



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

### Legal professional privilege (LPP) protocol

#### **1 Relying on this Compendium**

This Compendium of comments provides responses to a variety of comments received on the draft *Legal Professional Privilege protocol*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

In this Compendium, we have grouped, (and provided the ATO response to), the individual feedback based on key themes.

#### **Summary of issues raised and responses**

| Issue number              | Issue raised   | ATO response   |
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| <b>Cost of compliance</b> |  |  |
| 1                         | It is acknowledged that where a Commonwealth agency requests a description of communications subject to privilege, including date the communication was created and a general description of how privilege arose, this should be provided. However, it is impractical in large scale information requests to comply with all the required steps and particulars articulated in clauses 13, 16 and 28 of the draft Protocol. In any event, this approach is unnecessary in light of the decision of <i>Kenquist Nominees Pty Limited v Campbell (No 5)</i> . <sup>1</sup> | It is part of our role as a regulator to decide whether to accept, review or challenge a claim of LPP made in response to a formal notice. To make an informed decision, we require information about the communication and the basis on which LPP is claimed.<br><br>There is authority that a person asserting LPP should provide evidence or make submissions in support of their claim in the context of a response to a compulsory production power exercised by a statutory authority: <i>National Crime Authority v S.</i> <sup>2</sup> |

<sup>1</sup> [2018] FCA 853 at [15].

<sup>2</sup> [1991] FCA 234.

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|              | <p>At a minimum, the final Protocol should 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.</p>   | <p>We recognise that the level and type of particulars about a communication needed to decide what to do with a claim of LPP can vary depending on the circumstances.</p> <p>Additional wording has been added to paragraphs 11 and 37 of the final Protocol concerning compliance with the Protocol. If a taxpayer does not follow the Protocol, there is no presumption that a claim is invalid or that we will challenge it.</p> <p>Taxpayers may decide to adopt particular parts of the Protocol – for example, if all the communications are with a lawyer retained for the purpose of providing legal advice and are directly related to the performance by the lawyer of their professional duty, a taxpayer may choose to provide more limited particulars that they consider will enable the ATO to understand the context of the communications. However, if taxpayers do not follow the Protocol and do not explain why they have not followed the recommended approach, we may make further enquires.</p> |
| 2            | <p>The draft Protocol is a useful document to understand the ATO's expectations. Many aspects of the draft Protocol are currently covered in existing ATO processes relating to LPP claims (for example, LPP forms 1 and 2). The ATO's approach and expectations will result in a significant increase in costs to taxpayers in seeking to comply with the onerous level of detail requested, in particular in relation to 'additional steps', 'additional particulars' and Example 2 in the draft Protocol.</p> | <p>See our response to Issue 1 of this Compendium.</p> <p>We will take a taxpayer's circumstances into account and try to limit the cost of compliance. We will seek to work with taxpayers to resolve any disputes about LPP claims in a manner consistent with our existing guidance.</p> <p>Additional examples relating to the dominant purpose of a communication and a communication involving non-legal persons or legal practitioners not acting in the capacity of legal practitioners have been added to the final Protocol based on stakeholder feedback.</p>   |
| 3            | <p>The ATO should identify a balanced approach to addressing the ATO's information gap and the cost of providing all the detail required under the Protocol.</p> <p>The ATO should consider agreeing with the taxpayers and advisors on the process of claiming LPP before the taxpayer or advisor embarks on the process (that is, agree on Step 3 before undertaking Steps 1 or 2). It is very costly for</p>  | <p>We are of the view that the final Protocol presents a balanced approach to addressing our duty as a regulator to decide what to do with a claim of LPP in circumstances where we have exercised a statutory power to compel the production of information and documents, and the cost associated with providing an explanation to enable the ATO to make an informed decision.</p> <p>Where there are legitimate concerns about following the Protocol, you can engage with us to explore these concerns early in the information</p>   |

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|                        | taxpayers and advisors to revisit LPP claims if the ATO perceives that there is a gap in the analysis or process.   | gathering process. Any disputes will be resolved consistently with our existing guidance.   |
| 4                      | The ATO should consider the Protocol from a client perspective and 'seasoned vs less seasoned' practitioners or taxpayers.  | <p>Additional paragraphs have been included in the final Protocol (see paragraphs 11, 34 and 35) to emphasise that:</p> <ul style="list-style-type: none"> <li>• taxpayers are not expected to waive privilege when following the Protocol</li> <li>• taxpayers are encouraged to seek legal advice if there is a risk of waiver, and</li> <li>• the Protocol does not intend for legal practitioners to advise their clients in a manner contrary to their professional obligations.</li> </ul>  |
| <b>Compliance time</b> |   |   |
| 5                      | <p>There is no obligation to provide particulars of privilege claims at the same time as responding to the Commissioner's formal notice unless specifically requested in the notice.</p> <p>It is acknowledged that the Commissioner is concerned about the time it takes for privilege claim information to be provided.</p> <p>The Commissioner could encourage taxpayers to be more forthcoming at an earlier point in time if the Commissioner adopted:</p> <ul style="list-style-type: none"> <li>• as a matter of good administration, not to insist on their entitlement where there has been inadvertent waiver, and</li> <li>• an approach where privilege claims are examined by staff other than the auditors responsible for the underlying formal notice.</li> </ul> | <p>It is our view that taxpayers should explain their LPP claims by the due date specified in the formal notice. We will give taxpayers an adequate opportunity to make a claim for LPP (and to explain their claim). If taxpayers require more time, they can engage with us early to explore the available options.</p> <p>The Protocol also notes that when determining how much time to give to comply with a notice (including a request for an extension of time to comply), we will have regard to <a href="#">Our approach to information gathering</a>. In accordance with this, we encourage taxpayers to discuss their circumstances involving information requests with us as early as possible. We do not think it is necessary or appropriate to prescribe a process for all LPP claims to be examined at first instance by someone other than the team responsible for the underlying formal notice.</p> <p>Issues concerning inadvertent waiver are highly dependent on the facts and circumstances, and outside the scope of the Protocol.</p> |
| 6                      | <p>To provide the particulars in the draft Protocol will require significant time if strictly adhered to.</p> <p>The ATO should provide taxpayers additional time to respond to the formal notice in situations where the Protocol</p>  | <p>See our response to Issue 5 of this Compendium.</p> <p>The final Protocol recognises the existing approaches to responding to information requests, including the adoption of a staged or tranches approach where appropriate.</p>   |

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|                               | <p>is applied and the Commissioner's intention of allowing additional time should be stated in the Protocol.</p> <p>Alternatively, the Protocol should allow for the response to be provided in tranches with a later date for taxpayers to provide particulars.</p> <p>Alternatively, the notice should provide for a standard response time of 56 days where privilege issues are likely to arise.</p> <p>Alternatively, the Commissioner should allow for a tranche delivery of responses with a standard response of:</p> <ul style="list-style-type: none"> <li>• unclaimed documents to be delivered within 28 days</li> <li>• LPP claim details to be provided within 56 days, and</li> <li>• production of documents where privilege claim has been made and these have been challenged successfully by the ATO in court, 14 days after the final court decision.</li> </ul> <p>Alternatively, in seeking to apply the Protocol, it may be unproductive and unreasonable to set timeframes as noted in paragraph 26 of the draft Protocol. The ATO, taxpayers and their advisors should agree mutually acceptable timeframes on a case-by-case basis.</p> | <p>While <a href="#">Our approach to information gathering</a> prescribes a general timeframe of 28 days to comply with a notice, it also recognises that shorter or longer periods of time may apply in some cases. We do not think it is necessary to change the general timeframe of 28 days or to prescribe in the Protocol some other period of time to comply where privilege issues arise. As with our existing practice, taxpayers will be given a reasonable period of time to seek advice on claiming LPP and to respond to a formal notice.</p> |
| <b>Particulars – standard</b> |   |  |
| 7                             | <p>The level of detail required in the 'standard particulars' goes beyond what is required to be disclosed under the <i>Federal Court Rules 2011</i><sup>3</sup> to substantiate an LPP claim and beyond what is required to be disclosed in discovery. This is onerous and an overreach because:</p> <ul style="list-style-type: none"> <li>• it is not required by law</li> </ul>   | <p>See our responses to Issues 1 and 3 of this Compendium.</p> <p>We recognise that the level and type of particulars to enable us to decide what to do with an LPP claim can vary and there is no standard amount of information that must be provided. For instance, the recommended particulars may not be required to be provided on a document-by-document basis where the communications clearly only involve legal practitioners acting in their capacity as legal practitioners.</p>   |

<sup>3</sup> Rule 20.17(2)(c).

