

Legal Professional Privilege

Guidelines Applied by the
NSW Chief Commissioner of State Revenue



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Introduction

1. The Chief Commissioner and other authorised officers are permitted by provisions in Part 9 Division 2 of the *Taxation Administration Act 1996* to exercise specified investigative powers for the purposes of administration of tax laws.
2. Tax laws include the following:
 - *Betting Tax Act 2001*
 - *Duties Act 1997*
 - *Gaming Machine Tax Act 2001*
 - *Health Insurance Levies Act 1982*
 - *Insurance Protection Tax Act 2001*
 - *Land Tax Act 1956*
 - *Land Tax Management Act 1956*
 - *Parking Space Levy Act 2009*
 - *Payroll Tax Act 2007*
 - *Taxation Administration Act 1996*
 - Part 4A of the *Public Finance and Audit Act 1983* (relating to the State tax-equivalent regime), and
 - a regulation under any of these provisions.
3. The powers which may be exercised by the Chief Commissioner and authorised officers include obtaining access to certain premises, requiring production of records, the power to inspect records and take extracts or make copies. The powers to obtain information or access to records may be exercised by requiring a client or a person who has relevant information or records, to:
 - a) provide to the Chief Commissioner (either orally or in writing) information described in a notice, or
 - b) attend and give evidence before the Chief Commissioner or an authorised officer, or
 - c) produce to the Chief Commissioner an instrument or record in the person's custody or control that is described in the notice.
4. The Chief Commissioner and authorised officers are permitted to exercise similar powers under the following provisions:
 - *First Home Owner Grant Act 2000* – Division 2 of Part 3
 - *Regional Relocation (Home Buyers Grant) Act 2011* – Division 2 of Part 6
 - *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* – Division 2 of Part 7
5. Part 9 Division 2 of the *Taxation Administration Act 1996* also permits the Chief Commissioner or an authorised officer to enter and remain on premises, or to search premises if in possession of a search warrant.
6. A person who prevents, hinders or obstructs the Chief Commissioner or an authorised officer in exercising investigative powers, or who, without reasonable excuse, refuses or fails to comply with a requirement made or to answer a question, may be guilty of an offence.

7. However, the Chief Commissioner recognises that legal professional privilege restricts or prevents the exercise of the compulsion powers of the Chief Commissioner and authorised officers when conducting authorised investigations. The Chief Commissioner also recognises that a legal adviser has an obligation to a client or former client not to permit access to privileged records unless the client has waived the privilege.
8. The Chief Commissioner acknowledges that difficulties may arise in determining the proper application of the law relating to legal professional privilege. Where a person asserts during an investigation that a client is or may be entitled to claim legal professional privilege in respect of specified information or records, an authorised officer who is seeking access to the information or records will discontinue the investigation of the particular information or records (but not the matter being investigated) until the validity of the claim can be determined.
9. These Guidelines set out procedures which must be followed by authorised officers when a claim of legal professional privilege is made by any person in the course of an investigation under a tax law. The procedures will be applied when investigative powers are exercised in relation to clients, their agent, solicitors or barristers, or any other person from whom information is sought. However, these Guidelines do not create any legally enforceable obligations and cannot override any provision in legislation or the common law that is inconsistent with the Guidelines.

Purpose of Guidelines

10. The purposes of these Guidelines are to:
 - a) ensure that any person who wishes to claim that legal professional privilege applies to information or records has the opportunity to assert such a claim;
 - b) ensure that the validity of claims is, where possible, determined before an authorised officer obtains access to, or uses the relevant information or records;
 - c) ensure that while the validity of a claim is being determined, the integrity of the records is maintained;
 - d) resolve any disputes between an authorised officer and a person who claims that privilege applies, as quickly as possible and with minimal disruption and cost to all parties; and
 - e) ensure that an authorised officer is able to without delay obtain access to information and records which are not protected by legal professional privilege.

What is legal professional privilege?

