

# **Laws to protect tax whistleblowing in Australia: What does this mean for taxpayers and the taxation profession?**

John McLaren

## **Abstract:**

*The Commonwealth Government is keen to explore the development of statutory laws to protect whistleblowers in the taxation environment. The Commonwealth Government has asked for submission on their consultation paper, 'Review of tax and corporate whistleblower protections in Australia' which was released on 20 December 2016. The Corporations Act already has comprehensive provisions designed to protect whistleblowers that disclose breaches of the Act to the Australian Securities and Investment Commission (ASIC). These provisions do not protect whistleblowers that have knowledge of tax avoidance or tax evasion by an individual taxpayer or business entity and wish to report these activities. The Government anticipates that the law would provide protection to whistleblowers such as accountants, tax agents, legal advisers, financial service providers, employees of the entity or business contractors that report breaches of the taxation law to the Australian Taxation Office (ATO). While it might be good for the Government to institute laws that protect whistleblowers, what about the rights of the taxpayer and the tax professional? Taxpayers expect their tax adviser to maintain the confidentiality of their financial affairs and to comply with their fiduciary duty to them.*

*This paper will examine the objectives of the Government in introducing tax whistleblower laws and the existing whistleblower laws in Australia. The paper will then discuss the fiduciary duties of the tax adviser and the importance of legal professional privilege in protecting the rights of the taxpayer. It would appear that there is a potential conflict between the desire of the Government to collect taxation revenue and the common law duty to maintain the confidentiality of a taxpayer's information. The paper will critically examine the implications of this government initiative for both the tax profession and the taxpayer.*

## **I INTRODUCTION**

The Commonwealth Government is keen to explore the development of statutory laws to protect whistleblowers in the taxation environment. This means that the whistleblower is protected by specific provisions in the statutory law against civil actions for breaching their common law fiduciary duty to the client or employer or for defamation. The Commonwealth

Government has asked for submission on their consultation paper, *Review of tax and corporate whistleblower protections in Australia* which was released on 20 December 2016.<sup>1</sup>

The *Corporations Act 2001* (Cth) already has comprehensive provisions designed to protect whistleblowers that disclose breaches of the Act to the Australian Securities and Investment Commission (ASIC). These provisions do not protect whistleblowers that have knowledge of tax avoidance or tax evasion by individual or business taxpayers. The Government envisages that the law would provide protection to whistleblowers such as accountants, tax agents, legal advisers, financial service providers, employees of the entity or business contractors that report to the Australian Taxation Office (ATO) breaches of the taxation law. While it might be good for the Government to institute laws that protect whistleblowers, what about the rights of the taxpayer and the tax professional? Taxpayers expect their tax adviser to maintain the confidentiality of their financial affairs and to comply with their fiduciary duty to them. This conflict between the approach taken by the government to encourage whistleblowers by providing statutory protection and the rights of the taxpayer is the main focus of this paper.

For many years the Australian Commissioner of Taxation has appealed to tax agents in Australia to 'dob'<sup>2</sup> in tax scheme promoters and clients with undeclared overseas income. This statement was made as part of the offensive by the Australian Taxation Office (ATO) against tax havens.<sup>3</sup> The ATO encourages the public to report suspected tax cheats either by telephone, letter or email or through the 'Report a concern' tool in the ATO app. Tax practitioners have a specific facility to report unlawful behaviour. One of the main contentions of this paper is that tax advisers and accountants owe a fiduciary duty to their clients who require them to maintain the confidentiality of their financial information. However, should they place their clients first or do they have a higher duty to the community and in turn the ATO, which requires them to report the conduct of their client if their client's activities will result in not paying the correct amount of tax. It is not intended in this paper to examine the distinction between tax evasion, tax avoidance and tax minimisation strategies that might be adopted by taxpayers. The distinction is very important but much has already been written on this area of taxation law.<sup>4</sup> Not only does this distinction create problems for taxpayers and tax advisers if the whistleblower reports tax minimisation activities that are perfectly legal but also what if the whistleblower only suspects that illegal activities may have taken place when it turns out that no actual breaches of the taxation law have occurred? These are questions for further research.

In Part II of this paper the objectives of the Government in introducing tax whistleblower laws will be critically examined as well as the existing whistleblower laws in both the private and public sectors in Australia. Part III of the paper will then discuss the fiduciary duties of

---

<sup>1</sup> Australian Government, The Treasury, *Review of tax and corporate whistleblower protections in Australia* < <https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/>

<sup>2</sup> The term 'dob' is Australian slang for to report or to inform someone in authority about a person's behaviour.

<sup>3</sup> Anderson, Fleur, 'ATO urges tax agents to dob in cheats', *Australian Financial Review* Sydney, 9 October 2007, 1.

<sup>4</sup> John McLaren, 'The Distinction between Tax Avoidance and Tax Evasion has become Blurred in Australia: Why has it happened?' (2008) 3(2) *Journal of the Australasian Tax Teachers Association*, 141.

the tax adviser and the importance of legal professional privilege in protecting the rights of the taxpayer. Part IV of the paper will examine the implications of this initiative by the government to introduce tax whistleblower laws for both the tax profession and the taxpayer.

## II THE CURRENT LAW PROTECTING WHISTLEBLOWERS

The Australian Government and State and Territory Governments all agree that a whistleblower provides a key role in detecting corporate misconduct.<sup>5</sup> Government agencies are not always in a position to detect wrongdoing by corporations or employees in government departments due to their size and commercial secrecy.<sup>6</sup> There are a range of statutory laws enacted by both the Commonwealth Government and State and Territory Governments that are designed to protect whistleblowers from legal action brought against them by their employer. These laws are set out below. The statutory laws cover whistleblowers employed or contracted to both private corporations and the public sector such as government departments or government agencies.

