

Trends and updates on ATO challenges to taxpayer LPP claims

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Introduction

1. This presentation provides an update on recent cases and developments regarding taxpayer legal professional privilege (**LPP**) claims made against and challenged by the Commissioner of Taxation (**Commissioner** or **ATO**).
2. The presentation will first provide a high-level refresher on the key elements of LPP.
3. The presentation then explains the Commissioner's treatment of LPP claims in response to notices issued under s 353-10 of Schedule 1 to the *Tax Administration Act 1953* (Cth) (the **Administration Act**) recently through:
 - a. the decision in *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171 (**CUB**); and
 - b. the recent, and highly publicised, hearings in *Commissioner of Taxation v PricewaterhouseCoopers & Ors* (decision reserved).
4. Finally, the presentation will address:
 - a. the draft ATO LPP protocol released for public comment in late September 2021 (**draft protocol**), including potential areas of concern for taxpayers and their lawyers;
 - b. how the Commissioner may use material received pursuant to the exercise of his powers under s 353-10.
5. Practically, as further addressed below, once material is in the hands of the Commissioner he likely has a duty in most¹ cases to use it for assessing any relevant taxpayers. Accordingly, the ability to assert privilege and the actual assertion of privilege have to be carefully managed.

¹ Section 166 of the *Income Tax Assessment Act 1936* (Cth).

A. KEY ELEMENTS OF LPP

6. LPP is a longstanding and well recognised common law immunity.² Claims for LPP can arise under the Uniform Evidence Acts and at common law.³
7. Specifically, LPP (referred to as Client Legal Privilege) under the *Evidence Act 1995* (Cth) (*Evidence Act*) is relevant to hearings held under that Act and does not extend to pre-trial stages of civil and criminal proceedings.⁴ Therefore, when considering making an LPP claim in response to an exercise by the Commissioner of its powers under s 353-10, the relevant source of LPP is usually the common law.⁵
8. While the requirements of LPP are well known, their application to any specific document or communication inevitably turns on:
 - a. the features of that document or communication;
 - b. the events that gave rise to the creation of that document or communication; and
 - c. the parties involved in its creation.
9. For this reason, the increasing trend towards complex, multi-party, multi-jurisdictional transactions pose unique challenges for the establishment of LPP claims, including the practical consideration of how much time and resources the taxpayer/lawyer should devote to determining and documenting such claims.

Dominant purpose

10. An essential element of any LPP claim is satisfaction of the dominant purpose test.⁶

² *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [553].

³ As a general rule, the Uniform Evidence Act applies in curial contexts while the common law remains the source of LPP in non-curial contexts. However, even where the primary source of LPP is the Uniform Evidence Act, as the Uniform Evidence Act does not operate as a code, where the Act is silent on certain matters, the common law will apply.

⁴ Section 131A of the *Evidence Act*.

⁵ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, [590] and *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, [202], [217].

⁶ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404.

11. The test requires an objective assessment⁷ made at the time the document or communication is brought into existence as to whether, as a matter of fact,⁸ the prevailing or most influential purpose of the document or communication was for obtaining legal advice or in relation to actual or contemplated litigation.⁹
12. A pertinent question in considering whether a document or communication has satisfied the dominant purpose test is to ask who is the relevant person from which the purpose of the document or communication can be ascertained. While the correct starting point in most cases will be the client, in some circumstances it may be necessary to consider the purpose of the author or initiator of the communication, and in others the person at whose request or under whose authority the communication was created or made.¹⁰ As transactions become increasingly complex and involve numerous parties across organisations and jurisdictions, the notion of a “corporate purposes” rather than that of a single person is also increasing in prevalence.¹¹

Independent lawyer giving legal advice

13. Lawyers employed in private practice will, in most instances, easily meet the requirement of an independent lawyer giving legal advice. In contrast, notwithstanding it is well established that in-house counsels are entitled to claim LPP on behalf of their employer as the client,¹² such claims appear to attract a greater level of scrutiny, primarily due to

⁷ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67, [172]. It is further noted that evidence of the subjective intention of the author or person requesting the creation of the communication or document is significant but not conclusive: *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)* [2014] FCA 796, [28]-[34].

