

# ***SGM/LPP-FINAL -***

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Australian Government  
Australian Taxation Office

# Compliance with formal notices – claiming legal professional privilege in response to formal notices

## Legal professional privilege (LPP) protocol

This protocol contains the ATO's recommended approach for identifying communications covered by LPP and making LPP claims to the ATO.

June 2022

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# About this Protocol

1. This Protocol has been developed to assist you and your advisors when making legal professional privilege<sup>1</sup> (LPP) claims in response to requests for information we make under our formal information gathering powers.
2. Its purpose is to recommend an approach which, in the ATO's view, will best assist the ATO in deciding whether to accept, review or challenge an LPP claim. It is voluntary to follow the approach set out in this Protocol.
3. This Protocol is not intended to provide a legal analysis of the law of LPP in Australia. It does not take the place of legal advice on what LPP claims are available to you.
4. This Protocol applies to legal practitioners and non-legal practitioners generally. It applies to all applicable LPP claims regardless of the firm or business structure within which the service or engagement is provided.
5. This Protocol is relevant to taxpayers that are making LPP claims when responding to formal information gathering notices. This will typically be large businesses that have received a notice as part of a dispute or audit activity. The vast bulk of our engagements in the large market are done without recourse to formal information gathering powers. In most situations, we will only issue a formal notice after attempting to obtain the information or documentation by using a cooperative approach.
6. We will review this Protocol to monitor how it is used, its effectiveness on the quality of LPP claims and the impact on taxpayers and the ATO. Any material revisions to this Protocol will be made on an 'as necessary' basis and will be informed by any feedback and legal developments.

## Why do we have this Protocol?

7. The ATO can compel you to provide information and documents.<sup>2</sup> However, we cannot compel you to provide information and documents where the underlying communication is privileged. Where a claim of LPP is made, it is part of our role as a regulator to decide whether to accept, review or challenge that claim. To make an informed decision, we need information about the communication and the basis on which LPP is claimed. Where not enough information is given to us to explain an LPP claim, we cannot determine whether we have received all information and documents under the law to which the Commissioner is entitled. The 'Our concerns' section in Addendum 1 to this Protocol sets out where we consider that LPP may not arise or where we are concerned that there are features that give rise to a risk that LPP does not arise. Where a communication is made in furtherance of an illegal or improper purpose (as described in subparagraph 29(c) of this Protocol) or does not satisfy the requirements of LPP, no privilege should arise in respect of the communication and the document must be produced to the Commissioner pursuant to the formal notice.
8. We recognise that the amount and type of information about the communication needed to decide what to do with the LPP claim can vary depending on the context. We also recognise that there is not a 'standard' amount of information that must be provided for this purpose. However, we expect that a person claiming LPP will provide us with an explanation

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<sup>1</sup> This Protocol focuses on the aspect of LPP, which is a privilege from compulsory disclosure of confidential communications between client and lawyer for the dominant purpose of seeking or providing legal advice. LPP may also attach to confidential communications prepared for the dominant purpose of actual or reasonably anticipated legal proceedings.

<sup>2</sup> The ATO's access powers are not restricted by claims of confidentiality or privilege against self-incrimination.

that allows us to decide what to do. This Protocol sets out the approach and information that we think would allow us to quickly decide how to treat your claim for LPP.

## What to expect from us

9. Where you follow this Protocol, we will usually have a sufficient level of information to be able to decide what to do next. In many cases, it is likely that we will accept your claim for LPP without any further enquiries.

10. However, following the Protocol does not mean we will never have concerns about your LPP claims or challenge your claims, although it is less likely. In these types of cases, it does mean that we will be able to more readily identify what concerns we do have and ask specific questions about those concerns. For example, we may be concerned that:

- the requisite lawyer and client relationship is not established, or
- the areas of concern referred to in Addendum 1 to this Protocol are present.

11. If you do not follow this Protocol, there is no presumption that your LPP claims are invalid or will be challenged by the ATO. We appreciate that, in some circumstances, taxpayers may decide to adopt none, or particular parts, of this Protocol and not follow all of the recommendations in their entirety. We request that you explain to us where you depart from this Protocol. If you do not follow the approach (which is an avenue available to you as this Protocol is voluntary in nature) and you do not explain why you have not followed the approach, you should expect that we are likely to make further enquiries.<sup>3</sup>

12. You can expect us to work with you to resolve any disputes about LPP claims in a manner consistent with our existing guidance.

## Computer-assisted technology

13. Where computer-assisted technology is used, it is our view that you will still need to review your LPP claims, as computer-assisted processes alone are not a reasonable basis for determining if LPP applies.

14. We do, however, see opportunities for taxpayers to include computer-assisted processes to improve efficiency, timeliness and accuracy while reducing the cost of compliance when determining whether a communication may be privileged. We will seek to better understand how computer assisted technology will assist us in determining whether to accept, review or challenge a claim.

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<sup>3</sup> In some situations, this may involve us issuing a formal notice requesting particulars of an LPP claim; refer *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171.

# The ATO's recommended approach

15. Our recommended approach contains three steps:



## Step 1: Assess your engagement and each communication



### Step 1.1 – Identify the service or engagement giving rise to the communication

16. Taxpayers can obtain advice from a variety of advisors. Identifying who is involved in creating the communications being assessed for privilege assists you to:

- (a) consider whether the tests of LPP at law can be satisfied by that engagement<sup>4</sup>, and
- (b) identify the steps we recommend that you take in assessing whether LPP applies and explaining that assessment to us.

17. Our recommended steps for each type of service or engagement are summarised below.

**Table 1: Recommended steps for each type of service or engagement**

| Type of service or engagement  | To assess if LPP arises   | To particularise your LPP claim   |
|--|---|---|
| <b>Service or engagement involving only:</b><br>(i) <b>legal practitioners acting in their capacity as legal practitioners, and</b><br>(ii) <b>paralegals, clerks, law graduates, executive assistants and similar non-legal persons acting under the close supervision and direction of the legal practitioners to whom they are more junior, less experienced and subordinate.</b> | Undertake the steps outlined at paragraphs 19 to 21 in Step 1.2 of this Protocol. | Provide the particulars in paragraph 38 in Step 2 of this Protocol.         |
| <b>In-house counsel.</b>   | Undertake the steps outlined at paragraphs 19 to 21 in Step 1.2 of this Protocol. | Provide the particulars in paragraphs 38 and 39 in Step 2 of this Protocol. |

<sup>4</sup> The term 'engagement' is a reference to the broader use of the term, such as consultation or interaction as opposed to the engagement documentation.

| Type of service or engagement  | To assess if LPP arises   | To particularise your LPP claim   |
|--|---|---|
| <p><b>Service or engagement that had involvement by non-legal persons<sup>5</sup> or by legal practitioners not acting in the capacity of legal practitioners irrespective of the firm or business structure within which the service or engagement is provided.</b></p> <p><b>Service or engagement where third-party advice was obtained other than from a legal practitioner.</b></p> | Undertake the steps outlined at paragraphs 19 to 22 in Step 1.2 of this Protocol. | Provide the particulars in paragraphs 38 and 40 in Step 2 of this Protocol. |

## Step 1.2 – Assess each communication

18. Once you have identified the service or engagement (above), we recommend that you assess each communication as follows.

### Steps to assess LPP

19. Review each specific communication separately, guided by established legal principles. This means considering each communication on its merits, with a separate review undertaken for (where relevant):

- (a) each email within a chain of emails
- (b) the attachments to the emails, and
- (c) a forwarded copy of an email and its attachment.

20. When assessing copies (or duplicate versions) of the same document, assess each copy separately.

*It may be that an original document is privileged, and copies made of that document are not. Equally, a copy of a document may be privileged even if the original document is not privileged. It is important to consider the purpose of each communication separately.*

21. Consider whether LPP has been waived by actions that are inconsistent with the maintenance of the privilege; for example, by communication with other parties.

