



THE TAX INSTITUTE

15 November 2021

Faith Harako
Assistant Commissioner
Public Groups & Internationals
Australian Taxation Office

By email: faith.harako@ato.gov.au

Dear Ms Harako,

Draft Legal Professional Privilege Protocol | Australian Taxation Office

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the draft Legal Professional Privilege (**LPP**) Protocol dated September 2020 (**Draft Protocol**).

In the development of this submission, we have consulted with our National Large Business and International Technical Committee, National Dispute Resolution Technical Committee and National SME Technical Committee to prepare a considered response which represents the views of the broader membership of The Tax Institute.

LPP is a fundamental right of all clients, including taxpayers, who seek legal advice. The Tax Institute recognises that the ATO requires access to certain information in order to effectively administer the tax system. It is important for the Draft Protocol to ensure the right balance is achieved between these principles in a way that will support taxpayers to exercise their rights, while facilitating ATO access to relevant information, where appropriate.

Taxpayers must be able to trust that LPP will generally remain inviolate, so that they can seek legal advice with full transparency. If this assurance is not provided, taxpayers may be discouraged from seeking advice, or from being fully transparent with their legal advisers. This may lead to taxpayers adopting incorrect or more aggressive tax positions, withholding important information from advisers, or taking actions without the benefit of advice on the legal implications.

In addition, to strike a balance with the compliance burden imposed on taxpayers by the Draft Protocol, it is important that only necessary information is requested for the purposes of determining whether to challenge an LPP claim, and that reasonable time is allowed to provide it. As a fundamental premise, information requests should not result in taxpayers waiving LPP, or being required to provide information that would not otherwise be required by a court when determining an LPP claim.

It is therefore important that any steps recommended in the Draft Protocol do not amount to, and importantly are not perceived as, overreach, or cause LPP claims to become excessively burdensome.

We also note that the ATO's practice is likely to have consequences outside of the tax sphere, as other regulators may adopt similar approaches. Perceived overreach could therefore lead to a much wider erosion of trust in LPP in the community. The potential repercussions outlined above could be even more severe in areas other than tax. This potential wider impact on the legal system reinforces the importance of this issue. We are therefore of the view that certain aspects of the Draft Protocol require continued consideration and revision.

Our detailed response is contained in **Appendix A**.

We would be pleased to continue to work with the ATO on any amendments to the Draft Protocol, and the development of further related guidance, to better assist taxpayers and their advisers.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more about The Tax Institute.

If you would like to discuss any of the above, please contact Tax Counsel, Julie Abdalla, on 02 8223 0058.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Peter Godber', with a long, sweeping horizontal flourish extending to the right.

Peter Godber

President

APPENDIX A

We have set out below detailed comments and observations for your consideration in order to ensure the Draft Protocol provides useful guidance which taxpayers can apply in practice, without undue burden or potential waiver of LPP. Our comments broadly follow the order of the paragraphs in the Draft Protocol.

Paragraph 1 – Draft Protocol as a voluntary recommended approach

Paragraph 1 of the Draft Protocol notes that it is a voluntary recommended approach for taxpayers and their advisers to follow. However, throughout the Draft Protocol, there are several instances which indicate that if the recommended approach is not followed, further questions will be asked by the ATO.¹ The existence of potential ramifications for not complying with the Draft Protocol undermines its voluntary nature.

The right to LPP belongs to the client (taxpayer) and not their adviser. Likewise, the right to decide whether to waive LPP remains at all times with the client. Case law has highlighted the importance of ensuring that taxpayers are able to claim LPP where available.² The Tax Institute is of the view that the Draft Protocol should not place an undue burden on taxpayers who choose not to comply with it, provided they comply with the law in claiming LPP.

Relevantly, The Tax Institute is of the view that the Draft Protocol should also acknowledge the duty of advisers to their clients and that they are bound to act on the instructions of their clients, except for in very limited circumstances. The Draft Protocol should recognise the impact that requiring advisers to comply with it may have, particularly where it may give rise to a breach of their professional obligations.