Whistleblowers are provided with statutory legal protection against their employers in Australia if they are a public servant, an employee or contractor of a corporation. The reason for the legal protection is that whistleblowers expose themselves to potential legal action because in many instances they breach their fiduciary duty to their employer or a client. The concept of a 'fiduciary duty' is examined in detail in Part III of this paper.

### *A Private Sector Statutory Protection*

The private sector provides protection pursuant to the *Corporations Act 2001* (Cth). There are four sections of the Act which are designed to not only protect the whistleblower but also to deter the employer from victimising the whistleblower and if required order the payment of compensation.

The four sections are as follows:

- (i) Section 1317AA, Disclosures qualifying for protection under this Part
- (ii) Section 1317AB - Disclosure that qualifies for protection not actionable etc.
- (iii) Section 1317AC - Victimisation prohibited - Actually causing detriment to another person
- (iv) Section 1317AD - Right to compensation

These sections can be distilled into the following statements:

- The person who is making the disclosure will only be given protection under the act if they are an officer of the company; an employee of the company; a person who has a

---

<sup>5</sup> Australian Treasury, 'Improving protections for corporate whistleblowers' *Options Paper*, October 2009, 4.

<sup>6</sup> *Ibid.*

contract for the supply of services and goods to the company or an employee of that contractor;

- The disclosure must be made to ASIC; the company's auditor or a member of the audit team, a director, secretary or senior manager of the company or a person authorised to receive the disclosure;
- The discloser must provide their name before making the disclosure;
- The discloser must have reasonable grounds to suspect the information indicates that the company or an officer or employee of the company has contravened the corporation's legislation;
- The discloser must make the disclosure in good faith.

If the above conditions are met the discloser

- Qualifies for protection from any civil and criminal liability because of making the disclosure
- They are not liable for breaching their employment contract and no rights or remedies can be enforced against them.
- They may be subject to criminal or civil liability if the discloser is found to be involved in the wrongdoing;
- The court can order that a discloser's employment contract can be reinstated.

If a whistleblower is victimised or is threatened by the employer or company

- The person doing the victimisation action will be prosecuted;
- And if they suffer damage because of the disclosure which resulted in victimisation they may receive compensation.

Additional private sector legislation to protect whistleblowers is contained in the following:

- *Banking Act 1959* (Cth)
- *Insurance Act 1973* (Cth)
- *Life Insurance Act 1995* (Cth)
- *Superannuation Industry (Supervision) Act 1993* (Cth)

### *B Public Sector Statutory Protection*

The Commonwealth public sector provides protection for whistleblowers under the *Public Interest Disclosure Act 2013* (Cth) (PID Act).

Additional public sector legislation to protect whistleblowers is contained in the following:

- *Fair Work (Registered Organisations) Amendment Act 2016* (Cth)

The six State and two Territory Governments provide protection to their own whistleblowers within their public sector with similar legislation to the PID Act. The legislation is contained in the following statutes:

- *Whistleblowers Protection Act 1993*, South Australia
- *Whistleblowers Protection Act 1994*, Queensland
- *Public Interest Disclosures Act 1994*, New South Wales
- *Public Interest Disclosure Act 2012*, Australian Capital Territory
- *Protected Disclosure Act 2012*, Victoria
- *Public Interest Disclosures Act 2002*, Tasmania
- *Public Interest Disclosure Act 2003*, Western Australia
- *Public Interest Disclosure Act 2008*, Northern Territory

### *C Existing tax whistleblowing protection*

The government introduced the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 to amend the secrecy and disclosure provisions that apply to taxation information that are spread over many taxation law acts. The new law is contained in Division 355 of Schedule 1 of the *Taxation Administration Act 1953* and complies with international obligations enunciated by the OECD, the Asia-Pacific Economic Cooperation and the United Nations relating to the protection of privacy.<sup>7</sup>

Division 355 of the *Taxation Administration Act 1953* provides limited protection for employees of the taxation office and other government officials from disclosing confidential information about taxpayers. Division 355 states that the objects of this Division are:

- (a) to protect the confidentiality of taxpayers' affairs by imposing strict obligations on taxation officers (and others who acquire protected tax information), and so encourage taxpayers to provide correct information to the Commissioner; and
- (b) to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.

These provisions do not apply to tax agents, tax practitioners and their employees if they disclose confidential information about their clients.

### *D Proposed new tax whistleblower laws*

---

<sup>7</sup> Explanatory Memorandum, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009, General outline and financial impact.

