

Faith Harako
Assistant Commissioner
Australian Taxation Office
747 Collins St
DOCKLANDS VIC 3008



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

12 November 2021

Dear Ms Harako,

AUSTRALIAN TAXATION OFFICE – DRAFT LEGAL PROFESSIONAL PRIVILEGE PROTOCOL

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and represents approximately 19,000 people working and studying in the legal sector in Victoria, interstate and overseas.

The LIV welcomes the opportunity to engage in consultation with the Australian Taxation Office (**ATO**) in relation to the draft *Legal Professional Privilege Protocol* issued on 23 September 2021 (**draft Protocol**). The LIV has members engaging in practice via all forms of entity and in all sizes of operations that rely on legal professional privilege (**LPP**) to effectively discharge their ethical duties and obligations under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules (**Professional Conduct Rules**).

The LIV has read a draft of the submission by the Law Council of Australia (**LCA**) on the draft Protocol and agrees with and supports the comments raised in that submission and wishes to make the following additional points.

Potential Conflict between Practitioners' Professional Duties and Compliance with the Draft Protocol

The Professional Conduct Rules (**Rules**) were drafted by all State and Territory Law Societies and other constituent bodies of the LCA to form the basis of professional conduct by solicitors in Australia. They are a statement of the professional and ethical obligations as derived from legislation, common law, and equity. Some of these Rules, as they relate to a solicitor's use of LPP, are as follows:

- A duty to act in the *best interests of a client* in any matter in which the solicitor represents the client, and to deliver legal services competently and diligently.
- A duty to *avoid any compromise to their integrity and professional independence*.
- A duty to *comply with the Rules and the law*.
- A duty to refrain from *engaging in conduct which is likely to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice*, or bring the profession into disrepute.
- A duty to provide clear and timely advice *to assist a client to understand relevant legal issues and to make informed choices* about action to be taken during the course of a matter.
- A duty to *follow a client's lawful and proper instructions not to disclose any information which is confidential to a client except, relevantly, where authorised by the client*.

When considering the draft Protocol in light of the above professional duties of a solicitor, the LIV is concerned that the draft Protocol does not accord with the professional obligations to which solicitors are subject or the law of LPP generally.

An example of this can be seen in step 3 of the draft Protocol, which requires a solicitor to set out the approach used by the solicitor in making the LPP claim '*... including how you used this Protocol*'. Amongst the information requirements detailed on page 15 of the draft Protocol, details are required of the name, position and organisation of the person preparing the particulars of the LPP claim.

There are no such requirements in the law of LPP, and no such information has to be provided for a claim of LPP to be properly made to the ATO. It is not clear why the ATO demands such information before it will assess whether to challenge a claim for LPP. Such information requests do not form a valid basis for the ATO to challenge a claim for LPP or to threaten sanctions against the claimants and their legal advisers.

The LIV also notes that among the '*Standard Particulars*' required to be provided by legal practitioners on pages 11 to 12 of the draft Protocol are such extensive information demands that providing those details would compromise the LPP claim being made. These required particulars include details such as:

- the subject of the communication;
- the identity and role of each person between whom the document or communication is made;
- the legal issue being advised upon or for which the advice is being sought;
- if the communication was forwarded, the purpose of forwarding it; and
- how you assured yourself that privilege was not lost.

These requirements extend beyond what is required by the law of LPP for a claim of privilege to be made. As a public organisation, the ATO has an obligation and duty not to engage in such an, as described by the LCA in its media release dated 23 September 2021, 'overreach' in the face of the established principles of LPP at law.¹

In addition, whilst paragraph 1 of the draft Protocol provides that compliance is *voluntary*, paragraph 8 provides for the ATO to continue to ask for information which may jeopardise a solicitor's claim to LPP, so the question then arises as to how voluntary the draft Protocol actually is.

As a result, for legal practitioners:

- who are issued with a demand to provide documents/information without having an opportunity to seek instructions from their client; or
- having instructions to advise clients about their rights to claim LPP, the choice in many cases would come down to either:
 - complying with the draft Protocol and, in doing so, breaching their ethical duties and professional obligations; or
 - complying with their ethical duties and professional obligations to maintain client privilege and confidential information in accordance with the law of LPP.

In those circumstances, practitioners have no choice but to properly claim privilege to which their client is entitled according to the law of LPP, even if to do so would not comply with the ATO's requirements under the draft Protocol and thus risk attracting the sanctions set out in the draft Protocol against their client and their law practice.

