INFORMATION GATHERING BY THE COMMISSIONER: DOES IT MATTER WHETHER YOUR ADVISOR IS A LAWYER OR ACCOUNTANT? THE IMPACT OF THE *WHITE INDUSTRIES* CASE

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I. INTRODUCTION

There is no doubt that the Federal Commissioner of Taxation has extensive and powerful access and information gathering powers. Sections 263 and 264 of the *Income Tax Assessment Act 1936* ('*ITAA 36*') provide for the Commissioner to seek access to buildings and documentation of taxpayers and their advisors for the purposes of the Act. The High Court decision in the *Daniels v* ACCC ('*Daniels*') corporation case[1] established that legal professional privilege does apply in relation to investigations under the *Trade Practices Act 1974*. Although there is no direct High Court decision in relation to sections 263 and 264 of the *ITAA 36*, it would seem that these legislative provisions are also subject to the doctrine of legal professional privilege.[2] This means that it would appear that sections 263 and 264 of the *ITAA 36* do not abrogate the right to make a claim that legal professional privilege applies to documents that are being sought by the Australian Taxation Office (ATO). The ATO also accepts this position, as has been made clear in their *Access and Information Gathering Manual*.[3] In the *Manual*, the ATO states that:

> the Tax Office policy is that its access and information gathering powers do not override legal professional privilege. If a communication is subject to legal professional privilege, the Tax Office is not entitled to use its statutory powers to obtain it or informally request it.[4]

In essence, this common law privilege provides a defence to a claim for access by the ATO.

This of course is the position where a taxpayer has utilised a lawyer in obtaining advice concerning their tax affairs. It should be made clear that legal professional privilege is only applicable in relation to the lawyer-client relationship, and the privilege rests with the client.[5] Legal professional privilege does not apply to the accountant-client relationship. However, many taxpayers utilise accountants and tax agents for tax advice and tax return preparation. The ATO recognises this and has acknowledged that taxpayers should be able to consult with their professional accounting advisors to enable full and frank discussion in respect of their rights and obligations under the tax laws.[6] However, the ATO also makes it clear that they will access restricted and non-source documents, as defined in the *Manual*, in exceptional circumstances.[7] As to what is meant by exceptional circumstances, Chapter 7 of the *Manual* outlines some examples, including where there is a scheme or arrangement for the purposes of Part IVA of the *ITAA 36* or where there are reasonable grounds to believe that fraud or evasion has taken place.[8] Approval by an appropriate ATO Senior Executive officer is required prior to accessing such documents. This would also be

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1 *Daniels v ACCC* [2002] HCA 49.

2 See Robin Woellner et al, *Australian Taxation Law* (17th ed, 2007) 1814.

3 Australian Taxation Office (ATO), *Access and Information Gathering Manual* <http://www.ato.gov.au/corporate/content.asp?doc=/content/51035.htm> at 8 December 2008.

4 Ibid ch 6 [6.1.5].

5 Peter Fraser and Kirsten Deards, 'Underprivileged Accountants and Illegitimate Expectations — Part 1' (2007) 42(2) *Taxation in Australia* 79, 81.

6 ATO, above n 3, ch 7 [7.1.1].

7 Ibid ch 7 [7.2].

8 Ibid ch 7 [7.2.4].

the case where the ATO seeks to inspect or obtain documents listed in litigation procedures.

As to what falls within restricted and non-source documents, this is set out in the *Guidelines to Accessing Professional Accounting Advisors' Papers*.[9] In essence, the ATO is providing an administrative concession in an attempt to place the accountant- client relationship in a similar position as the lawyer-client relationship, yet retains the right to access documents in certain circumstances. An immediate problem that may arise is that, at the time that the accountant provides their tax advice, it will not be known whether a situation will arise that falls under exceptional circumstances.[10] This immediately generates a significant difference between where taxpayers seek advice from accountants, as distinct from seeking advice from a lawyer.

So, on one hand, the well-entrenched principle of legal professional privilege covers the lawyer-client relationship and, on the other hand, an administrative ATO concession covers the accountant-client relationship. A closer examination of the concession granted to accountants is necessary to fully understand whether practical and legal differences exist.

II. ACCOUNTANTS' CONCESSION

The Accountants' Concession is in the form of an administrative guideline issued as part of the *Access and Information Gathering Manual*. The real practical issue occurs when the ATO does exercise its right to access restricted and non-source documents where there are, in the opinion of the ATO, exceptional circumstances. There is no legal mechanism as such to set in motion a review of this notion of exceptional circumstances.