The Australian government review of corporate and tax whistleblower protection sets out a number of issues relevant to possible new laws to protect tax whistleblowers. Much of the new law will be based on existing protections contained in the private and public sector statutory law as discussed above. The review did contain a number of questions under separate headings that are relevant for tax whistleblower protections and they are briefly summarised below.<sup>8</sup>

- (i) The definition of a whistleblower includes tax agents, accountants, legal advisers, contractors and employees of the entities. The scope of persons covered by the definition is broader than the Corporations Act but intended to list all who may become aware of breaches of the tax law.
- (ii) There should be provisions to ensure that the whistleblower is protected against retaliation.
- (iii) In order for the whistleblower to qualify for protection under the law they must have reasonable grounds to suspect actual or potential tax avoidance or a breach of the tax law before they disclose the information to the ATO.
- (iv) The new law does not require the whistleblower to disclose their name or contact details which is completely different from other whistleblower protections laws in Australia.
- (v) The new law will be consistent with the Registered Organisation amendments to the *Fair Work Act 2014* in that the whistleblower will be entitled to compensation for damages, reinstatement of employment or both.
- (vi) That the information disclosed be made through a secure channel to the ATO.
- (vii) The question of whether a reward should be paid to the whistleblower is still open but the whistleblower would have to disclose their personal details.
- (viii) The question as to whether the whistleblower should have access to the taxpayer information is still open.
- (ix) The final issue for consideration in new law is whether there should be another agency to accept disclosed information or should it just be the ATO.

At the time of producing this paper the government has not released the result of the consultation process.

### III THE RIGHTS OF THE TAXPAYER - THE AUSTRALIAN POSITION

Australia has a 'self-assessment' system of taxation in that all income tax returns as well as Fringe Benefit Tax returns and Business Activity Statements are accepted at face value and are not subject to immediate scrutiny. This means that the Commissioner of Taxation has certain powers to check the veracity of claims by taxpayers.<sup>9</sup> Every year the ATO collects

---

<sup>8</sup> Australian Government, The Treasury, above n 1, 33.

<sup>9</sup> Tang, Reynah, 'The Commissioner's power to access taxpayer information from third parties and a taxpayer's right to privacy – A case for reform?', (2005) 34 *Australian Tax Review* 20, 20.

financial information about its citizens including interest earned on bank deposits; the receipt of dividends; employment information including income tax paid under the 'pay-as-you-go withholding system (PAYGW); the sale of shares and real property; the purchase of motor vehicles and boats over a certain monetary limit; and a whole range of transactions that involve money derived in Australia or overseas. The main method used by the ATO to track these transactions is through the need for all taxpayers to have a Tax File Number (TFN). The penalty for not having a TFN is that tax is withheld at source at the rate of 47 percent.<sup>10</sup> For business taxpayers, the requirement to have an Australian Business Number (ABN); a TFN; registration for Goods and Services Tax (GST) if sales are over a defined amount;<sup>11</sup> the lodgement of a Business Activity Statement (BAS) monthly, quarterly or yearly,<sup>12</sup> with the result that the ATO has a very good indication of the financial position of each business deriving income in Australia before a tax return is lodged each year. There is very little that the ATO does not know about the finances of the individual and with developments in exchanging information between Australia and other countries, even foreign finances will be part of the vast amount of information gathered by the ATO each year. Even when visiting accountants or lawyers stay in Australia their client lists which may be contained on a data file within the laptop computer can be seized by the police and used in the prosecution of Australian taxpayers.<sup>13</sup>

However, given this vast range of information that is available to the ATO, they are not privy to what is discussed between a taxpayer and their tax adviser. This information will only be passed on to the taxation adviser if the adviser can assure the taxpayer that it will remain confidential. This includes not only the adviser but any employee or contractor of the adviser.

### *A The Taxpayer's Charter*

The crucial issue with the collection of taxes and administering the tax law is to balance the rights of the taxpayer with maximising the collection of revenue. From the perspective of the tax administrator, the ATO, the Australian taxpayer has a number of basic rights that are encapsulated in the 'Taxpayers' Charter'. The charter was first introduced in Australia on 4 July 1997 and was the result of a parliamentary inquiry into the administration of the tax system.<sup>14</sup> The Charter outlines the relationship the ATO seeks with the community, and is stated to be one of mutual trust and respect. To this end, the Charter sets out the following:

---

<sup>10</sup> The rate of tax deducted under the withholding system for not providing a TFN is the top marginal rate of income tax, namely 45% plus 2% Medicare levy. Once the taxpayer lodges a tax return the amount withheld is credited against tax payable by the taxpayer.

<sup>11</sup> An entity must be registered for GST if their turnover is greater than \$75,000 or \$100,000 if a non-profit entity or a business may choose to be registered if their turnover is less.

<sup>12</sup> A business must lodge a BAS monthly, quarterly or yearly depending on their turnover and level of PAYG withholding.

<sup>13</sup> *Egglisshaw v Australian Crime Commission* [2006] FCA 819.

<sup>14</sup> Australian Taxation Office, 'Celebrating the 10<sup>th</sup> anniversary of the Taxpayers' Charter', [www.ato.gov.au/print.asp?doc=/content/86369.htm](http://www.ato.gov.au/print.asp?doc=/content/86369.htm) 6 November 2017.

- taxpayers' rights under the law;
- the service and other standards taxpayers' can expect from the ATO;
- what taxpayers can do if they are dissatisfied with the ATO's decisions, actions or service, or if they wish to complain; and
- taxpayers' important tax obligations.

The charter contains two specific rights relating to privacy and confidentiality. At point 5, the ATO assures taxpayers that they respect their privacy and assure taxpayers that they are collecting the information in a fair and lawful way that is not unreasonably intrusive and furthermore will advise the taxpayer of the reason why the information is being collected, especially from third parties, and the purpose to which the information will be used. The information will only be shared with another person or organisation if it is authorised by the law. The ATO is also bound by the *Privacy Act 1988* (Cth) and the Privacy Commissioner can investigate a complaint by the taxpayer.