#### **Approaches that are not recommended**

The following approaches are not consistent with our recommended approach and are likely to attract our attention:

- > Making 'blanket claims' across bundles of unreviewed documents or all documents on a computer or storage device.
- > Using assumptions or pre-determined judgements to assess if LPP applies without regard to the merits of each communication.
- > Relying solely on computer-assisted processes.

<sup>5</sup> Excluding paralegals, clerks, law graduates, executive assistants and similar non-legal persons acting under the close supervision and direction of the legal practitioners to whom they are more junior, less experienced and subordinate.



## Steps for specific engagements

22. For those services or engagements identified in Step 1.1 of this Protocol as involving non-legal persons or legal practitioners not acting in the capacity of legal practitioners, or where third-party advice was obtained other than from a legal practitioner, we recommend that you:

- (a) evaluate the overarching service, engagement or relationship to see if it is capable of establishing the requisite lawyer-client relationship, having particular regard to whether the relationship gives rise to any of our concerns outlined in Addendum 1 to this Protocol
- (b) identify and review the role or function being performed by each non-legal person involved in the communication
- (c) assess the purpose of any communication which was initiated or developed by non-legal persons and how it relates to the purpose of providing legal advice or use in anticipated legal proceedings, and
- (d) determine the capacity in which the communication was made, including giving due consideration to the terms of engagement and the roles of the people involved in the communication.

## Step 1.3: Check for communications which are usually not privileged

23. As a final check on your LPP assessment, we recommend that you review the documents to identify if you are intending to claim LPP over communications in the following categories.

24. These categories of documents are not privileged and will require a careful review of context:

- (a) Documents brought into existence for more than one purpose and the claimant is unable to demonstrate that the dominant purpose of the communication was the giving or receiving of legal advice or for use in litigation taking place or reasonably anticipated. You should only make a claim for LPP where you can demonstrate that the dominant purpose satisfies the LPP tests at law.
- (b) Communications made to and from a lawyer, whether internal or external, who had multiple roles and who was not acting in the lawyer capacity; for example, executive, management or policy decisions, as a participant in the transaction or as your commercial advisor.

25. These categories of documents are usually not privileged, unless they are copies provided to a lawyer for the dominant purpose of receiving legal advice or use in litigation<sup>6</sup>:

- (a) Internal reports and memoranda, such as board minutes and presentations, that do not convey or record privileged communications and advices. We accept that legal advice can, and at times should, be conveyed to a board and might be reflected in internal reports and memoranda (and redactions should be made for that legal advice rather than claiming privilege over the entirety of the document).

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<sup>6</sup> A copy of the documents can be privileged if the copy is made for the dominant purpose of obtaining legal advice or use in, or in relation to, litigation (whether existing or reasonably anticipated), even if the original documents are not. In this case, the original documents must still be produced to the Commissioner.

- (b) File notes and minutes of meetings with third parties involving communications not being intended to be confidential.
- (c) Non-privileged documents lodged with or provided to a bank or other third party for safe keeping.
- (d) Original documents which constitute or evidence transactions; for example, contracts, conveyances, declarations of trust, offers or receipts, and partnership agreements, even if they are delivered to a solicitor or counsel for advice or used in litigation.
- (e) Accounting, financial or banking records, invoices, company minutes, etcetera.
- (f) Documents which would otherwise satisfy the requirements of privilege but which were not intended to be confidential when made.
- (g) Lists of clients or associates.
- (h) Lawyers' trust account records and client lists.
- (i) A written communication directing a solicitor to send money to a third party.
- (j) Data demonstrating when communications were sent or received (for example, fax books recording faxes sent), to the extent that they do not disclose the actual advice.

26. If you have identified any such documents as being potentially eligible for a claim of LPP, we recommend that you check to ensure that is appropriate and you have appropriately described the document.

27. These categories of documents are usually not privileged, except to the extent they disclose the actual advice sought or provided:

- (a) a lawyer's bill of costs
- (b) time sheets
- (c) performance appraisals
- (d) legal engagement letters.

28. If you have made a claim of LPP over any such documents listed in paragraph 27 of this Protocol, we recommend that you check to ensure that this is because they do contain privileged content.

29. Carefully review the context of the engagement to ensure that you have not made claims of LPP over communications from the following types of arrangements or situations:

- (a) communications made before the client contemplated obtaining legal advice on the matter where the elements of LPP may not be met<sup>7</sup>
- (b) documents lodged with or provided to a lawyer simply for the purpose of obtaining immunity from production where the dominant purpose of the communication was not to obtain or provide legal advice, or for actual or reasonably anticipated litigation
- (c) documents or communications made for a purpose that is contrary to public interest; that is, where the communication is made in furtherance of an illegal or improper purpose. The illegal or improper purpose covers all forms of fraud

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<sup>7</sup> Consultation prior to actual formal engagement may still be privileged provided that the elements of LPP are met.

and dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and 'sham' contrivances, as well as cases of fraud by third parties.<sup>8</sup>

30. If you have made claims of LPP over such communications or surrounding context suggests that LPP has been claimed inappropriately, we may ask you to provide more explanation about that claim.

## Step 2: Explain your LPP claim

31. It is our view that you should explain (particularise) your LPP claims on or before the due date specified in the formal notice seeking information, documents or both. In all cases, we encourage you to speak to us early about the likely volumes of claims, your processes and how it impacts on timing.

32. When determining how much time to give to comply with a notice (including determining a request for an extension of time to comply), we will have regard to the matters set out in [Our approach to information gathering](#). We may also adopt a staged approach and accept the information, documents or both in tranches. We will seek to work with you to identify the most efficient way to respond to our information gathering requests.

33. Our [Legal professional privilege form](#) will assist you in providing your particulars and can be accessed on our website. You can also use your own forms or schedules other than the ATO form. However, they should include the same information as requested in our form.

34. You are not expected to waive LPP when following this Protocol. Where practitioners are assisting clients with LPP claims as part of responding to a formal notice, this Protocol does not intend for practitioners to advise their clients in a manner contrary to their professional obligations.

35. We consider that providing the recommended particulars to us, of itself is unlikely to result in an unintended waiver of privilege and we will generally not seek production of the underlying communication on this basis. In the unlikely event that privilege is inadvertently waived, this is likely to operate as a limited waiver as against the Commissioner but not as against the rest of the world. There may be some exceptional or limited situations where you form the view that providing some of the particulars in paragraphs 38 to 40 of this Protocol could amount to a waiver. To the extent that any particular would reveal the content of the advice you received, we do not expect it to be provided. We encourage you to consider seeking legal advice if you believe there is a risk of waiver of privilege.

36. Particulars provided to us in support of an LPP claim will be 'protected information' for the purposes of Division 355 of Schedule 1 to the *Taxation Administration Act 1953* and will not be disclosed, except as required or permitted by law.

37. If you have any concerns about providing any of the recommended particulars in paragraphs 38 to 40 of this Protocol, you can engage with us to explore your concerns (including the reasons for any redaction).

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<sup>8</sup> For the purposes of the illegal or improper purpose principle, the relevant distinction is between a communication made in furtherance of an illegal or improper purpose, which is non-privileged communication, as compared with a communication made for the purpose of seeking advice in relation to a criminal or other matter at law, which may be privileged.

## Particulars

38. We recommend that you provide the following:
- (a) a Document ID, file name or reference number
  - (b) the name of privilege holder(s)
  - (c) the date the document was prepared or communication was made
  - (d) the number of pages in the document
  - (e) a title or subject line of the communication, except to the extent that disclosure of the title or subject line would also disclose the content of legal advice
  - (f) the form of the communication; for example, email, letter or file note
  - (g) the type of document; for example, advice, contract or invoice
  - (h) the identity and role of each person between whom the document or communication is made
    - (i) author(s) and, if different, sender (name, position, organisation), and
    - (ii) all people who have received the document (name, position, organisation); if the document is an email, this will include those in the 'cc' and 'bcc' fields
  - (i) whether the document is a copy
  - (j) the dominant purpose for which the communication was made (see the examples in Addendum 3 to this Protocol) but not to the extent this discloses the content of legal advice
  - (k) the legal issue being advised upon or for which the advice is being sought, except to the extent that disclosure of the legal issue would also disclose the content of legal advice
  - (l) whether the communication was forwarded; if so, provide an explanation of
    - (i) the purpose of forwarding it
    - (ii) how confidentiality in the communication was maintained, and
    - (iii) how you assured yourself that privilege was not lost
  - (m) whether LPP is claimed in full or in part, and
  - (n) if there are attachments to the document, whether LPP is being claimed over the attachment(s); if yes
    - (i) identify the relevant Document ID or number of the attachments; for example, *Attachment to document X*, and
    - (ii) provide the particulars in this paragraph for the attachment(s).