11. Legal professional privilege is 'a rule of substantive law which enables a person to resist the giving of information or the production of records to a third party which would reveal confidential communications between the person and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings': *Daniels Corporation International Pty Ltd and Anor v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49. The rationale of the privilege is 'that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline': *Grant v Downs* (1976) 135 CLR 674 at 685; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487.
12. There are a number of authoritative publications on legal professional privilege which are referred to at the end of this document.
13. The following are some important general principles which apply in relation to legal professional privilege in the context of an investigation by the Chief Commissioner:
 - a) Legal professional privilege is the privilege of the client, not that of the legal adviser.
 - b) Legal professional privilege attaches to confidential communications passing between a client and his or her legal adviser (and sometimes between one of those and a third party), if the communications are made for the dominant purpose of enabling the client to obtain, or the legal adviser to give, legal advice; or for the dominant purpose of providing legal services relating to litigation that is actually taking place or was in the contemplation of the client at the relevant time: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Daniels Corporation International Pty Ltd and Anor v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.
 - c) The communication will be privileged only where the legal adviser was acting in the capacity of legal adviser, was qualified and admitted to legal practice: *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233.
 - d) Legal professional privilege does not apply to communications made in connection with the commission of a fraud, crime or other illegal purpose: *Beazley v Steinhardt* [1999] 106 A Crim R 21. This exception to privilege also extends to situations where the relevant illegal or improper purpose was that of a third party; the privilege attaching to communications between the client and lawyer is destroyed by virtue of the improper purpose of the third party: *Clements, Dunne and Bell Pty Ltd v Commissioner of the Australian Federal Police* (2001) 188 ALR 515.
 - e) Legal professional privilege does not protect things lodged with a legal adviser for the predominant purpose of obtaining immunity from production.

- f) Legal professional privilege applies to in-house legal advice only if it is given by in-house counsel who can demonstrate independence in spite of their employment: *Seven Network Ltd v News Ltd* (2005) 225 ALR 672; *Rich v Harrington* (2007) 245 ALR 106. At a minimum, the lawyer would have to be admitted to legal practice, acting in the capacity of legal adviser, and the communications would have to be made in confidence, arise from the relationship of lawyer and client, and be made for the dominant purpose of seeking legal advice. However, in *McCormack v Vance* [2005] ACTCA 35 (unreported), it was held that it was not a prerequisite for a lawyer to hold a practising certificate in order to maintain a claim for privilege.
 - g) Legal professional privilege does not generally apply to advice provided by people who are not legal practitioners, such as accountants and other financial advisers. However, in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, the Full Federal Court held that the availability of the privilege should not depend on whether the document is authored by an agent or another third party (such as an accountant), nor on whether the document is delivered to the lawyer directly by the author or through the client. Provided that the dominant purpose requirement is met, the privilege should extend to communication by the author to the client.
 - h) Communications between a client and a third party, and communications between a client's legal adviser and a third party, may be subject to legal professional privilege if they are made for the purpose of litigation, whether anticipated or commenced.¹
14. Examples of records which will not ordinarily be held to be subject to legal professional privilege are:
- a) Evidence of transactions such as contracts, conveyances, receipts and offers, partnership agreements, declarations of trust, and invoices.
 - b) Accounting, financial and banking records, such as ledgers, journals, passbooks and cheque butts.

However, privilege can be claimed if they are copy records and the copies were created for the dominant purpose of giving or obtaining legal advice or for the provision of legal services.

Circumstances in which legal professional privilege may be waived

- 15. Waiver of legal professional privilege is an act or conduct that is inconsistent with the maintenance of confidentiality over the information or records: *Mann v Carnell* (1999) 201 CLR 1.
- 16. Waiver or loss of privilege may be express or implied. Express waiver usually refers to the situation where the client expressly consents to the release of the privileged communications. Only the client can expressly waive privilege, or the client's agent or legal adviser can do so if acting on the authority or with the consent of the client.