⁸ *TEC Hedland Pty Ltd v Pilbara* [2020] WASC 364, [23]; *AWB Ltd v Cole* (2006) 152 FCR 382, [110].

⁹ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [61] (Gleeson CJ, Gaudron and Gummow JJ), [173] (Callinan J).

¹⁰ *ASIC v Mitchell* [2019] FCA 1484, [58].

¹¹ *Sydney Airports Corp Ltd v Singapore Airlines Ltd* (2005) NSWCA 47. In this case, the Court ultimately considered that the relevant purpose was that of the corporation, not the in-house lawyer. This conclusion was reached by gathering individual purposes of employees acting within the scope of their authority. The Court held that even if the in-house lawyer legitimately considers legal advice or litigation to be dominant, this might not equate with the purpose of the organisation as a whole.

¹² *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500, [530] to [531]; *Waterford v The Commonwealth* (1987) 163 CLR 54, [61]-[62], [79]-[82], [95]; *Ritz Hotels v Charles of the Ritz Ltd (No 4)* (1987) 14 NSWLR 100, [102].

questions raised regarding the lawyer's independence and whether the lawyer has given confidential, legal advice.¹³

14. Sufficient evidence of an in-house counsel's independence is a question of fact that requires close examination of the nature of the lawyer's employment relationship. The question of whether the lawyer's personal loyalties, duties and interests influence the professional legal advice must be capable of being refuted.¹⁴
15. For similar reasons, lawyers employed by multi-disciplinary practices (**MDP**) are also facing a higher practical, and evidentiary, threshold for establishing claims of LPP. This is discussed further in the context of *Commissioner of Taxation v PricewaterhouseCoopers & Ors* below.

Third parties

16. Confidential communications between a non-legal practitioner (**non-lawyer**) and a lawyer will be privileged if such communications can satisfy the dominant purpose test.¹⁵ While confidential communications between a non-lawyer and a client can also attract LPP, in practice, it may be difficult for such communications to satisfy the dominant purpose test. This is because in such circumstances there is a greater risk that the client conducted itself in a manner that indicates its intended use of the communication is to inform itself of its subject matter as opposed to seeking legal advice or in relation to current or anticipated litigation. This is especially the case where the client filters, adapts or modifies the non-lawyer's communication.¹⁶

Emails

17. When considering LPP claims in relation to emails with multiple addressees, each individual email between the sender and the recipient must be considered separately.¹⁷
18. Further, courts will likely distinguish between whether a recipient is a "to" or "cc" on the original email chain, where such allocation will often be regarded as a deliberate choice,

¹³ *Commonwealth v Vance* (2005) 158 ACTR 47; *Sydney Airports Corp Ltd v Singapore Airlines Ltd* (2005) NSWCA 47, [24].

¹⁴ *Telstra Corp Ltd v Minister for Communications, Information Technology & the Arts* (No 2) [2007] FCA 1445, [35]-[41].

¹⁵ *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357, [41]-[48]

¹⁶ *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357, [41]-[48]; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd* [2014] FCA 796, [38]-[44].

¹⁷ *TEC Hedland Pty Ltd v Pilbara* [2020] WASC 364, [29].

and whether a recipient is a “to” or a “cc” on a reply all, where such allocation will likely be regarded as unintentional.¹⁸