At point 6, the ATO assures taxpayers that all information collected will be kept confidential unless the disclosure is authorised by the law. However, the Charter has not been given legislative force, and as such does not provide taxpayers with any legal basis in which to bring an action against the ATO based on a breach of their obligations. At best, it provides some comfort and a legitimate expectation that the ATO will act with some level of professionalism in their dealings with the taxpayer.

The 'right to privacy' and 'breach of confidentiality' are used in a general sense to explain that taxpayers have an expectation that their private affairs will not be unlawfully disclosed to the public. The Charter, as discussed above, provides taxpayers with an expectation that the ATO will not unlawfully disclose their financial details.

One main issue that is at odds with the right of the taxpayer to privacy and is contrary to the concept of mutual trust and respect as contained in the Taxpayer's Charter, is the ease by which information about a taxpayer can be obtained from third parties.<sup>15</sup> Taxpayers are not given notice of the ATO's intention to obtain information from third parties and third parties are placed in a position of possibly infringing their obligations under Privacy laws by not informing the taxpayer of the situation and obtaining their consent. This would include information provided by whistleblowers. Tang argues that taxpayers should have the right to contest the release of information in what has been described as a 'reverse-FOI procedure'.<sup>16</sup> This approach is in line with the Australian Law Reform Commission report on privacy in advocating that all personal information should be kept confidential and that a person affected by disclosure of that information by a third party should be subject to objection by

---

<sup>15</sup> Tang, n 9, 27.

<sup>16</sup> *Ibid*, 26.



the person so affected.<sup>17</sup> However, the ATO would contend that in order to effectively collect revenue in some cases the taxpayer should not receive advance notice.

### *B Duty of confidentiality*

It is well established in the common law that trade secrets and commercial intellectual property are protected by breach of confidence actions. Similarly, certain private and public organisations are governed by Privacy legislation in order to protect the confidentiality of confidential information. This issue was discussed in some detail by Tang and the fact that organisations breach their legal obligation to maintain the privacy of information of individuals when served with notices under s 263 or s 264, *Income Tax Assessment Act 1936* (Cth) (ITAA 36).<sup>18</sup> The protection of the public revenue is paramount, and rights provided by the Privacy legislation are secondary. The coercive powers under s 263 and s 264 provide access powers beyond those provided to the police. The police require a search warrant to access information for criminal proceedings but they are not required by the ATO when the revenue is being threatened.<sup>19</sup> However, the focus of this section is to examine what protection the law provides to a taxpayer in their confidential dealings with their tax adviser. In particular, how comfortable can a taxpayer be in maintaining the confidential nature of their financial details, including arrangements that may involve investments in tax havens and OFCs with their tax adviser, given that the Commissioner of Taxation would like that same tax adviser to report their client's activities to the ATO? If tax whistleblower protection laws are enacted this situation will be at greater risk because even employees of the tax adviser could provide confidential information to the ATO and potentially collect a monetary reward.

The legal action for breach of confidence has, according to P.D. Finn, only matured in recent decades into a rule that 'those who receive information in confidence shall not take unfair advantage of it'.<sup>20</sup> Arguably being paid a reward by the government for disclosing confidential information is clearly the actions of someone taking an unfair advantage of a taxpayer for their own benefit.

It is established law that certain people or institutions have a duty to keep information confidential.<sup>21</sup> This duty is based on trade secrets; the existence of a special relationship such as lawyer and their client; accountant and their client; or a director and the company.<sup>22</sup> If a tax adviser or accountant were to take notice of the Commissioner of Taxation's advice and report their clients that have foreign undeclared income then they would breach their duty of confidentiality. Tax whistleblower protection laws would exacerbate this situation. If the adviser and client are in a fiduciary relationship, then the taxpayer could have taken legal action on the basis of the special relationship if whistleblower protection law did not exist.

---

<sup>17</sup> Australian Law Reform Commission, *Report No. 22 – Privacy* (1983) 92.

<sup>18</sup> Tang, Reynah, n 9, 22.

<sup>19</sup> *Ibid*, 23.

<sup>20</sup> Finn, P.D., 'Confidentiality and the "Public Interest"' (1984) 58 *The Australian Law Journal* 497, 497.

<sup>21</sup> Finn, P.D., 'Confidentiality and the "Public Interest"', (1984) 58 *Australian Law Journal* 497, 508.

<sup>22</sup> *Ibid*.

However, if that special relationship does not exist, the taxpayer must then rely on the common law to provide the basis for legal action for breach of confidence as would be the case with an employee or contractor of the tax adviser.

### *B Fiduciary relationship*

It is contended in this paper that accountants, tax agents and tax advisers are in a fiduciary relationship with their client, the taxpayer. Moreover, it is equally contended that book-keepers engaged in preparing Business Activity Statements (BAS) are also in a fiduciary relationship with their clients. An employee owes a fiduciary duty to their employer and it is usual in contracts of employment to include a clause relating to confidentiality. Prior to examining the consequences for breaching that relationship, it is important to understand what the duties are under that relationship.

In the High Court case of *Hospital Products Limited v Unites States Surgical Corporation* (1984) 156 CLR 41, Mason J made the following observation about the existence of a fiduciary relationship:

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. *Phipps v. Boardman* [1966] UKHL 2; (1967) 2 AC 46, at p 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. See generally: Weinrib, "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1, at pp.4-8.<sup>23</sup>

In the case of *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165, Kirby J examined in detail the tests to be used in determining the existence of a fiduciary relationship and one of those tests is set out as follows:

---

<sup>23</sup> (1984) 156 CLR 41, 96.

