



Law Council
OF AUSTRALIA

ATO Legal Professional Privilege Protocol

Australian Taxation Office

19 November 2021

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Introduction	6
Preliminary comments on Legal Professional Privilege and the present setting	6
LPP generally	6
LPP in the tax setting.....	10
Legal practitioners' ethical duties and LPP.....	12
The consultation draft Protocol – general comments	13
The consultation draft Protocol and previous feedback.....	13
A solution designed to meet needs	13
Terminology within the consultation draft Protocol.....	15
Practicalities of compliance.....	15
Waiver of LPP.....	16
Involvement of non-lawyers	17
References to 'capacity'.....	17
Subject line or topic, and suggested best practice particularisation of the purpose of the communication.....	18
Name of client.....	19
Civil / administrative penalties and the fraud, crime or improper purposes circumstance	19
Timing of provision of particulars.....	21
Reference to computer assisted technology	22

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contribution of its Business Law Section in the preparation of this submission, particularly its Taxation Committee and associated Working Group.

The Law Council also appreciates input provided by its Professional Ethics Committee, in addition to views provided by the Law Society of New South Wales, the New South Wales Bar Association and Queensland Law Society.

Executive Summary

1. The Law Council of Australia appreciates the context underpinning the development of the Australian Taxation Office's (**ATO**) draft legal professional privilege (**LPP**) protocol (**consultation draft Protocol**), and welcomes attempts to assist advisers and taxpayers to work through LPP matters. Indeed, the Law Council and its Business Law Section (**BLS**) acknowledges the ATO's constructive engagement to date with its Working Group consisting of members of the BLS Taxation Committee, and welcomes those areas in the consultation draft Protocol that have been amended to reflect previous feedback provided by this Working Group.
2. This submission raises a number of key concerns with the consultation draft Protocol, both in terms of its consistency with established principles of LPP, and professional and ethical obligations held by the legal profession. In terms of specific feedback, the Law Council offers a number of observations in relation to the practical effect of the consultation draft Protocol, including in relation to:
 - instances where the ATO appears to be requesting information concerning the subject matter in respect of which advice is given (including matters such as subject lines, topics and client names);
 - the appropriateness of terminology used throughout the consultation draft Protocol;
 - the practicality of performing all of the required steps, and assembling all the required particulars, for each individual document in large-scale information requests;
 - the possibility that the Commissioner will claim that LPP has been waived due to the level of detail expected by way of particulars;
 - the ATO's apparent concern with arrangements involving junior non-lawyer staff such as law graduates or paralegals, acting under the direction or supervision of lawyers; and
 - the consultation draft Protocol's approach to communications or documents in the furtherance of an act that renders someone liable to administrative penalties.
3. These matters, and others, are addressed in further detail within this submission. At all times, this response intends to promote the view that it is in both the ATO's and the community's interests to achieve the dual goals of:
 - providing the Commissioner with the documents to which he is entitled; and
 - preserving confidentiality that LPP claimants are entitled to preserve.
4. The Law Council looks forward to continuing to work collaboratively with the ATO and other stakeholders to pursue an acceptable protocol that strikes the correct balance between these two objectives.

Introduction

5. The Law Council's engagement with the consultation draft Protocol has its origins in the work of a small group comprising a Working Group of the Taxation Committee of the Law Council's BLS and representatives of the ATO that began in 2019.
6. Throughout this process, the Law Council through its BLS Working Group has maintained the fundamental policy position that:
 - (a) the Commissioner of Taxation ought to be provided with the information and material and documents that he is entitled to under the law; and
 - (b) taxpayers ought to be entitled to preserve confidentiality in respect of communications between them and their lawyers in accordance with the long-established LPP doctrine.
7. The Working Group has also maintained an approach that a critical feature of a protocol on this topic is that whatever is put in place, what is called for is a set of procedures that achieve the dual goals in paragraph [6] above in a practical and efficient way.
8. This is consistent with the views of the Australian Law Reform Commission in relation to LPP over tax advice that 'in order to promote compliance, clients ought to be protected fully in their communications in relation to tax law in the same way they are in other areas of the law'.¹
9. The Law Council and its Working Group appreciate the ongoing dialogue with the ATO on the development of the consultation draft Protocol, and in particular that the ATO understands and seeks to achieve these goals, and without reservation acknowledges those of the suggestions made that have been adopted and integrated into the draft.
10. The following submissions provide (and in some cases restate) feedback on the consultation draft Protocol, including in relation to the scope of the material covered, the practical compliance challenges created by the document, and the implications for the legal profession with regard to existing ethical duties and professional obligations.

Preliminary comments on Legal Professional Privilege and the present setting

LPP generally²

11. The LPP doctrine³ is an important aspect of Australia's system of administration of justice. The purpose of the privilege is to facilitate the application of the rule of law in

¹ Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations (ALRC Report 107)* (February 2008), 31.

² In earlier dialogue the Law Council's Working Group has been more fulsome on this topic. Some of those matters can be repeated shortly as they give a contextual element that might otherwise be missed.

³ In 1995 the *Evidence Act 1995* (Cth) came into effect, creating a client legal privilege concept that is broadly similar to LPP. That Act applies to litigation in all Federal Courts, which include the High Court, the Federal Court and the Family Court. It does not apply to the use of the Commissioner's coercive information gathering powers. See *Barnes and Anor v Federal Commissioner of Taxation* (2007) 242 ALR 601 at [4] (Tamberlin, Stone and Siopis JJ) referring to *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*) at 59-63 (Gleeson CJ, Gaudron and Gummow JJ):

the public interest.⁴ As such, LPP plays an important role for the contemporary Australian community.