B. THE COMMISSIONER’S INFORMATION GATHERING POWER

19. Section 353-10 of Schedule 1 to the TAA gives the Commissioner the power to require a taxpayer to give the Commissioner any information that it requires for the purpose of the administration or operation of a taxation law.
20. This power can be validly exercised to seek information for various reasons, including to make wide-ranging enquiries.¹⁹ Notwithstanding the breadth of this power, it does not abrogate LPP where appropriately asserted and claimed by a recipient to prevent disclosure.²⁰ Therefore, the Commissioner cannot, in its exercise of this power, encroach on a taxpayer’s common law right to LPP.²¹ Nor is the Commissioner able to determine whether LPP applies as a matter of law: that power is remanded to the Courts.²² Accordingly, this sets up a procedure whereby:
- a. the Commissioner issues a notice pursuant to s 353-10;
 - b. the addressee claims LPP in respect of particular communications;
 - c. the Commissioner either accepts the claim or challenges the claim in Court.
21. The potential remedies against a recipient of s 353-10 notice for over-asserting privilege include the ATO seeking recovery of costs if it successfully challenges LPP claims in court proceedings, penalties for making a false or misleading statement to the Commissioner, referral to prosecution for failure to comply with s 353-10 and, in the case of lawyers, referring them to the appropriate professional body. It is not impossible to imagine a case where overly aggressive, and false, privilege claims could form part of an element of further offences, such as conspiracy to defraud the Commonwealth.²³
22. The tension between LPP claims and s 353-10 is particularly prevalent in cases where the Commissioner seeks further information or particulars under this section to determine whether to accept or challenge a taxpayer’s LPP claim, as evident in CUB.

¹⁸ *TEC Hedland Pty Ltd v Pilbara* [2020] WASC 364, [62].

¹⁹ See for example *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499.

²⁰ .c.f. *Glencore International AG v Commissioner of Taxation* [2019] HCA 26.

²¹ See for example *LHRC v Federal Commissioner of Taxation* [2015] FCAFC 184; (2015) 239 FCR 240, [10].

²² *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171, [29].

²³ Section 135.4 of the *Criminal Code Act 1995* (Cth).

C. *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171

23. CUB confirms the broad ambit of the Commissioner's power under s 353-10 in circumstances where the Commissioner seeks information from the taxpayer to determine whether to accept or challenge LPP claims.
24. In CUB, the Commissioner issued a notice to CUB under s 353-10 requesting particulars for documents in respect of which CUB claimed LPP. CUB sought judicial review of the Commissioner's decision to issue the notice on the basis that the request was not a proper exercise of power.
25. At first instance, the primary judge held that the Commissioner's purpose (or substantial purpose) in exercising his power was, as a whole and in context, to obtain information necessary to determine whether to accept or challenge CUB's LPP claim and **not** to determine the validity of CUB's LPP claim. For this reason, the court found that it was a proper exercise of power by the Commissioner to rely on s 353-10 to seek information to determine whether to accept or challenge an LPP claim.
26. On appeal, Middleton, McKerracher and Griffiths JJ again considered whether, as a matter of fact, the Commissioner's primary or substantive purpose for issuing the notice was improper.²⁴ Based on the uncontested evidence before the Full Court, it found the Commissioner's purpose in requesting the information was to obtain enough information to decide whether to challenge the claims for LPP.²⁵
27. It can be inferred from both the primary judge and the Full Court that any purported determination by the Commissioner of the validity of LPP claim would be beyond power.²⁶ Both the primary judge and the Full Court relied on the fact that the information sought by the Commissioner (i.e. the title of each document, the subject line of each email, the name of the author, and the name of each person to whom the document was communicated)

²⁴ The first ground of appeal, which was also rejected by the Full Court was whether the primary judge erred in applying the correct legal test relating to whether the exercise of the power was for a proper purpose. The Court agreed that the proper test is where a statutory power is exercised for multiple purposes, and one of those purposes is improper, the exercise of the power will be vitiated if the improper purpose was a substantial purpose. However, this ground was not successful because the Full Court found that the primary judge correctly found there was only one purpose identified by the Commissioner in the exercise of its power, and therefore a consideration of multiple purposes was not required (see [25]).

²⁵ *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171, [10]. See also at [13] where the Full Court held that it was tolerably clear that the Commissioner was saying that he needed the information to decide for himself whether to press for production of the documents.

