The Primacy of Client Privilege: Designing a Statutory Advice Privilege for Accredited Non-Lawyer Tax Advisors

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1. Introduction

There are several different types of professional groups that provide tax advice in Australia: lawyers, accountants, financial advisors, superannuation providers and registered tax agents. In many cases, the type of advice provided is the same; however, non-lawyer tax advisors (“NLTAs”) do not enjoy equivalent privileges in providing such advice. Whilst, lawyers enjoy a blanket legal professional privilege (“LPP”) over confidential tax advice, NLTAs are presently only granted an administrative concession by the Australian Taxation Office (“ATO”), over limited documents.
Differential treatment of tax professionals in Australia, based on whether they are members of the legal profession, is an issue of considerable controversy. This debate has taken centre stage in Australia with the release of a Discussion Paper in April 2011: “Privilege in relation to tax advice” (“the Discussion Paper”).

This article argues in favour of the enactment of a separate statutory advice privilege in Australia for accredited NLTAs. It is proposed that the suggested regime be integrated with registration of a tax agent by the Tax Practitioners Board (“TPB”) under the Tax Agent Services Act 2009 (“TASA 2009”) and would operate as a separate accreditation process to provide appropriately credentialed tax agents with the ability to provide privileged legal taxation advice. A precondition to eligibility for registration to provide privileged tax advice would be existing registration as a tax agent. However, three further fundamental conditions would need to be satisfied. The first condition is a further postgraduate qualification in taxation (for example a Masters of Taxation or equivalent) or designation as a Chartered Tax Adviser (“CTA”), Certified Practising Accountant (“CPA”), Chartered Accountant (“CA”) or a member of the Institute of Public Accountants (“IPA”). The second condition is undertaking rigorous and comprehensive competency training in the law of privilege. The third condition is engaging in ongoing continued professional education in the law of privilege.

Part one of this paper briefly outlines the current situation with respect to privilege over taxation advice in Australia. Part two considers the policy

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1 Department of Treasury, *Privilege in relation to tax advice* (April 2011) (the Discussion Paper (“DP”)).
justifications for and against the enactment of a privilege for NLTAs. Part three looks at the key elements and practical issues that arise in designing a statutory privilege for NLTAs and suggests a framework for determining which taxation professionals should be able to offer privilege to their clients. Part four concludes, arguing that the most suitable legislative model would be an accreditation system available only to registered tax agents that had additional postgraduate qualifications in taxation that had also undertaken additional specialised training in the law of privilege. It is then suggested that a linked model based on the United States (“US”) statutory privilege in section 7525 of the Internal Revenue Code should be adopted.

PART ONE

2. The current position in Australia

Lawyers enjoy LPP in respect of confidential communications with clients where the communication is for the dominant purpose\(^2\) of obtaining legal advice or preparing for litigation (actual or contemplated).\(^3\) LPP can also extend to communications between lawyers and third parties if the purpose of the communication is for actual or contemplated litigation.\(^4\) In this regard, LPP can

\(^3\) The Commonwealth Evidence Act 1995 codifies LPP which applies in proceedings before a Federal Court.
\(^4\) Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122.
provide a powerful shield\(^5\) against the ATO’s information seeking powers in sections 263 and 264 of the *Income Tax Assessment Act 1936* ("ITAA 1936").\(^6\)

### 2.1 Accountant’s Concession

NLTAs do not currently receive the same protection in respect of confidential tax advice they provide directly to clients. Rather, the form of protection provided is an administrative concession extended by the ATO to certain tax advice documents between taxpayers and their professional accounting advisers.\(^7\) The policy underlying the concession is that there are documents that in: “all but exceptional circumstances” should “generally remain within the confidence of taxpayers and their tax advisers.”\(^8\) This policy recognises that tax advisers and their clients should be able to engage in full and frank discussions regarding their taxation obligations.\(^9\)

The documents that attract the concession are restricted source and non-source documents.\(^10\) Restricted source documents contain advice created prior to, or contemporaneously with, the transaction entered into by a taxpayer. Non-source documents contain written advice prepared after a transaction is complete, that do not affect the recording of the transaction in the taxpayer’s accounts or tax returns. The concession does not cover source documents which are documents that record a transaction or an arrangement entered into by a taxpayer (such as

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\(^5\) For example *FCT v Citibank* (1989) 17 ALD 401 confirms that section 236 is subject to LPP.

\(^6\) Section 263 and 264 of the ITAA 1936 provide the ATO with access powers to obtain various documents and books of a taxpayer.


\(^8\) DP, above n 1, 4.

\(^9\) ATO, above n 7, paragraph 7.1.1, DP Ibid.

\(^10\) ATO Ibid.
financial accounts or tax returns). The ATO currently has full access to these documents.11

Unlike LPP, the accountant’s concession is not self-executing and must be claimed. Further, the concession does not apply to “internal” tax advisors (employees of the taxpaying entity).12

An important limitation of the accountant’s concession is that the ATO has complete discretion to lift the concession in “exceptional circumstances”. Exceptional circumstances include:

- Where the ATO believes fraud, tax avoidance, evasion or another illegal tax offence has taken place; and
- Where the ATO needs the documents to ascertain material facts necessary to determine the taxation consequences of the transaction because the taxpayer or their records cannot be located.13

Case law has established that taxpayers have a “legitimate expectation” that the Commissioner will not depart from the guidelines without giving them an opportunity to state their case (that there are no exceptional circumstances.)14 Accordingly, a decision to lift the concession could be set aside on the basis that the rules of procedural fairness were breached.15

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11 Ibid.
12 Ibid paragraph 7.1.5.
13 Ibid.
15 Ibid.
Given the virtually unfettered discretion of the Commissioner to lift the concession, and the limited scope for judicial review, it is commonly asserted that the accountant’s concession is inferior to the protection afforded to lawyers under LPP and is fertile for review.  

Some of the primary criticisms of the concession include that:

- The exceptional circumstances criteria is “broad and ill-defined,” meaning taxpayers can have little confidence that their communications with accountants would be protected by the concession;\(^{16}\)

- The concession works “one way” only and doesn’t provide confidentiality in relation to a clients’ communications to their accountants (e.g. a request for advice) or notes a client makes regarding their discussions with their accountants;\(^{17}\)

- The anti-avoidance provisions in Part IVA are frequently invoked by the Commissioner and this means the accountant’s concession is frequently lifted because the potential application of Part IVA constitutes an exceptional circumstance;\(^{18}\)

- The ATO does not administer and interpret the concession in a transparent and consistent manner.\(^{20}\)


\(^{18}\) ICAA Ibid.