Potential Conflict with ATO's Position on LPP and Section 39 of the LPUL

In addition to the concerns outlined above that the draft Protocol requires practitioners to potentially breach their professional and ethical obligations, the LIV is concerned that a potential breach by the Commissioner of s 39 of the LPUL could arise as a result of legal practitioners being required to contravene their 'professional obligations' to their clients by complying with the draft Protocol.

Whilst at the time of this submission, s 39 of the LPUL applies only to Victoria and New South Wales, equivalent provisions to a modified extent also exist in state legislation in other jurisdictions which are not currently Participating Jurisdictions under the LPUL.

The LIV notes that the relevance of s 39, to the draft Protocol and the Commissioner's approach to LPP generally, turns on the following key points:

¹ Law Council of Australia, *Some concerns remain for the Law Council over ATO draft privilege protocol* (Web page) <https://www.lawcouncil.asn.au/media/media-releases/some-concerns-remain-for-the-law-council-over-ato-draft-privilege-protocol>

1. What, exactly, is the scope of s 39 in terms of a practitioner's use of LPP?
2. Does s 39, as a matter of statutory interpretation, bind the Crown?
3. Could s 39 validly bind the Crown in right of the Commonwealth?

These key points are discussed in further detail below.

1. Scope of s 39 in terms of LPP

Section 39 of the LPUL states as follows:

Section 39 Undue influence

A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations.

Penalty: 100 penalty units.

Section 39 therefore proscribes conduct which 'causes', 'induces', 'attempts to cause' or 'attempts to induce' a legal practitioner to contravene the LPUL or other 'professional obligations'.

The question, therefore, is whether a practitioner's use of LPP is encompassed by the term 'professional obligations'. In this sense, s 6 of the LPUL defines 'professional obligations' inclusively, as follows:

Section 6 professional obligations includes —

- (a) duties to the Supreme Courts; and
- (b) obligations in connection with conflicts of interest; and
- (c) duties to clients, including disclosure; and
- (d) ethical standards required to be observed —
that do not otherwise arise under this Law or the Uniform Rules

When examining relevant case law authorities on a practitioner's use of LPP and their professional obligations, these indicate that a failure by a practitioner to claim LPP on a client's behalf may involve a breach of professional duty and obligation.

It is important to note that in light of these case authorities, classic legal encyclopaedia *The Laws of Australia* has concluded that: 'In the absence of instructions by the client to waive, it is the legal adviser's duty to claim the privilege on behalf of the client.'²

2. Does s 39 bind the Crown?

Once it is established that s 39 applies to a practitioner's use of LPP, the next question is whether s 39 binds the Crown in terms of statutory interpretation. The LIV notes that as the LPUL does not purport to bind the Crown, the issue is whether (subject to intergovernmental immunity constraints) the presumption that it does not is, as a matter of interpretation, rebutted either by necessary implication or legislative intent.

It would appear to be an extraordinary anomaly if a servant, agent or officer of the Crown (or other 'person' acting on the Crown's behalf) was not bound by s 39, in particular in respect of a duty as important as protecting LPP (which has been held in the High Court to be a fundamental right of a person, in a system under the rule of law).³

The leading case on the issue of whether legislation binds the Crown as a matter of necessary implication or legislative intent is *Bropho v Western Australia*.⁴ In this case, s 17 of the *Aboriginal Heritage Act 1972* (WA) prohibited destruction of, or damage to, Aboriginal sites without the responsible minister's consent. The section established a criminal offence and the legislation did not purport to bind the Crown (just like s 39 of the LPUL). In *Bropho*, a statutory corporation of the

² Thomson Reuters, *The Laws of Australia* (at 16 June 2016) 16 Evidence '2 Legal Professional Privilege and Client Legal Privilege' [16.7.330].

³ See, eg, *Baker v Campbell* (1983) 153 CLR 52, 127.

⁴ (1990) 171 CLR 1.

Western Australian government undertook works to redevelop a site owned by the State of Western Australia. The High Court (unanimously) held that it (the Crown) was bound by s 17.

3. Could s 39 validly bind the Crown in right of the Commonwealth?

Once it is established that s 39 can bind the Crown, the question arises as to whether, as the LPUL is state legislation, this legislation can validly bind the Crown in right of the Commonwealth.