(6) As a matter of practicality, to reduce the uncertainties that arise from the elusive "essence" of the "fiduciary principle", it is reasonable for courts to have regard to features commonly found in cases where fiduciary obligations have been upheld. Necessarily, such features are not exhaustive. They may overlap. As Gaudron and McHugh JJ pointed out in *Breen*, they have included in the past: "the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another". Superimposed on all of these instances is the common requirement of "loyalty". Whilst that word itself is also somewhat tautologous, it signals, in the context, the central idea involved. In some relationships, or factual circumstances, an element of selflessness is implicit. It is not enough that the party charged with default may have conformed to contractual duties or even to the standards of a tortious duty of care. Whether it has or not, equity will require that party not to profit in any way from the relationship nor advance any interests other than those of the beneficiary, except with the beneficiary's informed consent. Equity will oblige the fiduciary not to have any interest unknown to the beneficiary that could conflict with the foregoing duties ...<sup>24</sup>

Applying the reasoning as enunciated by Kirby J, it can be strenuously argued that an accountant, registered tax agent, tax adviser and registered bookkeeper stand in a fiduciary relationship with their client. As such, the duty to maintain the privacy and confidentiality of their clients' personal financial details is of paramount importance. If they fail to uphold this duty then they should face the prospect of being sued for damages and be investigated and sanctioned by the appropriate professional body for misconduct. The proposed tax whistleblower protection laws would completely contradict this area of equity and reverse the concept of loyalty which is a major aspect of a fiduciary duty. To reward whistleblowers with money that are in a fiduciary relationship with the taxpayer conflicts with this area of law.

### *C Right to privacy*

A right to privacy is not as well established in the law as is the duty of confidentiality.<sup>25</sup> Traditionally privacy has been protected through the equitable doctrine of 'breach of confidence'.<sup>26</sup> However, as a result of the High Court decision in the case of *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, the 'door has been left ajar'<sup>27</sup> to eventually introduce a tort of privacy into the Australian common law, but as yet there is no cause of action against someone invading another person's personal privacy. At best, the action on the basis of breach of confidence is the best cause of action that a taxpayer could take against their adviser. One of the main issues in this case was the fact that the ABC was intending to broadcast a film of possums being killed for meat in a licensed abattoir but the film had been taken by an unknown trespasser. The High Court held that an injunction to prevent the

---

<sup>24</sup> (2001) 207 CLR 165, 217.

<sup>25</sup> Dean, Robert, 'A right to privacy?', (2004) 78 *Australian Law Journal* 114, 114.

<sup>26</sup> *Ibid*, 117.

<sup>27</sup> *Ibid*, 119.

broadcasting of the film should not have been granted because no legal or equitable rights had been affected. In Australia there was no right to privacy and an action for breach of confidence could not be entertained because no duty was owed by the third party trespasser to the owner of the information, namely *Lenah Game Meats Pty Ltd* or by the ABC to *Lenah Game Meats*.

In the UK the Court of Appeal in the case of *Douglas v Hello! Ltd* [2002] WLR 992 recognised that a right of privacy had developed in the law.<sup>28</sup> The Court also recognised the influence that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had on the equitable doctrine of breach of confidence.<sup>29</sup>

The main problem with relying on using the breach of confidence action to either prevent a tax adviser disclosing information or suing for damages is that it requires the existence of a special relationship. This does not exist if the disclosure of information is made by a third party, as was the case in the *ABC v Lenah Game Meats* case. For example, what if an employee of the tax adviser disclosed information about the taxpayer to the ATO and then left the employment? Similarly, a contractor could be engaged by the tax adviser or an employee of the contractor could disclose the information. The taxpayer has no special relationship to the former employee or the contractor, but only to the tax adviser. It is contended in this paper that in order for the Australian law to provide protection for taxpayers there needs to be in existence a strong legal safeguard against unauthorised disclosure. The Australian common law would benefit by a tort of privacy, although Robert Dean suggest that the development of breach of confidence supported by torts may be a better path to protect privacy rather than a new tort of invasion of privacy.<sup>30</sup>

However, the Government may attempt to extend the whistleblower protection law to third party contractors or employees of the contractor as is currently the case with whistleblower protection laws under the *Corporations Act* and the public sector statutory laws.

#### D *Legal professional privilege*

If the Commissioner of Taxation serves a notice pursuant to s 263 or s 264, ITAA 36<sup>31</sup> the only means available to an Australian taxpayer to prevent access by the ATO to certain documents and advice is to claim legal professional privilege. That privilege will prevent the disclosure of written communication between the taxpayer and their lawyer relating to certain legal advice and legal services in some instances. There are exceptions to this privilege and they are discussed below. The government argues that legal professional privilege will not apply if the whistleblower only discloses factual information because these matters are not

---

<sup>28</sup> *Ibid*, 117.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*, 125.

<sup>31</sup> These sections contain the coercive powers to compel a taxpayer to provide evidence of dealings in person or by way of documentation.

covered by the privilege.<sup>32</sup> What happens when the whistleblower has no idea what is covered by the privilege and what is simply factual information.