Taxpayers and their accounting advisors may feel that the issuing of a manual providing this administrative concession is in itself a safe harbour mechanism. The real problem arises when there is an attempt by the ATO to seek access to documentation and advice provided by accountants and a dispute occurs as to the access power. The reason for this is that there is no specific legislative provision which the ATO has utilised in issuing the *Access and Information Gathering Manual*. Rather, the ATO is utilising the general administration power of s 8 of the *ITAA 36*, which merely provides that the Commissioner shall have the general administration of this Act.[11]

The *Manual* acknowledges that judicial decisions have indicated that the *Guidelines* give rise to a legitimate expectation that the ATO will not depart from them without giving the affected person an opportunity to argue that there are no exceptional circumstances. The *Deloitte* case[12] concerned an action for judicial review of the decision to issue a s 264 *ITAA 36* notice, while in the *ONE.TEL* case[13] the Commissioner was seeking access pursuant to s 108 of the *Sales Tax Assessment Act 1992* (Cth) ('*STAA*'). Both cases relate to the decision to utilise those powers, in light of the *Guidelines*, concerning the accounting concession on such access. Although, in the end, the cases decided that there was scope for judicial review, the ATO had satisfied the expectations that arose from those *Guidelines*. An important aspect to note here is that the Commissioner had issued notices seeking relevant information from the taxpayer and their advisors. There clearly were decisions made under an enactment (being s 264 of the *ITAA 36* and s 108 of the *STAA*) which, therefore, were capable of being subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*').

9 Australian Taxation Office (ATO), *Guidelines to Accessing Professional Accounting Advisors' Papers* <http://www.ato.gov.au/corporate/content.asp?doc=/Content/51665.htm> at 8 December 2008.

10 Fraser and Deards, above n 5, 130, 135-136.

11 See Michael Blissenden, 'The Review Processes under the *Administrative Decisions (Judicial Review) Act* — Jurisdictional Issues in the Income Tax Arena' (2000) 3 *Journal of Australian Taxation* 22, 25.

12 *Deloitte Touche Tomhatsu v DCT* (1998) 40 ATR 436.

13 *ONE.TEL Ltd v DCT* (2000) 101 FCR 548.

III. REVIEW PROCESSES UNDER THE *AD(JR) ACT*

Before proceeding to examine the impact of the recent judicial decision of the *White Industries* case,[14] it may be useful to examine the manner in which an application can be sought under the *AD(JR) Act*. An application for review of an administrative decision is made pursuant to s 5 of the *AD(JR) Act*. The key aspect is set out in the opening words of s 5(1), where it is stated that 'a person who is aggrieved by a decision to which this Act applies' may apply for an order of review. It is important to remember this jurisdictional limitation when examining the decision making processes of the ATO.

The phrase 'decision to which this Act applies' is defined in s 3 of the *AD(JR) Act* and basically means a decision of an administrative character made, proposed to be made or required to be made under an enactment, other than a decision included in any of the classes set out in Schedule 1. Enactment is itself defined as an Act, an Ordinance of a Territory or an instrument made under such an Act or Ordinance.

The combined effect of these definitions is that decisions made by the ATO may, or may not, be subject to an application for review where the jurisdictional framework has been satisfied. For instance, schedule 1 of the *AD(JR) Act* excludes decisions which are made, or form part of the process of making assessments or calculations of tax, under the *ITAA 36* or the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 97*'). The type of decisions that would fall for consideration under the *AD(JR) Act* are those decisions made under the *ITAA 36* or *ITAA 97* for which the Commissioner is authorised or empowered to make. In this context, decisions to utilise the powers under s 263 and s 264 of the *ITAA 36* would be decisions made under an enactment.

The grounds for such review are listed in s 5 and include:

> (a) a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct
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> [Paragraphs (b) – (j) not reproduced]

There is a clear connection between the need to identify a 'decision to which this Act applies' and then to identify the grounds upon which the application for review is being sought. As to the rules of 'natural justice', this concept is not further defined. However, the general understanding in administrative law terms is that the rules of natural justice, sometimes referred to as 'procedural fairness', are rules designed to ensure fair decision making by administrators in relation to the various interests of the parties concerned.[15] Over time, administrative law has expanded the boundaries of the notion of procedural fairness to now include the notion of 'legitimate expectation'. The term legitimate expectation refers to an expectation that is reasonable that a legal right will not be interfered with. However, it is 'something short of a legal right.'[16] In *Kioa v West*,[17] Mason J included the concept of legitimate expectation in the list that attracts procedural fairness. His Honour stated that procedural fairness would apply where the administrative decision 'affects rights, interests and legitimate expectations, only subject to the clear manifestation of a contrary statutory intention.'[18] This has now developed to the point that if a legitimate expectation exists, it is expected that the decision maker will afford that person with procedural fairness.[19]