## Particulars for in-house counsel

39. To support LPP claims in relation to communications by, or to, an in-house advisor acting as a legal advisor, we also recommend that you provide the following particulars (in addition to the particulars in paragraph 38 of this Protocol):

- (a) the name of the in-house legal advisor
- (b) whether the in-house legal advisor has been admitted to practice and, if so, the jurisdiction of admission

- (c) as at the time of the communication, a description of all the functions, positions, roles and responsibilities of the person who is acting as the in-house legal advisor who prepared the communication, and
- (d) if the advisor had multiple functions, positions, roles or responsibilities, a description of the capacity in which that person was acting in making the communication.

## Particulars for specific engagements

40. For those services or engagements identified in Step 1.1 of this Protocol as involving non-legal persons or legal practitioners not acting in the capacity of legal practitioners, or where third-party advice was obtained other than from a legal practitioner, we also recommend that you provide the following details (in addition to the particulars in paragraph 38 of this Protocol). See the example in Addendum 3 to this Protocol.

### ***Evaluation of the service, engagement or relationship***

- (a) Explain the steps taken to ascertain that the service, engagement or relationship was a legal one, given the involvement of non-legal persons.

### ***Purposes of the communications***

- (b) State all main purposes of the communication but not to the extent this would disclose the content of legal advice.
- (c) Explain why the legal advice from the legal practitioner(s) is the dominant purpose of the communication but not to the extent this would disclose the content of legal advice.

### ***Role of non-legal practitioners***

- (d) Where communications were originally initiated or developed by non-legal persons
  - (i) provide a copy of the terms of engagement (also referred to as a statement of work) that they are engaged under for the communication, but not to the extent this would disclose the content of legal advice, and
  - (ii) explain the reason for their involvement in the communication.

### ***Preparation of the communications***

- (e) For each person involved in the preparation of the communication provide
  - (i) their name
  - (ii) their position, role and responsibility held in the organisation at the time of preparing the communication
  - (iii) the capacity the person was acting in when preparing the communication, and
  - (iv) whether the person held a current practising certificate at the time of preparing the communication.

## Step 3: Advise us of your approach

41. In this step, we recommend that you advise us of the process you used for making your LPP claims, framed around the following key questions.

**Table 2: Key questions to be considered when making an LPP claim**

| For taxpayers making their own LPP claims   | For legal practitioners or non-legal persons making LPP claims on behalf of a client  |
|---|---|
| <p>Did you follow Step 1 of this Protocol?</p> <ul style="list-style-type: none"> <li>If no, provide a description of the process used to identify the communications over which you are making an LPP claim.</li> </ul>  | <p>Did you follow Step 1 of this Protocol?</p> <ul style="list-style-type: none"> <li>If no, provide a description of the process used to identify the communications over which you are making an LPP claim.</li> </ul>  |
| <p>Did you use any computer-assisted processes to assess if LPP applies?</p> <ul style="list-style-type: none"> <li>If yes, provide details of the platform used and an explanation of the process undertaken.</li> </ul>   | <p>Did you use any computer-assisted processes to assess if LPP applies?</p> <ul style="list-style-type: none"> <li>If yes, provide details of the platform used and an explanation of the process undertaken.</li> </ul>   |
|   | <p>Did your engagement for the review of LPP allow you to particularise LPP in the way recommended in this Protocol?</p>  |
| <p>Was the assessment of LPP based on any assumptions or pre-determined judgements around the context of the communications which guided the assessment of LPP?</p> <ul style="list-style-type: none"> <li>If yes, provide the assumptions or other parameters used.</li> </ul> | <p>Was the assessment of LPP based on any assumptions or pre-determined judgements around the context of the communications which guided the assessment of LPP?</p> <ul style="list-style-type: none"> <li>If yes, provide the assumptions or other parameters used.</li> </ul> |

42. Our Legal professional privilege form has these questions included to assist you.

# Addendum 1 – Context and background

1. This Addendum provides additional context and background, including:
  - (a) the setting in which LPP claims are usually made
  - (b) the role we each play
  - (c) considerations for legal practitioners
  - (d) our concerns.

## The setting in which LPP claims are usually made

2. Taxation law is complex and the personal and business arrangements on which those laws operate may also be complex. We expect and understand that people obtain advice pertaining to a wide range of aspects of their personal and business affairs, and taxation aspects of those affairs are just one aspect of them.
3. We encourage people to seek quality professional advice to assist with meeting their tax obligations. Further, we:
  - (a) recognise that LPP is a fundamental common law right, and
  - (b) support taxpayers making LPP claims where the communications are privileged.
4. Our information and document gathering powers are very extensive. These powers include being able to compel you to furnish information or produce documents to us that are in your custody and control. They are important features of Australia's taxation system and important tools in administering Australia's taxation laws. The exercise of those powers creates legal obligations to provide information and documents.
5. When it attaches and is claimed, LPP operates as an immunity from any obligation to disclose created by the exercise of our information and document gathering powers. Accordingly, we have no expectation of receiving communications to which LPP attaches but will accept and review such information if it is provided.

## The role we each play

6. Our primary roles are to determine tax outcomes according to law and support taxpayers to get their tax positions right. Our information gathering activities are directed to obtaining access to facts for the purposes of the administration or the operation of a tax law (including making a correct assessment of tax), and our intent is to support you to make LPP claims where the communications covered by a formal notice are privileged.
7. Our expectations in relation to the respective roles of taxpayers, advisors and the ATO in regard to LPP can be summarised in the following table. The court is the ultimate decision maker in respect of LPP claims.

**Table 3: Our expectations in relation to your LPP claims**

| Taxpayers   | Taxpayer's advisors  | The ATO   |
|---|--|---|
| <p>Determine when and how to make and particularise LPP claims having regard to the law of LPP in Australia.</p> <p>Claim LPP in accordance with the principles of LPP.</p> <p>Consider the recommendations in this Protocol when:</p> <ul style="list-style-type: none"> <li>assessing and explaining your LPP claims, and</li> <li>explaining how you determined your LPP claims.</li> </ul> <p>Engage in dispute resolution processes in a timely and effective manner, where necessary.</p> | <p>Consider the recommendations in this Protocol when advising clients on their LPP claims.</p> <p>Advise your client about this Protocol and our recommendations.</p> <p>Fulfil professional and ethical obligations and duties to the client and the public and, if a legal advisor, fulfil duties to the Court.</p> | <p>Communicate to taxpayers and their advisors our recommended approach for claiming LPP in tax investigations.</p> <p>Be transparent on the steps we will take to review and test LPP claims (when needed).</p> <p>Be transparent on why and how we intend to test and challenge LPP claims.</p> <p>Engage in dispute resolution processes in a timely and effective manner, where necessary.</p> <p>Challenge an LPP claim only on appropriate grounds.</p> |

## Considerations for legal practitioners

8. Legal practitioners may be engaged to assess if LPP attaches to communications. They play an important role in exercising their professional judgement to decide if LPP applies or not. Where a notice is issued to a firm, this may include assessing whether the client may be able to, and wishes to, claim LPP in relation to documents in the possession of the firm (firm documents).