¹ Trade Practices Commission v Sterling (1978) 36 FLR244 at 245-6

17. Implied waiver of legal professional privilege can occur in a number of ways. Below are a few examples:
- a) The privilege-holder does not intend to lose the privilege but hands over the privileged communication to a third party, even with the express reservation of maintaining legal professional privilege in it. This may include disclosure for a specific and limited purpose. In such cases, the courts will have regard to a number of circumstances to determine whether waiver of privilege can be imputed, including: whether the privileged material has been circulated confidentially; the purposes for which the privileged material was created; how widely the privileged material is circulated; the nature of the obligation of confidentiality in the recipient; and whether the circumstances of disclosure are inconsistent with the maintenance of confidentiality: *Mann v Carnell* (1999) 201 CLR 1; *Goldberg v Ng* (1995) 185 CLR 83; *Osland v Secretary to the Department of Justice* (2008) 249 ALR 1; and *AWB Ltd v Cole and Anor* (No.5) (2006) ALR 651.
 - b) A privileged communication mistakenly passes into the hands of a third party who subsequently reads or uses it in some way, eg, by photocopying or distributing it. The owner of the communication then attempts to assert legal professional privilege. Arguably, there has been an implied waiver of privilege. The Court will consider whether it is fair for the party to maintain the claim of privilege, having regard to the circumstances, including whether the privilege can be effectively reinstated: *Hooker Corporation Ltd v Darling Harbour Authority and Ors* (1987) 9 NSWLR 538; *Kabwand Pty Ltd v National Australia Bank Ltd* (1987) 81 ALR 721. Note that since *Mann v Carnell*, courts have applied the test of inconsistency: see *Armstrong Strategic Management and Marketing Pty Ltd and Ors v Expense Reduction Analysts Group Pty Ltd and Ors* (2012) 295 ALR 348 at [179] – [180]; and *Commissioner of Taxation v Devereaux Holdings Pty Ltd and Anor* (2007) 240 ALR 128 at [13 and [17].
 - c) Privilege may be lost through implied waiver when the privilege-holder discloses the substance of the communication. For example, where the conclusion of a legal advice is disclosed, even if the legal reasoning leading to it is not, this will amount to a waiver of privilege: *Bennett v Chief Executive Officer of Australian Customs Service* (2004) 210 ALR 220; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12; *Osland v Secretary to the Department of Justice* (2008) 249 ALR 1.
 - d) Where a party to proceedings puts state of mind in issue, and legal advice is likely to have contributed to the party's state of mind, privilege cannot be claimed in respect of the advice: *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd and Ors* (1995) 37 NSWLR 405 (Giles CJ Comm D at 411), applying *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347 at 358-359 (per Jordan CJ). However, where legal advice is relevant or contributed to administrative decision-making, the mere reference to the fact of the advice by the decision-maker (without relying on its contents) in the course of defending a judicial review application or on a taxation appeal is not inconsistent with the maintenance of privilege, and therefore does not amount to a waiver. On the other hand, see *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; 151 FCR 341 where the Commissioner identified the basis for satisfaction and exercise of discretion as those matters 'evidenced' in a schedule of documents which included eight privileged documents. The Full Federal Court held that there was an inconsistency between the making of that assertion and the maintenance of the privilege, and therefore the Commissioner was taken to have waived privilege over the eight scheduled documents (per Kenny, Stone and Edmonds JJ at [72] – [74]).

See also *Fort Dodge Australia Pty Ltd v Nature Vet Pty Ltd* [2002] FCA 501 at [11]; *ASIC v Rich* [2004] NSWSC 923; *Chen v City Convenience Leasing Pty Ltd and Anor* [2005] NSWCA 297 and *Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd and Anor* [2009] FCAFC 105 at [44] (Spender J).

18. However, there are certain situations in which, despite an apparent disclosure of a privileged communication, the law will not treat the disclosure as being a waiver of privilege. Below are some examples:
- a) The mere act of copying a privileged document does not lead to loss of privilege in the copy simply because the copy was not created for a privileged purpose: *Carnell v Mann* (1998) 89 FCR 247 at 254. Further, where no privilege attaches to the original document, privilege can attach to a copy document which is provided to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings: *Commissioner, Australian Federal Police and Anor v Propend Finance Pty Ltd and Ors* (1997) 141 ALR 545. See also *Tan v Commissioner of the New South Wales Police* [2012] NSWSC 1580 in relation to the application of legal professional privilege to various categories of digital data.
 - b) Disclosure of documents under compulsion of law or under threat of compulsion may not amount to a waiver of privilege: *ACCC v George Weston Foods Ltd and Anor* (2003) 198 ALR 592; *Woollahra Municipal Council v Westpac Banking Corp and Anor* (1994) 33 NSWLR 529. However, in circumstances where disclosure is not compulsory, in the sense that the power being exercised does not extend to requiring the production of records which are privileged, compliance with a request made in the exercise of the power may amount to an implied waiver. For example, in circumstances where a notice is issued by the Chief Commissioner under section 72 *Taxation Administration Act 1996*. This question does not appear to have been the subject of conclusive judicial consideration.
 - c) Where two or more parties have a mutual interest in obtaining legal advice, 'common interest privilege' may arise which will operate to protect the privileged status of a confidential communication disclosed to a third party with whom the client has a common interest. A common interest may arise between an insurer and an insured; a potential underwriter and insured; a liquidator and creditors; however, the relationship of debtor and creditor is insufficient. Common interest privilege is not limited to litigation or anticipated litigation, although it is generally applied in that context: *South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72.
 - d) A 'joint privilege' arises where two or more persons communicate with a legal adviser for the purpose of obtaining legal services or advice; this may also arise where one of a group of persons in a formal legal relationship communicates with a legal adviser about that relationship, e.g. company director and shareholder. Holders of a joint privilege cannot maintain privilege against each other, but can do so against the rest of the world. The joint nature of the privilege means all to whom it belongs must concur in waiving the privilege. Similarly, if one holder of the privilege discloses the communication, the other holders of the joint privilege are still entitled to rely upon the privilege: *Farrow Mortgage Services Pty Ltd (in liq) v Webb and Ors* (1996) 39 NSWLR 601.