Paragraph 25 – Step 1.3 items

The Tax Institute notes the common law principle that LPP does not apply to communications that are made in furtherance of a crime or fraud.³ There needs to be prima facie evidence of a fraud or illegal purpose before a court will override a claim for LPP.⁴ In such instances, LPP is generally not available if the advice was received in the furtherance of, or guided towards, a fraud or illegal purpose.

However, there is a distinction between a communication which facilitates the commission of a crime or other improper purpose, and one which advises on a criminal or other matter at law. Legal advice on criminal acts will be subject to LPP if it demonstrates the strength of the client's cause of action.⁵

¹ Refer Draft Protocol, indicative response to Example 1 and Example 2 scenarios. See also, Draft Protocol page 4, paragraph 8.

² For example, see *FCT v Citibank Ltd* (1989) 20 ATR 292.

³ *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 35 ATR 130; *Varawa v Howard Smith & Co. Ltd.* [1910] HCA 11.

⁴ *Arno v Forsyth* (1986) 9 FCR 576; *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* (1997) 35 ATR 130.

⁵ *Attorney-General (NT) v Kearney* [1985] HCA 60 at 12 citing *Varawa v Howard Smith & Co. Ltd.* [1910] HCA 11 per Griffith CJ.

The items listed in paragraph 25 should carefully distinguish between these concepts. For this reason, we are of the view that paragraphs 25(l), (m) and (n) of the Draft Protocol require reconsideration as their current drafting encompasses advice to which LPP can apply.

In particular, we consider that further guidance should be provided by the ATO on how the Commissioner considers LPP and the Draft Protocol apply to communications regarding the application of Part IVA and other anti-avoidance provisions.

Further, these items should not refer to all conduct that renders a person liable to a civil penalty. Not all conduct which may attract a penalty will necessarily amount to a fraud or illegal conduct. In addition, we note that a penalty under Subdiv 284-C of the *Income Tax Assessment Act 1997* cannot be imposed until such time that the technical position is settled (and it is determined that a scheme or transfer pricing adjustment provision applies). While it may not be intended, paragraph 25(n) infers that the Commissioner is taking the view that LPP does not apply in audits that have a transfer pricing focus, or audits in which it is asserted that a general anti-avoidance provision could apply.

For these reasons, we recommend that references to conduct that renders a person liable to a civil penalty are not retained. We further recommend deleting paragraph 25(n) and instead modifying paragraph 25(l) to cover 'Documents or communications knowingly or intentionally made in the furtherance or participation in a fraud or illegal activity.'

Further, we note that paragraph 25(m) is an impractical formulation that could conceivably apply to all claims of LPP. The very nature and objective of LPP is to protect communications between a client and their adviser from third parties. Protecting communications by virtue of LPP is permissible, and indeed, intended, at law for various legitimate reasons. For this reason, we consider that paragraph 25(m) should be deleted from the Draft Protocol.

Paragraph 26 – particularising LPP claims before the due date specified in the formal notice seeking information and/or documents

Providing the ATO with the particulars recommended in the Draft Protocol can be a significantly time and resource intensive process for taxpayers, with concerns of the implications of non-compliance if the information is requested under a formal notice. To better manage this compliance burden, we consider that the ATO should provide taxpayers with more time to respond to information requests, especially in circumstances where information is requested under a formal notice.

Alternatively, taxpayers should be permitted to respond to information requests in tranches, with a later date for taxpayers to provide particulars in respect of communications for which LPP is claimed. Doing so will allow taxpayers to ensure that they provide high quality LPP claims with sufficient time to consider issues regarding waiver of LPP.

Paragraph 27 – use of ATO Form for claiming LPP

The prescribed ATO form may be appropriate to use in certain circumstances. However, taxpayers and their advisers may be able to provide high quality LPP claims in a more efficient manner by using their existing document management systems and processes. We therefore recommend that the Draft Protocol explicitly state that taxpayers are able to provide the particulars for an LPP claim in other formats than the prescribed ATO form.

