

6 September 2019

Our ref: WD-RLC

Mr Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr Westerink

Review of the Tax Practitioners Board – Discussion Paper July 2019

Thank you for the opportunity to provide comments on the Review of the Tax Practitioners Board Discussion Paper. Thank you also for the short extension of time to respond.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law and help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been prepared with the assistance of the QLS Revenue Law Committee and the QLS Ethics and Practice Centre, whose members have substantial expertise in this area.

With respect to the Discussion Paper we raise the following:

- Legal professional privilege only arises from a lawyer-client relationship.¹ It is a mechanism designed to protect certain communications from subsequent disclosure, thereby encouraging a free exchange of communication between a client and the lawyer acting for the client.
- The service providers subject to regulation under *Tax Agents Services Act 2009* (Cth) are mostly not lawyers and therefore are not able to give advice under privilege.
- QLS suggests that the complex issues raised in relation to legal professional privilege would be better addressed separately to this review. The scope and operation of legal professional privilege has been debated over many years and embedded within the

¹ *Glencore International AG v Commissioner of Taxation* [2019] HCA 26; *Grant v Downs* [1976] HCA 63.

proposed changes are many other issues which should be more fully articulated rather than as an ancillary matter to the broader issues addressed in the Discussion Paper.

Overview – legal professional privilege

Legal professional privilege (LPP) arises from a lawyer-client relationship² and resides with the client. That is, only the client can assert privilege, or instruct a lawyer to assert it for the client.

Legal professional privilege is a mechanism which is designed to protect certain communications from subsequent disclosure and thereby encourage a free exchange of communication between a client and the lawyer acting for the client. It does not arise in the absence of a lawyer-client relationship.³

As a general comment, QLS supports the approach of referring to ‘client legal privilege’ rather than ‘legal professional privilege’ as it is a more accurate description of the concept.

The issues surrounding legal professional privilege are complex. Some of these issues arising under Federal Income Tax law are currently under discussion with the Law Council/Australian Tax Office (ATO). We note, for example the comments attributed to the ATO in the Discussion Paper at [6.19].

Scope and parameters of this review

QLS agrees with the sentiments expressed at [6.20] of this Discussion Paper in relation to the ‘parameters of this review’. This is perhaps not the forum to consider the wide ranging issues and the tensions between various stakeholders, concerning the scope/operation of legal professional privilege as a part of the changes proposed.

The issue in relation to who ought to provide and give legal advice is best dealt with separately. The issue has been addressed in legislation in each jurisdiction – for example, see section 24 of the *Legal Profession Act 2007* (Qld). A comparative table of the various statutory regimes is replicated (below).

Legislature	Legislation	Section	Behaviour	Definition
WA	Legal Profession Act 2008	12(2)	To engage in legal practice when not entitled	“Engage in legal practice” includes practise law – s3 Definition
TAS	Legal Profession Act 2007	13	To engage in legal practice when not entitled	“Engage in legal practice” includes practise law but subject to safe harbours listed in s 13(2)
QLD	Legal Profession Act 2007	24	To engage in legal practice	“Engage in legal practice” includes practise law – Sch 2 Dictionary

² *Glencore International AG v Commissioner of Taxation* [2019] HCA 26; *Grant v Downs* [1976] HCA 63.

³ [Legal Professional Privilege: what is it?](#) Dan Phelan, Ethics Solicitor (28 January 2014).

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ACT	Legal Profession Act 2006	16	To engage in legal practice if not entitled	“Engage in legal practice” includes practise law – s3 Definition
VIC	Uniform Law (from 1 July 2015)	10	To engage in legal practice by unqualified entities	“Engage in legal practice” includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy); “Engage in legal practice”, “qualified entity” – s6 Definition
NSW	Uniform Law (from 2015)	10	To engage in legal practice unless a “qualified entity”	“Engage in legal practice” “qualified entity” – s6 Definition
NT	Legal Profession Act 2006	18	Prohibition on engaging in legal practice when not entitled	“Engage in legal practice” includes practise law – s4 Definition "Australian legal practitioner", s 6 Definition
SA	Legal Practitioners Act 1981	21(1)	To not practice the profession of the law	“Practices the profession of law” - defined in s21(2)

Essential to the lawyer-client relationship is that the lawyer has been admitted as an officer of the court; privilege will not arise if the person providing the advice is not so admitted.

Although possession of a practising certificate is not essential to assert privilege, circumstances in which it can be asserted to protect advice provided by someone who does not hold a practising certificate will be limited. Unless a specific exemption is granted (such as for government lawyers in Queensland) providing legal advice without possessing a practising certificate will breach Queensland’s *Legal Profession Act 2007* (Qld).

The service providers subject to regulation under *Tax Agents Services Act (2009) (Cth)* are mostly not lawyers and therefore are not able to give advice under privilege (their primary obligation is not to the court).

“The Tax Practitioner Board’s regulatory reach extends to include payroll service providers, conveyancers, quantity surveyors and research and development specialists. This list of tax intermediaries is not finite and will continue to grow as new tax initiatives are introduced.”⁴

If a Tax Practitioner is also an admitted lawyer holding a practising certificate, only advice provided in the context of a lawyer-client relationship (and which otherwise satisfies the requirements of privileged communication) will attract privilege.⁵

Despite the general prohibitions which are outlined in the various state legislative schemes, the consequences of failing to have clearly defined boundaries is apt to disadvantage clients. The difficulties for a user of tax agent service providers will be compounded should

⁴ Discussion Paper at [5.16]

⁵ [Gaynor King \[2018\] FWC 6006 \(26 September 2018\)](#).

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circumstances arise where an insurer becomes involved – and takes the view that the services were provided contrary to the applicable state legislation.

These are complex issues which have been debated over many years; embedded within the proposed changes are many other issues which should be more fully articulated and addressed – particularly in light of the relative ease by which privilege might be waived⁶; the concerns around competing claims where privilege is asserted and the costs associated with maintaining these claims (quite apart from the issues which are being ventilated by the ATO).

In the current environment and in preservation of the position (and concomitant rights of clients), QLS supports the position given by way of example at [6.21] of the Discussion Paper:

“For example, where a tax practitioner reasonably makes an LPP claim on behalf of a client at an access visit without notice, and the tax practitioner lacks the professional expertise to maintain that claim, it would be appropriate for the tax practitioner to obtain advice from a qualified Australian legal practitioner on the maintenance of that claim. Amendments could be made to the TPB Code of Conduct to require such tax practitioners who make a claim for LPP on behalf of their client to obtain advice from a qualified Australian legal practitioner on the maintenance of that claim.”

QLS understand that this paragraph refers to the circumstances where a tax practitioner has received privileged material from a client, when the client has not waived the privilege, and the tax practitioner is seeking to maintain that privilege on behalf of the client.

QLS considers that there is a need to have clear guidance on what particular issues and to what extent Tax Practitioners can provide advice. QLS also takes the view that there should also be clear guidance on what documents can be prepared by Tax Practitioners – both for the benefit of the Tax Practitioner and for the client.

Conclusion

These are complex issues and they ought not to be dealt with ancillary to the much more important broader issues addressed in the Discussion Paper – particularly the independence and regulatory environment affecting some 78,000 registered Tax Agents.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Bill Potts
President

⁶ *Glencore International AG v Commissioner of Taxation* [2019] HCA 26