12. The rationale for LPP was set out in *Grant v Downs*⁵ in the following terms:

*it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.*⁶

13. The doctrine of LPP protects certain communications in the context of the confidential relationship of lawyers and clients but not communications in other confidential relationships such as accountants and clients.⁷ It is a substantive right of the client and so can only be waived by the client and not their lawyer. This adds to the complexity of procedures under a protocol, because when it is asserted by a lawyer, it is the lawyer doing so either in discharge of professional obligations to the client,⁸ or, on occasions, on the client's behalf.⁹

14. The privilege is a protection afforded to communications with lawyers, and some communications between non-lawyers that are connected to communications with lawyers. This recognises that administration of the law is a combined function of the courts and the legal profession, with that administration more frequently and directly being administered by the profession.¹⁰ Advice and legal services from lawyers (in private practice, government practice, and/or working as such in-house in employment settings) forms part of the legal process,¹¹ and therefore an integral part of the system of administration of justice. In many respects, practising lawyers' work is invisible. Courts at the apex of the system of administration of justice do the more visible work. In Australia there are just over 1,100 judicial officers¹² but the work of in excess of

Claims for privilege are to be determined by common law principles and not pursuant to the provisions of the Evidence Act 1995 (Cth) because this case is concerned with an application in the nature of discovery before hearing ...

Various state parliaments have enacted evidence acts that are similar to the *Evidence Act 1995 (Cth)*. They too have no application to the Commissioner's access and notice powers. This protocol therefore deals with the LPP doctrine as understood, and the subject of decisions of the Courts, by the common law.

⁴ See *Baker v Campbell* (1983) 153 CLR 130 at 59 (Gibbs CJ), at 74 (Mason J), at 95 (Wilson J), at 105-106 (Brennan J), at 114 (Deane J) and at 129 (Dawson J).

⁵ *Grant v Downs* (1976) 135 CLR 674.

⁶ *Ibid*, at 685 (Stephen, Mason and Murphy JJ). See also *Glencore International AG v FCT* (2019) 265 CLR 646; [2019] HCA 26 at [27] to [30] (**Glencore**) and *Kennedy v Wallace & Ors* (2004) 142 FCR 185 at [201] (Allsop J).

⁷ *Baker v Campbell* (1983) 153 CLR 52 at 128 (Dawson J).

⁸ Even beyond a professional relationship, a bailee of privileged documents is obliged to make an LPP claim so as to preserve the confidentiality of the content of those documents: *Federal Commissioner of Taxation & Ors v Citibank Limited* (1989) 20 FCR 403 (**Citibank**) at [18] (Bowen CJ & Fisher J).

⁹ *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 (**Propend**).

¹⁰ See *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121 (**Carter**) at 127 (Brennan J).

¹¹ See *Baker v Campbell* (1983) 153 CLR 52 at 130 (Dawson J).

¹² Australian Institute of Judicial Administration *Judicial Gender Statistics: Number and Percentage of Women Judges and Magistrates* (30 June 2020).

83,000¹³ lawyers in Australia contributes significantly to the system of administration of justice. Each of those practising lawyers has responsibilities and duties, first to the courts and second to their clients, to uphold the law in their service to their clients. Those duties and responsibilities have led to a balance of competing interests in favour of the public interest of complete protection of disclosure of communications between client and lawyer so as to facilitate the administration of justice that underpins the legal professional/client legal privilege doctrine. That balancing exercise is the outcome which reflects the common law's recognition that security of communications protected by the privilege must prevail over establishment of truth or the interests of a fair trial in a particular instance.¹⁴ The LPP doctrine promotes the administration of justice through the fostering of trust and candour in the relationship between lawyer and client¹⁵ ensuring a client can obtain full and frank legal advice from their lawyer. It follows that, subject to rare and express exceptions, it also prevails over a government agency's interest in information.

15. In *AWB v Cole (No. 5)*¹⁶ Young J observed that:

*Under the legal advice limb of legal professional privilege, a document will attract privilege if it was brought into existence for the dominant purpose of giving or obtaining legal advice.*¹⁷ (Citations omitted)

and that there was nothing controversial about Dawson J's formulation of the scope of legal advice privilege in *Waterford*:¹⁸

*The legal professional privilege relied upon in this case is that which attaches to communications between a legal adviser and his client for the purpose of giving or receiving legal advice and to documents recording those communications or containing information for the purpose of enabling the advice to be given. In order to attract that privilege, the communications must be confidential and the legal adviser must be acting in his professional capacity.*¹⁹ (Citations omitted)

16. His Honour also summarised many of the LPP doctrine principles in the following terms:²⁰

- (1) *The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or*

¹³ Urbis (commissioned by The Law Society of New South Wales, on behalf of the Conference of Law Societies), *2020 National Profile of Solicitors* (1 July 2021) 24 <<https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics>>.

¹⁴ See *Carter* (1995) 183 CLR 121 at 133-134 (Dean J).

¹⁵ *Glencore International AG v FCT* (2019) 265 CLR 646.

¹⁶ *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* (2006) 155 FCR 30.

¹⁷ *Ibid* at [41] and [42].

¹⁸ *Waterford v Commonwealth* (1987) 163 CLR 54.

¹⁹ *Ibid*.

²⁰ *AWB v Cole (No 5)* (2006) 155 FCR 30 at [44]. These principles were endorsed by Davies J in *Song v Commissioner of Taxation* [2018] FCA 840 at [5], *Rodriguez & Sons v Queensland Bulk Water Supply authority t/as Seqwater (No 14)* [2018] NSWSC 939 and in *McKenzie v Cash Converters International Ltd* [2017] FCA 1564.

procured its creation. It might also be discharged by reference to the nature of the documents, supported by argument or submissions.