²⁶ *Ibid*, [29].

would not enable him to determine the actual validity of CUB's LPP claim.²⁷ The decision in CUB does provide a strong platform upon which the Commissioner can continue to exercise his powers under s 353-10 to obtain information he requires to ascertain whether he should challenge LPP claims. Practically this gives rise to the issue of the taxpayer having to gauge, without being able to be sure, what particulars are sufficient for the Commissioner to inform his view on whether to challenge privilege without disclosing enough material particulars that the privilege is inadvertently waived.

28. More positively for addresses of s 353-10 notices, *CUB* also recognises that it is, in certain circumstances, proper for there to be negotiations between the Commissioner and a taxpayer regarding the ambit of such information.²⁸ In particular, the Full Court commented that the draft notice sent by the Commissioner to CUB was substantially broader than the final notice²⁹ which appears to provide some implicit support for the proposition that the Commissioner may not have been entitled to all the information sought in the draft notice.³⁰
29. As discussed further below, step two of the draft protocol sets out a list of information or particulars required by the Commissioner to determine an LPP claim. How this list compares to the draft and final notices issued in CUB, and therefore the extent to which taxpayers and lawyers should follow the draft protocol remains an open question.

D. THE COMMISSIONER'S DRAFT LPP PROTOCOL

30. On 22 September 2021, the ATO released the draft protocol for public consultation. The draft protocol sets out the ATO's recommended approach for taxpayers and lawyers when making LPP claims. While the draft protocol, once implemented, will be voluntary, the current draft does not shy away from pointing out the consequences for taxpayers and lawyers who make improper LPP claims.³¹

What is the ATO's recommended approach?

²⁷ Ibid, [32]. CUB attempted to overcome this difficulty by submitting that the Commissioner's request for particulars was indicative of his attempt to determine the LPP claim, and that prior to the determination of an LPP claim by a court no such particulars should be sought. This submission was not accepted by the Full Court.

²⁸ Ibid, [62].

²⁹ Ibid, [46] and [47].

³⁰ Ibid, [46] and [47].

³¹ These include the ATO seeking recovery of costs if it successfully challenges LPP claims in court proceedings, penalties for making a false or misleading statement to the Commissioner, referral to prosecution for failure to comply with s 353-10 and, in the case of lawyers, referring them to the appropriate professional body.

31. The draft protocol establishes a three-step process for how taxpayers and their lawyers should prepare an LPP claim:³²
- a. First: assess the nature of the legal engagement and each individual communication;
 - b. Second: explain the claim by setting out the sufficient particulars; and
 - c. Third: advise the ATO on the approach taken to assess the LPP claim.
32. It is the second step, namely the level of particularisation required by the ATO, that is most likely to cause concern for taxpayers and lawyers, both from an LPP perspective and a practical perspective.
33. While it is well accepted that to make an LPP claim you need to “tell a small part of your secret in order to keep your secret”,³³ the necessary extent of disclosure is often one of fact and degree.
34. Some of the requested standard particulars in the draft protocol may go beyond what would typically be expected to establish an LPP claim. For example, the ATO recommends that a taxpayer/lawyer provide:³⁴
- a. the identity and role of each person between whom the document/communication is made (including the name, position and organisation of each person who received the document);
 - b. the title or subject line of the communication;
 - c. the dominant purpose for which the communication was made;
 - d. the legal issue being advised on; and
 - e. whether the document/communication was forwarded.
35. In addition, further particulars are required where the legal adviser is an in-house counsel, or the communication/document involves non-lawyers.³⁵
36. The extent of required particularisation in the draft protocol has attracted some criticism from the Law Council of Australia who publicly commented that such requirements were an “overreach”.³⁶

³² See paragraph 9 of the draft protocol.

³³ See, for example, *Rinehart v Rinehart* [2016] NSWCA 58 and *State of Victoria v Tabcorp Holdings Ltd* [2013] VSCA 180.

³⁴ See paragraph 28 of the draft protocol.