The concept underlying the justification for upholding legal professional privilege is explained by Professor Ligertwood<sup>33</sup> as the right of all citizens to obtain legal advice, which is at the core of the rule of law and protection human rights. It is especially important as a bulwark against tyranny and oppression.<sup>34</sup> If citizens are to fully understand their rights they must be encouraged to communicate with lawyers through open and frank discussions and this can only be achieved if the communications are protected from disclosure.<sup>35</sup> Legal professional privilege is described as a ‘substantive right which applies to prevent any compulsory access to client-lawyer communications’.<sup>36</sup>

The concept of legal professional privilege has been recognised by the *Evidence Act 1995* (Cth) as providing two privileges: an advice privilege, s 118 and a litigation privilege, s 119. The Sections provide for the written communications between a legal adviser and their client to be kept confidential provided the communication was made or the written advice was prepared for the ‘dominant purpose’ of the lawyer in providing that advice. The specific provisions of the Commonwealth Evidence Act are as shown above, but all States and Territories have similar provisions in their own Evidence Acts, commonly known as the ‘Uniform Evidence Act’.

The common law approach to legal professional privilege had adopted a ‘sole purpose’ test as being the test to be used to determine whether the communication between the lawyer and client should be protected from disclosure, but this view was changed by the High Court decision in the case of *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49. The High Court finally resolved this issue and the majority found in favour of a ‘dominant purpose’ test similar to the statutory requirements. The main concern of the High Court was that in a large company with in-house lawyers many documents were capable of having the privilege attached to them when that may not have been the original intent of the legal advice in the first place. The sole purpose test was seen as being too rigid and absolute and that a more practical application was required.<sup>37</sup>

The judgment of Gleeson CJ, Gaudron and Gummow JJ provides an excellent summary of the basis of the existence of legal professional privilege and the practical issues to be considered in its application:

Legal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court. In the ordinary course of

---

<sup>32</sup> Australian Government, The Treasury, above n 1, 2.

<sup>33</sup> Ligertwood, Andrew, *Australian Evidence* (4<sup>th</sup> ed. 2004).

<sup>34</sup> *Ibid*, 275, and the case of *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 583 (Kirby J)

<sup>35</sup> *Ibid*, 274.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49, 73.

events, citizens engage in many confidential communications, including communications with professional advisers, which are not protected from compulsory disclosure. The rationale of the privilege has been explained in a number of cases, including *Baker v Campbell*, and *Grant v Downs* itself. The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers. In *Waterford v The Commonwealth*, Mason and Wilson JJ explained that legal professional privilege is itself the product of a balancing exercise between competing public interests and that, given the application of the privilege, no further balancing exercise is required. As Deane J expressed it in *Baker v Campbell*, a person should be entitled to seek and obtain legal advice in the conduct of his or her affairs, and legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication. The obvious tension between this policy and the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case lies at the heart of the problem of the scope of the privilege. Where the privilege applies, it inhibits or prevents access to potentially relevant information. The party denied access might be an opposing litigant, a prosecutor, an accused in a criminal trial, or an investigating authority. For the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations. This Court is now asked to reconsider the balance that was struck in *Grant v Downs*.<sup>38</sup>

The majority of the High Court, Gleeson CJ, Gaudron, Gummow and Callinan JJ held that the correct test is the dominant purpose test, which is the common law test for claiming legal professional privilege.<sup>39</sup> The effect of this privilege would disappear if the government introduced the tax whistleblower laws because the ATO would have access to a wide range of information before the taxpayer had any opportunity to claim the privilege.

### *E Tax advisers and professional privilege*

In June 2005 the New Zealand Government introduced statutory law to extend the professional privilege to tax advisers.<sup>40</sup> The USA had extended the privilege to tax advisers from as early as 1998.<sup>41</sup> Keith Kendall contends that there is a logical argument to extend the privilege to tax advisers in Australia on the basis that registered tax agents are given a statutory right to provide advice on tax law and that many tax agents are not lawyers.<sup>42</sup> Section 251L(1), ITAA 36 provides a penalty for the provision of advice on taxation law unless a registered tax agent or a barrister or solicitor. This view, namely that the privilege should be extended to registered tax agents and their clients, is supported by the ATO in their 'Access and Information Gathering Manual, Chapter 7 – Guidelines to Accessing Professional Accounting Advisors' Papers. The manual is used by ATO staff but it is

---

<sup>38</sup> *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49, 64.

<sup>39</sup> *Ibid*, 73.

<sup>40</sup> Kendall, Keith, 'Prospect For A Tax Advisors' Privilege In Australia', (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 47. The New Zealand provisions are found in *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* (NZ).

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*, 52.

available to the public through the ATO website. While the ATO acknowledges the practical effect of providing a privilege from disclosure of certain source documents, there is no legislative or common law justification for this approach. According to Kendall, the existence of these guidelines has created a legitimate expectation of the confidentiality of certain documents between a tax adviser and their client and this has been supported in two Federal Court decisions.<sup>43</sup> Kendall is in favour of extending the privilege to non-lawyer tax advisers on the basis of their need to be registered tax agents before they can provide advice. The fact that both the USA and New Zealand have extended the privilege, coupled with the fact that the ATO recognises the role played by accountants in the taxation process, should be reason enough for the privilege to be extended in Australia. This view is also supported by the Australian Law Reform Commission as discussed in their Report titled 'Privilege in Perspective: Client Legal Privilege in Federal Investigations'.<sup>44</sup> It would appear that it is only a matter of time before the privilege will be extended to tax advisers in Australia.<sup>45</sup>

### *F Exceptions to the privilege – crime and fraud*

The legal professional privilege to protect written communication between a lawyer and their client is lost when the documents relate to an activity involving a crime or fraud. The privilege is also lost if the client of the lawyer waives their right to claim protection under the privilege. Both of these exceptions will be examined as they relate to the rights of taxpayers and the ATO. In the case of *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 48 ATR 650, North J held that the crime and fraud exception prevented the legal professional privilege being used to protect certain documents between the lawyer and client from being disclosed to the Australian Federal Police even though the alleged fraud was committed by a third party.