9. If you are a legal practitioner involved in assisting or advising a client in relation to their obligations to provide information and documents to us (or firm documents), we expect that:

- (a) where possible, you have received instructions from your client prior to making an LPP claim in response to a formal notice
- (b) your client understands the nature and extent of the LPP claims they are making
- (c) you made reasonable enquiries to ensure the claiming of LPP has a proper basis
- (d) you have advised your client of the existence of this Protocol, our recommended approaches to making LPP claims that are available and the likely responses to those approaches. We recommend advising your client of the extent to which you have followed, or departed from, this Protocol, and
- (e) your instructions allow you to attend to the matters in subparagraphs (b) to (d) of this paragraph.

10. In considering this Protocol and advising clients as to what to provide to the ATO to support an LPP claim, we recognise and expect that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. Importantly, we do not expect legal practitioners to breach their ethical and professional obligations if a conflict arises between them and the recommendations outlined in this Protocol.



## Our concerns

11. We take issue with any contrived arrangements or relationships (whether services or engagements involve only legal practitioners or services or engagements involve non-legal persons) which purport to attract LPP merely for the purpose of concealing communications from us. This is an abuse of LPP.

12. For example, we have concerns in relation to LPP claims made over communications arising out of the following arrangements:

- (a) Contrived arrangements or relationships which purport to attract LPP where there is a purpose of concealing communications from us. We will pay close attention to circumstances where LPP is actively promoted as a feature of tax advice. This is different to where an advisory firm is merely pointing out that privilege is an ordinary feature of communications that are for the sole or dominant purpose of giving or receiving legal advice or advice for litigation.
- (b) Routing advice through a lawyer merely for the purpose of obtaining privilege. Again, communications having the purpose of obtaining privilege are not for the sole or dominant purpose of giving or receiving legal advice or for litigation.
- (c) Legal engagements entered into after the substance of advice was provided by non-legal persons.
- (d) Concepts and ideas proactively promoted or marketed, or presented by a person or firm, whether lawyer or law firm or otherwise, prior to a legal engagement and unsolicited by the taxpayer.
- (e) Communications exclusively between non-legal persons in circumstances where the non-legal persons do not perform functions in furtherance of a solicitor-client relationship.
- (f) Unclear (and potentially overlapping or inconsistent) capacities and relationships designated to different members of the firm. For example, non-legal persons purporting to be an agent of the client in dealing with legal staff, an agent of the lawyer in dealing with the client, as well as potentially being an independent expert on tax law matters.

# Addendum 2 – Additional aspects

## High-quality LPP claims do not mean LPP will be waived

1. By sharing our recommended approach through this Protocol, we aim to support the provision of high-quality LPP claims. We do not seek to create unintended waiver of LPP by following this Protocol.
2. We consider that providing the recommended particulars to us of itself is unlikely to result in an unintended waiver of privilege. We will not contend that the information you provide about your LPP claims (particulars) in accordance with our recommended approach amounts, by itself, to an unintended waiver of your LPP and seek production of the underlying communication on this basis.
3. We have requested advice from the Australian Government Solicitor which we provide at Addendum 4. The advice concludes that, in a majority of cases, there will be a low risk of waiver of privilege where the particulars of a privilege claim are provided consistently with the recommendations in this Protocol, but that this will depend on the circumstances. The voluntary nature of this Protocol means that, if there are legitimate concerns that disclosure of certain particulars might result in waiver, that discrete information can be withheld. In the unlikely event that privilege is inadvertently waived by voluntary provision of the recommended particulars to the ATO, this is likely to operate as a limited waiver and preserve the privilege-holder's ability to enforce their claim against the world at large.
4. However, we cannot warrant that no-one else will contend that you have waived privilege. Further, the advice obtained by the Commissioner is necessarily expressed in general terms, and acknowledges that questions about waiver will turn on the specific circumstances of the particular taxpayer. We consider that it is broadly applicable; however, if you are concerned that in your unique circumstances the provision of particulars may waive privilege over the underlying document, we encourage you to obtain your own legal advice that takes those circumstances into account.

# Addendum 3 – Examples

1. The examples in the following table show how we are likely to respond to different levels of detail in order to understand the **dominant purpose** of a communication in subparagraph 38(j) of this Protocol.

**Table 4: Examples of responses to subparagraph 38(j) of this Protocol**

| Description of dominant purpose  | Our indicative response  |
|--|--|
| <p>The communication from Person X in Firm to Person Y in Client Company providing legal advice about the consequences of an asset transfer from Country A to Country B under Division 40 of the <i>Income Tax Assessment Act 1997</i> and Australian intellectual property law.</p> <p>Person X prepared the advice and is a legal graduate and employee in Firm [<i>and an admitted legal practitioner to be included where appropriate</i>].</p> <p>Person X was instructed by Partner A of Firm, who signed off upon the advice prepared by Person X, and is an admitted legal practitioner acting in the capacity of a legal practitioner.</p> <p>The advice of Partner A was provided under the terms of legal engagement or retainer [<i>as appropriate</i>] dated [DD Month YYYY] between the Client Company and the Firm.</p> | <p>This degree of specificity allows us to clearly understand both the nature and purpose of the advice.</p> <p>We will generally accept LPP claims that contain sufficient detail if they reveal that the communication is privileged.</p>  |
| <p>Email from Person X, a partner at Firm, to Persons Y, Z and AA from Client Company, providing tax legal advice in relation to the application of taxation laws to a proposed restructure pursuant to engagement entered into on [DD Month YYYY].</p> <p>Person X was supported by [<i>paralegal, clerk, law graduate, executive assistant and similar non-legal persons</i>] acting under the close supervision and direction of Person X, who is an admitted legal practitioner acting in the capacity of a legal practitioner.</p>  | <p>This degree of specificity allows us to sufficiently understand both the nature and purpose of the advice.</p> <p>We will generally accept LPP claims that contain sufficient detail if they reveal that the communication is privileged.</p>   |
| <p>Email from Person X, a legal graduate at Firm, to Persons Y, Z and AA from Client Company, copying Persons AB and AC from Firm, providing tax legal advice pursuant to engagement entered into on [DD Month YYYY]. Advice was reviewed and signed off by Person AB, who is an admitted legal practitioner acting in the capacity of a legal practitioner.</p> <p>The legal issue being advised upon is not disclosed as it would disclose the content of the advice.</p>  | <p>In context, this degree of specificity allows us to sufficiently understand both the nature and purpose of the advice.</p> <p>Where we consider that there is sufficient information, based on the facts and circumstances of the case, for us to make a decision on the LPP claim, we will generally accept claims if they reveal that the communication is privileged. We will not request further details in relation to the claim, including further details in relation to the legal issue being advised upon.</p> |
| <p>This document was brought into existence to enable Client Company to obtain legal advice in relation to the tax treatment pursuant to the engagement letter with Firm entered into on [DD Month YYYY].</p>  | <p>There is insufficient information, based on the facts and circumstances of the case, for us to make a decision on the LPP claim.</p>  |

| Description of dominant purpose   | Our indicative response  |
|---|--|
| <p>The legal issue being advised upon is not disclosed as it would disclose the content of the advice.</p> <p>The Firm authored the document.</p> | <p>We are likely to request further details about the identity and role of each person between whom the communication is made and the nature of the service, engagement or relationship where non-legal persons are involved where this is not readily apparent from information that is available to us. We are also likely to request further details in order to understand why the disclosure of the legal issue would disclose the content of the advice.</p> |
| Legal document  | <p>We will not accept a claim which is vague or formulaic. We will request further information about your LPP claim.</p>   |

2. The following example describes communications which relate to a service or engagement that had involvement by non-legal persons or legal practitioners not acting in the capacity of legal practitioners. While the level and type of information to enable us to decide what to do with an LPP claim can vary depending on the circumstances, the level and type of information provided in this example can generally enable us to quickly understand **the role and capacity of the people involved in the communication** for the purposes of addressing some of the particulars sought in paragraph 40 of this Protocol.