\(^{19}\) Ibid.

\(^{20}\) DP, above n1, 5.
2.2 Review of the Concession

In 2008 the Australian Law Reform Commission (“ALRC”) tabled a report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (“ALRC Report”), which recommended a statutory tax advice privilege should be created. Under this privilege a taxpayer would not have to disclose a confidential “tax advice document,” to the ATO when it was prepared by an independent registered tax agent, for the dominant purpose of providing the taxpayer with advice regarding the “operation and effect” of the tax law. The recommendations were based upon a partial adoption of the New Zealand (“NZ”) statutory model.

In April 2011, the Government released the Discussion Paper considering and seeking the public’s view on the establishment and appropriateness of a tax advice privilege for NLTAs. The Discussion Paper considers in further detail the ALRC Report recommendations, exploring the implications of such a privilege for NLTAs.

The issues canvassed in the Discussion Paper and recommendations in the ALRC Report will be further discussed throughout this paper.

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21 ALRC, above n 17. The Attorney –General announced the inquiry in November 2006 into LPP as relates to the activities of Commonwealth investigatory agencies.
22 Ibid, 11 (Recommendation 6.6).
23 Ibid.
24 Ibid, 11.
25 DP, above n 1,7. ALRC, above n 17, para 6.278.
26 DP, above n 1.
PART TWO

3. Why should NLTAs enjoy privilege over confidential tax advice documents?

Before analysing the practical issues that arise in designing a privilege for NLTAs, it is necessary to explore the policy arguments that arise in relation to whether NLTAs should enjoy a comparable privilege to lawyers.

3.1 Why do lawyers exclusively enjoy LPP?

The principle justification underpinning LPP is that it promotes the public interest by encouraging candid discussions between clients and their legal advisers and enhances the administration of justice.\(^{27}\) The extension of LPP to communications with lawyers has been attributed a special significance in Australia, being referred to as “part of the functioning of the law itself”,\(^ {28}\) a “human right”\(^ {29}\) and a “corollary of the rule of law.”\(^ {30}\)

A number of justifications have been provided as to why LPP is extended exclusively to communications with lawyers. In its inception, LPP was seen to extend to lawyers because they were men of honour who would keep the

\(^{27}\) Grant v Downs (1976) 135 CLR 674, 685.
\(^{28}\) Baker v Campbell (1983) 153 CLR 52.
confidence of their clients.\textsuperscript{31} This historical justification may no longer have any gravity as whilst LPP was previously viewed as being held by the lawyer, it has now “changed hands”\textsuperscript{32} and is firmly the “client’s privilege”. \textsuperscript{33}

Another justification is that lawyers are subject to rigorous “professional and ethical training,”\textsuperscript{34} not necessarily possessed by other professions. Lawyers are officers of the Court and it is argued that they possess unique duties that impose control upon the process by which LPP claims are made.\textsuperscript{35} For example, lawyers can be personally liable for asserting a claim for LPP without any basis and can be subject to misconduct proceedings.\textsuperscript{36} A lawyer has a duty to fully disclose to the court any criminal convictions and failure to do so can result in a lawyer being struck off the role.\textsuperscript{37}

Indeed, the case law affirms that it is the additional qualifications and obligations of being admitted to practice as a lawyer (rather than obtaining a law degree) that is a precondition to the grant of LPP. In \textit{Glengallan Investments Pty Ltd v Arthur Andersen},\textsuperscript{38} advice provided by an accountant who held a degree in law, but was not admitted to practice, was held not to benefit from LPP.

In the UK case, \textit{Regina (Prudential plc and another) v Special Commissioner of Income Tax and another (Institute of Chartered Accountants in England and Wales}

\textsuperscript{32} Desiatnik, above n 29, 12; Fisher Ibid.
\textsuperscript{33} Baker v Campbell (1983) 153 CLR 52, 84 (Justice Murphy).
\textsuperscript{34} DP, above n 1, 12.
\textsuperscript{35} ALRC, above n 17, (para 6.239 and 6.240)
\textsuperscript{36} DP, above n 1, 13 and ALRC, above n 17 (para 6.240.)
\textsuperscript{37} DP Ibid.
\textsuperscript{38} (2002) 1 Qd R 233.
and others intervening, the Court refused to extend LPP to accountants. The Court noted that LPP must be abundantly: “clear and certain in its application” as any grant of LPP too broadly could compromise the information available to run a fair trial and the administrator’s ability to enforce the tax legislation.

Given these overriding considerations, the Court suggested an extension of LPP to accountants could be detrimental to ensuring certainty and clarity and could lead to “serious questions” about LPP’s “scope and application”. The Court noted that the term “accountant” does not denote membership to any particular body or the obligation to comply with any particular professional obligations and that this led to difficult policy questions such as: to which accountants, and to what areas of law, would it apply?

3.2 Justifications for extending privilege to NLTAs

There is a substantial body of literature as to why privilege should be extended to confidential communications made by NLTAs. Some of these reasons are discussed and evaluated below.

3.2.1. Both NLTAs and Lawyers provide legal advice in the taxation context

One of the principal justifications for extending privilege to NLTAs is that both lawyers and NLTAs provide legal advice in the taxation context. It is argued that

irrespective of their professional designations in many areas of taxation law both NLTAs and lawyers provide equivalent legal advice. This is given explicit recognition in section 90-5 of TASA 2009 where it provides that a:

tax agent service is any service:
(a) 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 the entity or another entity that arise, or could arise, under a taxation law; or
(iii) Representing an entity in their dealing with the Commissioner; and
(b) That is 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 or obligations that arise, or could arise under a taxation law;
(ii) To claim entitlements that arise or could arise, under a taxation law."

(emphasis added)

Notably, a taxation law is any of the Acts over which the Commissioner has general administration.\(^{40}\)

The terms in section 90-5 explicitly contemplate that tax agents are providing “advice” in relation to the taxation law. It is acknowledged that lawyers provide different advocacy services to taxpayers in relation to litigation. However, this paper argues that in relation to tax planning and advice, in many cases the services provided by NLTAs and lawyers do not differ.