The LIV notes that this issue was addressed by the High Court in *Pirrie v McFarlane*.⁵ In this case, the question was whether a member of the Royal Australian Air Force who was driving on Victorian roads *in the course of his duty* was subject to the *Motor Car Act 1915* (Vic), which required him to possess a licence to drive in Victoria. The High Court held that he was.

Potential Conflict between ATO Recent Conduct and Practitioners' Reliance on LPP

In addition to the LIV concerns regarding potential conflict between the draft Protocol and the Rules, and the potential for any abrogation of LPP by the ATO to be in breach of s 39 of the LPUL, the LIV has concerns regarding how conduct by ATO officers could affect LIV members (and other general legal practitioners).

These concerns are illustrated in the case studies below. They are illustrative of concerns that practitioners have in dealings with ATO officers when practitioners are endeavouring to rely on LPP in properly representing their clients and honouring their professional and ethical obligations. In putting forward these case studies, the LIV makes no allegations, as the case studies are intended to be for illustrative purposes, but would ask that the ATO take these concerns seriously, as the concerns raised by the case studies have been informed by concerns of which LIV has been made aware.

Case Study 1 – specific pressure on a firm

The ATO tells a firm (**Firm**) that they are not satisfied that the Firm is making only properly available claims of LPP in response to statutory notices to produce that have been issued to clients, where the Firm has acted for those clients in advising in respect of LPP claims.

The ATO expresses their views on the interpretation and availability of LPP claims in certain, particular categories. In some cases, these views are not supported by case law (i.e. the law is uncertain), and in other cases, these views are materially at odds with case law. The ATO tells the firm that their LPP claims will be given more scrutiny than others' claims. The ATO tells the Firm that they will be taking test cases against the Firm, with likely public scrutiny the result, if the Firm allows its clients to make any LPP claims *with which the ATO disagrees*.

The ATO tells the Firm that they are at risk of criminal prosecution or civil penalty proceedings if they make LPP claims *with which the ATO disagrees*.

The ATO then issues a statutory notice to the Firm for all documents relating to six different clients (within specified categories). The Firm informs each of those clients. Client A informs the Firm that it intends to make a claim of LPP in relation to certain documents. The claim is ethically available to Client A. It is known that the ATO's view of the LPP claim is that such documents will not be subject to LPP. The law is unsettled and needs a test case to receive judicial guidance.

A senior partner at the firm tells the senior lawyer who is handling the ATO's notice that the Firm is under 'too much pressure from [the ATO]' and that the Firm will not respect or make the claim of LPP, and that they will hand the documents over to the ATO. The Firm gives the documents to the ATO in a sealed envelope, over Client A's claim of LPP and insistence that the documents should be withheld for LPP.

Case Study 2 – specific conduct directed to a legal practitioner

In a consultation roundtable, an admitted solicitor expresses the view that the ATO should take more care to ensure that the public understands that the courts, and not the ATO, are the ultimate arbiters of LPP. The admitted solicitor is highly experienced in LPP and often advises clients in respect of LPP claims in relation to statutory notices received from the ATO.

⁵ (1925) 36 CLR 170.

A senior officer at the ATO hears of the solicitor's comments and telephones the solicitor. The senior officer berates and harangues the solicitor on the telephone for about one hour. The solicitor is aware that the ATO's conduct in relation to how it handles claims of LPP made by the solicitor is highly relevant to the solicitor's ability to do his job well and efficiently for his clients.

The solicitor is shaken and distressed after the call from such a senior officer of the ATO.

A more senior officer at the ATO criticises the solicitor to the solicitor's supervisor shortly thereafter, for making the comment at the consultation roundtable.

The solicitor is concerned for his job, and feels he is being bullied by senior officers at the ATO.

Both officers of the ATO are also admitted solicitors.

Case study 3 – excessive pressure

The ATO has issued a statutory notice to produce documents to Client A. Client A is being advised by a firm (**Firm**). The Firm makes LPP claims on Client A's instructions and provides supporting information on the claims (**Particulars**) to the ATO.

The ATO makes a blanket complaint to the Firm about the inadequacy of the Particulars. Despite multiple requests from the Firm to offer an explanation for the complaints, the ATO declines. Despite multiple requests from the Firm to have a legally trained officer of the ATO involved, the ATO declines.