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|              | <ul style="list-style-type: none"> <li>it creates a conflict between compliance with the Protocol and the lawyers' duties to the court and their client</li> <li>not all lawyers will be equipped to deal with the level of particularisation required in the Protocol, and</li> <li>it will be expensive and time consuming to provide all the particulars identified in the Protocol.</li> </ul> <p>Further, the Protocol should allow communications to be categorised and reviewed in groups similar to the practice in courts, rather than on a document-by-document basis which is onerous.</p>  | <p>We are of the view that the final Protocol sets out the approach and relevant information that we think would allow us to quickly decide how to treat an LPP claim.</p> <p>Where there are legitimate concerns about following the recommended approach in the Protocol, taxpayers can engage with us early to explore those concerns.</p> <p>The Protocol is voluntary.</p>  |
| 8            | <p>The standard particulars seeking the 'subject line' in subparagraph 28(e) of the draft Protocol or topic or legal issue in subparagraph 28(k) of the draft Protocol is part of the confidential communication and document and is immune from compulsory disclosure.</p> <p>The title of the document may need to be redacted.</p> <p>A practising lawyer may be in breach of their duties to their clients if this information is disclosed.</p> <p>Further, the provision of this information does not inform the ATO whether the communication itself could be privileged given the range of possibilities.</p> <p>Similarly, seeking an outline of the nature of a transaction and the particular part of an enactment in establishing the purpose of the communication reveals the content of the communication and does not assist with an assessment of whether LPP applies.</p> <p>The Protocol should not seek details of the subject line (subparagraph 28(e) of the draft Protocol) until the issue is</p> | <p>Taxpayers are not expected to waive privilege when following the Protocol.</p> <p>The title, subject line, topic or legal issue of a communication may not necessarily be immune from compulsory disclosure due to LPP. Whether or not the title or subject line needs to be redacted will depend on the circumstances. Whether or not the topic or legal issue reveals legal advice is also sensitive to the circumstances. However, we do not agree that it will always be the case that the title, subject line, topic or legal issue will need to be redacted or is otherwise immune from compulsory disclosure. Usually, the subject line of an email, for instance, would not reveal the advice.</p> <p>Additional wording has been added at subparagraph 38(e) of the final Protocol to clarify that it is recommended that the title or subject line of the communication be provided except to the extent that disclosure would also disclose the content of legal advice.</p> <p>Taxpayers can engage with us early to explore any concerns about providing any of the recommended particulars (including the reasons for any redaction).</p> <p>Additional wording has been added (at paragraph 34, and paragraph 10 of Addendum 1) to the final Protocol to recognise that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. We do not expect legal practitioners to breach their ethical and professional obligations if a</p> |

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|              | <p>determined in <i>CUB Australia Holding Pty Ltd v Commissioner of Taxation</i>.<sup>4</sup></p> <p>The ATO should consider what other common law jurisdictions are doing or requesting.</p>   | <p>conflict arises between them and the recommendations outlined in the Protocol.</p> <p>The title, subject, topic or legal issue relating to a communication (together with the other recommended particulars) can put us in the best position to decide what to do with an LPP claim.</p> <p>Any legal developments materially impacting the Protocol will be considered and incorporated into the Protocol on an 'as necessary' basis. Accordingly, we have removed the reference to reviewing the Protocol over the next 3 years.</p> <p>Through the international exchange of information process, we share information with other jurisdictions in order to administer and enforce Australia's tax laws. Such information can include approaches to information gathering.</p> |
| 9            | The Protocol should include a warning that in complying with subparagraph 28(b), this particular should not be provided where to do so would reveal privileged communications.  | We do not think it is necessary that a warning be inserted in relation to the name of the privilege holder.  |
| 10           | <p>The level of detail required in the first scenario in Example 1 of the draft Protocol is significant. Further guidance should be provided by including a 'middle' scenario in Example 1 to clarify the level of detail the ATO requires.</p> <p>Further, it may be practically difficult for the taxpayer to establish the identity of Person X as it could include a range of staff. In any event, this information would not assist in determining whether the relevant communication is subject to LPP.</p> | Based on stakeholder feedback, additional examples have been included in Table 4 to Addendum 3 to the final Protocol relating to the dominant purpose of communications (including 'middle' scenarios). The identity of Person X in the first scenario in Table 4 to Addendum 3 is critical to identify whether the advice was given by a legal practitioner in their capacity as a legal practitioner.  |
| 11           | The Protocol should provide that taxpayers can leave 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.  | Additional wording has been added to the final Protocol, including at paragraph 37, that taxpayers can engage with us early to explore any concerns about providing any of the recommended particulars (including the reasons for not providing them).   |

<sup>4</sup> [2021] FCAFC 171.

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| 12           | <p>The taxpayer may not be aware of the identity of all persons who have been involved in preparing the advice or of persons who have received the relevant documents or communication subject to privilege. Subparagraph 28(h) of the Protocol should be limited to the addressees of the relevant communications and the identities of the person involved should be limited to only those who had a substantive input into the drafting.</p>  | <p>See our responses to Issues 7 and 11 of this Compendium.</p>   |
| 13           | <p>Subparagraph 28(i) of the Protocol should clarify:</p> <ul style="list-style-type: none"> <li>• the meaning of 'copy', particularly with digital communication noting that it is not readily identifiable whether a document is a copy</li> <li>• whether persons who are copied in on emails with attachments are receiving originals or copies, and</li> <li>• circumstances where an 'original' is accepted as subject to LPP but subsequent copies are not and vice versa.</li> </ul> <p>It is also not clear the relevance of whether a communication is a copy for the purposes of assessing privilege.</p> | <p>It is beyond the scope and purpose of the Protocol to resolve the legal question on the meaning of 'copy'.</p> <p>The intent of the recommended particulars is to provide us with sufficient information to decide whether to accept, review or challenge an LPP claim made in response to a formal notice. In this regard, subparagraph 38(i) of the final Protocol and its reference to whether a document is a copy is to ascertain a description of the communication which (together with the other particulars) may practically assist us in deciding what to do with the claim, including categorising documents.</p> <p>Any practical difficulties, including difficulties associated with the proper identification of originals and copies of communications, should be explained to us.</p> |
| 14           | <p>The Protocol should include a 'best endeavours' comment because particulars (such as the following) are not always readily identifiable or reliably available:</p> <ul style="list-style-type: none"> <li>• the date the document was prepared or communication was made</li> <li>• the number of pages in the document, and</li> <li>• the description of the role of each person between whom the document or communication was made.</li> </ul>  | <p>See our response to Issue 11 of this Compendium.</p>   |
| 15           | <p>The draft Protocol is binary where every particular appears to have equal weighting. The ATO should consider giving different weightings to particulars.</p>  | <p>Additional wording has been added to paragraph 8 of the final Protocol that we recognise that the amount and type of information to enable us to decide what to do with an LPP claim can vary depending on the context and there is no standard amount of information that must be</p>   |