Guidelines that will be followed by authorised officers

19. The intent of these Guidelines is that an authorised officer will not inspect, copy or remove any record to which access is sought, whether it is held by a client, the client's legal adviser or any other person, until the client has been given a reasonable opportunity to claim that legal professional privilege applies. This opportunity will be given, regardless of which of the methods of obtaining access described in paragraphs 3 and 5 is used by the Chief Commissioner or an authorised officer.
20. Where a claim of privilege is made, but is disputed by the authorised officer, the authorised officer will not continue to seek access to the information or inspect the relevant records unless:
 - a) the claim is abandoned or waived by the client; or
 - b) the claim is dismissed by a court.

Guidelines when claiming privilege in response to a notice issued under section 72(1) *Taxation Administration Act 1996*

21. When an authorised officer seeks access to information or records by way of a notice issued under section 72(1) of the *Taxation Administration Act 1996*, ('**section 72 notice**'). The notice will include directions on how to obtain a copy of these Guidelines on our website.
22. If the client wishes to make a claim of legal professional privilege in respect of any of the records or information covered by the section 72 notice, the client or the client's agent or the client's legal adviser should prepare a list of the records/information in respect of which legal professional privilege is claimed in accordance with paragraphs 33 to 43 of these Guidelines. The client may wish to seek legal advice as part of this process.
23. The list should then be signed and dated by the client, the client's agent or legal adviser. The original list should be forwarded to the authorised officer at the time of the production or provision of the other records and/or information sought under the section 72 notice that are not subject to a claim of legal professional privilege.
24. The validity of the claim for legal professional privilege will then be determined in accordance with paragraphs 44 to 46 of these Guidelines.

Guidelines when claiming privilege in the course of giving oral evidence under section 72(1)(b) or section 76(1)(b) *Taxation Administration Act 1996*

25. Where the client makes a claim of legal professional privilege during the course of giving oral evidence, and the authorised officer is not satisfied that the claim is valid, the request for the particular information will be made in the form of a notice issued under section 72(1)(a) of the *Taxation Administration Act 1996*, and the guidelines set out in paragraphs 21 to 24 of this document will apply.

Guidelines when claiming privilege when an authorised officer is on the premises

26. When seeking access to information or records at the premises of a client or legal adviser, authorised officers will adopt the following procedures:

- a) The authorised officer will identify himself or herself by name, advise that he or she is an authorised officer and produce for inspection his or her authority signed by the Chief Commissioner.
- b) The authorised officer will advise of the Act and the legislative powers in that Act under which enquiries are being made.
- c) Where a search warrant is executed, the authorised officer will provide a copy of the warrant to the client or legal adviser and will explain the purposes of the search.
- d) The authorised officer will indicate the types of records or other information to which access is sought.
- e) The authorised officer will seek the assistance of the client or legal adviser in facilitating access and finding relevant information and records. If the authorised officer requires access to a computer or other data recording system, the client or the client's agent or legal adviser will be asked to assist, if necessary, by explaining the system to the authorised officer.
- f) The authorised officer will offer the client or legal adviser a copy of these Guidelines.

27. In respect of information or records identified by the authorised officer as potentially within the access request, the authorised officer shall, before proceeding to inspect, copy, record or remove any records or information, ask the client or client's agent or legal adviser if the client wishes to claim legal professional privilege.