- (2) *The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication.*
- (3) *The existence of legal professional privilege is not established merely by the use of verbal formula. Nor is a claim of privilege established by mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving 'legal advice'. If assertions of that kind are received in evidence in support of the privilege claim, their conclusionary nature can leave unclear what advice was really being sought. There will be cases in which a claim of privilege will not be sustainable in the absence of evidence identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed.*
- (4) *Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications. In Kennedy v Wallace, Black CJ and Emmett J inclined to the view that in the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given.*
- (5) *A 'dominant purpose' is one that predominates over other purposes; it is the prevailing or paramount purpose.*
- (6) *An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.*
- (7) *The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character.*
- (8) *Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client.*
- (9) *Subject to meeting the dominant purpose test, legal professional privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser to enable him or her to advise: Stirling at 246. The privilege extends to drafts, notes and other material brought into*

existence by the client for the purpose of communication to the lawyer, whether or not they are themselves actually communicated to the lawyer.

- (10) *Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client. Some cases have added a requirement that the lawyer who provided the advice must be admitted to practice. However, in Commonwealth v Vance the Full Court (Gray, Connolly and Tamberlin JJ) did not regard the possession of a current practising certificate as an essential precondition to the availability of legal professional privilege. The same view was taken by Lee J in Candacal, by Gillard J in Australian Hospital Care (Pindara) Pty Ltd v Duggan, and by Downes J in Re McKinnon and Secretary, Department of Foreign Affairs and Trade.*
- (11) *Legal professional privilege protects communications rather than documents, as the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test. In Propend, Brennan CJ added a qualification to this principle: if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the persons seeking to execute the warrant, and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the otherwise privileged copy loses its protection.*
- (12) *The Court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power: Esso; see also Grant v Downs at 689. If the power is exercised, the court will need to recognise that it does not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege. (Citations omitted)*

LPP in the tax setting

17. Collecting revenue as part of the system of community wealth transfer and funding of Government operations and policies is also an important aspect of contemporary Australian community. Proper administration of Australia's taxation laws that secures collection of revenue for those needs dictates that the ATO must have access to information that is relevant to determining proper tax liabilities under the law and, where necessary, an ability to compel provision of that information.
18. The role that LPP plays in the community is an important limitation on the ATO's ability to compel provision of information. In that setting it serves precisely the same purpose and function as it does in the broader sphere of the interface between the legal system and business, commercial and daily life affairs of the community noted above. That limitation has the potential to create a tension between those wanting to preserve legitimately privileged information and an administration wanting access to information. That tension arises in a setting in which:

- (a) lawful exercise of the Commissioner's coercive powers to compel production of documents and information requires:
 - (i) a practical opportunity to claim legal professional privilege;²¹ and
 - (ii) a reasonable period of time for compliance;²²
- (b) the authorities, to the effect that it is necessary to undertake a document-by-document analysis to sustain privilege claims, were informed by and dealt with times and practices before the introduction of photocopying technology and more recently electronic and digital communication technologies which have changed the way people communicate;
- (c) contemporary society engages with advisors, at times large teams of advisors, through significant use of email and similar electronic communication which increases the volume of documents in which privileged communications can appear, and, more so than photocopying technology, can lead to errors in managing and making privilege claims;²³
- (d) modern electronic means by which business executives and their advisory teams communicate can repeat the content of privileged communications in further communications, for example as the tree of an email retained in subsequent emails branching off in various directions such that privileged content can legitimately and appropriately be disseminated to a significant number of interested people as part of many subsequent communications each of which needs to be examined;
- (e) the law generally, and the LPP doctrine and its management in particular, must evolve and adapt to a world in which communication is effected by new technologies;²⁴
- (f) there is variability in the tests required to demonstrate an LPP claim which turn very much on the circumstances of a particular case;
- (g) consistent with sections 37N and 37M of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**):
 - (i) the process of determining privilege issues should not be made unduly complicated, extended and rendered unacceptably expensive;²⁵ and
 - (ii) in making determinations of privilege (and processes leading up to them should be treated on the same footing), avoiding expense of access to the law is a relevant consideration.²⁶

19. In this regard, the observed outcomes of various of the Commissioner's audit enquiries that ask extensive questions concerning transactions and affairs and their related

²¹ *Citibank* at [17], [22], 26] & [36] (Bowen CJ & Fisher J) and [35] & [36] (French J); *JMA Accounting Pty Ltd v Commissioner of Taxation* [2004] FCAFC 274 at [12] to [14] (Spender, Madgwick & Finkelstein JJ); *Construction Forestry, Mining and Energy Union v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 833 at [127]-[128] (Reeves J).

²² *Hart v Deputy Federal Commissioner of Taxation* (2005) 148 FCR 198 at [23] (Greenwood J).

²³ See *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 French CJ, Kiefel, Bell, Gageler and Keane JJ at 320 [48] and the reference to *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at 269, [72].

²⁴ *Propend* at 585 (Kirby J).

²⁵ *Kirby v Centro Properties Limited (No 2)* [2012] FCA 70 at [30] (Bromberg J).

²⁶ *Propend* (1997) 188 CLR 501 at 555 (McHugh J) and at 571 (Gummow J).

planning, at times over a considerable period of time, and in which a significant number of corporate executives and advisory teams participate, bears reflection and thought. The nature of these enquiries at times calls for production of many thousands of documents. Computer search technology using keywords has revealed multiple cases of tens of thousands of documents, if not hundreds of thousands of documents, meeting the terms of an information request from the Commissioner. Within that population there can be documents numbering in the low tens of thousands which have indicators of privileged content. Those indicators might be names of law firms, names of lawyers, and names of projects which were used for the purposes of seeking and delivering legal advice. Further, expansive requests which involve the detail of many thousands of documents may stretch the resources of the larger law firms and be well beyond the practical capability of many smaller firms that make up the vast majority of legal practitioners in Australia. In this sense there is little public utility in a Protocol that has thresholds that cannot practically be met.