**Table 5: Example of response to paragraph 40 of this Protocol**

*Evaluation of the relevant service, engagement or relationship, and role of non-legal practitioners*

| Nature of service, engagement or relationship   | Approximate period of relationship | Relevant individuals  |
|---|------------------------------------|---|
| Engagement for legal services in relation to structuring advice and ongoing assistance with an ATO audit or objection (2015 Legal Engagement). A copy of this engagement is provided.   | December 2015 – August 2016        | <p>June Smith and team acting under her supervision</p> <p>A copy of the team's organisational structure is provided.</p> |
| <p>Engagement for valuation services in relation to assets forming part of the proposed structure. The valuation was requested by June Smith for the dominant purpose of enabling June to provide legal advice under the 2015 Legal Engagement (2016 Valuation Agreement). A copy of this engagement is provided.</p> <p>The engagement document was reviewed and Ken Lee was engaged in the capacity as a valuer to enable June to provide legal advice.</p> | March 2016 – August 2016           | Ken Lee   |

| Nature of service, engagement or relationship  | Approximate period of relationship | Relevant individuals |
|--|------------------------------------|----------------------|
| Engagement for independent expert advice in relation to financial aspects of the proposed structure. The advice was requested by June Smith for the dominant purpose of enabling June to provide legal advice under the 2015 Legal Engagement (2016 Expert Engagement). A copy of this engagement is provided. | April 2016 – May 2016              | Andre Gomes          |

### Dramatis Personae

At all relevant times for the purposes of communication claimed to be privileged, we confirm that the following personnel, role descriptions and capacities apply to all the communications.

| Individual    | Role   |
|---------------|--|
| June Smith    | <p>Partner at Law Firm B, specialising in corporate and international law, acting for Client A pursuant to:</p> <ul style="list-style-type: none"> <li>Engagement letter dated [DD Month YYYY], for the provision of legal services which extended to structuring advice and ongoing assistance with an ATO audit.</li> <li>Engagement letter dated [DD Month YYYY], for the provision of [services].</li> <li>Statement of work dated [DD Month YYYY], for the provision of [services].</li> </ul> <p>June Smith has held a practising certificate in NSW since 2005.</p> <p>Junior staff members acting at all times under the instruction and supervision of June Smith include [list of junior staff members].</p> |
| Ken Lee       | <p>Partner at Accounting Firm, specialising in asset valuations pursuant to letter of engagement with Law Firm B and Client A.</p> <p>Ken Lee is admitted to practice in NSW.</p> <p>Ken Lee was engaged by June Smith in his capacity as a valuer to prepare a valuation advice for the dominant purpose of assisting June Smith in the provision of her legal services.</p> <p>Non-legal staff at Accounting Firm who acted at the instruction of Ken Lee include [list of junior staff members].</p>  |
| Tom Pritchard | <p>Tom Pritchard was the Tax Manager of Client A during the period 1 January 2015 – 30 June 2016.</p>  |
| Rama Khan     | <p>Rama Khan was the in-house Legal Counsel of Client A during the period 1 January 2015 – 30 June 2016.</p> <p>Rama is admitted to practice in NSW and in the High Court of Australia and holds a practising certificate in NSW. Rama's only role in the business is to provide independent legal advice. She does not hold any other role in the business or provide any commercial advice. All communications made by or with Rama are made in her capacity as a practising lawyer.</p> <p>Junior staff members acting at all times under the instruction and supervision of Rama Khan include [list of junior staff members].</p>  |
| Andre Gomes   | <p>Andre Gomes is an expert in the financial services industry who was engaged by Law Firm B to provide independent expert advice for the dominant purpose of assisting June Smith in the provision of her legal services.</p>   |

*LPP Schedule for the purposes of addressing some of the recommended particulars sought in paragraph 40 of this Protocol*

| Document ID | Description of communication  | Explain why the legal advice from the legal practitioners is the dominant purpose of the communication  | Person who prepared, signed, or prepared and signed the document or communication | Person(s) who the document was directed or distributed to                        |
|-------------|---|---|---|--|
| 001.001.001 | Email providing legal advice in relation to potential capital gains tax (CGT) outcomes of proposed structure pursuant to the 2015 Legal Engagement. | The communication is for the dominant purpose of June Smith providing legal advice to the client.   | June Smith  | Tom Pritchard<br>Rama Khan<br>June Smith and her junior staff members<br>Ken Lee |
| 001.001.002 | Email providing financial modelling in relation to potential CGT outcomes of proposed structure pursuant to 2016 Valuation Agreement.               | The communication is for the dominant purpose of assisting June Smith in the provision of legal advice to the client.   | Ken Lee   | June Smith and her junior staff members  |
| 001.001.003 | Email discussing potential legal ramifications of proposed structure.   | Part of this communication contains legal advice which is reflected in document 001.001.001. The balance are confidential communications made for the dominant purpose of obtaining legal advice sought by Tom Pritchard from Rama Khan relating to the proposed structure. | Rama Khan   | Tom Pritchard  |
| 001.001.004 | Letter of opinion regarding financial aspects of the proposed structure pursuant to the 2016 Expert Engagement.                                     | The communication is for the dominant purpose of assisting June Smith in the provision of legal advice to the client.   | Andre Gomes   | June Smith and her junior staff members  |

# Addendum 4 – Australian Government Solicitor advice

The following is an advice obtained by the ATO from the AGS in relation to written feedback on waiver (the advice has been edited to remove confidential information).

## Prepared for Australian Taxation Office

Nicholas Shizas, ATO General Counsel

Our ref: 21008820

9 May 2022

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## ATO draft LPP Protocol – written feedback on waiver

1. You have requested advice about written feedback the Commissioner has received on the draft Legal Professional Privilege **Protocol** which suggests that providing particulars of legal professional **privilege** claims, in accordance with the Protocol's recommendations, may result in a waiver of privilege.

### Summary

Does the provision of the recommended particulars in the draft Protocol give rise to waiver of LPP, having regard to the purpose of the Protocol and the feedback received from the public consultation to date?

2. We expect that in the majority of cases there will be a low risk of waiver of privilege where the particulars of a privilege claim are provided consistently with the recommendations in the Protocol. However, this will depend on the circumstance of each case.

3. In cases where there are legitimate concerns that disclosure of certain information within particulars might result in a waiver of privilege, that information can be withheld. The provision of particulars under the Protocol is voluntary.

4. In the unlikely event that privilege is inadvertently waived by voluntary provision of the recommended particulars to the Commissioner, this is likely to operate as a limited waiver and preserve the privilege-holder's ability to enforce their claim against the world at large.

### Next Steps

5. Please contact us if you would like to discuss this advice.

### Reasons

Does the provision of the recommended particulars in the draft Protocol give rise to waiver of LPP, having regard to the purpose of the Protocol and the feedback received from the public consultation to date?

## Privilege claimants will ultimately bear the onus of making out their claims

6. A useful starting point, and important context in which this question arises, is that it is usually not sufficient for a party claiming legal professional privilege merely to assert that claim without exposing the facts on which the claim is based.

7. This is clearly established in the curial context, where the party claiming privilege bears the onus of making out the claim.<sup>1</sup> This onus can be discharged by leading evidence as to the circumstances or context in which the communications or documents were made, and by reference to the nature of the documents themselves.<sup>2</sup> Merely asserting that privilege applies or reciting a verbal formula will not suffice.<sup>3</sup>

8. There is also authority to similar effect where the privilege is claimed in answer to a compulsory production power exercised by a statutory authority,<sup>4</sup> even though statutory authorities (including the Commissioner) are not generally empowered to determine such a claim. In *National Crime Authority v S* (1991) 29 FCR 203 (**NCA v S**) at 211-12, Lockhart J (with whom Keely J agreed) held in the context of such a power that the person asserting privilege should provide 'evidence or make submissions in support of [their] claim'. This procedure is directed to ensuring it has 'before it the material to enable it to make a decision as to the correctness of the claim' (*NCA v S* at 212) or, more precisely in the present context, to decide whether the ATO will be prepared to accept a claim or will take further steps in respect of it. Further steps open to the Commissioner could include:

- a. requesting further information regarding the nature of the claim or particulars of the document<sup>5</sup>
- b. issuing a further notice under s 353-10 of the TAA to obtain compulsorily particulars of documents over which privilege has been claimed (insofar as those particulars do not disclose the privileged contents of those documents),<sup>6</sup> and/or
- c. seeking a declaration from the Federal Court that privilege does not apply to such documents,<sup>7</sup> at which point the privilege claimant would bear the onus of making out their claim in accordance with the principles outlined above.<sup>8</sup>

9. It is not necessary for present purposes to resolve whether *NCA v S* entails that a person claiming privilege in response to a compulsory notice is under a formal onus or duty to inform the Commissioner of the basis for their claim,<sup>9</sup> since:

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<sup>1</sup> See *Grant v Downs* (1976) 135 CLR 674 at 688-689.