\(^{40}\) This includes the ITAA 1936 and 1997, the Fringe Benefits Tax Assessment Act 1986, A New Tax System (Goods and Services Tax) Act 1999 and TASA 2009.
Interestingly, some proponents argue that tax agents and lawyers do not necessarily play an equivalent role in the tax system. For example, the Law Council argues that the primary role of a tax agent is “administrative” thereby, justifying the exclusive grant of LPP to lawyers over legal advice.

Interestingly, the Administrative Appeals Tribunal (“AAT”) decision in Sinclair and Commissioner of Taxation provided support for the view that lawyers and accountants play different roles in the provision of tax advice. In Sinclair, the AAT was reviewing penalties and suggested that the taxpayer had not taken reasonable care claiming a deduction because he did not seek advice from a taxation lawyer but instead had sought advice from an accountant. The decision implies that lawyers and accountants perform different functions in the taxation sphere and that lawyers can more appropriately provide “legal” advice in relation to certain tax matters.

This decision generated great controversy and it is suggested this decision advances an argument that is very difficult to sustain, as a large proportion of taxation advisory work is being performed by NLTAs. In fact, NLTAs also provide other legal services such as preparing objections and representing taxpayers in the Administrative Appeal Tribunal (“AAT”). Further, there are areas of the tax law where, arguably, NLTAs such as accountants may possess more suitable skills to provide legal advice. One such area is the Taxation of...
Financial Arrangements,\textsuperscript{44} which aims to align the taxation and financial accounting treatment of certain financial arrangements.

\textbf{3.2.2 Candour between taxpayers and their NLTAs}

As noted above, one of the fundamental principles underlying LPP is to encourage full disclosure and candour between lawyers and their clients, helping to ensure accurate legal advice and enhancing the administration of justice.\textsuperscript{45} The policy underlying the accountant’s concession reflects this rationale, but provides a significantly compromised protection.\textsuperscript{46} Arguably, to give primacy to the client’s privilege and to allow open communications to be effectively encouraged between NLTAs and their clients, NLTAs should have a privilege equivalent to LPP.

Candour between taxpayers and their NLTAs is imperative given the complexity of the tax law and the pivotal role tax agents and other NLTAs play in Australia, where the majority of Australian taxpayers seek tax advice from tax agents.\textsuperscript{47}

Australian taxpayers operate in a complex self-assessment system, which is defended by a harsh penalty regime and carry the onus of proving a tax assessment is excessive in any disagreement with the ATO. Therefore, it is critical a taxpayer prepares their return correctly and to ensure that NLTAs

\begin{enumerate}
\item See Division 230 of the ITAA 1997.
\item Grant v Downs (1976) 135 CLR 674, 685.
\item Commonwealth Treasury, Australia’s Future Tax System Review Overview, (2010) states that 72% of Australian taxpayers seek advice from a tax agent in respect of their tax affairs. The ATO Tax Statistics (2008/2009) state tax agents submitted 8.8 million tax returns in Australia (71.2%).
\end{enumerate}
should be fully apprised of a taxpayer’s affairs in order to provide accurate advice.

It has also been argued that providing privilege over certain communications could promote voluntary compliance.\(^{48}\) The ALRC Report states:

> Clients can obtain the fullest legal advice only where the lawyer is in possession of all relevant facts, so the protection of communications encourages greater compliance with the law as the client is in the best position to be informed about what does (and does not) amount to complying conduct.\(^ {49}\)

Conversely, whilst extending privilege to NLTAs may serve one public interest by encouraging full and frank disclosure, it compromises another important public policy goal of ensuring the ATO has sufficient information to administer and enforce the tax law and this may actually reduce compliance with the law. A grant of privilege over communications with NLTAs would also limit the materials available to a decision maker in a tax dispute.\(^ {50}\) However, where the materials in question would not have been liable to disclosure where they had been created by a lawyer, there does not appear to be a more compelling reason to disclose them simply because they are created by an NLTA.

\section*{3.2.2. Reduce inequity and compliance costs}

\(^{48}\) Analogously Justice Wilson stated in \textit{Baker v Campbell} (1983) 153 CLR 52, 95 that confidentiality between lawyers and their clients: “will make its own contribution to the general level of respect for and observance of the law within the community.” ALRC, above n 17, [Chapter 2 and para 6.212].

\(^{49}\) ALRC Ibid.

Extending LPP exclusively to lawyers may impact taxpayer's compliance costs\(^{51}\) and have an inequitable impact on small to medium enterprises ("SMEs"). SMEs may be more likely to engage accountants than lawyers, as legal advice is on average more expensive and therefore taxation advice from an accountant or other NLTAs may be more accessible to a larger range of taxpayers. Therefore, to ensure advice is confidential, SMEs may be forced to incur additional expenses to seek advice from a lawyer rather than their regular tax agent.

3.2.3 *Equivalent Penalties*

Arguably, the Australian taxation law holds lawyers and NLTAs to a largely equivalent professional standard. For example, the promoter penalty regime\(^{52}\) applies indiscriminately to promoters of tax schemes whether they are lawyers or NLTAs. This suggests that some NLTAs and lawyers are subject to the same professional standards, taxpayers should benefit from the same protection over the legal advice that they receive.

3.2.3 *Equivalent Professional Obligations*

While NLTAs may not have identical ethical and legal training to lawyers, many NLTAs have similar professional obligations, are subject to ongoing monitoring by their professional body and may also have legal training. Tax agents

\(^{51}\) Maples and Blissenden, above n 16.  
\(^{52}\) Division 290 of the *Taxation Administration Act 1953*. 
registered with the TPB are bound by an ethical Code of Professional Conduct in Pt 3 of TASA 2009.\textsuperscript{53} The purpose of the Code of Conduct is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct.

Some of the fundamental tenets of the Code include the maintenance of confidentiality, to act with honesty, integrity and competence. Where a tax agent fails to comply with the Code the TPB has a range of sanctions that they can apply ranging from a written caution, an order requiring the agent to undertake additional training or restricting the services that can be provided\textsuperscript{54} to suspension\textsuperscript{55} or termination\textsuperscript{56} of the agents registration.