³⁵ See paragraphs 29 and 30 of the draft protocol.

³⁶ Law Council of Australia, *Some concerns remain for the Law Council over ATO draft privilege protocol* (23 September 2021) <<https://www.lawcouncil.asn.au/media/media-releases/some-concerns-remain-for-the-law-council-over-ato-draft-privilege-protocol>>. It is arguable that this has been addressed to some extent in the

37. Two further issues relating to the level of particularisation are potential waiver as well as practical considerations regarding the time and resources required to sufficiently articulate such particulars where LPP claims are to be made over hundreds or even thousands of documents.

Particular ATO concerns

38. In an addendum to the draft protocol, the ATO has outlined some of its concerns that underpin the draft protocol and the way it approaches taxpayer LPP claims more broadly.

39. The ATO provides six arrangements that give rise to particular concern:

- a. contrived arrangements with a purpose to conceal communications from the ATO;
- b. routing advice through a lawyer merely for the purpose of claiming LPP;
- c. legal engagements entered into after the substance of advice was provided by non-legal persons;
- d. concepts and ideas proactively promoted or marketed prior to legal engagement and unsolicited by the taxpayer;
- e. communications exclusively between non-legal persons where the involvement of a lawyer is not apparent; and
- f. unclear and potentially overlapping or inconsistent capacities and relationships designated to different members of a firm.

40. The first five concerns are largely self-evident and in most cases would likely fall outside the scope of what is required to establish LPP. However, the final concern, while understandable from the ATO's perspective, poses practical challenges given the realities of modern-day tax transactions, which almost inevitably require input from both lawyers and non-lawyers. This concern may also be inconsistent with the fact that LPP claims can be made over third party documents and communications in particular circumstances.

41. The ATO has also expressed concern regarding bulk LPP claims and computer assisted technology being used as the sole basis for asserting LPP claims.³⁷

42. Lawyers and taxpayers will need to afford significant consideration to the appropriate balance between judiciously using limited resources and ensuring that they have a sufficient level of confidence in the strength of their LPP claim.

protocol by the ATO acknowledging that such particulars do not need to be provided where they would disclose the content of the advice (see for example paragraphs 28(j) and 28(k) of the draft protocol).

³⁷ See paragraph 15 of the draft protocol.

43. Given the concerns raised by the ATO in the draft protocol, the current proceedings of *Commissioner of Taxation v PricewaterhouseCoopers & Ors* was perhaps somewhat inevitable.

E. COMMISSIONER OF TAXATION v PwC & ORS

44. This case is currently before Moshinsky J in the Federal Court of Australia.

45. In this case, the Commissioner challenged PwC's LPP claims over 15,500 documents arguing there was no LPP due to, among other things, the absence of the lawyer-client relationship and a failure to meet the dominant purpose test. Issue was also taken with LPP claims made over documents created prior to the formal engagement of PwC. A sample of 100 documents is being considered by the Court.

46. The Commissioner's oral submissions centred on PwC's MDP and multi-jurisdictional structure, the establishment of the overall engagement of PwC, and the involvement of the lawyer and the capacity in which he was acting in the transaction.

47. Amicus curiae, who intervened to address foundational LPP issues regarding LPP claims made by an MDP, made submissions that emphasised the difference between an LPP claim made by a lawyer employed by an MDP and one employed by a traditional law firm. The existence of such a difference was heavily opposed by senior counsel for PwC.

48. Submissions also demonstrated the Commissioner's strong dislike of the establishment of "an umbrella of privilege" through colourful analogies such as the lawyer "bookending" the transaction and PwC's MDP set up constituting a "smorgasbord of offerings" covered by the "cling wrap" of LPP.

49. Of particular interest was the evidence relied on by both the Commissioner and PwC to establish the role and importance of the lawyer in the overall transaction. Significant attention was afforded to the hours he worked on the matter compared with other non-lawyers, his charge-out rate compared with other non-lawyers and the basis for his inclusion in certain emails.