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|                                 |   | provided. It is unhelpful in our view to provide different weightings to particulars in the abstract.   |
| 16                              | The fact that the document is relevant for the purposes of a formal notice should be sufficient for the ATO to infer what the communication is about and the legal issue.   | Formal notices can range in what they require and the circumstances in which they issue. We do not consider it good practice to direct taxpayers that they should leave elements of LPP claims to 'inference'.  |
| <b>Particulars – additional</b> |   |   |
| 17                              | The level of detail and scope of the additional particulars expected for specific engagements is beyond what the Commissioner would require to determine whether the ATO would challenge a claim for LPP. It imposes an additional burden on taxpayers engaging with multidisciplinary partnerships (MDPs) and implies that there are doubts as to whether LPP can apply where legal services are provided under an MDP engagement.   | See our response to Issue 7 of this Compendium. Additional wording has been included at paragraph 4 of the final Protocol to clarify that the Protocol applies to legal practitioners and non-legal practitioners generally and to all applicable LPP claims regardless of the firm or business structure within which the service or engagement is provided.   |
| 18                              | Subparagraphs 30(b) and (c) of the draft Protocol go beyond the dominant purpose test used by the courts and impose significant compliance burden on taxpayers. Subparagraph 30(c) should be deleted and subparagraph 30(b) should only request the dominant purpose of the relevant communications. Alternatively, the final Protocol should seek a list of principal or primary purposes.   | Subparagraph 40(b) of the final Protocol has been amended to limit the provision of information to the 'main purposes' of the communication (as opposed to 'all purposes' of the communication). Subparagraph 40(c) of the final Protocol has been retained given LPP turns upon the dominant purpose test and that understanding the asserted dominant purpose will help us decide what to do with an LPP claim. |
| 19                              | The draft Protocol requires a significant level of detail in relation to persons involved in the preparation of the communication (for example, subparagraphs 30(d) and (e) and reflected in Examples 1 and 2 of the draft Protocol). It is not required by law, nor is it practical or realistic, to anticipate this process to be followed, especially for high-volume claims. The final Protocol should provide an alternative option. For example, taxpayers provide this level of detail in certain exceptions such as where persons included in | See our response to Issue 7 of this Compendium. Based on stakeholder feedback, we have included additional examples in Addendum 3 to the final Protocol relating to the dominant purpose of a communication, and a communication which relates to a service or engagement that had involvement by non-legal persons or legal practitioners not acting in the capacity of legal practitioners.                     |

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|               | correspondence are identified as a non-legal person or the person has a dual role.   |   |
| 20            | The final Protocol should clearly articulate that the particulars concerning communications between non-legal persons in subparagraph 30(d) of the draft Protocol is in relation to the function of the person and whether the communication is in furtherance of the client obtaining legal advice.   | We think subparagraph 30(d) of the draft Protocol (now subparagraph 40(d) of the final Protocol) is sufficiently clear in seeking information relating to the capacity of the legal practitioner giving the professional advice which calls for an inquiry into the way the engagements were in fact performed by all relevant persons.   |
| 21            | Examples 1 and 2 in the draft Protocol present an impractical process in articulating the roles of the parties to communications.  | Additional examples provided by stakeholders have been included in Addendum 3 of the final Protocol relating to the dominant purpose of a communication, and a communication which relates to a service or engagement that had involvement by non-legal persons or legal practitioners not acting in the capacity of legal practitioners.   |
| 22            | The additional particulars required of in-house counsel at paragraph 29 of the draft Protocol are unnecessary. The final Protocol should apply consistently to legal advice from all appropriately qualified lawyers.  | We think it is useful to maintain the particulars for in-house counsel to assist our understanding of the professional capacity of an in-house counsel.   |
| <b>Waiver</b> |  |   |
| 23            | <p>The level of detail required in the draft Protocol, specifically in relation to title or subject line in subparagraph 28(e) and legal issue in subparagraph 28(k), can amount to waiver. The draft Protocol does not categorically exclude the possibility that the Commissioner might allege waiver. In any event, waiver will be to the world at large and it is irreversible. Further, the Commissioner has the power to share the information with other government agencies and regulators.</p> <p>The final 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.</p> <p>The statement in Addendum 2 to the draft Protocol (that the Commissioner will not contend waiver) should be clarified as to whether it means that the ATO will not seek access to the</p> | <p>We have obtained legal advice from the AGS in relation to stakeholder concerns that the provision of the recommended particulars in the draft Protocol may result in a waiver of LPP. The advice is provided in Addendum 4 to the final Protocol so that we can be transparent about the legal advice we have received as part of the process of assisting us to formulate the final Protocol.</p> <p>The AGS advice states that in the majority of cases, there will be a low risk of waiver where particulars of an LPP claim are provided consistently with the recommendations in the Protocol. In the unlikely event of an inadvertent waiver by the voluntary provision of the recommended particulars to us, this is likely to operate as a limited waiver and preserve the holder's ability to enforce their claim against the world at large.</p> |

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|              | <p>underlying communication or that the ATO will not use the information obtained by way of particulars provided by a taxpayer, noting the Commissioner's ability (or obligation) to use information.</p> <p>The following should be added to Addendum 2 in the final Protocol:</p> <p style="margin-left: 20px;">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.</p> <p>To reduce the risk of waiver, the final Protocol should allow for an independent assessor (within the ATO or the Australian Government Solicitor (AGS)) to consider whether disclosure of the particulars will amount to waiver. An independent process is even more important in the context of smaller businesses and less sophisticated taxpayers who may not appreciate the impact of their disclosure.</p> <p>Alternatively, the final Protocol should offer certainty that the Commissioner will not allege waiver and seek the underlying communication or use the communication in making an assessment or share the information with other government agencies or regulators.</p> | <p>The final Protocol explicitly acknowledges that we aim to support the provision of high-quality LPP claims and do not seek to create unintended waiver of LPP by taxpayers following the Protocol.</p> <p>Additional wording has been added to paragraph 2 to Addendum 2 to the final Protocol to clarify our position. We will not contend that the information you provide about your LPP claims (particulars) in accordance with our recommended approach amounts, by itself, to an unintended waiver of your LPP and seek production of the underlying communication on this basis.</p> <p>Paragraph 3 in Addendum 2 to the final Protocol has been amended to state that we cannot warrant that no-one else other than the Commissioner will contend that privilege has been waived by following the Protocol.</p> <p>The exception (that particulars should only be provided to the extent that would not waive privilege) has been replicated in respect of other recommended particulars (see subparagraphs 38(e), 40(b), 40(c) and 40(d)(i) of the final Protocol).</p> <p>Additional wording has also been added to paragraph 36 of the final Protocol to confirm that particulars provided to us will be 'protected information' and will not be disclosed except as required or permitted by law.</p> <p>To assist taxpayers and advisors, paragraph 35 of the final Protocol states that taxpayers and advisors are encouraged to seek legal advice if there is a risk of waiver.</p> <p>We do not think it is necessary or appropriate to prescribe a process for all LPP claims to be examined at first instance by an independent assessor. Any disputes relating to LPP (including issues of waiver) will be resolved consistently with our existing guidance.</p> <p>Taxpayers can engage with us early to explore any concerns about providing a recommended particular (including where there is a risk of waiver).</p> |
| 24           | Subparagraphs 28(h) and (l) of the draft Protocol could compromise the LPP claim being made. These requirements  | See our responses to Issues 1 and 23 of this Compendium.   |