<sup>2</sup> *Grant v Downs* at 689; *Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at [30]; *AWB Ltd v Cole* (2006) 152 FCR 382 at [63]; *AWB Limited v Cole (No 5)* (2006) 155 FCR 30 (**AWB v Cole**) at [44(1)].

<sup>3</sup> *Grant v Downs* at 689; *National Crime Authority v S* (1991) 29 FCR 203 at 211-212 (Lockhart J); *Candacal Pty Ltd v Industry Research & Development Board* (2005) 223 ALR 284 at [70]; *Seven Network Limited v News Limited* [2005] FCA 142 at [6]-[8]; *AWB v Cole* at [44(3)].

<sup>4</sup> Relevantly, such powers include those in s 353-10 (to issue a **notice** requiring production of information and/or documents) and in s 353-15 (**access** to books and premises) of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**).

<sup>5</sup> We note that the ATO often engages in alternative dispute resolution processes to this end.

<sup>6</sup> In *CUB Australia Holding Pty Ltd v Commissioner of Taxation* (2021) 385 ALR 731, such a notice seeking information about the title, authors and recipients of documents was found to be issued for a proper purpose of obtaining information which the Commissioner considered necessary to determine whether to accept or challenge the privilege claims, and in turn for the purpose of the administration of a taxation law (within the meaning of s 355-10(1)(a)): see particularly at [80], [84], [87]-[88], [92], [98]-[99]. An appeal against this decision was dismissed: *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171.

<sup>7</sup> Following the approach taken in, eg, *Deputy Commissioner of Taxation v Nicholls* (No 3) [2009] FCA 785 and *Australian Crime Commission v Stewart* [2012] FCA 29 (see, on appeal, *Stewart v Australian Crime Commission* (2012) 206 FCR 347).

<sup>8</sup> See in particular *Stewart* at [69]; *Nicholls* at [25]-[26], [128]; *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [176]-[182].

<sup>9</sup> [A submission] raises this issue: see Appendix at [10].



- a. *First*, the Protocol does not purport to reflect any such formal onus or duty. To the contrary, the Protocol makes plain that information about claims of privilege is recommended to be provided to the Commissioner on a voluntary basis to enable him '[t]o make an informed decision' about 'whether to accept or [to] challenge' those claims by way of alternative dispute resolution (where agreed to) or court proceedings: see at [1], [5], Addendum 2, [4]-[5].<sup>10</sup>
- b. *Second*, in practice, recipients of notices and those subject to access powers who claim privilege have a strong incentive to provide information in support of that claim. If they do not do so, the Commissioner could take any or all of the steps listed at [a]-[c] above. The Protocol should be understood as communicating an expectation of the level of detail that notice recipients and those subject to access powers should provide at an early stage to avoid further requests for information, compulsory notices and potentially costly litigation, in circumstances where such notices and litigation could result in that detail being disclosed in any event.

10. Of course, the extent of the particulars which should be provided to enable the Commissioner to make a decision about whether to accept or challenge privilege claims may vary depending on the circumstances. Relevantly, a person who asserts a claim of privilege would be expected to provide particulars in support of that claim in a way that does not prejudice that claim by, for example, giving rise to waiver of the privilege. This directly raises the question we are asked to advise on, which is whether a person who claims privilege may waive that privilege by providing the particulars recommended to be provided under the Protocol.

**Waiver is ordinarily unlikely to result from provision of the recommended particulars, but this will depend on all of the circumstances**

11. A number of submissions have raised concerns that a party may, by voluntarily providing the Commissioner with the recommended particulars in support of a privilege claim, waive privilege in the underlying document.<sup>11</sup> The general principles regarding waiver are summarised in the 'Context' section at [36]-[39] below.

***Provision of recommended particulars should not result in disclosure of the gist, substance or conclusion of advice***

12. Most clearly, where the voluntary provision of particulars amounts to a 'disclosure of the gist, substance or conclusion of legal advice' (as opposed to the mere fact that advice was obtained) this could give rise to 'a waiver in respect of the whole of the relevant advice'.<sup>12</sup> Although under common law waiver principles<sup>13</sup> the ultimate question will be whether the disclosure, assessed in its context and by reference to all the circumstances, is

<sup>10</sup> Cf [A submission] at [3.c] (including in particular fn 2) and Appendix [6]-[7]. We do not read the Protocol's references at [8]-[9] to the ATO 'determin[ing] whether [it] can accept the claims you have made' and 'decid[ing] whether [it] can accept your claims' as implying that the ATO is competent finally to determine privilege claims.

<sup>11</sup> [Submission references]

<sup>12</sup> *AWB v Cole* at [163]. See also *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at 19; *BT Australasia Pty Ltd v NSW (No 7)* (1998) 153 ALR 722; *Australian Unity Health Ltd v Private Health Insurance Administration Council* [1999] FCA 1770 at [18]; *Bennett v CEO, Australian Customs Service* (2004) 140 FCR 101 at [6], [12]-[13] (Tamberlin J), [65], [68] (Gyles J). See also s 122(3)(a) of the uniform *Evidence Acts*.

<sup>13</sup> And also under s 122(2) of the *Evidence Acts*. Cf, perhaps, under s 122(3)(a) of the *Evidence Acts*: see *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353 at [9]-[10].

inconsistent with maintenance of privilege,<sup>14</sup> we consider that in many cases a disclosure of the gist, substance or conclusion of advice will give rise to such an inconsistency.

13. However, providing the recommended standard particulars would not ordinarily disclose the gist, substance or conclusion of advice. Significantly, paragraphs (j) and (k) of the standard particulars – calling for an articulation of ‘the dominant purpose for which the communication was made’ and ‘the legal issue being advised upon or for which the advice is being sought’ – expressly state that the particulars should not be provided to the extent that this would disclose ‘the content of the advice’. This exception can readily be understood as directed to ensuring that the gist, substance or conclusion of the relevant advice is not disclosed.

14. Applying the exception will involve an assessment by the person asserting privilege of whether standard particulars (j) and (k) can be provided, either in full or at a level of generality, in a way that does not disclose the substance of the advice. In doing so, however, the person would be expected to provide as much information as possible, in order to assist the Commissioner to decide not to take one or more of the further steps listed at [a]–[c] above.<sup>15</sup> If particulars are withheld or generalised, we would expect a prudent person to indicate that this was done so as not to disclose the substance of the advice.

15. It appears to us that, in many cases, the assessment of whether the substance of the advice is disclosed by the particulars will be relatively straightforward and result in particulars being provided without any substantial risk of waiver. Many of the particulars are of the kind often found, for example, in schedules of documents and affidavits created for the purpose of proving privilege claims in litigation.<sup>16</sup> There is rarely any suggestion that disclosure of particulars in that context amounts to waiver.