Notably, tax agents who are also CAs, CPAs, CTAs or IPAs are subject to additional ethical responsibilities and ongoing professional monitoring as part of their professional obligations.\textsuperscript{57}

However, the Discussion Paper questions whether: “the degree of oversight and discipline” the TPB exercises over tax agents can be “equated” with a lawyer’s obligation to the Court.\textsuperscript{58} The purpose of the Code is protection of the public and the Board has powers of oversight and discipline of tax agents.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{53} Division 30 of TASA 2009.
\item \textsuperscript{54} Section 30-20 of TASA 2009.
\item \textsuperscript{55} Section 30-25 of TASA 2009.
\item \textsuperscript{56} Section 30-30 of TASA 2009.
\item \textsuperscript{57} Ibid.
\item \textsuperscript{58} DP, above n 1, 13.
\item \textsuperscript{59} Subdivision 30-B of TASA 2009.
\end{itemize}
Conversely, the Discussion Paper also acknowledges that differentiation on the grounds of training in ethics or professional codes of conducts is not always accurate and should be treated with realistic skepticism.\textsuperscript{60}

### 3.2.4. Reduce the competitive advantage enjoyed by lawyers

In the taxation profession, lawyers and NLTAs often compete for the same business.\textsuperscript{61}

However, lawyers have a competitive advantage as their advice can be subject to what some commentators have labeled as the “opaque curtain” of LPP.\textsuperscript{62} The Discussion Paper suggests that “competitive neutrality” demands that similar confidential communications with NLTAs or lawyers should be treated equally.\textsuperscript{63}

However, other commentators have queried the actual significance a grant of privilege over tax advice would hold for many taxpayers in relation to the choice of tax advisor. They argue that it is the nature and complexity of the advice that largely drives the choice between a lawyer and other NLTAs.\textsuperscript{64}

### 3.2.5 Multidisciplinary Practices

\textsuperscript{60}DP, above n 1,14.
\textsuperscript{61}DP, above n 1, 12. Desiatnik above n 29.
\textsuperscript{62}Desiatnik Ibid.
\textsuperscript{64}Maples and Blissenden "above n 20,29."
There are a growing number of multi-disciplinary practices in Australia where members of different professions such as lawyers, accountants and economists are engaged to provide taxation and other services. The ascendancy of multidisciplinary practices may also make access to LPP inequitable to SMEs. A large multidisciplinary practice could hire a registered legal practitioner in order to offer clients access to privileged advice. This may disadvantage smaller firms who do not have the resources to pursue such a course of action.

PART THREE

4. Practical design issues that arise in creating a statutory tax advice privilege for NLTAs

Part two discussed arguments for and against extending privilege over confidential communications between taxpayers and their NLTAs. As discussed, a number of the justifications can be counterbalanced by arguments to the contrary. However, it is argued in this paper that on balance the justifications for enacting a statutory privilege are compelling and many of the perceived disadvantages can be minimised by appropriate legislative safeguards in relation to the qualifications of those accredited to provide privileged advice and the types of documents over which privilege can apply. Therefore, this section

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66 Desiatnik, above n 29, 16.
67 DP, above n 1, 15.
considers the key elements of designing a statutory privilege, advocating a “licensing model” available only to certain qualified tax agents, who undertake competency training in the law of privilege and who have appropriate postgraduate qualifications.

4.1 Scope

The first essential design consideration is determining what group of NLTAs the privilege should extend to? This involves determining contentious issues such as should the privilege be extended to all NLTAs or a sub-set of NLTAs such as registered tax agents, CAs, CTAs, IPAs or CPAs?

The ALRC Report recommended that a statutory privilege should apply to communications with independent registered tax agents. Whilst superficially, this appears to limit the privilege to a relatively homogenous group, given all tax agents are accredited by the TPB, in practice the designation as a tax agent encompasses professionals with a diverse range of qualifications and experience. To be registered as a tax agent requirements in relation to age, being a fit and proper person, qualifications and experience requirements, must be satisfied. However, the education requirements are varied and are linked to the work experience of the applicant. For example, if an applicant has a tertiary degree in

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68 ALRC, above n 17, 11. The ALRC report referred to registration pursuant to the now superseded section 251A of the ITAA 1936.
69 Section 50-5 of the Tax Agent Services Act 2009 (“TASA”). Sections 50-10 and 90-5 provide that a person cannot advertise a tax agent or BAS Services unless they are registered. This excludes lawyers.
70 Must be over 18 (section 20-5(1) of TASA.)
71 Section 20-5(1) involves looking at if the person is of good fame, integrity or character.
accounting they need 12 months employment experience\textsuperscript{72}. Whereas, a person can be accredited by being a voting member of a professional association but they must have 8 years full-time employment experience.\textsuperscript{73} There are also accredited BAS Agents and tax agents that are registered via the transitional provisions\textsuperscript{74} who come within the tax agent regime. These agents may satisfy a different (and reduced) set of requirements and in the case of BAS agents can only provide limited advice.

Given the diverse qualifications of tax agents, some registered tax agents may not have received any tertiary or formal training on the law of LPP or even may not have received any training in relation to the application of basic legal principles. On this ground it is argued that privilege should not be extended merely on the basis of registration as a tax agent alone. It is however accepted that the first precondition for being eligible to become registered to provide privilege tax advice is that the NLTA must be a tax agent. The advantage of linking in such a regime to the registration of tax agents is two-fold:

- logically accreditation would be handled by the TPB and administered as part of TASA 2009. This would prevent burdening tax agents with the need to register under multiple regimes and would overall create a more streamlined process.
- It ensures that the statutory privilege draws on the experience and qualifications requirements already prescribed by TASA 2009, setting this as a pre-requisite to registration.

\textsuperscript{72}In the last five years.
\textsuperscript{73}In the last ten years.
\textsuperscript{74}For example a tax agent that was registered before 1 March 2010 will continue to be taken to be a registered tax agent for the unexpired registration period.
• It reaffirms the primacy of the TPB as the relevant organisation to determine which NLTAs can provide taxation advice in Australia and the scope of the advice that can be provided.

This paper further argues that three additional conditions should be introduced for a tax agent to be enabled to gain accreditation to provide privileged advice.

The first condition is that the tax agent must possess an additional relevant postgraduate qualification in tax such as Masters of Taxation (or equivalent) or a professional designation as a CA, CPA, CTA or IPA. The purpose of this requirement is not to provide preferential treatment to certain professional designations but rather to ensure that the individual has an appropriate academic background or academic preparation against which to apply the law of privilege and a comprehensive understanding of the ethical obligations and considerations that apply in relation to a claim of privilege. The secondary advantages of limiting it to such a group is that they have a more uniform set of qualifications and are also subject to additional regulatory frameworks in terms of their professional conduct.