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|  | also go beyond what is required by the law of LPP for a claim of privilege to be made.  |   |
| 25   | <p>Taxpayers who are not in the large market may feel some pressure or compulsion to provide the suggested or recommended particulars given the ATO's role as a regulator. The tone and language of the draft Protocol does not reflect the risk to the client. It is the client's choice based on its risk appetite as to how much it will provide in terms of particulars. The Protocol should acknowledge that:</p> <ul style="list-style-type: none"> <li>the document represents the ATO's view of privilege</li> <li>compliance with the Protocol may result in waiver</li> <li>taxpayers should seek legal advice if there is a risk of waiving privilege, and</li> <li>taxpayers only need to provide the particulars to the extent that they are comfortable that they are not waiving privilege.</li> </ul> | <p>The final Protocol reflects the following changes based on stakeholder feedback:</p> <ul style="list-style-type: none"> <li>Paragraph 2 provides that the purpose of the Protocol is to recommend an approach which, in our view, will best assist us in deciding whether to accept, review or challenge an LPP claim.</li> <li>Paragraph 35 explicitly provides that to the extent that any particular would reveal the content of the advice, we do not expect it to be provided in accordance with the Protocol.</li> </ul> <p>See our response to Issue 23 of this Compendium in relation to waiver, including seeking legal advice if there is a risk of waiving privilege.</p>   |
| <b>Exceptions to LPP – improper purposes</b> |   |   |
| 26   | <p>The common law principle that LPP does not apply to communications that are made in furtherance of a crime or fraud should be acknowledged. There is a difference between communication which facilitates the commission of a crime or other improper purpose, and communication which advises on a criminal or other matter at law. Paragraph 25 of the final Protocol should distinguish between these concepts. In particular, the final Protocol should address the following:</p> <ul style="list-style-type: none"> <li>guidance on how the Commissioner considers LPP and the Protocol apply to communications regarding the application of Part IVA of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) and other anti-avoidance provisions</li> </ul>  | <p>Subparagraphs 25(m) and (n) of the draft Protocol have not been included in the final Protocol and subparagraph 25(l) (now subparagraph 29(c) in the final Protocol) has been revised to refer to documents or communications made for a purpose that is contrary to public interest; that is, where the communication is made in furtherance of an illegal or improper purpose.</p> <p>The illegal or improper purpose covers all forms of fraud and dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and 'sham' contrivances, as well as cases of fraud by third parties.</p> <p>Footnote 8 of the final Protocol has been inserted to make clear that for the purposes of the illegal or improper purpose principle, the relevant distinction is made between a communication made in furtherance of an illegal or improper purpose (which is non-privileged communication), as compared with a communication made for the purpose of seeking advice in relation to a criminal or other matter at law (which may be privileged).</p> |

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|              | <ul style="list-style-type: none"> <li>clarify that not all conduct that renders a person liable to a civil penalty necessarily amounts to a fraud or illegal conduct</li> <li>subparagraph 25(n) of the draft Protocol infers that the Commissioner is taking the view that LPP does not apply in audits where transfer pricing or other general anti-avoidance provisions could apply</li> <li>subparagraph 25(n) of the draft Protocol should be removed and subparagraph 25(l) of the draft Protocol should be modified to cover 'Documents or communications knowingly or intentionally made in the furtherance or participation in fraud or illegal activity', and</li> <li>subparagraph 25(m) of the draft Protocol should be removed as it could conceivably apply to all claims of LPP.</li> </ul>  |   |
| 27           | <p>There is no authority for the proposition that communication or documents in the furtherance of an act that renders someone liable to an administrative penalty are 'usually' not privileged as suggested in subparagraph 25(n) of the draft Protocol. Common law does not even recognise a 'civil penalty' exception. Therefore, this example should be removed.</p> <p>Section 125 of the <i>Evidence Act 1995</i> (Evidence Act) is about adducing evidence in court proceedings, not about the law of privilege. Further, the reference to civil penalty in section 125 of the Evidence Act does not extend to administrative penalties. Civil penalties and administrative penalties must not be conflated as they are not comparable. In any case, it is for the courts to determine finally whether anyone is liable for penalties which occurs at the conclusion of audit or review process not while the Commissioner is still gathering facts. Therefore, this exception cannot be practically applied.</p> | <p>See our response to Issue 26 of this Compendium.</p> <p>We will scrutinise LPP claims made over communications prepared in furtherance of a dominant purpose that is merely designed to obscure or hinder the Commissioner's understanding of a transaction.</p> <p>We will also scrutinise LPP claims made over communications prepared in furtherance of a dominant purpose such as tax avoidance.</p> |

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|              | <p>Subparagraph 25(n) of the draft Protocol will discourage taxpayers from seeking advice about the application of Part IVA of the ITAA 1936, transfer pricing and other provisions for fear that it would not be privileged. It would be contrary to public interest to penalise and discourage the seeking of such advice.</p> <p>If any reference to civil penalty is to be maintained, the final Protocol should clarify that this does not extend to administrative penalties such as those imposed under Division 284 of Schedule 1 to the <i>Taxation Administration Act 1953</i> (TAA).</p>  |   |
| 28           | <p>Subparagraphs 25(l) and (n) of the draft Protocol should be combined and the Commissioner's intent for these subparagraphs (which was to raise taxpayer awareness that LPP does not apply to documents or communications prepared in furtherance of the commission of a fraud, offence or an act liable to a civil penalty) be clearly explained with reference to case law and legislation.</p> <p>Alternatively, the final Protocol should clarify or remove the following:</p> <ul style="list-style-type: none"> <li>Subparagraph 25(m) of the draft Protocol should be removed as there is no tenet of law that provides that documents which are otherwise privileged would lose their status because the documents or communications designed to obscure or hinder the Commissioner's understanding of the transaction.</li> <li>Subparagraph 25(n) of the draft Protocol should be removed as there is no basis in law to exclude communication made in the context of a transaction or arrangement in respect of which the Commissioner determines a penalty arises under Subdivision 284-C of Schedule 1 to the TAA from being privileged. There are also practical difficulties with the proposition in subparagraph 25(n) of the draft Protocol.</li> </ul> | See our responses to Issues 26 and 27 of this Compendium. |

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| 29   | The statements regarding improper purpose must be better articulated to ensure it is clear that it is 'in furtherance' of an improper purpose.  | See our response to Issue 26 of this Compendium.  |
| <b>Duties of legal and non-legal practitioners</b> |   |   |
| 30   | The final Protocol should acknowledge the duty of advisors to their clients and that they are bound to act on the instructions of their clients except in very limited circumstances. The final Protocol should recognise the impact of requiring advisors to comply with it may have, particularly where it may give rise to a breach of their professional obligations.   | Additional wording has been included in paragraph 34 of the final Protocol to clarify that where practitioners are assisting taxpayers to respond to a formal information gathering notice issued by the Commissioner, the Protocol does not intend for practitioners to advise their clients in a manner that is contrary to their professional obligations. See also paragraph 10 to Addendum 1 to the final Protocol.<br>Paragraph 37 of the final Protocol states that taxpayers can engage with us early to explore their concerns about following any of the recommended particulars. |
| 31   | Australian legal practitioners have ethical duties and professional obligations to their client and the courts. Failure to comply with these ethical duties and professional obligations can constitute professional misconduct. Observing the terms of the draft Protocol in full could potentially involve a breach of the practitioner's ethical obligations and professional duties.  | See our response to Issue 30 of this Compendium.  |
| 32   | Subparagraph 9(e) to Addendum 1 and the table at paragraph 31 of the draft Protocol refer to conflicts of interest and independence in circumstances where the firm advising the taxpayer in relation to its LPP claims was the same firm which made the communications (firm documents) the subject of the claim. Such reference suggests a presumption that legal practitioners may be in breach of their professional duties and ethics, and overlooks the ethical commitments they have to professional standards, fiduciary duties to their clients and professional obligations to the courts. It is also a duplication when providing the particulars. | Paragraph 9(e) of Addendum 1 to the draft Protocol and the reference to independence in the table at paragraph 31 of the draft Protocol have not been included in the final Protocol.   |
| 33   | Legal practitioners may be issued with a formal notice without having an opportunity to seek instructions from their  | See our response to Issue 30 of this Compendium.  |