The above discussion needs to be taken into account when examining the scope of the judicial review of ATO decision making. In summary, there are two specific aspects that need to be identified before considering an application for review of a decision made by the ATO. The decision needs to be of an administrative character which has been made

14 *White Industries Aust Ltd v FCT* [2007] FCA 511.
15 Margaret Allars, *Introduction to Australian Administrative Law* (1990) 236.
16 Ibid 238.
17 (1985) 159 CLR 550.
18 Ibid 584. See also Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100, 101.
19 Fraser and Deards, above n 5, 137-138.

under an enactment, and a specific ground under s 5 needs to be identified, such as a breach of the rules of natural justice. It should be noted that, from an administrative law perspective, it is not the breach of a ground of review such as procedural fairness which leads to a decision being made under an enactment.[20]

Applying this analysis to the *Deloitte* and *ONE.TEL* cases, Goldberg J and Burchett J both accepted that the decisions to seek access to documents under s 264 of the *ITAA 36* and s 108 of the *STAA* fell within the provisions of the *AD(JR) Act*. On that basis, there had been decisions made under an enactment. Their Honours also determined that the *Guidelines to Accessing Professional Accounting Advisors' Papers* created an expectation that the ATO would abide by such guidelines. On that basis, a legitimate expectation existed, and satisfied a reviewable ground for s 5 purposes.

IV. THE WHITE INDUSTRIES CASE

The above position now needs to be re-evaluated in light of the judgment by Lindgren J in *White Industries Aust Ltd v FCT*. In that case, the ATO and the taxpayer were involved in litigation proceedings in the Federal Court. The ATO sought discovery of certain accountants' documents through normal discovery processes under 0 33 r 12 of the *Federal Court of Australia Act 1976* (Cth). The applicant taxpayers claimed that the documents were privileged from production, pursuant to the *Guidelines to Accessing Professional Accounting Advisors' Papers*. The applicants sought judicial review of the decision by an ATO SES officer to decide, pursuant to s 5 of the *Guidelines*, to lift the concession in respect of certain documents. The basis of this application was that the ATO officer had breached the rules of natural justice (procedural fairness) and that irrelevant considerations had been taken into account. The applicants asserted that decisions under the *Guidelines*, such as during the course of an audit or in relation to documents sought under discovery proceedings, were decisions of an administrative character made under an enactment for *AD(JR) Act* purposes. The applicants relied on the *ONE.TEL* and *Deloitte* decisions. Lindgren J dismissed the application on the basis that the application was incompetent, insofar as it relied on the *AD(JR) Act*.[21]

V. STATUS OF THE *GUIDELINES*

One of the most interesting aspects of this case is the discussion by Lindgren J of the status of the *Guidelines*. His Honour accepted that the *Guidelines* did create an expectation that they will be adhered to by the ATO. Even so, this did not mean that the decision made with respect to those *Guidelines* was an administrative decision under an enactment. The real issue was whether the *Guidelines* created any substantive rights which would render the decision (to lift the concession), a decision under the *ITAA 36*. His Honour concluded that the *Guidelines* were made by the Commissioner pursuant to the general power of administration under s 8 of the *ITAA 36*. On this basis, the granting of the concession and the discretion to exclude particular documents from it were only attributable to that general power of administration.

In the particular circumstances of the case, the *ITAA 36* did not give legal force or effect to the *Guidelines* or to the decision by the ATO officer to lift the concession. In essence, the *ITAA* did not provide for the ATO officers' decision and it could not be said to be a decision of an administrative character under an enactment. Rather, the decision by the ATO officer was a decision, prior to the actual claim by the ATO, for discovery pursuant to 0 33 r 12 of the *Federal Court of Australia Act 1976*, as a litigant in appeal proceedings. This aspect is critical. The actual decision by the ATO to seek access arose

20 Daniel Stewart, '*Griffith University v Tang*, Under an Enactment and Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 525, 546-547.

21 As to whether an injunction could be issued against the ATO officer under s 39B of the *Judiciary Act 1903* (Cth), Lindgren J listed the matter for hearing as it was considered that there were some reasonable prospects of success. However, this issue has now been settled between the parties.

during litigation and such access is dictated by the relevant rules of the Federal Court. It was not a decision by the ATO to seek access through the access and information gathering powers of s 263 and 264 of the *ITAA 36*.