Paragraph 28 – standard particulars

Our understanding from our members is that the level of detail requested in the standard particulars at paragraph 28 of the Draft Protocol extends beyond what is typically requested by a court when substantiating an LPP claim. For the purposes of Federal Court proceedings, when claiming privilege, parties may provide lists of documents. Such lists must describe each document within the party's control for which privilege is claimed, along with the grounds for privilege.⁶

Further, the Federal Court's Default Document Management Protocol, used for electronic discovery, requires the following mandatory information for each document to be set out in the list of documents for exchange between parties:

- Document ID
- Document title
- Document type
- Document date
- Author
- Recipient
- Host Document ID
- Folder and Filename

Accordingly, the standard particulars contained in paragraphs 28(b), (d), (f), (h), (j), (k) and (l) in the Draft Protocol would appear to extend beyond what the Federal Court would normally require. This significantly increases the burden placed on taxpayers who elect to voluntarily comply with the Draft Protocol.

Further, the Draft Protocol requires that the standard particulars in paragraph 28 are provided in respect of each communication or document. This places an onerous and excessive burden on taxpayers. Our understanding from our members is that courts typically allow communications to be categorised and reviewed in groups, rather than on a document-by-document basis. We consider that the Draft Protocol should adopt a similar approach to the courts, ensuring consistency combined with a more practical and feasible procedure for taxpayers when providing particulars.

⁶ *Federal Court Rules 2011* (Cth) rule 20.17(2)(c).

In practice, it may not be possible for taxpayers to provide all particulars for a range of reasons, including the unavailability of commercial software or practical difficulties in determining some details with sufficient certainty. We consider that the Draft Protocol should build in scope for taxpayers to leave such fields blank if they have taken reasonable efforts to find the details and can explain why the details have not been provided or cannot be confirmed. This would assist to reduce the burden on taxpayers while still providing assurance to the ATO to the extent possible.

Paragraph 28(e) – the title or subject line of the communication

The title of a document or a description thereof can potentially disclose a significant amount of the included content, which may cause the taxpayer to risk waiving LPP. For this reason, the title of a document may need to be redacted.

Paragraph 28(h) – the identity and role of each person between whom the document/communication is made

The Draft Protocol currently requires taxpayers to undertake the challenging and resource intensive requirement to identify all persons who have received the relevant documents or communications. A taxpayer may only engage a partner in a law firm for legal advice, but the relevant research and initial drafts could be prepared by more junior staff, paralegals, or support staff, across various departments with more senior staff checking and reviewing the work. As a result, the taxpayer may not be aware of all the individuals who have been involved in preparing the advice. For more complex matters involving multiple law firms and expert opinions, this difficulty is compounded.

Noting the practical challenges, we recommend that this requirement in the Draft Protocol is limited to the addressees of the relevant communications. Further, we recommend that the identities of the persons involved should be limited to only those who had a substantive input into the drafting. This would alleviate the need to identify, for example, administrative staff who would be acting in the course of their employment and generally would be subject to confidentiality obligations in accordance with their employment contract.

Paragraph 28(i) – whether the document is a copy

There are significant practical difficulties associated with the proper identification of originals and copies of documents in a modern digital environment. These difficulties are exemplified as LPP claims and issues of potential waiver need to be considered for both originals and copies of communications. Examples of the practical difficulties faced by taxpayers include:

- the appropriate definition of an ‘original’ and a ‘copy’ in the context of electronic storage, especially when files are moved to new locations or sent to multiple people in one email.
- whether persons who are copied in on emails with attachments are receiving originals or copies; and
- understanding the circumstances where an ‘original’ is accepted as subject to LPP but subsequent copies are not.

We recommend that the Draft Protocol includes detailed guidance on what constitutes a copy, and examples of when an original may be subject to LPP but a copy is not (and vice versa).