For example, to become a CA an individual must satisfy certain prerequisites including a “recognised degree level qualification” with passes in core knowledge areas that include Australian corporations law, taxation law, introduction to law and commercial law. Furthermore, once an individual is within the CA program they complete an Ethics and Business Application that includes looking at some of the core ethics and values of being a CA. Given CAs have undertaken all these
law subjects and training in relation to ethics and values it is arguable that they have a strong foundation to be trained in claiming and maintaining privilege. Notably CPAs, CTAs and IPAs undertake similar subjects and training and therefore, would have a comparable foundation from which to work.

It is acknowledged that the difficulty with limiting privilege to this particular sub-set of tax agents is that it may be interpreted as implying that they have superior qualifications relative to other tax agents. Furthermore it may be perceived to erode or usurp the competence of the TPB to determine which individuals are equally qualified to provide taxation advice in Australia. However, as stated previously the policy underlying such a choice is ensuring that individuals that wish to undertake training in privilege have the sufficient educational pre-requisites to engage in such a course of study. Furthermore, it is not only open to qualified members of the professional bodies but also those with a Masters of Taxation (or equivalent). This clearly signals that the purpose of this condition is not preferential treatment on the basis of professional affiliation but rather differentiation on the basis of necessary pre-requisites for a focused course of study in privilege.

Likewise, differentiation on the basis of holding a certain type of postgraduate qualification in taxation or professional designation is not without precedent. In this regard the proposed regime is analogous to two recently introduced regimes the Australian Financial Services License (“AFSL”) Scheme and the Self Managed Superannuation Fund (“SMSF”) Auditor Registration Scheme. Under these
regimes only license holders are able to provide additional specialised services to their clients.

For example those accountants that hold SMSF Auditor Registration Schemes can provide specialised SMSF audits. The proposed Explanatory Memorandum ("EM") to the SMSF Auditor Registration states that the registration process is:

> Intended to ensure that auditors of SMSFs have a minimum standard of competency and knowledge of relevant laws and are able to detect and report contraventions by SMSF trustees.\(^75\)

The EM further states that the objective of registration is to:

> Raise the standard of SMSF auditor competency and ensure there are minimum standards across the sector. Registration will identify, formally recognise and enable the provision of tailored support to SMSF auditors that are currently producing high quality audits.\(^76\)

This rationale firmly reflects the policy reasoning put forward in this paper for stringent registration requirements for those allowed to provide privileged advice.

Likewise to be registered as an SMSF auditor an individual must meet stringent requirements including:

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\(^76\) Ibid, paragraph 1.10, p 6.
• Holding a tertiary accounting qualification that includes an audit component or successfully completing audit as part of a professional body program;
• Meeting the fit and proper person test;
• Holds professional indemnity insurance;
• Have 300 hours of relevant SMS audit experience in the three years preceding registration and
• Passed a competency examination. 77

Likewise, accountants that are holders of an AFSL license can provide a broader range of financial advice to their clients. The license is only available to accountants who hold a public practice certificate from one of three professional accounting bodies (CPA, the ICAA and the IPA).

The second condition is that there should be an additional rigorous training regime undertaken on the law of privilege as a precondition to allowing certain tax agents to offer privilege over tax advice. Whilst an exhaustive analysis of the content of the course is beyond the scope of this paper, it should entail a thorough analysis of the law of privilege (both statutory and case law), when it can be applied and what types of documents it covers. The course could be designed in consultation with the Law Council, professional bodies (Tax Institute, Institute of Chartered Accountants, Certified Practising Accountants and Institute of Public Accountants) and the TPB. It is contemplated that the course would be administered by legal practitioners who are experienced in the

77 Ibid.
intricacies of the laws of privilege. At the conclusion of the course it is contemplated that the tax agent would sit a competency examination. Notably, the obligation to sit a competency examination in order to provide specialised services is also mirrored in the proposed provisions for becoming an SMSF Auditor.\textsuperscript{78}

A third requirement is that the individual must meet Continuing Professional Education (“CPE”) requirements to maintain their right to offer privileged advice. This will ensure the individual retains a current knowledge of any developments in the law of privilege. Again, it is contemplated that such a program would be monitored by the TPB and administered as part of the existing requirements for tax agents to maintain CPE as contained in TPB (EP) 04/2012: Continuing Professional Education.\textsuperscript{79} Notably, SMSF auditor registration contains similar ongoing CPE requirements to maintain registration.

This process is represented diagrammatically in Appendix A.

4.2 Stand alone or linked privilege?

Once it is determined who should be eligible for the privilege, the next foundational consideration is whether the privilege should be linked to common

\textsuperscript{78} Proposed section 128B provides that in order to register an applicant must have passed a competency examination in accordance with section 128C.

law LPP or enacted as a discrete statutory stand-alone privilege. Maples and Woellner emphasise the significance of this choice as:

These two approaches produce very different outcomes (with LPP providing a much wider protection) and the choice of creating a separate and much more limited separate privilege therefore represents a conscious and significant policy choice with substantial legal and other impacts.80

The US and NZ provide examples of two different models. The US model links the tax practitioner’s privilege to common law attorney’s privilege. Section 7525 of the Internal Revenue Code provides:

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.

Conversely, the NZ model creates a discrete stand-alone privilege separate from the common law LPP.81 The ALRC Report recommended the adoption of the NZ model.

Whilst, a separate stand-alone privilege will provide the Parliament with greater control over the design, development and moderation of the privilege82 it also creates two distinct privileges for lawyers and NLTAs. In order to ensure a degree of equivalence between the two the statutory privilege would need to be continually amended to mimic developments in common law LPP. Such a process would be very complicated and time consuming, given speedy legislative

80 Maples and Woellner, above n 17, 150.
81 Section 20B of the Taxation Administration Act 1994 (NZ).
82 ALRC, above n 17, para 6.278.
amendment is difficult. Accordingly, if the intention is to maintain parity between the two privileges, a linked model would provide a less onerous and more direct link because as the Discussion Paper notes a linked model can “easily and simultaneously” evolve under the common law.\textsuperscript{83}

To the extent that the privilege for NLTAs is narrower than LPP it would perpetuate the issues that currently exist, such as the competitive advantage afforded to lawyers in the taxation field.\textsuperscript{84} Two different privileges may also result in complexity for taxpayers, leaving them uncertain as to the scope of the two different privileges or sustaining false confident that all communications with NLTAs will be privileged.