While this exception to the application of legal professional privilege may be sound law, what then is the situation where the third party, as in this case, is eventually found not be guilty of the serious crime of defrauding the Commonwealth, but the claim for protecting the confidentiality of the documents had not been granted some years earlier on the basis of the fraud exception? From the perspective of the taxpayer and their right to maintain the confidentiality of certain written communications, the basis on which this exception has been applied would tend to suggest that the tax administrator has been granted an unfair advantage.

This view is supported by Vincent Morfuni when he contends that the extension of the exemption of the privilege to third parties contradicts the widely held view that legal professional privilege is a fundamental right and he hopes that an appellate court will restore

---

<sup>43</sup> Ibid, 54.

<sup>44</sup> Australian Law Reform Commission, Report 107.

<<http://www.austlii.edu.au/au/other/alrc/publications/reports/107/>> at 3 November 2017.

<sup>45</sup> For an extensive discussion on the New Zealand law see: Maples, Andrew, 'The Non-Disclosure Right In New Zealand – Lessons For Australia', (2008) 1 *Journal of the Australasian Law Teachers Association* 351.

the exception to its traditional boundary.<sup>46</sup> Morfuni<sup>47</sup> advocates the restoration of the view taken by Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 where he stated that:

It's efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed, even to promote the search for justice or truth in the individual case or matter and extends to protect a citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials.<sup>48</sup>

#### IV IMPLICATIONS FOR THE TAXPAYER AND TAX ADVISER

This part of the paper considers the implications for the taxpayer if the proposed tax whistleblowers law are introduced together with a reward system for the whistleblower.

##### *A Use of information provided by the whistleblower*

A whistleblower with information about a taxpayer may provide the ATO with that information including copies of documents that may be privileged communication between the taxpayer and their legal adviser. The taxpayer is not aware of the information that has been provided and has no opportunity to claim the legal privilege. Is the Commissioner able to use all of that information in making an income tax assessment? Section 166 of the *Income Tax Assessment Act 1936* (Cth) provides the Commissioner of Taxation with the power to use whatever information they have in their possession determining the taxpayers assessment of their liability to pay income tax. The assessment is determined from their tax return and any other information in the Commissioners' possession or from any one or more of those sources. In the following Federal Court case the Full Bench confirmed that even information covered by the legal privilege may be used.

In the case of *Federal Commissioner of Taxation v Donoghue* [2015] FCAFC 183, per Kenny and Perram JJ, made the following statement:

Section 166 exhibits a policy which explicitly privileges the need to have accurate assessments made on the information available over other private law rights. It did not matter in *Denlay* that the information might have been unlawfully obtained by the Commissioner's officers (although that was not the finding); all that mattered was that it had come into the Commissioner's possession. The combined effect of *Denlay* and *Awad* is that the Commissioner is not only entitled, but obliged, to use information which is in his possession

---

<sup>46</sup> Morfuni, Vincent, 'Legal professional privilege and the government's right to access information and documents', (2004) 33 *Australian Tax Review* 89, 112.

<sup>47</sup> *Ibid.*

<sup>48</sup> (1986) 161 CLR 475, 491.



even if he knows it is subject to a claim for breach of confidence and even if he knows it is privileged.<sup>49</sup>

### *B Duty of the tax adviser to the client*

A tax adviser can never without the authority of his client voluntarily give information to the Commissioner no matter how inclined he may be to co-operate. The confidentiality implied in the relationship of lawyer and client or accountant and client ensures this. This confidentiality is, however, overborne by s 264.<sup>50</sup> However, in the absence of any lawful obligation to disclose confidential and private information, it is submitted that a tax agent or tax adviser must not disclose any information belonging to their client to the ATO. The following statement by A. J. Myers QC on the duty owed by a tax adviser to their client provides the most appropriate answer to the conflict between a duty to society and a duty to the taxpayer:

A legal adviser in the field of taxation or anything else has two main duties: to advise his client to the best of his knowledge and ability, and to uphold the law. There is no conflict between those roles, properly understood. The adviser upholds the law by advising his client to the best of his knowledge and ability.<sup>51</sup>

If a tax adviser is uncomfortable with the activities of their client then they should refrain from providing professional services to their client. If they decide to disclose any information to the ATO then they should expect to be sued for damages for breaching their duty of confidentiality, their duty to maintain the privacy of their clients' information, and in most cases breach their fiduciary duty to act in the best interests of their client.

This duty has now been incorporated into the *Tax Agents Services Act 2009* (Cth), subsection 30-10(6) under the heading of Confidentiality:

(6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

If the registered tax agent does engage in whistleblowing then they infringe this law and risk losing their registration or other sanctions by the Tax Practitioners Board and potentially their livelihood. At present tax agents do not have a legal obligation to report and breach of the taxation law but they may decide not to prepare a tax return for the taxpayer.

The Accounting Professional & Ethical Standards Board has issued a code of ethics for professional accountants, APES 110 which reinforces the duty of confidentiality under the professional accountant's existing fiduciary duty. However, the code does allow the member to disclose information if required by law, as is the case in all circumstances, but it does require disclosure if the professional accountant is aware of illegal activity. This provision of the code, in effect makes it mandatory for professional accountants to engage in whistleblowing in a similar way to the government's proposed tax whistleblower laws. The

---

<sup>49</sup> [2015] FCAFC 183, Paragraph 74.