Example 1 – ATO response to different levels of detail about the purpose of a communication

We consider that Example 1 should be revised to be no more onerous than the level of information that a court would require when determining a claim for LPP. That is, the example should only show the relevant level of information required to demonstrate that the dominant purpose of the communication was to seek legal advice or to use in actual or contemplated litigation.⁷

There is a real concern that the description of the transaction in Example 1 may, in some circumstances, lead a court to determine that LPP has been waived. We consider that the example should demonstrate that the level of detail that is required will depend on the circumstances in each case. We recommend that it is revised to provide a more reasonable baseline which appropriately balances the taxpayer's rights to LPP with the Commissioner's objectives in administering the tax system.

Further, we note that the example demonstrates the significant burden imposed on taxpayers when complying with the Draft Protocol. For example, the references to Person X could be practically difficult for the taxpayer to establish, as the person could represent a range of junior staff and paralegals. Importantly, this information would not assist in determining whether the relevant communication is subject to LPP.

Paragraph 29 – additional particulars for in-house counsel

For the purposes of assessing LPP, it should make no difference as a matter of law if the lawyer is practising through a law firm, a law firm as part of a broader professional practice, or as in-house legal counsel. The Draft Protocol should apply consistently to legal advice from all appropriately qualified lawyers. We note that the particulars requested in paragraphs 28(a) to (d) effectively cover the same information as that which is requested in paragraph 29. As a result, paragraph 29 of the Draft Protocol is likely not necessary to ensure that high quality LPP claims are provided.

Paragraph 30 – additional particulars for specific engagements

Paragraphs 30(b) and (c) of the Draft Protocol require taxpayers to state all the relevant purposes of a communication and explain why seeking legal advice was the dominant purpose. When read together, the requirements in these paragraphs go beyond the dominant purpose test used by the courts.⁸ Further, requiring taxpayers to provide the ATO with a list of non-dominant purposes for every communication imposes a significant compliance burden on taxpayers to identify facts that a court would not consider. This results in a disproportionate compliance burden on taxpayers to produce information that would not be taken into account in determining an LPP claim.

⁷ *Grant v Downs* (1976) 135 CLR 674; *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [15].

⁸ *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; *FCT v Pratt Holdings Pty Ltd* [2005] FCA 1247.

To achieve a more balanced approach that is consistent with case law, we recommend deleting paragraph 30(c) and amending paragraph 30(b) to request only the dominant purpose of the relevant communication(s). As an alternative, it should be sufficient for taxpayers to provide a list of principal or primary purposes.

Addendum 1 – paragraph 7 – ATO view of party roles in LPP claims

We consider that this paragraph should explicitly state that the views presented in the table are those of the ATO. We also consider that the table should be revised to state that taxpayers can claim LPP ‘when it is available’ as they are entitled to do at law, not ‘only where it is appropriate’. Taxpayers are not required to consider the appropriateness of a claim for LPP as an additional factor.

Addendum 1 – paragraph 12 – ATO concerns

Paragraph 12 of Addendum 1 in the Draft Protocol describes instances where claims of LPP will raise concerns from an ATO perspective. We consider that some of these items need further clarification as they appear to cover communications where LPP can clearly exist. These are described in greater detail below.

Paragraph 12(a) – communications in contrived arrangements

Although the description in the paragraph intends to target unscrupulous and potentially frivolous instances where LPP is claimed, it also describes instances where legitimate legal advice is sought and would be protected by LPP. As noted above in respect of paragraph 25 of the Draft Protocol, the fundamental premise of LPP is to protect certain communications. For this reason, we recommend that the words ‘where there is a purpose of concealing communications from us’ are deleted from the first sentence of this paragraph. This drafting is inconsistent with the intention to support taxpayers to claim LPP where the relevant communications are privileged.

Paragraph 12(e) – communications exclusively between non-legal persons in circumstances where the involvement of a lawyer is not apparent

There are a number of circumstances in which communications between non-lawyers may be subject to LPP. For example, specialist advice may be sought for the preparation of legal advice. We understand that this often occurs in the context of transfer pricing and other matters where valuers or industry experts may be engaged to provide advice that forms part of the broader legal advice sought by the taxpayer. Further, it is not uncommon for legal advice to be circulated confidentially to non-legal specialists for the purposes of review, where those advisers are better placed to verify key facts and findings which impact that legal advice.