In so holding, Lindgren J also distinguished the *Deloitte* and *ONE.TEL* judgments on the basis that the underlying decisions were made pursuant to the relevant enactments. Those enactments were s 264 of the *ITAA 36* and s 108 of the *STAA.* The end result of the decision in *White Industries* is that the *Guidelines* do not themselves immediately affect legal rights and obligations. The general administration power of s 8 of the *ITAA 36* does not provide a basis for those legal rights and obligations.

Even though the applicants had a legitimate expectation that the *Guidelines* would be followed, this did not, by itself, turn a non-reviewable decision into a reviewable decision under the *AD(JR) Act*. Therefore, even though the applicants could point to the potential application of procedural fairness, the jurisdictional threshold had not been met for *AD(JR) Act* purposes. There was not a decision made under an enactment. Instead, there was an ATO decision to lift the Accountants' Concession and then seek access to documentation pursuant to the relevant litigation processes of the Federal Court.

His Honour stated that the decision by the ATO officer would have been reviewable as a decision of an administrative character made under an enactment if the *ITAA* had provided for the making of the *Guidelines* granting the concession. In addition, the *Guidelines* would then need to provide for the granting of the concession and for the making of the decision to lift it as a condition precedent to the taking of action to compel the giving of access. Finally, the *ITAA* or the *Guidelines* would themselves need to provide for the compelling of the giving of access.

VI. PRACTICAL IMPLICATIONS AND THE WAY FORWARD

On the surface, the concession provided to the accountant-client relationship is comparable to the position of the lawyer-client relationship. The Commissioner has acknowledged the need for taxpayers to be able to seek advice from both lawyers and accountants. However, the reality is that the concept of legal professional privilege is a common law right, recognised and, more importantly, enforced as a legal right belonging to the client. Such a right is able to be used as a defence to the access power of s 263 and the information gathering powers of s 264 of the *ITAA*.

In the context of the situation where there is litigation between the parties, legal professional privilege is a recognised common law right. In the case of the accountant-client relationship, the administrative concession provides protection only as far as it is relevant and workable, between the Commissioner and the taxpayer and their accountant advisor. Even though the *Guidelines* provide a legitimate expectation that the ATO will follow them, this is of relevance as to the process set out in the *Guidelines*. The *Guidelines* do not by themselves generate a legal right. They generate an expectation that the ATO will follow them. More importantly, decisions that are made in accordance with the *Guidelines* (appropriate notice to the taxpayers and an opportunity to respond) will be sufficient for the operation of the ATO access powers. The *White Industries* case shows that where decisions are made under the *Guidelines* which do not have direct impact on the legal rights of taxpayers and their accountant advisors, there will be a bar to possible judicial action in the courts.

From a practical perspective, there is a very significant gap of protection for taxpayers who use lawyers or accountants. Taxpayers need to be conscious of this distinction. There should be a concerted effort to move towards introducing a statutory level of protection for clients that use accountants for tax advice. The ATO *Guidelines* cannot provide enough safeguards for taxpayers. Providing a uniform statutory regime will eliminate any need for decision making by the ATO as to whether there are exceptional circumstances.

The Australian Law Reform Commission (ALRC) has now recommended that client privilege be extended to cover the accountant-client relationship.[22] The ALRC recommends that[23]:

> 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.
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> 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.
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> 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.
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> An independent professional accounting adviser must be a registered 'tax agent' for the purpose of s 251A 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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> No privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' is information about:
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> (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 a 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.

In making this recommendation, the ALRC supports the New Zealand model, which has been in operation since 2005, of creating this tax advice privilege rather than simply extending legal professional privilege to accountants giving tax advice.[24] On this basis, there can be more legislative control over the scope and operation of the privilege, as distinct from the common law doctrine of legal professional privilege. However, the New Zealand experience so far suggests that the protection being mooted for accountants will be far more confined than legal professional privilege. It should also be noted that the recommendation relates to an accounting advisor. There is no impact for the lawyer-client relationship, which will remain under the legal professional privilege umbrella.

Until this recommendation is acted upon, taxpayers and their advisors will need to be wary in relation to the provision of tax advice. It may be that there will be a need to consider the use of a lawyer when contemplating certain tax arrangements so that the common law right of legal professional privilege can be claimed. On the other hand, it may be appropriate to utilise an accountant for more specific practical and business-oriented advice relating to the tax affairs of the taxpayer which will not be requiring the protection of legal professional privilege. In the situation where there is documentation or advice that may be sought by the ATO, in accordance with the *Guidelines*, taxpayers and their advisors do need to be aware of the limitations of the *Guidelines* in terms of their intended protection.

22 Australian Law Reform Commission (ALRC), *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) ch 6.
23 Ibid Recommendation 6-6.
24 Ibid ch 6, [6.278].