20. Quite clearly not all of the features of the current setting where the tension arises as noted in paragraph [18] above are always harmonious.
21. Consistent with paragraphs [6] and [7] above, the Law Council's view is that it is in both the Commissioner's and the community's interests, if at all possible, to achieve the dual goals of:
 - (a) providing the Commissioner the documents to which he is entitled; and
 - (b) preserving confidentiality that LPP claimants are entitled to preserve, in a manner that is not unduly complicated, extended and rendered unacceptably expensive without resorting to court processes to determine whether the LPP doctrine applies to any particular document or part thereof wherever possible.²⁷
22. It is noted, however, that where disputes are unable to be resolved there remains a need for the Federal Court and the Supreme Court of each state and territory to have appropriate arrangements in place to cater for hearing applications on short notice concerning disputed privilege claims in federal investigations.²⁸

Legal practitioners' ethical duties and LPP

23. When responding to ATO requests for information, whether made directly to lawyers or to their clients, Australian legal practitioners need to have regard to their ethical duties and professional obligations, including the obligation not to disclose any information which is confidential to a client except, relevantly, where authorised by the client or where disclosure is compelled by law.²⁹
24. Failure to comply with ethical duties and professional obligations is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.³⁰ In addition, a breach of such duties and obligations may amount to professional misconduct at common law and potentially serious repercussions. A legal practitioner who breaches his or her ethical duties and professional obligations may become liable

²⁷ Contemporary civil procedure rules oblige parties at least to attempt to do so: see Federal Court Act, Part IV and rules related thereto.

²⁸ See, Australian Law Reform Commission *Privilege in Perspective: Client Legal Privilege in Federal Investigations (ALRC Report 107)* (February 2008), Recommendation 8-10.

²⁹ See, for example, the Australian Solicitors' Conduct Rules (**ASCR**) at Rules 9.2.1 to 9.2.2, as set out in the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#), applying in New South Wales and Victoria, with similar rules applying in all other states and territories.

³⁰ Under the statutory definitions contained in the legal profession laws of each State and Territory.

to both disciplinary action, and damages at common law for breach of contract and professional negligence.

25. Revealing any privileged information in a setting where privilege is not abrogated will be problematic for practising lawyers in this context. More problematic is the content of a government sponsored document that suggests that it may be permissible to do this and assures readers that such disclosures will not, of themselves, constitute a waiver of privilege as this has the potential to be misleading for a sector of the community in that it will have an air of authority which is misplaced.
26. Observing the terms of the consultation draft Protocol in full could potentially involve a breach of the practitioner's ethical obligations and professional duties to pursue the proper administration of justice and paramount duty to the court; and to act in the best interests of the client.³¹
27. In those circumstances, practitioners have no choice but to properly claim privilege to which their client is entitled according to the current law; even if to do so would not comply with the ATO's requirements under the consultation draft Protocol and risk invoking sanctions against themselves, their law practice and/or their client. This inherent conflict can only be resolved by amending the consultation draft Protocol to be fully consistent with the current law of privilege.

The consultation draft Protocol – general comments

The consultation draft Protocol and previous feedback

28. The Law Council welcomes those areas in the consultation draft Protocol that have been amended to reflect previous feedback provided by its Working Group. In particular, the concept of showing privilege claims processes on a spectrum and indicating the likely response to processes on different ends of a spectrum, as a concept, is a particularly good one. The processes indicated at the ATO preferred end of the spectrum of claims processes are not always processes the Law Council agrees with, but the concept is a helpful one. The submissions outlined below have been further developed in response to ongoing concerns with the consultation draft Protocol, and where appropriate, suggest how the Law Council believes further improvements can be made.

A solution designed to meet needs

29. The Law Council recognises that the ATO takes issue with contrived arrangements, or relationships which purport to attract LPP in an effort to conceal matters from it as expressed at paragraphs 11 and 12 of the consultation draft Protocol. Without commenting substantively on any particular instance, the Law Council notes that if there are abuses of elements of the system of administration of justice by lawyers who are part of that system:
 - (a) then those abuses need to be addressed; and
 - (b) such circumstances are rarely encountered, are not the norm in behaviours of practising lawyers in Australia or clients for whom they act, and should not inform a protocol that is designed to apply across the board.

³¹ See, for example, ASCR Rule 4 as set out in the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#), applying in New South Wales and Victoria, with similar rules applying in all other states and territories.

30. There is one case currently on foot of which the Law Council is aware that the ATO has those concerns. However, the tenor of the consultation draft Protocol seems to be a response to contrived arrangements as if those arrangements are across the board problems when they are not. The tenor of the consultation draft Protocol seems to be an attempt to identify such contrived arrangements on an assumption that they are likely to be widespread when there is no evidence thereof of which the Law Council is aware.
31. For example, subparagraph 16(a)(ii) of the consultation draft Protocol requires an evaluator to 'see if' the overarching relationship gives rise to any of the 'concerns' set out at Addendum 1. These concerns do not directly state legal principles, but rather describe various general categories of conduct said to be an abuse.
32. The task of the evaluator here should be to assess whether the lawyer-client relationship exists as a matter of law and the dominant purpose of the communication, not to address each of the ATO's administrative concerns (which we expect would not be an issue in the vast majority of engagements, at times even where non-lawyers are involved).
33. However, if reference to the 'concerns' must be retained, a better way to do so is to state at paragraph 16:

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 the concerns referred to in Addendum 1;
34. This flavour is also manifest in, among others, the level of detail required to particularise privilege claims.
35. In a setting where the Commissioner is supportive of members of the community obtaining good advice and, consistent with the LPP doctrine, claims no interest in intruding into the details of what that advice is, it is difficult to understand why the consultation draft Protocol appears to request information touching upon the subject matter in respect of which advice is given. That makes the sentiments expressed in support of people obtaining advice and respecting the LPP doctrine difficult to reconcile. In a case without features of dual roles of the legal adviser, there would be no reason for insisting on this type of information (see item (4) at paragraph 12 above).
36. Even if, on occasion, this information can assist the Commissioner in placing the relevant document in a sequence of documents or communications from, or between, those in a setting where it is not immediately clear that legal services are being provided, or that the provider of the service is acting in a legal capacity, asking for information that might assist in these more complex cases across the board in all cases could be considered an overreach of what is needed. In the straightforward setting, and until there is reason to approach a circumstance on the footing that there is cause for potential confusion as to the underlying advisory relationship, there is no call for this type of information to assist the Commissioner in any material way.
37. Given the relative minority of instances of the kind of arrangements of which the ATO has concerns, it seems inappropriate to have the consultation draft Protocol framed in terms that give the impression that it is addressing these sorts of concerns across the board. As detailed below under the heading 'Practicalities of compliance', the consultation draft Protocol asks for a level of information which is beyond what is ordinarily provided in commercial matters and represents or imposes a workload in management not seen in circumstances where the losing party to the tussle over privileged documents would be obliged to meet the cost of the exercise.

Terminology within the consultation draft Protocol

38. The consultation draft Protocol identifies the processes the ATO would like taxpayers to adopt in making LPP claims. However, it uses terminology which suggests that the ATO's desired approach reflects the law or generally accepted procedures.
39. For example, the heading above clause 28 is 'standard particulars', a term that is used elsewhere throughout the consultation draft Protocol. The Law Council considers that there is no such thing as 'standard' particulars and suggesting otherwise is problematic. Terminology like 'ATO preferred particulars' is more appropriate.
40. Likewise, the phrase 'recommended approach' used throughout the consultation draft Protocol should be amended to read 'the ATO's preferred approach' (or similar) to better reflect the intent of the document.
41. To ensure the consultation draft Protocol properly reflects the ATO's view of its purposes and expectations as administrator, the Law Council is also of the view that in Addendum 1, the following amendments should be made:
- (a) replacing the second sentence at paragraph [6] with:
Our information gathering activities are directed to obtaining access to the facts which help us to make 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.
 - (b) replacing the opening words at paragraph [7] (before the table), with 'Our expectations in relation to the respective roles with regard to LPP can be summarised as follows'; and
 - (c) deleting the first sentence in paragraph [11], which would be covered by the above amendments to paragraph [6].

Practicalities of compliance

42. The Law Council has consistently said that where a Commonwealth agency requests a description of privileged material, including the date the material was created and a general description of how privilege arises, this should be provided.³² However, with regard to clauses 13, 16 and 28 of the consultation draft Protocol, the Law Council considers performing all of the required steps, and assembling all the required particulars, for each individual document, including every copy, attachment and every email in every email chain, is impractical in large-scale information requests. It is not unusual for many thousands of documents to be responsive to a notice or Request for Information, and many of these might be privileged, such as where lawyers were involved in a complicated merger or acquisition.
43. Moreover, such an approach would be unnecessary in light of authority relating to claims of privilege in such circumstances, as Thawley J said in *Kenquist Nominees Pty Ltd v Campbell (No 5)*:

Where a lawyer has been retained for the purposes of providing legal advice in relation to a particular transaction, communications between the lawyer and client relating to the transaction will prima facie be privileged, notwithstanding they do not contain advice on matters of law; it is usually

³² For example, see, Law Council of Australia, *Client Legal Privilege and Federal Investigatory Bodies* (4 June 2007), 45.

*enough that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser to the client.*³³

44. This is especially a problem with subparagraphs 16(b) to 16(d) of the consultation draft Protocol. The requirement to evaluate and *particularise* the role and capacity of every person involved in the preparation of each of thousands of documents is unrealistic and will make the consultation draft Protocol unworkable in such cases.
45. At a minimum, the consultation draft Protocol should recognise this problem and indicate that the Commissioner will work with respondents on a case-by-case basis to agree on a more balanced, practical way of giving the ATO a reasonable level of information in such cases.

Waiver of LPP

46. Due to the level of detail the Commissioner expects taxpayers to provide by way of particulars, it is not difficult to envisage scenarios where taxpayers will disclose the contents of an otherwise privileged communication by following the consultation draft Protocol. This is problematic because:
 - (a) the consultation draft Protocol does not categorically exclude the possibility that the Commissioner will claim that LPP has been waived. It merely states in Addendum 2 that providing particulars will not of itself be said to amount to a waiver. The Commissioner therefore leaves it open that he might allege waiver in some cases;
 - (b) the Commissioner may well say that he will not assert waiver but that does not prevent a court from independently finding that privilege has been waived. Therefore, if a privilege dispute ends up being litigated, following the consultation draft Protocol may cause a taxpayer to have waived privilege; and
 - (c) the Commissioner has the power to share information with other government agencies and regulators. While the Commissioner may not assert that there has been a waiver, another regulator in receipt of information provided by the Commissioner might.
47. Further clarity is required as to what is meant by the statement in Addendum 2 of the consultation draft Protocol that the Commissioner will not contend waiver. The Law Council particularly queries whether this means the ATO:
 - (a) will not seek access to the underlying communication; or
 - (b) will not use the information obtained by way of particulars provided by a taxpayer who follows the Protocol.
48. It is assumed that it means (a), given the authorities³⁴ establish that once the Commissioner has information, he has a positive duty to use the information if it is relevant to the making of an assessment (e.g. the topic on which legal advice has been obtained could be relevant to the assessment of penalties). The consultation draft Protocol needs to clearly distinguish waiver in the strict legal sense from the Commissioner's ability (or obligation) to use information. There will be taxpayers and

³³ [2018] FCA 853 at [15].