Some commentators have argued that the courts are showing a greater propensity to lift the veil of LPP in taxation investigations.\textsuperscript{85} Therefore, if two separate privileges were adopted and the common law put greater restrictions on LPP than the statutory privilege it could result in NLTAs being accorded a privilege that covered a wider scope than lawyers under LPP. It is likely that such an anomaly would be remedied by legislative amendment to the statutory privilege, but in the lead time between identification of the issue and amendment this could create controversies in the reverse to that which currently exists with the differential treatment of NLTAs and lawyers. Another implication of linking the privileges may be that judicial interpretations of the statutory privilege for

\textsuperscript{83}DP, above n 1, 10.
\textsuperscript{84}DP, above n 1, A Maples and R Woellner above n 17, 143.
NLTAs could have an effect on the interpretation given to LPP as it applies to lawyers. In the US context Pease-Wingenter states:

...because the FATP privilege requires the interpretation of preexisting attorney-client privilege principles, courts could view the interpretation as a two-way street, relying on section 7525 case law to discern the appropriate contours of the attorney client privilege. Indeed, even when attorneys were not involved, erroneous interpretations of section 7525 have already begun to infect applications of the attorney-client privilege. If followed more frequently in the future, that approach could lead to significant erosion of the scope of the attorney-client privilege.86

Arguably, the major drivers for the creation of a privilege would be better advanced by adopting a model that links the statutory privilege for NLTAs to common law LPP.87 This would mean that, for a communication between a taxpayer and an NLTA to attract the privilege, the basic conditions to satisfy common law LPP such as confidentiality and the dominant purpose test would need to be satisfied. Even if the privilege that is ultimately enacted for NLTAs is narrower (e.g. excludes additional information such as source documents and tax contextual information to that protected by LPP) a linked model will still facilitate greater uniformity between the two privileges.

A linked model will also provide the judiciary with a larger role in moderating the parameters and development of the privilege. The judiciary has a long history with the development of LPP and is acutely aware of the delicate balance needed between balancing confidentiality and appropriate disclosure of important information to administrators and the Courts. The Law Council states

86C Pease-Wingenter, "Lemons From Lemonade: The Courts Fumble the FATP Privilege" (2010) Tax Notes 977 states section 7525 is a "statutory analogue" to the attorney client privilege.
that: “balancing this tension is the central theme of all significant judgments involving the questions of LPP.” Accordingly, it is argued in this paper that the Courts are better equipped to regulate and develop the doctrine than the Parliament.

A linked approach may also be more consistent with the recent trend towards a principles-based drafting approach. Lovric defines a principles-based drafting approach as: “a broad and operative principle” that is often accompanied by “surrounding provisions” that contain “clarifications, add-ons” or “carve-outs”.

Like section 7525 of the Internal Revenue Code in the US context, if a linked model was drafted using a principles-based drafting approach, the central principle would be that the common law protection pursuant to LPP which applies between a lawyer and taxpayer would apply to communications between accredited NLTAs and taxpayers, to the extent that if the NLTA was a lawyer LPP would apply. Surrounding provisions could then provide any necessary carve-outs or limitations from this general principle.

Lovric states that one of the advantages of principles-based drafting is that it: “allows many rules to be compressed into one principle.” Indeed, if a statutory privilege for NLTAs is linked to common law LPP, all the case law precedents

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88 Law Council, above n 41, 7.
could be relied upon and this may assist in the determination of difficult issues, by drawing on established case law, for issues such as:

- should privilege apply to in-house or foreign NLTAs?
- how will copies of confidential documents prepared by NLTAs be treated?
- can the privilege be waived and when will a waiver be implied.

If all these issues were dealt with in a stand-alone privilege this may result in the provision becoming extremely complicated and unwieldy. However, specific attention needs to be given to the resolution of these issues but is beyond the scope of this paper.

4.3 **Type of Advice**

A further critical element of establishing a privilege for NLTAs is determining what type of advice should be covered. Should tax contextual information, business, international tax and oral advice be covered? The ALRC recommended that privilege be extended to confidential “tax advice documents” created by a tax advisor for the dominant purpose of giving advice on tax laws.\(^90\) Notably, even if a linked model were adopted, the dominant purpose test would apply as this is the current test for determining LPP. It was contemplated by the ALRC that a tax advice document would not include source documents.\(^91\)

4.3.1 **Should tax contextual information be excluded?**

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\(^90\)ALRC, above n 17, 11.

\(^91\)As defined above for the accountant’s concession at 2.1.
The ALRC recommended that tax contextual information should be excluded from a statutory privilege. Tax contextual information includes information about a fact or assumption that has occurred or assumed or a description of the steps involved in an arrangement. It also includes advice that does not concern the operation and effect of the tax laws.

There are compelling reasons why it is in the public interest to exclude tax contextual information. Such reasons include that excluding tax contextual information will provide the ATO with access to additional taxpayer materials to audit and enforce the taxation legislation and providing the judiciary with all relevant information when making a decision in a tax dispute. The Discussion Paper also asserts that not excluding certain source documents from disclosure would undermine the record keeping provisions that are a fundamental part of the Australian tax regime.

However, excluding tax contextual information will mean the privilege for accredited tax agents is narrower than LPP. If this means that in practice the privilege is rarely enforceable, it will fail to deliver the policy goals that were the impetus for its introduction. This will also erode taxpayer confidence in the privilege. Attorney General for the Northern Territory v Maurice noted in relation to LPP:

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92 ALRC, above n 17, 11 (para 6.281).
93 DP, above n 1.
94 Maples and Woellner, above n 17.
95 (1986) 161 CLR 475, 490.
Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced.

It may also cause undesirable distortions such as NLTAs not stating facts or assumptions in their advice, to ensure that privilege over a document is not compromised. Alternatively, it may lead to legal disputes in relation to what falls within the definition of a tax advice document.  

However, the carve-outs (such as limiting the documents to which the privilege applies) may be the key to maintaining an appropriate balance to the privilege and would need to be a focal point on the competency training undertaken by the tax agents.

Arguably, even with the carve outs suggested by the ALRC the privilege would be significantly enhanced (from the existing accountant’s concession) and it is arguable that some of the documents excluded would not attract a claim for LPP in any case.