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|                            | clients or, if they have instructions, the choice is either to comply with the Protocol (and in doing so, breach their ethical duties and professional obligations) or comply with these duties and obligations to maintain client privilege but risk attracting sanctions noted in the Protocol.  |   |
| 34                         | The Commissioner may potentially be in breach of section 39 of the <i>Legal Profession Uniform Law (NSW) 2014</i> as a result of legal practitioners being required to contravene their professional obligations to their clients by complying with the draft Protocol.  | <p>We do not consider that practitioners will be 'caused' or 'induced' to breach their professional obligations, or that the Protocol should be regarded as an 'attempt' by us to cause or induce them to do so because the legal practitioner will act on instructions from their client in responding to a formal notice including providing any particulars requested. If a legal practitioner is acting in accordance with the client's instructions when providing particulars it is difficult to see how that could, of itself, breach the practitioner's obligations. Further, the recommended approach in the Protocol is voluntary to follow.</p> <p>Paragraph 34 of the final Protocol states that taxpayers are not expected to waive LPP when following the Protocol. The paragraph also provides that where practitioners are assisting taxpayers in responding to the Commissioner's formal information gathering notice, the Protocol does not intend for practitioners to advise their clients in a manner that is contrary to their professional obligations. See also paragraph 10 to Addendum 1 to the final Protocol.</p> |
| Firm or business structure |  |   |
| 35                         | The draft Protocol applies equally to all LPP claims and does not distinguish between claims involving traditional law firms and law firm affiliates of the professional services firms. Instead, the draft Protocol is predicated on the type of service or engagement. To minimise any misrepresentation as to the operation of the final Protocol, the distinction between 'standard' and 'additional' particulars should be removed and replaced by one list of particulars required to explain the claim for taxpayers to consider for every matter. This will also reduce any duplication; for example, subparagraphs 30(b) and (c) of the draft Protocol appear to require similar particulars as subparagraph 28(j). The final | <p>Paragraph 4 of the final Protocol provides that it applies to all applicable LPP claims regardless of the firm or business structure within which the service or engagement is provided. This is reinforced in the table at paragraph 17 of the final Protocol in relation to the third category of 'service or engagement involving non-legal persons or legal practitioners not acting in the capacity of legal practitioners'.</p> <p>The terms 'standard particulars' and 'additional particulars' have not been included in the final Protocol. We have, however, retained the approach based on the type of service or engagement, as we think this approach provides a balance by providing fewer particulars in certain</p>  |

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|              | <p>Protocol should also clarify why the steps in subparagraphs 16(a) to (c) of the draft Protocol would not be required in relation to all LPP claims.</p> <p>This does not extend to specific particulars required for in-house counsel.</p>   | <p>situations and will allow us to quickly decide how to treat a claim for LPP.</p>  |
| 36           | <p>The final Protocol should clarify that the concerns identified in Addendum 1 to the draft Protocol apply to both 'pure' legal engagements and engagements involving non-lawyers.</p>   | <p>The concerns are not specific to any type of service or engagement. We will closely scrutinise LPP claims involving any contrived arrangements or relationships (whether services or engagements involving only legal practitioners or services or engagements involving non-legal persons) which purport to attract LPP merely for the purpose of concealing communications from us.</p>   |
| 37           | <p>Paragraph 11 of the draft Protocol and the distinctions created by it should be removed. The law governing the provision of legal services makes no distinction based on structure and to artificially impose one is at odds with the proper administration of the law.</p> <p>Provision of legal services by 'traditional' law firms regularly involves non-legal practitioners. Therefore, the MDP arrangement is no different to a traditional law firm.</p> <p>The final Protocol should not be suggesting that if additional information requested in paragraph 30 of the draft Protocol is not provided, the ATO will view the claimant as not complying with the Protocol and a presumption will arise that the ATO will challenge the LPP claim. The ATO must still make an assessment based on the information which has been provided.</p> <p>It is inappropriate for the Commissioner to seek to suggest to the market that advice provided by a lawyer providing legal services through an MDP structure will be subject to a greater level of scrutiny than advice provided by traditional law firms.</p> <p>The final Protocol should clarify that the requirements in paragraph 30 of the draft Protocol are required of all services or engagements involving non-legal practitioners irrespective</p> | <p>See our response to Issue 35 of this Compendium.</p> <p>Services or engagements involving traditional law firms with non-legal persons or legal practitioners not acting in the capacity of legal practitioners will be considered under the third category of service or engagement (see Table 1 of the final Protocol).</p> <p>Where a taxpayer does not follow the recommended approach, there is no presumption that the LPP claims are invalid or will be challenged by us. However, where a taxpayer does not adequately explain why they have not followed the Protocol and we are of the view that we do not have sufficient information to properly make a decision on a claim, the taxpayer can expect us to make further enquiries. This may involve, in some situations, us issuing a formal notice requesting relevant particulars of an LPP claim.</p> <p>The first category of service or engagement in Table 1 of the final Protocol has been amended to include paralegals, clerks, law graduates, executive assistants and similar non-legal persons acting under the close supervision and direction of the legal practitioners to whom they are more junior, less experienced and subordinate.</p> <p>We have retained the approach based on the type of service or engagement, as we think this approach provides a balance by providing fewer particulars in certain situations and will allow us to quickly decide how to treat a claim for LPP.</p> |

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|   | <p>of the firm structure within which that service or engagement is provided.</p> <p>Also, the difference between category 1 and category 3 type services or engagements created by the recommendation for category 3 (involving non-lawyers) to explain the main purposes as well as the dominant purpose should be removed.</p> <p>The final Protocol should also clarify at paragraph 11 that the involvement of junior non-lawyers acting under the direction, or supervision, of lawyers will not trigger the 'specific' assessment category. It is suggested the following words be added to the first and third rows of the table:</p> <p>... 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.</p> |   |
| 38  | The ATO should acknowledge that it has concerns with the certain types of services or engagements (that is, the MDPs) and address concerns with those types of services or engagements only.  | <p>See our response to Issue 35 of this Compendium.</p> <p>We will closely scrutinise any arrangements or relationships (whether services or engagements involving only legal practitioners or services or engagements involving non-legal persons) which purport to improperly claim LPP to the detriment of us being able to properly administer the tax and superannuation laws.</p>   |
| <b>Communications that are not usually privileged</b> |   |   |
| 39  | Step 1.3 of the draft Protocol appears to provide an analysis of the law of privilege which the document states it is not intending to do.  | Step 1.3 is part of the ATO's recommended approach and sets out the ATO's view of the categories of documents which we think require particular care to ensure that the communication is for the dominant purpose of giving or receiving legal advice. We think this step is useful and contains practical information for taxpayers to consider when making LPP claims. It also allows us to quickly decide how to treat those claims. |
| 40  | It is acknowledged that many documents listed in paragraph 25 of the draft Protocol are unlikely to be privileged.  | Subparagraph 25(a) of the draft Protocol (now subparagraph 24(a) of the final Protocol) falls under Step 1.3 which recommends that a claimant checks for communications which may require more scrutiny.  |