28. In respect of the information or records which are subject to a claim of legal professional privilege, the authorised officer should proceed in accordance with the guidelines set out below. In respect of the remaining records, the authorised officer may then proceed to inspect and otherwise deal with the records or information in accordance with the applicable legislative provisions.
29. If a claim of legal professional privilege is made, then the authorised officer should ask the client to secure the relevant records in a sealed envelope, or a locked container, cabinet, or office, and to prevent access until the validity of the claim can be determined. (This is discussed in more detail at paragraphs 38 to 40 of the Guidelines). If the client wishes to consult a legal adviser, the authorised officer should take no further action until the client's legal adviser arrives.
30. The client or the client's agent or legal adviser should be permitted to take copies of any of the documents before they are sealed.
31. If a legal adviser representing the client is in attendance, a reasonable time will be allowed to enable the legal adviser to consult with the client or to obtain legal advice from another legal practitioner before proceeding with the procedures set out in these Guidelines.
32. The procedures set out below to claim and to determine the validity of the claim for privilege should then be followed.
33. A list of the records in respect of which legal professional privilege is claimed by or on behalf of the client should be prepared by the client or the client's agent or legal adviser, in the presence of the authorised officer, or by the authorised officer with assistance from the client or the client's agent or legal adviser. The list should contain the following details, and any other information considered by the authorised officer or the client or the client's agent or legal adviser to be relevant to determining the claim for legal professional privilege:
 - a) the type of document, e.g. a letter, memorandum, opinion, statement of claim, advice, file note, lease, contract;
 - b) the nature of the contents of the document e.g. information about a takeover, details of a lease, finance arrangements;
 - c) the number of pages in each document;
 - d) the date each document was prepared or executed, or a note indicating that the document is not dated;
 - e) the author and addressee of the document, including identification of the persons who signed it, if known and the capacity in which each person signed it;
 - f) a physical description of each document e.g. printed, handwritten, photograph;
 - g) whether the document is an original, duplicate, photocopy, facsimile or carbon copy;
 - h) the grounds upon which legal professional privilege is claimed in respect of each document;
 - i) the name of the client in respect of whom the privilege claim is made; and
 - j) if applicable, the person who claims, on behalf of the client, that legal professional privilege applies.

34. In order to determine whether a communication with an in-house counsel is privileged in accordance with paragraph 13(f) of these Guidelines, where the author or addressee of the document identified in paragraph 33(e) above is an in-house counsel, the list should contain the following additional details:
- a) whether the lawyer has been admitted to practice as a lawyer?
 - b) the lawyer's role within the organisation, and if more than one, whether each position is separate with individual job descriptions attaching to each?
 - c) whether the lawyer fulfils various functions, positions, roles and responsibilities within the organisation, and if so, the capacity in which the lawyer was acting at the time the record or communication was prepared or received?
 - d) where is the lawyer situated within the organisational hierarchy of the company and what are the lawyer's reporting lines?
 - e) whether the lawyer's remuneration is linked to the performance of the business as a whole?
 - f) whether the lawyer owns or controls shares in the company, and if so, how many, and what proportion of the issued capital does that represent?
 - g) whether the lawyer has the authority to circumvent the reporting lines and report to the board of directors personally where his or her opinion differs from that of management?
35. The details provided pursuant to paragraphs 33 and 34 must not include information, the disclosure of which would be a waiver of legal professional privilege by or on behalf of the client.
36. Each communication whose details are recorded should be identified by a cross-reference to a number, letter or other unique identifying mark affixed to the document. Where possible the identifying mark should not interfere with the document's content.
37. At any time, the authorised officer may accept a claim that legal professional privilege applies to a document.
38. The documents recorded on the list should, in the presence of the authorised officer, be placed in an envelope or container that is 'sealed' so that it will be obvious to an observer if the documents have been accessed. The client, or the client's agent or legal adviser, and the authorised officer should sign their names and the date across each seal.
39. The list of documents that have been sealed should be endorsed to the effect that having regard to the claim of legal professional privilege made by or on behalf of the client, the authorised officer has sought access to the listed documents but the documents have been sealed without being examined until the validity of the claim of legal professional privilege has been determined.
40. The endorsed list should then be signed and dated by the authorised officer and the client or the client's agent or legal adviser. The original list should be kept by the authorised officer. Two copies of the endorsed list should be made, one to be held by the client or the client's agent or legal adviser and the second list should be kept with the envelope or container containing the documents which have been 'sealed' as referred to at paragraph 29.