4.3.2 Fraud/Abuse of Power

The ALRC proposes that a statutory privilege would not apply to documents where the advisor knew (or ought reasonably to have known) that the document was prepared to further:

- commission of a crime or fraud;

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96 Maples and Woellner, above n 17.
• an abuse of power;
• an offence;
• an act that renders a person liable to civil penalty;
• committing of an illegal or wrongful act.\textsuperscript{97}

These exceptions appear to mirror the law of LPP and if a linked privilege were adopted they may not need to be codified.

A further question arises when looking at these exceptions, as to whether this excludes advice promoting tax avoidance.\textsuperscript{98} Notably, the ATO argued in favour of inserting a tax avoidance exception for NLTAs but this idea was rejected by the ALRC. Indeed, if a tax avoidance exclusion did apply to a statutory privilege for NLTAs it would be subject to the limitations of the “exceptional circumstances” exception to the accountant’s concession. However, if such advice is privileged it may corrode the deterrent effect of the promoter penalty regime, that aims to penalise promoters of tax avoidance schemes, as it may be difficult to access the advice that promotes the schemes.\textsuperscript{99}

Interestingly, if a linked model were adopted there may still be an argument that advice obtained in furtherance of tax avoidance may not be covered by LPP. In \textit{Clements Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police}\textsuperscript{100} Justice North determined that advice received to further tax avoidance was in

\textsuperscript{97}ALRC, above n 17, Recommendation 6-6.
\textsuperscript{98}Maples and Woellner, above n 17, 159.
\textsuperscript{99}Division 230 of the ITAA 1997.
\textsuperscript{100}[2001] FCA 1858.
“furtherance of an illegal or improper purpose.” It was held that LPP would not protect such communications.

The US, section 7525 contains an exception for advice made in the promotion of a tax shelter\footnote{Section 7525(b) of the IRC.} and the privilege is limited to non-criminal proceedings. This has led to criticisms that the privilege is significantly narrower than the attorney-client privilege, is uncertain, compromised and provides more limited protection for taxpayers.\footnote{A Petroni, ‘Unpacking the Accountant Client Privilege under I.R.C. Section 7525’ (1998/99) 18 Virginia Tax Review 844. M Hindelang, ‘The Disappearing Tax Adviser Privilege’ (2003) 49 Wayne Law Rev 861 states that the IRS has filed three suits in California, Illinois demanding documents from KPMG and BDO Seidmen and disputing the application of section 7525.} Petroni argues that it is a “half loaf privilege” that is in “reality no loaf at all.” The tax shelter exception in the US has been particularly controversial and the subject of major litigation. Analogously, a statutory tax avoidance exception in Australia is also likely to cause significant litigation and substantially weaken the privilege.

4.3.3 Business, Oral and Advice on International Laws

The statutory privilege would need to clarify whether business advice by NLTAs is covered by the privilege and attempt to draw parameters in relation to when taxation advice becomes business advice.

It is argued that given that one of the fundamental bases for suggesting privilege be extended to tax agents is the regulatory framework of TASA 2009 and the explicit recognition that such agents are providing legal advice, that the privilege should not cover general business advice.
This however leads to difficulties in defining what is general business advice as opposed to what is advice on the taxation law. For example, is advice provided on the most tax effective business vehicle to be utilised (company/trust/partnership) business advice? The Discussion Paper acknowledges the difficulty in isolating communications made for multiple purposes, particularly because, unlike a lawyer, an accountant may also be providing non-tax advice roles like auditing or preparing accounting statements. These may potentially give rise to privilege claims for a broader range of advice documents than are now available under the accountant’s concession and LPP.103 Again this is an issue that could be covered vigorously by any competency training.

Another issue is whether the privilege would apply to oral advice.104 This could be significant because, pursuant to section 264 of the ITAA 1936, the ATO can compel a person to attend and give evidence.105 The ALRC proposes that privilege would not apply to oral advice. However, LPP applies to oral and written confidential communications. Therefore, if a linked privilege was adopted, oral communications would be covered. There does not appear to be any compelling reason why the choice of format the advice takes should dictate a claim of privilege. The exclusion of oral advice would lead to the anomalous situation that advice in relation to the same content could be either privileged or non-privileged depending on the communication medium used.

103 DP, above n 1, 12.
104 Maples and Woellner, above n 17, 148.
105 Ibid 154.
It should also be clarified whether privilege could apply to international tax advice. Notably, the NZ statutory privilege does not apply to tax laws in any other jurisdiction. However an argument can be sustained that advice provided on foreign tax laws should not be excluded (for example this may be relevant in providing advice on the taxation laws in a country with which Australia has a Double Tax Agreement), where an accredited tax agent has special knowledge of a foreign jurisdiction's tax law.

4.4 Procedural Issues

Several procedural issues arise in designing a privilege for NLTAs, including should:

- the privilege only be triggered by a request?
- a time limit be imposed on when the privilege can be claimed?
- the privilege be susceptible to waiver?
- privilege be claimed by the NLTA or the client.

The adoption of a linked model would address a number of these issues. If the privilege was linked to LPP it would arise as of right and there would not be a time limit on the claim. Furthermore, the privilege would be the client's privilege and could accordingly only be claimed by the taxpayer, but should be maintained by the NLTA until the taxpayer chose to waive the privilege. The

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106 Maples and Woellner Ibid 1:43.
adoption of a linked model would also mean the privilege could be subject to express or implied waiver and that waiver could be unintentional.107

Conversely, the ALRC recommends a framework that requires particulars of the privilege claim within a certain period of time.108

It is argued that regardless of whether a separate or linked model is adopted, a statutory privilege for NLTAs should at least be subject to express waiver. A taxpayer may wish to waive the privilege so that they can provide the advice thereby demonstrating that they have taken reasonable care in preparing their tax return as this may impact penalties.

What may become an acute issue if a privilege is extended to NLTAs, is when will waiver be implied? An implied waiver occurs when LPP is waived even though there was no intention to do so (for example inadvertently disclosing a confidential document to a third party). Certainly, where an accounting firm provides different services such as tax, audit and business services, there is a risk that privilege could be waived where there is a disclosure between different departments (e.g. a document shared between the tax and audit partners) or confidential information is placed on a firm’s intranet.109 This may mean that accounting firms have to erect “Chinese walls” to prevent waiver of the privilege through inadvertent communication of confidential tax information between

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107 Mann v Carnell [1999] HCA 66 at [29]. Here the Court stated that a waiver will occur where the conduct of a party “is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect”.