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|              | <p>However, the final Protocol should clarify or remove the following:</p> <ul style="list-style-type: none"> <li>• What is the standard of proof when it comes to establishing the dominant purpose in subparagraph 25(a) in Step 1.3? Does the ATO require taxpayers to conduct a detailed forensic analysis of the purpose(s) of each communication to determine the dominant purpose?</li> <li>• How should the communication referred to in subparagraph 25(b) of the draft Protocol be assessed? Is the contemplation of obtaining legal advice based on the client's subjective intention or is it assessed objectively? The final Protocol should acknowledge that if a client approaches a lawyer seeking advice there would be a presumption that a client approaching is seeking legal advice.</li> <li>• The reference to confidentiality in subparagraph 25(e) of the draft Protocol is as to the context of the communication and not the physical location.</li> <li>• Documents lodged with or provided to a lawyer simply for the purpose of obtaining immunity from production referenced in subparagraph 25(f) of the draft Protocol will not be subject to privilege where the dominant purpose of the communication was not to obtain or provide legal advice, or for actual or reasonably anticipated litigation.</li> <li>• Subparagraphs 25(i) and (j) of the final Protocol should acknowledge that a copy of a document can be privileged if it is made for the dominant purpose of obtaining legal advice even if the original document is not.</li> </ul> <p>It is acknowledged that the performance appraisals are unlikely to be privileged as noted in subparagraph 25(r) of the draft Protocol. However, the final Protocol should clarify</p> | <p>The purpose for which a document is brought into existence is a question of objective fact. Where there are multiple purposes, the claimant needs to be able to satisfy themselves that the purpose of obtaining legal advice or the use in litigation was the dominant purpose. Context and circumstances will determine what is appropriate. We do not expect that the claimant do things such as obtaining affidavit evidence but we do expect that context be appropriately considered and claims made only where there is a reasonable basis for the claim. In light of the feedback, we have replaced 'prove' with 'demonstrate' in the final Protocol.</p> <p>Subparagraph 25(b) of the draft Protocol (now subparagraph 29(a) of the final Protocol) refers to the client's contemplation in obtaining legal advice where the elements of LPP may not be met.</p> <p>Subparagraph 25(e) of the draft Protocol (now subparagraph 25(b) of the final Protocol) has been amended to refer to communications not being intended to be confidential.</p> <p>Subparagraph 25(f) of the draft Protocol (now subparagraph 29(b) of the final Protocol) has been amended to include the additional wording '... where the dominant purpose of the communication was not to obtain or provide legal advice, or for actual or reasonably anticipated litigation'.</p> <p>Subparagraphs 25(i) and (j) of the draft Protocol (now subparagraphs 25(d) and (e) of the final Protocol) reference a footnote which acknowledges that a copy of the documents can be privileged if it is made for the dominant purpose of obtaining legal advice or use in, or in relation to, litigation (whether existing or reasonably anticipated), even if the original documents are not.</p> <p>The Commissioner may seek the production of performance appraisals in order to make a decision as to whether or not to review, accept or challenge a claim for LPP (as opposed to making an assessment of the underlying tax issue).</p> |

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|                          | how such documents go to the assessment of any tax issue otherwise it should be removed.  |  |
| <b>Scope of protocol</b> |   |  |
| 41                       | <p>It is recognised that the ATO takes issue with contrived arrangements or relationships which purport to attract LPP in an effort to conceal a matter from it.</p> <p>Abuses of this nature need to be addressed. However, they are considered to be rarely encountered, are not the norm in behaviours of practicing lawyers in Australia or clients for whom they act and should not inform a Protocol that is designed to apply across the board. For example, subparagraph 16(a)(ii) of the draft Protocol requires the evaluator to address each of the ATO's administrative concerns rather than assess whether the lawyer-client relationship exists as a matter of law and the dominant purpose of the communication.</p> | <p>The Protocol is intended to provide guidance on how to make an LPP claim to allow us to make a decision on the claim as quickly as possible. We see LPP claims that we consider to be reckless or knowingly false or misleading and made to obscure facts from us. We have seen claims of privilege over thousands or even tens of thousands of documents, but when we ultimately receive the documents, we are of the view that they were never privileged.</p> <p>Resources and time are being spent to deal with, and resolve, LPP claims, and their resolution in some cases is delayed because we do not have sufficient information to make a decision on whether or not to review, accept or challenge these claims.</p> <p>Listing the areas in Addendum 1 to the final Protocol highlights those concerns and puts taxpayers on notice of the matters which the ATO will pay close attention to.</p> |
| 42                       | The words '... where there is a purpose of concealing communications from us' from subparagraph 12(a) of Addendum 1 to the draft Protocol should be removed as in this case the communications may nevertheless be subject to privilege.  | See our responses to Issues 27 and 41 of this Compendium.  |
| 43                       | There are a number of circumstances in which communications between non-lawyers may be subject to LPP. Subparagraph 12(e) of Addendum 1 to the draft Protocol should be 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.   | Additional wording has been added to subparagraph 12(e) of Addendum 1 to the final Protocol to clarify that we will closely scrutinise LPP claims made over communications exclusively between non-legal persons in circumstances where the non-legal persons do not perform functions in furtherance of a lawyer-client relationship.   |
| 44                       | Subparagraph 12(f) of Addendum 1 to the draft Protocol should be revised to state the exact nature of the ATO's   | The concern is in the context of a lawyer-client relationship. What results from the appointment of a non-legal person purporting to be an agent of the lawyer vis-à-vis the client is an issue concerning independence, and   |

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|                             | concerns as it is not uncommon for accountants to act in the capacity of an agent, as an intermediary between their clients and lawyers.  | whether the lawyer was acting in their professional capacity and whether the communication meets the dominant purpose test.  |
| <b>Protocol terminology</b> |   |  |
| 45                          | <p>The terminology within the draft Protocol suggests that the ATO's desired approach reflects the law or generally accepted procedures. The final Protocol should be revised as follows:</p> <ul style="list-style-type: none"> <li>replacing the heading above paragraph 28 of the draft Protocol from 'standard particulars' to 'ATO's preferred particulars'</li> <li>replacing the phrase 'recommended approach' with 'the ATO's preferred approach'</li> <li>replacing the second sentence at paragraph 6 of Addendum 1 to the draft Protocol with           <p>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</p> </li> <li>replacing the opening words at paragraph 7 of Addendum 1 to the draft Protocol with 'Our expectations in relation to the respective roles with regard to LPP can be summarised as follows', and</li> <li>deleting the first sentence in paragraph 11 of Addendum 1 to the draft Protocol.</li> </ul> | <p>The Protocol is intended to provide guidance on how to make LPP claims to enable us to quickly decide on what to do with those claims. The following terminology has been revised in the final Protocol:</p> <ul style="list-style-type: none"> <li>It is made clear that its purpose is to recommend an approach which, in our view, will best assist us in deciding whether to accept, review or challenge an LPP claim (see paragraph 2 of the final Protocol).</li> <li>References to 'standard particulars' have been removed.</li> <li>Paragraph 6 of Addendum 1 has been amended to include the following wording:           <p>Our information gathering activities are directed to obtaining access to facts for the purposes of the administration or the operation of a tax law (including making a correct assessment of tax), and our intent is to support you to make LPP claims where the communications covered by a formal notice are privileged.</p> </li> <li>Paragraph 7 of Addendum 1 has been revised as follows:           <p>Our expectations in relation to the respective roles of taxpayers, advisors and the ATO in regard to LPP can be summarised in the following table. The court is the ultimate decision maker in respect of LPP claims.</p> </li> </ul> <p>The first sentence in paragraph 11 of Addendum 1, relating to us being required and entitled to full access to facts, has been removed in the final Protocol.</p> |
| 46                          | The draft Protocol notes that it is ATO's 'recommended approach' and it is 'voluntary'; however, the terminology 'Protocol' infers otherwise. To avoid any misunderstanding, the document should be referred to as the 'Guidance Note' or 'Recommended Approach'.   | We have revised the title of the final Protocol to 'Compliance with formal notices – claiming legal professional privilege in response to formal notices' but otherwise maintained the reference to 'Protocol'. We think that the document is sufficiently clear in describing its purpose.  |