41. In some circumstances (e.g. if the quantity of records asserted to be subject to legal professional privilege is large), the authorised officer may agree to an extension of time for the client or the client's legal adviser to prepare a list of records in accordance with paragraph 33, on the undertaking that the documents secured in accordance with paragraph 29 remain so secured and are not removed from the premises at which they were secured. Generally, the authorised officer may only agree to an extension of time to prepare the list under this paragraph if the relevant documents are located at the premises of the client's legal adviser. However, the authorised officer may agree to an extension of time to prepare the list notwithstanding that the relevant documents are not located at the premises of the client's legal adviser.

Partly privileged documents

42. If a client wishes to make a claim of legal professional privilege in respect of one or more portions of a document, the Chief Commissioner may agree to sever or mask that portion, provided that the portion claimed to be privileged satisfies the dominant purpose test of legal professional privilege, and is capable of isolation from the remainder of the document.
43. In such a case, the client should provide a copy of the document with the relevant parts for which privilege is claimed masked. In addition, the details to be included in the list specified in paragraph 33 should also include:
- a) identification of the part of the document claimed to be subject to legal professional privilege, e.g. title and page or paragraph number(s);
 - b) details of how that part of the document relates to the document as a whole;
 - c) the general nature of the content of that part; and
 - d) the grounds upon which legal professional privilege is claimed in respect of that part of the document.

Determining validity of a privilege claim

44. An authorised officer, on behalf of the Chief Commissioner, may either accept a claim that privilege applies, or propose a process which might lead to agreement with the person who controls the relevant records.
45. The options that may be proposed will depend on the circumstances in a particular case. The options available include, but are not limited to:
- written agreement with the client to a process of mediation conducted by an independent third party approved by the client and the authorised officer; or
 - written agreement with the client to a process of arbitration, conducted by an independent third party approved by the client and the authorised officer.

Such an agreement with the client as to mediation or other review process will generally require the client to meet his/her own costs of the process and to contribute half of the mediator's or arbitrator's fees.

46. If agreement on a method of settling a disputed claim for privilege is not reached, the Chief Commissioner may institute court proceedings to determine the Chief Commissioner's entitlement to access the disputed documents or records. In some cases, the Chief Commissioner may consider it appropriate to institute court proceedings without attempting to negotiate an alternative settlement process, e.g. where there have been previous disputes about the client's entitlement to privilege during the investigation, or during previous investigations involving the client.

Claiming privilege in the course of execution of a search warrant

47. In the case of an investigation where a search warrant is executed, the authorised officer should proceed in accordance with paragraphs 26 to 46 of these Guidelines, in respect of information or records which are subject to a claim of legal professional privilege.

Prosecution for offences

48. A person who fails or refuses to provide access to information or records may be prosecuted for an offence under Division 2 of Part 9 of the *Taxation Administration Act*. The relevant offences include:

- failing to comply with a notice to produce information or records under section 72,
- without reasonable excuse, refusing or failing to comply with a requirement made or to answer questions under section 76, and
- preventing, hindering or obstructing the Chief Commissioner or an authorised officer exercising investigative functions under Division 2 of Part 9.

49. The Chief Commissioner will not institute proceedings for offences against a person who claims that legal professional privilege applies to information or records, provided the person cooperates with an authorised officer in accordance with the procedures in paragraphs 21 to 43 of these Guidelines. The Chief Commissioner will consider instituting proceedings for offences, even where a claim of legal professional privilege is made, where the person has not cooperated with an authorised officer, for example, by failing to comply with paragraphs 29 and/or 36 of the Guidelines.

Further reading

There are a number of authoritative publications which contain explanations of and commentary on the law applying to claims of legal professional privilege. These include:

- Chapter 6 of the Australian Taxation Office's (ATO) publication called 'Access and Information Gathering Manual', which is available from www.ato.gov.au;
- The July 2006 Newsletter of the Law Council of Australia's Federal Litigation Section;
- The 'CLPWatch' website maintained by the Law Council of Australia at www.lawcouncil.asn.au/sections/federal-litigation/clpwatch/; and
- Australian Law Reform Commission (ALRC) Report 107, Privilege in Perspective: Client Legal Privilege in Federal Investigations, December 2007.

Note: The publications referred to above in some instances involve a consideration of the statutory powers of federal authorities which are slightly different to the statutory powers of the Chief Commissioner, and therefore, care should be exercised in applying such case law.

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