108 ALRC, above n 1, 8.3 to 8.15.

109 Petroni, above n 102, Wilson, above n 84.
departments and may lead to the need for separate engagement letter for tax matters that could be covered by the privilege. 110

4.5.3. Safeguards

A further issue is what safeguards should be enacted to prevent abuse of the privilege? Arguably if, as it is suggested accreditation to provide privileged advice is administered by the TPB, it would be necessary to further provide the TPB with sanctions to ensure the privilege is not misused by deliberately claiming privilege to prevent access or making unfounded privilege claims.

The law of privilege is complicated and dynamic, described by the ALRC as: “a highly complex body of law which is arcane even to most lawyers”. 111 Whilst lawyers are trained specifically in LPP, NLTAs may not be. Therefore, one potential safeguard is to require a lawyer to certify an NLTAs claim of privilege. The ALRC suggests that some claims of privilege should be certified 112 by a lawyer stating:

> Whether advice meets the dominant purpose test is often a matter of some complexity and should be determined and certified by a lawyer rather than an accountant. This additional protection also removes the difficulty of whether accounting professional bodies have sufficient sanctions to address improper claims by placing the responsibility for certifying there are reasonable grounds for the making of a claim on a lawyer. 113

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110 Petroni, above n 102.
112 ALRC, above n 17, Chapter 8.
113 ALRC, above n 17, 12 (Recommendations 8-3 to 8-5, paragraph 6.286).
Critics argue that requiring certification creates additional compliance costs for taxpayers and will not be on equal footing with LPP. In fact some commentators have remarked that ironically extending privilege to NLTAs is that it may increase business for lawyers who will need to clarify the scope of the privilege or certify claims for privilege that are made.

However, it is suggested that given the model advocated in this paper involves competency training in LPP and ongoing CPD requirements no certification should be required, as the tax agents who are accredited to provide such as advice would already have received rigorous training on the intricacies of the law of privilege.

4.6 What agencies should the privilege apply against?

It must also be determined whether the coercive information seeking powers of regulatory bodies other than the ATO should be subject to a privilege extended to accredited tax agents. This could include bodies such as the Australian Securities and Investment Commission (“ASIC”), Australian Crime Commission (“ACC”) or the various State Revenue Offices or private litigants. The Discussion Paper states that the ALRC supports restricting the privilege to the ATO because this would: “appropriately limit the privilege, and would not interfere with the investigative powers of other agencies.” However, the ATO works extensively with other agencies to cross-match and exchange information. As an example,

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114 Maples and Woellner, above n 17.
115 Lobenhofer, above n 54.
Project Wickenby is a “cross agency” taskforce that consists of eight Commonwealth agencies including the ACC, Australian Federal Policy and ASIC.\textsuperscript{116} The Discussion Paper\textsuperscript{117} and ALRC Report\textsuperscript{118} provides that a privilege for NLTAs would need to be considered in the context of the ATO’s ability to participate in taskforces, joint investigations and the information exchange articles in Australia’s Double Tax Agreements.

If a statutory privilege for accredited tax agents did not apply against these bodies its effectiveness would be substantially compromised. The ATO would be able to obtain information from these agencies directly where they were both part of the same taskforce or indirectly through mutual information exchange agreements\textsuperscript{119} and therefore circumvent the privilege.

This also raises the question of whether privilege would be waived for Commonwealth tax purposes if confidential legal advice between an accredited tax agent and client was utilised in a proceeding by another Commonwealth agency. Certainly if a linked model were utilised it would appear that if a document was waived for one purpose it would be waived for all purposes.

It is argued that for the privilege to be effective it would need to apply in relation to any Commonwealth or State regulatory agency and this would be an area where there would be significant advantages in harmonisation between States,

\textsuperscript{117}DP, above n 1, 16.
\textsuperscript{118}ALRC, above n 17, para 6.284.
\textsuperscript{119}For example the Office of NSW can exchange information with the ATO on taxpayers pursuant to Part 9 of the \textit{Taxation Administration Act 1996} (NSW). There are also provisions to allow ASIC and the ATO to exchange confidential taxpayer information see section 127 of the Australian Securities and Investments Commission Act 2001.
Territories and the Commonwealth. However, it is acknowledged harmonisation of a uniform privilege for NLTAs in relation to all of these bodies may be unattainable, at least in the short term, as it would need to be debated in the context of each agency’s objectives and circumstances.  

PART FOUR

5.0 Conclusion

The justifications for extending privilege over confidential legal tax advice prepared by accredited NLTAs are compelling. These justifications have been detailed in this paper and include encouraging candid discussions between taxpayers and their NLTAs, reducing the competitive advantage currently afforded to lawyers and providing equivalent protection for equivalent services, obligations and penalties.

However, counterbalancing these policy justifications is the equally important policy goals that a statutory privilege straddles: the need for the ATO to be able to protect and enforce the integrity of the revenue base and for the judiciary to have all necessary information before making a decision in a tax dispute. Given NLTAs (which includes tax agents) control a great deal of vital information in the taxation system, it is essential that an appropriate balance between these two goals is maintained.

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120 Note in NZ the statutory privilege applies against all bodies.
121 ALRC, above n 17, para 6.284.
Accordingly, to ensure the privilege is only claimed in appropriate circumstances, this paper has suggested extending privilege only to registered tax agents that not only meet the requirements currently provided for under the tax agent service regime but also whom have an additional postgraduate qualification in taxation, who have undertaken an additional competency examination in relation to privilege and who meet ongoing continued professional development standards.

It is further argued that a linked model should be adopted as this will ensure the privilege for accredited NLTAs involved and lawyers remains aligned to a greater degree and the development and moderation of the privilege will be left to the judiciary. However, the privilege should exclude protection under tax contextual documentation.

It is submitted that such a formulation strikes the right balance between ensuring that primacy is given to the client’s privilege, by allowing taxpayers to have candid discussions in relation to their tax affairs with accredited tax agents and ensuring that an appropriate level of information is still available to administrators.
APPENDIX A: PROCESS FOR GRANTING OF PRIVILEGE TO NLTAs

**Pre requisites**
*All three must be satisfied*

- **Registration as a tax agent**
- **Possession of a relevant postgraduate qualification in taxation or professional designation**
  - As a CA, CPA, CTA or IPA
- **Competency Training in LPP**
- **Accreditation to provide Privileged tax advice**
  *(Registration subject to maintaining ongoing CPD requirements)*