions of steps involved in the performance of transactions that have occurred or are advanced by the person creating the tax advice document; and
- advice that does not concern the operation and effect of tax laws.

If the ALRC recommendations are adopted, privilege will only extend to an advice provided by a professional accounting adviser who is also a registered "tax agent" under s251L (1) (b) of the Commonwealth Income Tax Assessment Act 1936.

Not unexpectedly, privilege will not apply to a tax advice document created in relation to the commission of a fraud, offence or other wrongdoing; however, it remains to be seen how a claim of privilege will be made out where, for example, the ATO is investigating whether there is a fraud in the first place.

Whether the ALRC recommendations will be accepted by the Federal Government remains to be answered. There is also a question-mark as to whether similar legislation will be adopted by the state governments for other purposes, such as documents providing advice in relation to the stamp duties legislation.

In any case, accountants should start to consider the form in which they provide taxation advice and the systems they have in place to protect privilege in the event that the ALRC recommendations are adopted. [more...](#)

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