We recommend that this paragraph is clarified to exclude communications between non-legal persons where such communications are for the purposes of providing instructions to a lawyer, or are an ordinary consequence of fact gathering and review when instructing a lawyer.

Paragraph 12(f) – unclear (and potentially overlapping or inconsistent) capacities and relationships designated to different members of the firm

The use of the word ‘capacities’ in the current description creates uncertainty in situations where accountants and tax advisers instruct lawyers and assist clients in their tax affairs. Our understanding from our members is that it is not uncommon for accountants to act in the capacity of an agent, as an intermediary between their clients and lawyers, in the course of a tax matter or dispute.

As currently drafted, the description and example in the Draft Protocol create uncertainty about the exact nature of the ATO’s concerns. This potentially captures a wide scope of communications between accountants, their clients, and counsel which could be protected by LPP in normal circumstances. We recommend that this description is revised to clearly highlight the nature of the potential mischief which is of concern to the ATO.

Addendum 2, paragraph 2 – waiver of privilege

The question of whether LPP has been waived is a matter that can only be determined by the courts. This is the case, regardless of the intention or interpretation of others, including the ATO, or indeed any other third party. We consider that this section of the Draft Protocol should explicitly acknowledge that high quality LPP claims should not necessarily result in a waiver of LPP and that taxpayers are not expected to waive LPP when responding to an information request.

We have received significant concerns from our members that providing the detail requested in the Draft Protocol can, in fact, result in a waiver of LPP, regardless of the ATO not contending that it is waived, as currently indicated in the Draft Protocol. The current drafting does not provide sufficient comfort or assurance to taxpayers that compliance with the Draft Protocol will not result in a waiver of LPP. Reframing the position will help to strike an appropriate balance between ensuring the taxpayer’s fundamental rights to LPP are preserved and facilitating the administration of the tax system.

In addition, a potential option to manage these risks and provide taxpayers with certainty and assurance is the appointment of a qualified and independent third party to review and determine a taxpayer’s LPP claim. The independent third party could be externally appointed, such as from within the Australian Government Solicitor.

An independent process subject to strict confidentiality may help to protect the taxpayer’s right to LPP against third party claims, while ensuring that the decision maker in respect of the LPP claim is impartial and objective. This process is even more important in the context of smaller businesses and less sophisticated taxpayers who may not appreciate the impact of their disclosures.

Other considerations

Date of effect

Although the Draft Protocol is intended to be a broad guidance product, recent case law may impact the fundamental framework for LPP. We consider that the best practice approach recommended in the Draft Protocol should take effect after the impact of the upcoming decision in *Commissioner of Taxation v PricewaterhouseCoopers & JBS* (VID 364/2020) is known.

Further consultation and guidance

We consider that further guidance regarding the use of technology to assist with substantiating LPP claims will better assist taxpayers to apply the Draft Protocol. There are several considerations regarding the use of technology, including automation, managing privacy concerns, and understanding the practical limitations of currently available software and technology. We strongly recommend that the ATO consults with industry to ensure that further guidance is targeted, and adopts an approach that seeks to minimise costs for both taxpayers and the ATO.

We also consider that there is a need to develop additional, related guidance products regarding LPP. This includes the use of Alternative Dispute Resolution and related processes for LPP claims, especially in the context of challenging issues with limited court guidance.

Additionally, following finalisation of the Draft Protocol, we consider that a review of the guidance provided by the ATO in relation to the 'Accountants' Concession' should be undertaken to ensure a degree of consistency with the guidance on LPP. The Tax Institute considers that the Accountants' Concession is an appropriate administrative approach which recognises that there is a class of documents which should, in all but exceptional circumstances, remain within the confidence of taxpayers and their professional accounting advisers.

The Tax Institute would be pleased to participate in further consultation on these matters.

APPENDIX B

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.