³⁴ See *Denlay v FCT* (2013) 211 FCR 344 (*Denlay*) and *Donoghue v Commissioner of Taxation* (2015) 237 FCR 316 (*Donoghue*).

advisers who will interpret the 'no waiver' reassurance to be broader such that the consultation draft Protocol could be misleading.

49. Further, whilst the Commissioner will generally have discretion whether to disclose protected information to another agency, the Commissioner may well consider that it is lawful and appropriate, if not necessary, to disclose to another agency despite the representation in Addendum 2.
50. Given that the Commissioner cannot take a position contrary to statutory obligations, an additional sentence in Addendum 2 is required to ensure users of the Protocol are aware of the risks. A suggested addition to Addendum 2 is as follows:

The Commissioner, once in possession of information arising from the making of LPP claims in accordance with our recommended approach, is obliged to make use of that information or disclose to other agencies as permitted or required by law.

Involvement of non-lawyers

51. Some of the concerns listed in Addendum 1 do not seem limited to engagements involving non-lawyers but could also involve 'pure' legal engagements that are nonetheless abusive in the ATO's eyes (for example, the concerns in subparagraphs 12(a) and (d)). It would be better therefore to refer first to the 'concerns' more generally at paragraph 10, rather than imply that it is only 'specific' engagements that can ever be abusive or give rise to the concerns.
52. Further, paragraph 11 of the draft Protocol suggests that the mere involvement of junior non-lawyer staff such as law graduates or paralegals, acting under the direction or supervision of lawyers, will trigger the 'specific' assessment category. These are the kind of arrangements that have been in place in law firms for decades. There has never been and is not any need to have concerns with this feature of the provision of legal services. Large numbers of these types of legal engagements would be unintentionally caught by the current wording. The Law Council therefore proposes that the following words be added to the first and third rows of the table:

, other than non-lawyers acting under the supervision or direction of a lawyer to whom they are subordinate (such as, for example, paralegals, clerks, law graduates and executive assistants).

53. The singling out of involvement of non-lawyers also raises a broader issue of multidisciplinary practices and how non-lawyers in those structures should properly be acknowledged in the consultation draft Protocol.

References to 'capacity'

54. References to 'capacity' at paragraphs 16(d) and 22 can be confusing. In particular, for a given communication:
 - (a) given by a lawyer (whether or not they also hold other qualifications);
 - (b) pursuant to, and understood by the client to be pursuant to, a formal legal engagement; and
 - (c) whose content has the objective quality of legal advice because that is its dominant purpose;

then absent factors to the contrary, it seems reasonable to proceed on the basis that the individual acted in his or her capacity as a lawyer in making the communication.

55. Further, the consultation draft Protocol in some places refers to 'specific capacity' and in others merely to 'capacity'. Assuming that no difference in meaning was intended, it would be clearer to use only one of these expressions.

Subject line or topic, and suggested best practice particularisation of the purpose of the communication

56. The issue of whether the subject line of the communication needs to be disclosed to the Commissioner is currently before the courts. For that reason alone, it should not be sought in the consultation draft Protocol.
57. Nevertheless, because of the ethical issues that arise for lawyers, it is necessary to comment substantively in any event. The topic or subject matter upon which advice is given, or in respect of which advice is sought, is as much a part of the confidential communication as is the other parts of the content of that communication. For that reason, it is immune from compulsory disclosure. A government agency asking for this type of information can unwittingly lead a member of the public who is not regularly involved in the law of LPP to think that it is appropriate that this information be provided. If it were to be provided by a practising lawyer, it may put the practising lawyer in breach of his or her ethical duties to their clients (see also the 'ethical duties' section above).
58. Quite apart from the ethical issues noted above, it is difficult to see how this material could inform whether the communication itself could be privileged. Legal advice, or a request for it, usually has two elements: the first being the subject matter on which the advice is sought, which can be a matter of day-to-day life, or ordinary commercial and business affairs; and a legal element, which could be one of a common-law remedy or right or obligation, an equitable remedy or right or obligation, or the operation of a particular statute. The topic or subject matter of any communication could be an identifier of either the day-to-day life event or the relevant legal aspect upon which advice is sought, or a combination of both, or none of them. Similarly, the title to a document might be somewhat benign, for example, *memorandum*, *request for advice* or *advice*. Given this range of possibilities only some of the possibilities could throw light on whether the content of the document is properly privileged. Just because the title to a document, in many circumstances, would not throw light on the content in a way that would suggest that it is privileged, does not detract from the proposition that the document and the communication that it embodies is privileged.
59. Similar sentiments can be expressed in relation to the particulars that the Commissioner says are best practice in explaining the purpose of a communication at paragraph 28 of the consultation draft Protocol. Suggesting that a claim should outline the nature of a transaction and the particular part of a particular enactment in establishing the purpose of the communication reveals the content of the communication. It is unnecessary for an assessment of whether LPP applies, as the privilege does not depend on which particular provisions of the law are advised upon nor the nature of the transaction. No greater assurance would be provided to the Commissioner if the person making the claim said that it concerned advice about a lawful commercial transaction in the context of a State or Commonwealth statute and some common law rights.
60. Each of these descriptions, namely the non-revealing type above and the description in the table at the foot of paragraph 28 of the consultation draft Protocol would allow the same assessment to be made with the former approach preserving the confidentiality that the holder of the privilege is entitled to have preserved. Insisting on the more specific does not assist, and encroaches on impermissible territory.