The ATO's officers tell the Firm that if their client persists in the LPP claims, the ATO will assume the claims are invalid. The ATO's officers tell the Firm that they are concerned Client A has 'something to hide' and they should waive LPP unless they have 'something to hide'.

The lawyer at the Firm feels significant pressure to advise their client to either abandon the LPP claims or provide significant further Particulars, and thereby risk waiving LPP.

Case Study 4 – excessive pressure v2

The ATO has issued a statutory notice to produce documents to Client A. Client A is being advised by a firm (**Firm**). The Firm makes LPP claims on Client A's instructions and provides supporting information on the claims (**Particulars**) to the ATO.

The ATO makes a blanket complaint to the Firm about the number of documents claimed as LPP.

The ATO's officers tell the Firm that they are concerned Client A has 'something to hide' and they should waive LPP unless they have 'something to hide'.

The ATO's officers say that they observe that the Firm advised Client A in the transaction the subject of the statutory notice, and that the Firm has a conflict of interest, implying that the ATO is considering pursuing action against the Firm's interests.

The lawyer at the Firm feels significant pressure to advise their client to either abandon the LPP claims or provide significant further Particulars, and thereby risk waiving LPP.

Case study 5 – inducements

The ATO has issued a statutory notice to produce documents to Client A. Client A is being advised by a firm (**Firm**). The Firm makes LPP claims on Client A's instructions and provides supporting information on the claims (**Particulars**) to the ATO.

Officers at the ATO tell the lawyer at the Firm that "things will go better" for their client if the lawyer encourages the client to drop LPP, and they will get a better outcome if the lawyer convinces the client to drop LPP claims.

The ATO's officers say that they observe that the Firm advised Client A in the transaction the subject of the statutory notice, and that the Firm has a conflict of interest, implying that the ATO is considering pursuing action against the Firm's interests.

The officer at the ATO says words to the effect of, 'Persuade your client ...', 'Just get your client to drop the claim. It will go better for them and for you.'

Case study 6 – improper use

The ATO sends an individual a s '353-10 notice', as part of a taxation audit the ATO is conducting of the individual and transactions by related entities of the individual.

The 353-10 notice asks the individual for copies of any advice that the individual received relating to the transactions. The individual had received legal advice and claimed LPP over that advice and completed ATO form LPP1.

When the ATO issued its penalties position paper towards the end of the audit, the ATO said that it intended imposing penalties of 75% for intentionally disregarding a taxation law.

Included in the reasons for why the ATO thought the individual intentionally disregarded a taxation law, the ATO said the individual had 'sought advice and was not ignorant or uninformed of the processes involved'. The authority in the footnote for the quoted proposition was 'LPP Form'.

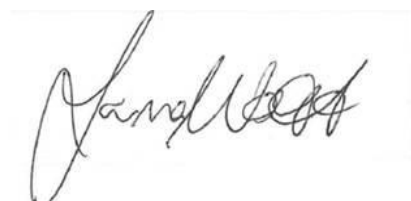
Conclusion

The LIV is concerned that the ATO's draft Protocol is inconsistent with the law of LPP and does not adequately address practitioners' professional and ethical obligations in the discharge of their professional duties. Whilst Addendum 2 of the draft Protocol asserts that: (1) the ATO will not contend that information provided about LPP claims ('particulars') in accordance with the Protocol amounts, by itself, to a waiver of LPP; and that (2) the ATO does not seek to create waiver of LPP by following the Protocol, as you would be well aware, *waiver is imputed by operation of law and courts thus will judge waiver objectively, that is, by ignoring the subjective intentions of parties*. The draft Protocol therefore gives rise, in conjunction with the various statements made, to a real risk that the ATO could be held, in breach of s 39, to be inducing a contravention by practitioners of their professional duties and professional obligations.

Further, the LIV is concerned in relation to how conduct by ATO officers could affect LIV members and practitioners generally as highlighted in the case studies set out in this submission.

The LIV therefore welcomes the opportunity to be further involved in developing the ATO's approach to LPP, including in the draft Protocol consultation, and welcomes further discussion. If you would like to discuss any of the matters raised in this submission, please do not hesitate to contact Angela Gidley-Curtin, LIV Senior Commercial Lawyer on agidleycurtin@liv.asn.au, to arrange a time to meet together with representatives of the Taxation and Revenue Committee of the LIV.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tania Wolff', is written over a light blue grid background.

Tania Wolff
President
Law Institute of Victoria