16. However, we acknowledge that the assessment will not always be an easy exercise. It must have regard to all of the circumstances of the case,<sup>17</sup> and could involve considering whether a particular matter could, when combined with other public or known facts, lead a reliable inference to be drawn about the substance of the advice. Further, even in the curial context, particulars such as document titles or email subject lines (sought as standard particular (e)) are occasionally withheld by, for example, redacting them in schedules of documents. It is not difficult to imagine circumstances where providing those particulars could disclose the substance of an advice and amount to a waiver. However, as against those matters:

- a. The assessment can be undertaken with the benefit of legal advice.
- b. The fact that the exercise may sometimes be difficult does not mean it should not be undertaken. Were a person who claims privilege not to undertake an assessment of this matter, and consequently not provide standard particulars (e), (j) and/or (k) at any level of generality nor explain why they have not done so, the Commissioner may not thereby be in a position to accept the basis for the privilege claim, with the result that he may be inclined to take further (potentially costly) steps.
- c. If disclosure of particulars could amount to waiver of privilege, the person asserting privilege could simply choose not to provide them. Compliance with the Protocol is voluntary, and the Protocol contains an indication that the ATO does ‘not seek to create waiver of LPP by following the Protocol’: Addendum

<sup>14</sup> *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [34]–[35], [45]–[46], [49]–[50].

<sup>15</sup> As reflected in, eg, the guidance given in respect of Examples 1 and 2 in the Protocol.

<sup>16</sup> See, eg, *Rayney v AW* [2009] WASCA 203 at [42] (McLure JA, Buss and Newnes JJA agreeing); *AWB v Cole* at [61].

<sup>17</sup> See, eg, *Osland* at [45]; *GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd* [2020] NSWCA 266 at [57.4] (Macfarlan JA, McCallum JA and Simpson AJA agreeing).

2, [3]. As we note above, a prudent notice recipient could be expected to indicate why they have not provided particulars.

17. To put the scope of the exception to standard particulars (j) and (k) beyond doubt, and to ensure the Protocol assists recipients to preserve their position, we recommend that the ATO consider making the following further refinements to the Protocol to clarify the intended effect of this exception:

- a. ***Widen the expressed scope of the exception:*** The ATO may wish to make clear that other particulars should also only be provided to the extent that would not waive privilege in the advice. This could be done, for example, by clarifying in [28]-[30] that the ATO recommends providing the relevant particulars only to the extent that this does not disclose the substance or contents of legal advice. Alternatively, the ATO could replicate the existing exception (which currently only applies to standard particulars (j) and (k)) in respect of other recommended particulars which may give rise to waiver issues most acutely. In our view these include:
  - standard particular (e) – title or subject line of the communication
  - additional particular (b) – all purposes of the communication
  - additional particular (c) – why legal advice was the dominant purpose of the communication, and
  - additional particular (d)(II) – the reason for a non-legal person’s involvement in the communication (although the circumstances in which this could give rise to waiver are likely to be far rarer)
- b. ***Include additional guidance about waiver:*** The ATO may wish to include additional guidance for recipients of notices who are concerned about waiver. This could include, for example, suggesting that the recipient:
  - seek legal advice if they are unsure whether providing certain particulars could amount to waiver
  - if they withhold particulars, or detailed particulars, on grounds that this would disclose the substance of the advice, they expressly indicate as much in their response, and
  - include an express statement in their response that they do not intend (and, if a legal practitioner, are not instructed) to waive privilege in any of the documents about which the recommended particulars are provided.

***Provision of recommended particulars is unlikely otherwise to be inconsistent with the maintenance of privilege***

18. Assuming that particulars provided to the Commissioner do not disclose the gist, substance or conclusion of legal advice, it is unlikely that providing them will otherwise be inconsistent with the maintenance of privilege so as to give rise to an implied waiver.<sup>18</sup>

19. This is essentially because the particulars are being provided in order to advance a claim for privilege in the relevant documents, by assisting the Commissioner to understand the basis for those claims. That is reflected in the express purpose of the Protocol: see at [5]-[7], Addendum 2 at [1], [3]. A court is unlikely to find that they were provided for some other purpose inconsistent with the maintenance of privilege, such as to obtain a forensic or commercial advantage.

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<sup>18</sup> According to the principles outlined in, eg, *Mann v Carnell* at [29]; *Osland* at [45], [49].

**Even in the unlikely event of waiver as against the ATO, it is unlikely there would be a waiver as against the world**

20. The Protocol contains an indication that the ATO 'will not contend that the information you provide about your LPP claims (particulars) in accordance with our recommended approach amounts, by itself, to a waiver of your LPP': Addendum 2, [2]. This represents a fair and practical indication of the Commissioner's intention not to take advantage of compliance with the Protocol, which serves to assist him, by contending that it prejudices an otherwise sound claim for privilege. It does not (and could not) constitute an indication that the Commissioner will not rely on the particulars in raising an assessment<sup>19</sup> (although it is difficult to conceive of cases where the recommended particulars will themselves be relevant to such an assessment) nor disclose them pursuant to his powers to do so in Div 355 of Schedule 1 to the TAA.<sup>20</sup>

21. The submissions have highlighted a concern that, even if the Commissioner does not contend that provision of particulars constitutes a waiver, this does not prevent a third party doing so.<sup>21</sup> The primary answer to that concern is that, for the reasons outlined at [12]-[19] above, careful compliance with the Protocol should not result in waiver. However, the submissions have also raised the possibility that waiver could be inadvertent,<sup>22</sup> and we now turn to consider the result should that occur.

22. Where the provision of particulars to the Commissioner inadvertently gives rise to waiver of privilege as against the Commissioner, it would still then be necessary to consider the circumstances of the disclosure to determine whether privilege has been waived as against the world. The general principles are outlined at [40]-[41] below and would require consideration of:

- a. whether the disclosure was inconsistent with the maintenance (as against the world) of confidentiality in the communication said to be protected by privilege, as to which see [18]-[19] above, and
- b. other relevant circumstances, which will in particular include:
  - the fact that the **particulars were provided in relation to the exercise of a statutory power to compel production** of information and/or documents
  - the degree of **inadvertence** of the disclosure
  - the **degree of the confidentiality** of the disclosure to the Commissioner, and
  - whether the party making the disclosure obtained a **forensic or other advantage against a third party** in existing or reasonably contemplated litigation.

23. Although each disclosure would need to be considered in its circumstances, for the following reasons we consider that the four points highlighted in bold above mean it is unlikely that an inadvertent waiver of privilege against the Commissioner would also constitute a waiver against the world.

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<sup>19</sup> *Commissioner of Taxation v Donoghue* (2015) 237 FCR 316 at [58], [74]. Cf [A submission].

<sup>20</sup> For example, in s 355-50 ('in performing ... duties as a taxation officer'). See also ss 355-45 to 355-72, and 355-170 to 355-200, and 355-215.

<sup>21</sup> [Submission references].

<sup>22</sup> [Submission references].

### ***Particulars provided in response to a statutory power to compel production***

24. A line of cases has considered the issue of waiver of privilege in the context of disclosures to various types of regulators. The cases indicate that where a disclosure is made in response to a statutory power to compel production of information or documents, that is a factor suggesting against a waiver of privilege against the world at large even if it amounts to waiver as against the regulator.<sup>23</sup>

25. While the voluntary provision of recommended particulars may not itself be compelled by a statutory notice, the fact that the particulars were provided in connection with a compulsory disclosure process in order to protect the privilege-holder's interests is important context for the disclosure. It tends to indicate that it is not made to secure some other advantage inconsistent with the maintenance of privilege as against the world at large.<sup>24</sup>

### ***Inadvertence of disclosure***

26. Although much will turn on the facts of a given case, a further factor relevant to waiver is the degree of inadvertence. If the disclosure of the gist of substance of advice through the provision of particulars to the Commissioner is a result of inadvertence, this is a factor which tends against there being a waiver as against the world at large.<sup>25</sup>

### ***Degree of confidentiality***

27. Information in particulars provided under the Protocol will be 'protected information' within the meaning of the tax secrecy provisions in Div 355 of Schedule 1 to the TAA. Those provisions make it an offence to disclose such information, unless an exception applies: s 355-25(1).