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| 47           | The draft Protocol states that if the recommended approach is not followed there is 'no presumption that ...claims are invalid'. However, the Protocol still infers that there will be follow up by the ATO if the Protocol is not followed.  | <p>It is part of our role as a regulator to decide whether or not to accept, review or challenge an LPP claim that has been made in response to a formal notice for production of information and documents. A purpose of this Protocol is to set out what taxpayers can expect when they are dealing with us. If we are not able to make an informed decision based on the information available, we may:</p> <ul style="list-style-type: none"> <li>• request further information</li> <li>• issue a further formal notice to obtain compulsorily particulars of communications over which privilege has been claimed, or</li> <li>• commence declaratory proceedings.</li> </ul> |
| 48           | The introductory comments of the draft Protocol state that its purpose is to assist the ATO to determine whether to accept, review or challenge an LPP claim. The terminology in the remainder of the Protocol shifts to imply the ATO determines the validity of the LPP claims. The final Protocol should clearly state that the Courts are the final arbiter of whether a claim for LPP is valid.  | <p>The terminology in the final Protocol has been revised to reflect the purpose of the document, which is set out at paragraph 2 of the final Protocol.</p> <p>Paragraph 7 of Addendum 1 to the final Protocol provides that the court is the ultimate decision maker in respect of LPP claims.</p>  |
| 49           | The term 'engagement' in Step 1.1 of the draft Protocol implies that the reference to engagement is the engagement documentation as opposed to a broader use of the term such as consultation or interaction. It is established in case law that consultation prior to actual formal engagement may still be privileged. The final Protocol should remove the reference to engagement or clarify that the focus is on the nature of the relationship. | <p>Footnote 4 has been included in the final Protocol to clarify that the term 'engagement' is a reference to the broader use of the term, such as consultation or interaction as opposed to the engagement documentation.</p>  |
| 50           | Step 1.1 of the final Protocol should require an assessment of the capacity in which the legal practitioner is acting, given the context in which the communications occurred; that is what service is being sought by the client.  | <p>We think that Step 1.1 of the Protocol is sufficient to identify the service or engagement. The question of whether the advice constitutes professional advice given by a lawyer in his or her capacity is considered in the other steps.</p>  |

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| <b>General issues</b> |  |  |
| 51                    | <p>The draft Protocol does not accord with the professional obligations to which solicitors are subject or the law of LPP generally. For example, Step 3 of the draft Protocol requires solicitors to set out the approach used by them in making the LPP claim including 'how you used this Protocol'. There are not such requirements in the law of LPP.</p>   | <p>The final Protocol is designed to recommend an approach which, in our view, will best assist us in deciding whether to accept, review or challenge an LPP claim. Understanding the process by which a taxpayer or advisor has approached a claim for privilege can assist us in making that decision.</p>   |
| 52                    | <p>The draft Protocol outlines that taxpayers can inform the ATO of their compliance with the Protocol using a 'Form'. Will the form be an 'approved form' for the purposes of subsection 388-50(1) of Schedule 1 to the TAA?</p> <p>The final Protocol should allow taxpayers and advisors to provide the particulars for an LPP claim in other formats than the prescribed ATO forms</p>   | <p>The Legal professional privilege form is not an approved form for the purposes of subsection 388-50(1) of Schedule 1 to the TAA.</p> <p>Additional wording has been included at paragraph 33 of the final Protocol to clarify that taxpayers can use their own forms or schedules other than the prescribed ATO form. However, they should include the same information as requested in the ATO form.</p>   |
| 53                    | <p>Paragraph 7 to Addendum 1 to the draft Protocol should explicitly state that the views presented in the table are those of the ATO.</p> <p>The table at paragraph 7 of the draft Protocol 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'.</p>   | <p>Paragraph 7 of Addendum 1 to the final Protocol has been amended to reflect our expectations in relation to the respective roles of taxpayers, advisors and ourselves in regard to LPP.</p> <p>Table 3 of Addendum 1 has also been revised to state that we expect taxpayers to claim LPP in accordance with the principles of LPP.</p>   |
| 54                    | <p>Addendum 2 to the draft Protocol should specify how penalties may apply to a statement about compliance with the Protocol, in the context of Law Administration Practice Statement PS LA 2012/4 <i>Administration of the false or misleading statements penalty – where there is no shortfall amount</i>.</p> <p>The Protocol should explain the ATO's position on prosecution on an LPP claim that is not ultimately successful.</p> | <p>The paragraphs relating to disputes about LPP claims in the draft Protocol have not been included in the final Protocol. Instead, the final Protocol includes a new paragraph 12 which provides that taxpayers can expect us to work with them to resolve any disputes about LPP claims in a manner consistent with our existing guidance.</p> <p>The Commonwealth Director of Public Prosecutions (CDPP) is charged with responsibility for the carriage of all prosecution matters relating to offences against Commonwealth laws. Whether we decide to refer a matter for prosecution will depend on our CDPP referral guideline, and the Commonwealth prosecution guidelines.</p> |

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| 55           | It would be prudent for the ATO to withdraw the Protocol until the final outcomes of the decisions are known in the current matters before the courts. Alternatively, the date of effect of the final Protocol should be after the outcome of the court decisions are known.   | We do not think it is necessary or appropriate to delay the publication of the final Protocol or delay its date of effect until after various court decisions are known. Any legal developments materially impacting the Protocol will be considered and incorporated into the Protocol on an 'as necessary' basis. Accordingly, we have removed the reference to reviewing the Protocol over the next 3 years.  |
| 56           | The implication of the draft Protocol is that the taxpayer is required to discharge the onus of proving to the Commissioner the <i>bona fides</i> of their LPP claims. The question of onus will ultimately be resolved by courts.   | There is authority that a person asserting LPP should provide evidence or make submissions in support of their claim in the context of a response to a compulsory production power exercised by a statutory authority (see <i>National Crime Authority v S</i> <sup>5</sup> ). Paragraph 8 of the final Protocol recognises this. It also recognises that there is not a 'standard' amount of information that must be provided to decide what to do with an LPP claim. We think that the final Protocol sets out an approach that would allow us to quickly decide how to treat an LPP claim. |
| 57           | <p>The draft Protocol notes that it is voluntary; however, it also indicates that if a taxpayer does not comply with the Protocol, the Commissioner will ask for further information to assess such claims.</p> <p>The Protocol needs to clearly state that taxpayers will not be compelled in the context of paragraph 8 of the draft Protocol to provide the detail required in a different process.</p> <p>The existence of potential ramifications for not complying with the Protocol undermines its voluntary nature. The final Protocol should not place undue burden on taxpayers who choose not to comply with it, provided they comply with the law in claiming LPP.</p> | <p>See our response to Issue 47 of this Compendium.</p> <p>We need a certain amount of information to decide how to deal with an LPP claim.</p> <p>Further enquiries may involve, in some situations, us issuing a further formal notice to obtain compulsorily particulars of documents over which privilege has been claimed (insofar as those particulars do not disclose the privileged contents of those documents); see <i>CUB Australia Holding Pty Ltd v Commissioner of Taxation</i><sup>6</sup>.</p>   |
| 58           | It is agreed that taxpayers should only claim LPP where it is appropriate. The final Protocol should acknowledge that the ATO would only challenge LPP claims on appropriate and legitimate grounds.   | Table 3 at paragraph 7 of Addendum 1 to the final Protocol has been amended to include the wording that we will only challenge an LPP claim on appropriate grounds.  |

<sup>5</sup> [1991] FCA 234.