Name of client

61. In addition to the above, paragraph 28 of the consultation draft Protocol recommends that the name of the privilege holder be provided to assist in the assessment of a claim of privilege. The Law Council notes that while the names of clients involved in privileged communications are not usually privileged, if the ATO proposes to ask for this information in its desired particularisation of privilege claims, it should include a warning that these particulars ought not be provided where to do so would reveal privileged communications.³⁵

Civil / administrative penalties and the fraud, crime or improper purposes circumstance

62. Subparagraph 25(n) of the consultation draft Protocol asserts that communications or documents in the furtherance of an act that renders someone liable to an administrative penalty are 'usually' not privileged. To our knowledge, there is no authority for that proposition. The subsistence of LPP cannot depend upon whether the Commissioner – conceivably many years after the communication was made – chooses to impose an administrative penalty in relation to events or a transaction canvassed in a communication. The common law does not recognise a 'civil penalty' exception to LPP, let alone an exception relating to administrative penalties.

63. It is understood that the concept might have been drawn from section 125 of the *Evidence Act 1995* (Cth) (**Evidence Act**). However:

- (a) section 125 is about adducing evidence in court proceedings; it does not affect the law of privilege more generally and it is therefore unclear what relevance it could have to the consultation draft Protocol;
- (b) the relevant expression in section 125 of the Evidence Act is 'a fraud or an offence or the commission of an act that renders a person liable to a civil penalty'. Read in context, this reference to 'civil penalty' does not extend to every manner of *administrative* penalty, such as those imposed by the Commissioner under Division 284 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**). The distinction, which is recognised, for example, by the Australian Law Reform Commission,³⁶ is between court-ordered *civil* penalties for major wrongdoing of a pseudo-criminal nature (albeit that no criminal conviction is recorded and only the civil standard of proof may be required to establish liability), and *administrative* penalties imposed in the normal course by the executive branch of Government. Subdivision 284-C, like the rest of Division 284, is in the latter category; and
- (c) in any case, the concept is not capable of practical application in the context of the Protocol. It is for the courts, and not for the client, the lawyer or the Commissioner, to determine finally whether anyone is liable for penalties. That can occur only at the culmination of the audit and review process; not during it while the Commissioner is still gathering facts. To illustrate, section 125 of the Evidence Act itself overcomes this problem by expressly allowing the court in question to 'find', for the purposes of determining admissibility, that the communication was made in furtherance of a prohibited act etc, if there are reasonable grounds for doing so. In contrast, no such legal mechanism is

³⁵ See, *Commissioner of Taxation v Coombes* [1999] FCA 842 at [31]; *Z v New South Wales Crime Commission* [2007] HCA 7 at [4] and [12].

³⁶ See *Principled Regulation: Federal Civil and Administrative Penalties in Australia* [2002] ALRC 95 at [2.63] and [2.64].

available to the Commissioner. Nor would one be appropriate, because the Commissioner is not a court.

64. Subparagraph 25(n) gives as an 'example' of relevant penalties, Subdivision 284-C of Schedule 1 of the TAA. If reference to Subdivision 284-C is merely an *example* of a law imposing a civil penalty, then it is not clear why Subdivision 284-B of Schedule 1 would not also be caught by this concept. That would mean that any legal advice given that (in the opinion of the Commissioner) contributed to the incurrance of shortfall penalty, for example because a lawyer advised a client to claim a tax deduction that the ATO believes was not claimable, would not be privileged. That cannot be correct.
65. An alternative would be to invent a distinction, for LPP purposes, between normal tax provisions and anti-avoidance rules. However, there is no basis in the law of privilege for such a distinction, nor would it be practicable to go through the tax legislation and accurately classify every provision in this way. Even Subdivision 284-C of Schedule 1 of the TAA resists such classification. Some of the provisions it relates to are General Anti-Avoidance Rules (**GAARs**), others (such as transfer pricing and certain non-arm's length rules) are not. Further, even the GAARs turn on objective purpose, not any finding of fraud, dishonesty or other deliberate wrongdoing, while the notion of tax avoidance does not 'involve any notion of active or passive fault on the part of the taxpayer'.³⁷
66. LPP does not protect a communication made in the furtherance of a fraud, crime or other improper purposes. As was held in *Propend*:

*Communications in furtherance of a crime or fraud are not protected by legal professional privilege, because the privilege never attaches to them in the first place. While such communications are often described as 'exceptions' to legal professional privilege, they are not exceptions at all. Their illegal object prevents them becoming the subject of the privilege.*³⁸

67. The exception, so described, applies to a wide species of fraud, criminal activity or actions taken for an illegal or improper purpose³⁹ including trickery and 'sham' contrivances.⁴⁰ For example, it has been held to apply to:
- a) documents brought into existence to defeat the interests of certain creditors;⁴¹
 - b) documents brought into existence in furtherance of a fraudulent claim for tax deductions;⁴²
 - c) a deliberate abuse of statutory power.⁴³ The offending confidential communication was made by a public authority for the purpose of obtaining advice on how to exceed its statutory powers to prevent others from exercising

³⁷ *Australasian Jam Co Ltd v Commissioner of Taxation* (1953) 88 CLR 23 at 34.