28. Division 355 provides for circumstances in which 'protected information' may be lawfully disclosed.<sup>26</sup> However, the fact that a regulator may by reason of its statutory duties be unable to provide a complete undertaking as to confidentiality (that is, without exceptions) will not prevent a conclusion that there was no general waiver of privilege.<sup>27</sup>

### ***Disclosure where obtaining a forensic or other advantage against a third party***

29. A disclosure in these circumstances may result in the conclusion that there has been a waiver of privilege.<sup>28</sup> However, it is hard to envisage circumstances in which this issue could arise where the disclosure to the Commissioner is by way of answer to a notice issued under s 353-10 or access powers under 353-15, and it is likely such circumstances will be very rare.

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<sup>23</sup> *British Coal Corporation v Dennis Rye Ltd* [1988] 1 WLR 1113, cited in *Mann v Carnell* at [32] (Gleeson CJ, Gaudron, Gummow and Callinan JJ); *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529 at 539; *Kirby v Centro Properties (No 2)* (2012) 87 ACSR 229; [2012] FCA 70; and *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701; [2012] HKCA 153.

<sup>24</sup> See, by analogy, *AWB v Cole* at [138], citing *Goldman v Hesper* [1988] 1 WLR 1238; *Trans America Computer Co Inc v IBM Corporation*, 573 F2d 646 (9th Cir 1978) at 651.

<sup>25</sup> *Woollahra* at 529, citing *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027; [1987] 2 All ER 716; *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538. In the context of s 122(3)(a) of the uniform *Evidence Acts*, see *Ampolex* at [22].

<sup>26</sup> See fn 20 above.

<sup>27</sup> *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529 at 540 (Giles J).

<sup>28</sup> See, eg, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, at 487-8; *Goldberg v Ng* (1995) 185 CLR 83; cf *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253 at [45].

## Context

### Background

30. The Protocol has been developed to assist those making claims for legal professional privilege (**LPP**) in response to an exercise of the Commissioner's statutory information and evidence gathering powers.<sup>29</sup>

31. You have noted that the purpose of the Protocol is not to provide an analysis of the law of LPP; rather, it is intended to provide practical guidance on the information which would best assist the Commissioner to decide whether to accept, further review, or challenge the claim.

32. The Protocol does this by recommending that those making LPP claims undertake a 3-step approach:

- a. Assess communications falling within the scope of the exercise of the Commissioner's powers when deciding to assert a claim for LPP.
- b. Provide the Commissioner with particulars in support of a claims for LPP.
- c. Advise the Commissioner of the approach undertaken in making claims for LPP.

33. Four of the submissions received by the Commissioner on the draft LPP Protocol have raised concerns that provision of particulars under the Protocol may give rise to a risk of waiver of LPP. Extracts from the submissions are reproduced at [\[42\]](#) below.

34. The particulars which the draft protocol recommends be provided to the ATO differ depending on the identity and capacity of persons involved in providing that advice. They comprise:

- a. the 'standard particulars', which are recommended to be provided in all cases (and are sufficient of themselves in cases involving only legal practitioners acting in that capacity)
- b. the 'in-house counsel particulars', which are recommended to be provided, in addition to the standard particulars, where the adviser was an in-house counsel, and
- c. the 'additional particulars', which are recommended to be provided, again in addition to the standard particulars, where:
  - the service of engagement involved non-legal persons or legal practitioners not acting in that capacity, or
  - third party advice was obtained other than from a legal practitioner.

35. The standard particulars are set out in the draft protocol at [\[28\]](#) and comprise:

- a. a Document ID, file name or reference number
- b. the name of privilege holder(s)
- c. the date the document was prepared/communication was made;
- d. the number of pages in the document;
- e. title or subject line of the communication;
- f. the form of the communication i.e., email, letter, file note;

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<sup>29</sup> Namely, the power to issue a notice requiring information to be given, and/or documents to be produced, pursuant to s 353-10 of Schedule 1 to the TAA; and the power to, broadly, enter premises and have full and free access to documents, pursuant to s 353-15 of Schedule 1 to the TAA.

- g. the type of document i.e., advice, contract, invoice;
- h. the identity and role of each person between whom the document/communication is made:
  - author(s) and, if different, sender (name, position, organisation).
  - all people who have received the document (name, position, organisation) – if the document is an email this will include those in the 'cc' and 'bcc' fields
- i. whether the document is a copy
- j. the dominant purpose for which the communication was made (see the example below) but not to the extent this discloses the content of the advice
- k. the legal issue being advised upon or for which the advice is being sought except to the extent that disclosure of the legal issue would also disclose the content of the advice
- l. whether the communication was forwarded. If so, provide an explanation of:
  - the purpose of forwarding it
  - how confidentiality in the communication was maintained
  - how you assured yourself that privilege was not lost
- m. whether LPP is claimed in full or in part
- n. if there are attachments to the document – whether LPP is being claimed over the attachments and, if so:
  - the relevant Document ID/number of the attachment/s, and
  - the standard particulars for the attachment/s.

## Principles regarding waiver and limited waiver

### **Waiver**

36. The test applied to determine whether a waiver has occurred asks whether the privilege owner has acted inconsistently with the maintenance of the confidentiality that the privilege is intended to protect.<sup>30</sup>

37. Whether or not there has been inconsistency such as to constitute waiver is a question of fact<sup>31</sup> to be determined objectively (i.e. rather than by the subjective intentions of the privilege owner)<sup>32</sup> and may be informed by considerations of fairness.<sup>33</sup> In practice, it will involve examination of the nature of the matter in which the privileged communication was received, the evident purpose motivating its disclosure, and the legal and practical consequences of limited rather than complete disclosure.<sup>34</sup>

38. Privilege may be waived where a privilege owner deploys the substance or effect of a privileged communication for forensic or commercial purposes, such as where there is

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<sup>30</sup> *Mann v Carnell* at [29].

<sup>31</sup> *Expense Reduction Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [30]-[31].

<sup>32</sup> *Expense Reduction Analysis* at [30].

<sup>33</sup> *Osland* at [45].

<sup>34</sup> *Osland* at [46].

disclosure of legal advice by a client for the purpose of explaining or justifying the client's actions.<sup>35</sup>

39. Section 122 of the uniform *Evidence Acts* sets out circumstances in which waiver occurs for the purposes of those Acts. Although the terms of that provision are not in all cases identical to the common law,<sup>36</sup> the High Court has stated that the common law principles 'apply with equal force in relation to the statutory question posed by' s 122.<sup>37</sup>

### **Limited waiver**

40. Where third parties are provided with privileged communications, a question arises as to whether privilege has been waived. If the disclosure is for a limited and specific purpose, and on terms that the recipient treat the information as confidential, a limited waiver may have occurred.<sup>38</sup> In other words, the privilege will survive and be able to be claimed by the privilege owner on other occasions, but not as against the recipient of the relevant privileged documents, against whom there has been a waiver.

41. In determining whether a limited waiver has been effected, rather than a waiver on the whole, the key consideration is whether the confidentiality of the privileged communications has been maintained.<sup>39</sup>

## **Extracts from the submissions on the draft LPP Protocol**

[Confidential information removed]

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<sup>35</sup> *Mann v Carnell* at [34]; *Bennett v Chief Executive Officers, Australian Customs Service* (2004) 210 ALR 220 at [68]; *Tec Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd* [2018] AASC 300 at [16]-[18].

<sup>36</sup> *Osland* at [49]; *Mann v Carnell* at [23].

<sup>37</sup> *Expense Reduction Analysts* at [32].

<sup>38</sup> *Mann v Carnell* at [29]-[32]; *Goldberg v Ng* (1995) 185 CLR 83 at 96; *Goldman v Hesper* [1988] 3 All ER 97.

<sup>39</sup> See, eg, *Seven Network Ltd v News Ltd* [2005] FCAFC 125 at [35]; *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 at [70]-[74], [87]. The requirement for confidentiality is reflected in s 122(5)(a)(i) of the uniform *Evidence Acts* (read with the definition of 'confidential communication' in s 117), as to which see, eg, *Telstra Corporation v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346 at 350-352; *Lakatoi v Walker* [1999] NSWSC 156 at [31]; *Amalgamated Television Services Pty Ltd v Marsden* [1999] NSWCA 97 at [27]-[30] (Giles JA, Mason P and Handley JA agreeing).