<sup>6</sup> [2021] FCAFC 171.

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| 59           | It is unusual that the ATO will only use alternative dispute resolution (ADR) process for LPP disputes where it is agreed to be a binding process.  | See our response to Issue 54 of this Compendium.  |
| 60           | <p>Reference to 'capacity' at subparagraph 16(d) and paragraph 22 of the draft Protocol can be confusing.</p> <p>The draft Protocol in some places refers to 'specific capacity' and in others to 'capacity'. One expression should be used if no difference in meaning was intended.</p> | <p>To qualify as privileged, the advice sought must satisfy the description of professional advice given by a lawyer in his or her capacity as such.</p> <p>In the final Protocol, we have replaced the references to 'specific capacity' with 'capacity', so that one expression is used throughout.</p>   |
| 61           | <p>The ATO should review the guidance provided by the ATO in relation to the Accountants' Concession to ensure consistency with the LPP guidance.</p> <p>How does the LPP Protocol interact with the accountants' concession?</p>   | <p>The accountants' concession is an administrative concession we have granted to clients of professional accounting advisors. Under the concession, we will generally not seek access to certain advice documents in all but exceptional circumstances. LPP and the accountants' concession are 2 different limitations to our formal powers. The LPP Protocol does not apply to accountants' concession claims.</p> |
| 62           | There are concerns regarding the conduct of ATO officers when practitioners are relying on LPP in representing their clients. A number of case studies have been provided by way of illustrative purposes.  | We are separately reviewing the case studies and take these allegations very seriously.   |
| 63           | The relevance of certain particulars to assessing whether a document is subject to privilege is not apparent; for example, whether the document is a copy, the date and the number of pages of the document.  | We expect that a person claiming LPP will provide us with an explanation that allows us to decide what to do with a claim for privilege. We are of the view that the final Protocol sets out the approach and relevant information that we think would allow us to quickly decide how to treat an LPP claim.  |
| 64           | There are some inconsistencies between the draft Protocol and other ATO guidance. How does the draft Protocol align with other ATO guidance such as <a href="#">Our approach to information gathering</a> ?   | The stakeholder feedback did not specify the perceived inconsistencies. However, we note that paragraphs 12 and 32 of the final Protocol clarify that we will work with taxpayers to resolve any disputes about LPP claims and any requests for an extension of time to comply in a manner consistent with our existing guidance. This includes <a href="#">Our approach to information gathering</a> .               |
| 65           | Will the Commissioner adhere to the draft Protocol when they are claiming privilege in litigation or in response to Freedom of Information requests?  | The final Protocol is specifically intended to recommend the provision of particulars to support an LPP claim so that the Commissioner can discharge their statutory duty in deciding whether a formal notice has   |

| Issue number                 | Issue raised  | ATO response   |
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|                              |   | <p>been complied with or not. Taxpayers do not operate under a similar statutory duty.</p> <p>Where a request is made under the <i>Freedom of Information Act 1982</i>, the relevant agency or minister responding to the request is required to comply with their obligations under that Act and its associated regulations. This includes explaining a decision not to grant access to a document as it is an exempt document due to LPP.</p> <p>In support of a claim for LPP or a decision not to grant access to an exempt document in respect of a Freedom of Information request, the Commissioner is bound by the law (not the Protocol), including all applicable statutory obligations and frameworks.</p> |
| 66                           | <p>Paragraph 31 of the draft Protocol requires information regarding the independence of the original advisor or the advisor making the claim and the person making the assessment. This information should be available to the ATO and it appears to be a duplication of the information sought.</p>   | <p>We have not included in the final Protocol the questions in Step 3 which relate to who was involved in preparing the particulars and whether the person making the privilege assessment was independent of the original advisor.</p>  |
| 67                           | <p>The table at paragraph 31 of the draft Protocol contains a duplication in seeking to confirm whether Step 1 has been followed.</p>   | <p>We agree and the duplication has been removed in the final Protocol.</p>  |
| <b>Guidance to ATO staff</b> |   |  |
| 68                           | <p>The ATO's suggestion of training ATO officers regarding the approach on privilege claims in practice, including the ability to escalate, is strongly supported. This should also include the use of ADR and related processes for LPP claims.</p>  | <p>We are currently planning training in relation to the Protocol for all impacted ATO staff which will be rolled out when the Protocol is finalised.</p>  |
| 69                           | <p>There is a concern that ATO staff, particularly those who are not legally trained, will see the Protocol as binding and comprising a checklist of items to request in a subsequent formal notice if a taxpayer or advisor does not provide all the particulars recommended in the Protocol. Accordingly, guidance must be provided to staff on how the Protocol is to be used.</p> | <p>See our response to Issue 68 of this Compendium.</p>  |

| Issue number                        | Issue raised   | ATO response   |
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|                                     | The ATO should seek to understand the reasons for non-provision of the recommended particulars.  |  |
| <b>Computer-assisted technology</b> |  |  |
| 70                                  | <p>Computer-assisted technology plays a key role in searching for and identifying documents responsive to a formal notice and assisting with LPP claims, including improving the quality and completeness of document production and LPP claims.</p> <p>The final Protocol should contain a positive statement about the use of technology and the types of benefits that the ATO sees can be obtained through its proper use.</p> <p>Stakeholders welcome the opportunity to engage further with the ATO on this.</p> | <p>Paragraphs 13 and 14 of the final Protocol acknowledge that there are opportunities for taxpayers to include computer-assisted processes when determining whether a communication may be privileged.</p> <p>We will be seeking, through a consultation process, to better understand how computer-assisted technology will assist us in determining whether to accept, review or challenge a claim.</p> |
| 71                                  | The draft Protocol contains various dispersed statements relating to the use of computer-assisted technology (including to identify documents for relevance), thereby reducing clarity of the ATO's expectations.  | All statements relating to the use of computer-assisted technology have been moved to paragraphs 13 and 14 in the final Protocol, under the separate heading 'Computer-assisted technology'. We have also removed the reference to the use of technology to identify documents for relevance, as it is outside the scope of the Protocol.  |
| 72                                  | The inference at paragraph 15 and footnote 2 of the draft Protocol (that each LPP claim prepared using computer-assisted technology would need to be manually reviewed) diminishes the efficiency benefits gained and increases compliance costs. The final Protocol should clarify that the ATO's concern with use of computer-assisted technology relates to governance procedures being in place.   | See our responses to Issues 70 and 71 of this Compendium.  |
| 73                                  | The ATO should consult with industry to ensure that further guidance on the use of technology is targeted and adopts an approach that seeks to minimise costs for both the taxpayers and the ATO.  | We will be seeking to better understand how computer-assisted technology will assist us in determining whether to accept, review or challenge a claim. This will involve consultation with relevant stakeholders.  |
| 74                                  | There was an acknowledgement that technology cannot solely be used to make privilege claims. However,  | See our responses to Issues 70 to 72 of this Compendium.   |

| <b>Issue number</b> | <b>Issue raised</b>  | <b>ATO response</b> |
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|                     | <p>technology should be a focus area for the ATO. It is an important tool that can assist in:</p> <ul style="list-style-type: none"><li>• identifying documents responsive to a formal notice</li><li>• assessing privilege claims, and</li><li>• extracting details for the purposes of providing particulars to support a claim by automatically completing certain particulars, which can improve the consistency and the quality of the claims.</li></ul> <p>The final Protocol should clarify that it is concerned with the use of technology to determine whether the communication is subject to privilege.</p> |                     |