<sup>50</sup> Hill, D.G. 'The Role and Responsibility of the Tax Practitioner', (1984) *Taxation in Australia* 298, 311.

<sup>51</sup> Myers, A. J. 'Tax Advice: The Lawyer's Ethical Responsibility' (1990) 19 *Australian Tax Review* 80, 87.

illegal activity that potentially could be reported would include not only taxation matters but any other breaches of the law. One obvious question is, are professional accountants so well trained and qualified in the law that they could do this with any confidence. If they are wrong they then face the prospect of being sued for breach of their fiduciary duty to their client. There are no laws that will protect them from legal action if the client has not engaged in illegal activity.

### *C Implications of a reward system*

Australia does not have a reward system for whistleblowers in the public sector or in the private sector pursuant to the Corporations Act. Whistleblowers may receive compensation for loss of employment or persecution but they are not paid a reward for making the disclosure of illegal activity. The Australian government in its review of whistleblower protection law examines the concept of paying a reward for information from whistleblowers in general and in particular with tax disclosure.<sup>52</sup> The UK has a reward system for tax informants<sup>53</sup> but according to the Treasury Review into whistleblowers the HM Revenue & Customs authority they are reluctant to publicise the payments and most of the whistleblowers receive no reward.<sup>54</sup>

The Internal Revenue Service in the US pays a reward to tax informers.<sup>55</sup> What is now 26 USC 7623(a) has been on the books since March 1867, allowing the Secretary of the Treasury to pay such amounts as he deems necessary 'for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same.'<sup>56</sup> The Bush administration introduced the *Tax Relief and Health Care Act 2006* which amended the previous informant reward program and introduced a 'whistleblower' program with rewards up to 30 per cent of the tax, penalties and interest collected.<sup>57</sup> As a countervailing measure, US State parliaments have specifically enacted laws making it a crime for accountants and lawyers to disclose confidential information about their clients in relation to taxation matters.<sup>58</sup> Accountants and lawyers in Australia have a similar duty to maintain the privacy and confidentiality of their clients'.

---

<sup>52</sup> Australian Government, The Treasury, above n 1, 35.

<sup>53</sup> HM Revenue & Customs <<https://www.gov.uk/government/organisations/hm-revenue-customs/contact/reporting-tax-evasion>>

<sup>54</sup> Australian Government, above n 1, 35.

<sup>55</sup> Riggall, Kneave, 'Should Tax Informants Be Paid? The Law And Economics Of A Government Monopsony', (2008-2009) 28 *Virginia Tax Review* 237, 239.

<sup>56</sup> Internal Revenue Service <<https://www.irs.gov/compliance/history-of-the-whistleblower-informant-program>>

<sup>57</sup> Riggall, above n 51, 241.

<sup>58</sup> *Ibid*, 274.

On the other hand, it is contended that the greatest concern of the US award system is that a reward is paid to a tax professional for breaching their duty of trust and confidence.<sup>59</sup> Edward Morse concludes that while enhancing tax collections is important other values deserve consideration such as a tax system that is administered fairly and impartially. He acknowledges that while whistleblowers are important tools to uncover noncompliance thus increasing the perception of fairness, however, a reward system that induces professionals invited into a taxpayer's private sphere in order to breach their confidence detracts from the concept of basic fairness.<sup>60</sup>

The idea of paying a reward to tax and accounting professionals for breaching their common law fiduciary duty to their client by disclosing activity that may or may not be illegal and in breach of the taxation law is repugnant. There are situations where tax advisers and accountants are required by law to disclose information about their clients but there is a substantial body of law and regulations that ensure limited safeguards to taxpayers to protect legal documents covered by legal professional privilege. It is a worrying trend to find that accounting professionals are now required to report illegal activity of their clients under their Code of Conduct, APES 110.

## V CONCLUSION

There are many issues raised by the government's planned tax whistleblower protection laws. The purpose of this paper was to examine the existing whistleblower protection laws in Australia and to discuss the proposed law to protect tax whistleblowers. The paper highlights the existing rights of the taxpayer in relation to their financial affairs and their relationship with their tax adviser. The tax adviser owes clear duties to their client and these duties have existed in the common law for hundreds of years in Australia. Those rights to confidentiality have been gradually eroded by statutory provisions in the taxation law and used by governments to collect tax revenue.

The implications of the proposed tax whistleblower laws have been critically examined and it is contended in this paper that the tax system in Australia should be fair to the tax administrator, the ATO and the taxpayer alike. There must be a balance between the taxpayer receiving recognition that they should expect a degree of confidentiality from their advisers and the government collecting is right amount of tax. If the proposed tax whistleblower laws are eventually enacted in Australia with a reward system attached then there are a number of consequences that will follow. First, taxpayers will all pay their rightful amount of tax and the government will have been successful with its new law. Second, taxpayers will be reluctant to discuss a range of legal and illegal strategies with their adviser and lose faith in the profession as a whole. They will never be sure that their tax adviser or their employee will not report them to the ATO and collect a reward. Third, the body of equitable and legal rights

---

<sup>59</sup> Edward Morse, 'Whistleblowers and Tax Enforcement: Using Inside Information to Close the "Tax Gap"' (2009) *Akron Tax Journal* 1, 36.

<sup>60</sup> *Ibid.*

that currently exist to protect taxpayers as discussed above will disappear and this will damage the foundation of the Australian legal system. Perhaps then Australia will need laws to protect taxpayers Human Rights.