50. Also of interest was the different approach taken by the parties regarding the establishment of LPP in circumstances where it was claimed over multiple documents. Both the Commissioner and PwC's submissions were aimed at a more holistic assessment of the existence of a valid LPP claim, whereas amicus curiae emphasised that the proper approach required a document-by-document assessment.

51. The outcome of this case will likely have significant consequences for how the Commissioner responds to LPP claims made by lawyers in a "Big Four" firm, and how the Big Four in turn respond to any new or altered approach from the Commissioner.

F. WHAT CAN THE COMMISSIONER USE THE MATERIAL RECEIVED FOR?

52. Section 166 of the *Income Tax Assessment Act 1936* (Cth) relevantly provides:

166 Assessment

From the returns, **and from any other information in the Commissioner's possession**, or from any one or more of these sources, **the Commissioner shall make an assessment of the amount of the taxable income** (or that there is no taxable income) of any taxpayer, and of the tax payable thereon (or that no tax is payable).

53. Once Commissioner possesses material, he can and arguably must use it for the purpose of assessing any relevant taxpayers pursuant to s 166 of the *Income Tax Assessment Act 1936* (Cth). The Commissioner's statutory power or obligation to assess using information in his possession overrides the source of information, including at least:

- a. information intended to be confidential between parties;³⁸
- b. information obtained in breach of foreign law;³⁹
- c. legal professional privilege;⁴⁰ or
- d. material that could have been prevented from being disclosed.⁴¹

54. This means that once material has been disclosed to the Commissioner that material generally must be used, if relevant, to assess the particular taxpayer and any other taxpayer to whose affairs it relates. There is no requirement the Commissioner only have regard to material provided under a s 353-10 notice for a particular purpose. Nor is there any requirement the material is quarantined to the assessment of the person who provided it. This raises practical issues for taxpayers who are transactional intermediaries and receive a s 353-10 notice (e.g. counterparties to a transaction) and professional intermediaries (such as accountants, advisers) and those holding third party assets (such as fund managers).

55. Each type of intermediary may have a particular set of obligations to other parties. A counterparty to a transaction may have an obligation to not take steps which would impair the value of assets it has sold, an accountant or investment banking advisor would have a duty of loyalty to a client and a fund manager would owe fiduciary duties to its clients. Whether or not the relevant duty would extend to not disclosing material in respect of which

³⁸ *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316.

³⁹ *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412.

⁴⁰ *Glencore International AG v Commissioner of Taxation* [2019] HCA 26.

⁴¹ *Glencore International AG v Commissioner of Taxation* [2019] HCA 26; *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316.

a 3rd party could validly assert, and may have an interest in asserting, LPP over needs to be considered against its obligations to comply with the s 353-10 notice. Certainly, once the Commissioner has the information it is unlikely – given the decisions in *Donoghue*⁴² and *Denlay*⁴³ and *Glencore International AG*⁴⁴ – other parties are unlikely to be able to prevent it being used to assess themselves.

56. Accordingly, for taxpayers who are intermediaries, such as fund managers and counterparties to transactions, careful consideration should be given to ensure LPP claims are made to protect both their position from both a tax payable perspective and a commercial liability perspective regarding other stakeholders whom they may owe a contractual or common law duty.

Conclusion

57. The draft protocol and the cases explored above illustrate the tension between the Commissioner performing his statutory obligations and taxpayers being able to rely on their right to LPP.
58. This tension is unsurprising given that, at its core, LPP serves to frustrate the usual operation of the administration of justice by permitting an individual to refuse to disclose relevant and often cogent information to the matters in issue between the parties.
59. While a silver bullet is unlikely to present itself any time soon, ensuring that lawyers have a healthy understanding of when claims of LPP will arise, and confidence in articulating such claims may reduce unnecessary LPP litigation between taxpayers and the Commissioner.

⁴² *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316.

⁴³ *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412.

⁴⁴ *Glencore International AG v Commissioner of Taxation* [2019] HCA 26.