³⁸ At 556 (McHugh J) referring to *R v Cox and Railton* (1884) 14 QBD 153. See also:

- at 514 (Brennan CJ) referring to *O'Rourke v Darbishire* [1920] AC 581 at 604, 633 and *Kearney* (1985) 158 CLR 500 at 516, 517, 525, 527;
- at 545-546 (Gaudron J) referring to *Kearney* (1985) 158 CLR 500 at 528-529 and the cases there cited and *Carter* at 16;
- at 568 (Gummow J) referring to *Follett v Jefferyes* (1850) 1 Sim (NS) 3 at 17 [61 ER 1 at 6] and *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 1152; and
- at 591 (Kirby J).

³⁹ *Kearney* (1985) 158 CLR 500.

⁴⁰ *AWB v Cole (No. 5)* (2006) 155 FCR 30.

⁴¹ *Australian Securities and Investments Commission v Mercorella (No 3) (Mercorella)*.

⁴² *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515. In *Jones v Jones* [2009] VSC 292, Judd J held that the brief remarks in *Clements* in relation to Part IVA and LPP were obiter and respectfully disagreed with them, in detailed analysis set out at [65]-[69].

⁴³ *Kearney* (1985) 158 CLR 500.

their rights to native title claims under the law. The court relied on *R v Bell; Ex parte Lees*⁴⁴ in deciding that a 'higher public interest' would prevail over the competing public interest that LPP should apply; and

- d) documents structured so as to inflate transportation prices and to work a trickery on the United Nations contrary to international sanctions.⁴⁵

68. The common thread in these cases is an element of deliberate wrongdoing such as fraud, dishonesty or abuse of power. Tax provisions to which administrative penalties may apply are simply not comparable. Importantly, it does not matter whether the lawyer knows of the illegal purpose.⁴⁶ The relevant illegal or improper purpose may be that of a third party.⁴⁷

69. An important distinction needs to be made between furtherance of illegal behaviour and mere recounting of concluded or past illegal behaviour so as to obtain advice.⁴⁸ For example, in *Mercorella*, the Federal Court held that LPP would not attach to advice about the creation of the improper security instruments but that it would attach to, for example, advice about the enforceability of the instrument. It is not enough that the communication merely discloses wrongdoing. It must be in furtherance of the wrongdoing, that is, it must be connected in the sense of helping it, advancing it or assisting the wrongdoing.⁴⁹

70. None of the authorities have gone so far as to contend that privilege does not apply in certain civil penalty circumstances. The Law Council submits that this is not a good example to include and, suggests that some of those listed above be preferred if any are required at all, although they may be covered by paragraphs 25(l) and (m), in which case there is no need for 25(n) even in an edited form.

71. Further, the current subparagraph 25(n) would discourage taxpayers from seeking advice about the application of Part IVA, transfer pricing and other provisions, for fear that it would not be privileged. Taking Part IVA as an example, the number of Part IVA decisions is relatively small. It is largely lawyers who do the work of 'applying' Part IVA, in the sense of providing advice about the extent to which Part IVA may apply to a potential transaction. It would be contrary to the public interest to penalise and discourage the seeking of such advice. The same goes for transfer pricing and the other relevant provisions.

72. If any reference to civil penalty must remain, then it should be made clear that this does not extend to *administrative* penalties such as those imposed under Division 284.

Timing of provision of particulars

73. There is no obligation to provide particulars of privilege claims unless specifically asked for in a notice under section 353-10 of Schedule 1 to the TAA. Even less is there an obligation to provide particulars of privilege claims at the same time as responding to the section 353-10 notice which identified populations of privileged and non-privileged documents.

⁴⁴ (1980) 146 CLR 141.

⁴⁵ *AWB v Cole (No.5)* (2006) 155 FCR 30.

⁴⁶ *Baker v Campbell* (1983) 153 CLR 52.

⁴⁷ *Clements, Dunne & Bell Pty Ltd v Commissioner of the Australian Federal Police* (2001) 188 ALR 515; *Capar v Commissioner of Police* (1994) 34 NSWLR 715; *R v Central Criminal Court; Ex parte Francis & Francis* [1989] AC 346.

⁴⁸ *Propend* (1997) 188 CLR 501 at 545 (Gaudron J). See also *P & V Industries Pty Ltd v Porto* [2007] VSC 113 at [27].

⁴⁹ *Kaye v Woods (No 2)* [2016] 8 ACTSC 87 at [38].

74. The Law Council understands that the Commissioner is concerned about the time it takes for privilege claim information to be provided to him.
75. The amount of time taken in making privilege claims is potentially affected by the Commissioner's policy in declining to return mistakenly provided privileged material and insisting on his rights, as has been confirmed in the *Glencore*, *Denlay* and *Donaghue* decisions, that not only is he entitled to use information, he is also obliged to do so.⁵⁰
76. As a matter of administrative practice, and as a matter of general administration, the Commissioner can choose whether he insists upon his entitlements in this regard, or whether as a matter of good administration he chooses not to. If he chose the latter, he might encourage people to be more forthcoming at an earlier point in time with privilege claims. It is a matter entirely in the Commissioner's hands and how he conducts himself.
77. The approach to making privilege claims may well also be improved if the Commissioner were to adopt an approach that privilege claims were examined by staff other than the auditors responsible for the underlying section 353–10 notice. If administrative independence was created between staff dealing with the privilege claims and ATO staff on the audit team, behaviours in making the claims may well alter and the timeliness within which they are made may will improve.

Reference to computer assisted technology

78. The Law Council agrees with the reference in the consultation draft Protocol to the key role of computer assisted technology both in searching for and identifying documents as well as assisting with LPP claims.
79. The Law Council would welcome the opportunity to engage further on this topic if that would assist the ATO, including by drawing on the expertise within its membership as appropriate.

⁵⁰ See *Glencore*, *Denlay* and *Donoghue*.