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General Manager,  
Tax System Division,  
The Treasury,  
Langton Crescent,  
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Attention: Mr Jamie Roberts.

Dear Sir/Madam,

*Submission on Discussion Paper - Privilege in relation to tax advice*

Thank you for a granting me an extension of time to make a submission on the above discussion paper.

Surprisingly the discussion paper fails to refer to any persons outside the relationship of lawyer and client<sup>1</sup> with respect as to what is now called client legal privilege, under the *Uniform Evidence Acts*.<sup>2</sup> It being known as legal professional privilege under the common law.<sup>3</sup>

Its purpose was succinctly expressed by Dawson J. in *Baker v Campbell*<sup>4</sup> when he said:

*Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. This is why the privilege does not extend to communications arising out of other confidential relationships such as those of doctor and patient, priest and penitent or accountant and client.*

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<sup>1</sup> Although a reference is made to Patent Attorneys at para 6.232 of *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC Report 107). See < <http://www.alrc.gov.au/report-107> >

<sup>2</sup> Ss. 118, 131A *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 1995*(ACT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic)

<sup>3</sup> *Esso Australia Resources Limited v. Commissioner of Taxation*, (1999) 201 CLR 49.

<sup>4</sup> (1983) 53 CLR 52 at p.128

In the case of the confidential relationship between the accountants and their clients that relationship is of a different nature when accountants as tax agents are advising their clients with respect to their taxation affairs particularly in the case of income tax. They are interpreting and advising on what are often complex laws, like capital gains tax. To apply that legislation requires an understanding of the rules of statutory interpretation and the reasoning of judges in the tax cases. But in order to receive sound advice, clients need to be in a position to frankly tell their tax agents the peculiar facts relating to their affairs without fear of being compelled to disclose this information. Mr Geoffrey Lehmann, a partner of Price Waterhouse, writing on the present topic nearly 20 years ago said that, “privilege encourages full and free communications, so that professional advisers are given the full facts and can call a ‘spade a spade’.”<sup>5</sup>

Clients of accountants as tax agents have for many years now had the benefit of having direct access to counsel.<sup>6</sup> This requires the accountant to take instructions directly from the client and serves to reinforce the need for clients to have the same privilege as that enjoyed by clients of solicitors. The discussion paper is silent on this issue.

It is submitted that no valid distinction can be drawn between the accountant-tax agent, the lawyer-tax agent or the sole tax agent in advising clients on their legal rights and obligations about their taxation affairs. The importance of accountants in doing so was acknowledged by Sir Owen Dixon when he said:<sup>7</sup>

*It is a mistake to look at the legal system as if it worked only in or through the courts. Countless people are governed as to their rights and liabilities by the advice they receive. In more important matters the advice may come from men qualified to give it, that is to say solicitors or counsel, **unless the question be one of income tax**; for that question we have been told, is at present a mystery impenetrable by all save accountants. (emphasis added)*

Not only do accountants give legal advice on taxation matters, including the drafting of objections against assessments of taxes, but similarly patent attorneys advise on intellectual property matters. The anomaly is that the clients of patent attorneys have the benefit of legal professional privilege, but clients of tax agents do not. Clients of patent attorneys first gained the privilege on 2 November 1904.<sup>8</sup> The present privilege is contained in s. 200(2) of the *Patents Act 1990* (Cth) which says that:

*A communication between a registered patent attorney and the attorney’s client in intellectual property matters, and any record or*

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<sup>5</sup> Geoffrey Lehmann, ‘Accountants, lawyers essential to society’, *The Australian*, Wednesday June 17, 1992. (see attached).

<sup>6</sup> See Rule 24B of the NSW Barristers’ Rules, 8 August 2011.

<sup>7</sup> The Rt. Hon. Sir Owen Dixon, [A *Justice of the High Court of Australia 1929-1952 and Chief Justice 1952-1963*], ‘Jesting Pilate’ 20 August 1957, in the Hon. S H Z Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (2<sup>nd</sup> ed 1997) at p.3.

<sup>8</sup> *Patents Act 1903* (Cth) and *Reg. 135 of the Patents Regulations 1904* (Cth).

*document made for the purposes of such a communication, are privileged to the same extent as a communication between a solicitor and his or her client.*

An illustration of the wide ranging legal nature of the work of the accountant-tax agent is in the area of taking instructions and the drafting of objections against amended assessments of income tax. The objection is a crucial document and if the taxpayer client is dissatisfied with the Commissioner's decision on the objection, it may lead to his or her decision being referred to the Administrative Appeals Tribunal or the Federal Court for review.

It must always be remembered, that it is the privilege of the client and not the privilege of the adviser. Because Parliament has treated clients of patent attorneys in the same way as it has treated clients of lawyers for a very long time, it ought to consistently follow that clients of tax agents should also enjoy the same privilege as clients of lawyers. It is an oversight which could be readily corrected by inserting into the *Taxation Administration Act 1953* (Cth) a provision in similar form to s. 200(2) of the *Patents Act 1990* (Cth).

I have confined myself to answering three questions asked in paragraph 95 of the Discussion Paper. They are as follows:

As to sub-paragraph A:

- (c) Yes;
- (d) Yes.

As to sub-paragraph B:

- (j) As for s.200(2) of the *Patents Act 1990* (Cth) and the provisions should be contained in the *Taxation Administration Act 1953* (Cth).

Yours sincerely,

Bryan Pape