



THE TAX INSTITUTE

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Dear Vicki

NTLG LPP Working Party – “Scope of Engagement” agreement consultation

The Tax Institute welcomes the opportunity to make the following submission to the Australian Taxation Office (**ATO**) in relation to the NTLG LPP Working Party “Scope of Engagement” agreement consultation as outlined in the paper provided to the Working Group (**Consultation Paper**).

The Consultation Paper sets out what the ATO considers important when making legal professional privilege (**LPP**) claims. According to the Consultation Paper, when responding to a request for information or seeking to access documents, the ATO expects to understand what documents have been reviewed, the process by which that review was undertaken and what communications are asserted to be privileged and why.

Targeted measure needed

The Tax Institute understands that the ATO accepts that the majority of practitioners are legitimately making LPP claims on behalf of their clients and that the ATO is only concerned with claims made by a small percentage of practitioners who they consider to be making inappropriate claims on behalf of their clients.

Given this, it would be preferable to have a more targeted approach than the approach outlined in the Consultation Paper to deal with the ATO’s concerns regarding inappropriate LPP claims.

For a more targeted approach, the ATO needs to give a clear and detailed explanation of its concerns. In this regard, The Tax Institute suggests that the ATO should provide guidance with examples setting out its concerns, and not merely express issues of principle. For instance, rather than stating that claims by in-house counsel may be an issue if there are concerns around independence, the ATO could give an example of a factual scenario where it would consider there was no such independence. In addition, the ATO could give examples where it considers legal advice would be commercial advice in a tax context, as opposed to just stating the principle. If such guidance is not provided, it may leave practitioners with the misleading impression that the ATO is

concerned about LPP generally rather than only being concerned about specific scenarios where LPP is being claimed.

Time requirements

In some circumstances, the ATO's time limit to respond to requests to produce documents will not practically allow a considered review of privilege claims to be made. The ATO tends to apply a standard 28 day timeframe to any request or notice regardless of the circumstances (eg the volume or age of the documents requested). Extensions may not readily be granted unless a taxpayer can demonstrate some extraordinary circumstances.

In some instances, the basis for a LPP claim may be obvious (eg legal advice letters from a lawyer). However, in other circumstances it is less clear (eg internal correspondence which summarises what appears to be legal advice but does not attribute it to a particular lawyer or communications which include parties other than the relevant client and their lawyers). Determining the extent to which such documents are subject to LPP can be challenging and time consuming particularly if the document is aged and the author is no longer available.

Experience indicates that audit teams often expect that taxpayers will have gathered all relevant documents at the start of a review or audit and that they will be readily accessible when a request or notice is received. This expectation is unrealistic. In reality, taxpayers cannot know what the ATO might consider to be relevant over the course of a review or audit. Documents and information may be gathered as and when requests or notices are received or in order to respond to an ATO position stated in a position paper, statement of audit position or objection decision.

Where the ATO only allows a short time period to respond, it may take the majority of the allowed time to locate the documents. Carefully assessing each document for privilege is a time-consuming process that may not be possible within the required timeframe.

Where insufficient time is provided to locate and assess requested documents, this may result in claims for privilege that may not otherwise be made in an attempt to preserve privilege. If a practitioner has insufficient time to adequately assess the relevant documents, the practitioner may take, legitimately, a cautious approach and make a "provisional" claim for privilege, subject to a full and proper assessment of whether the claim can be maintained. A taxpayer may subsequently produce further communications once it has had an adequate opportunity to determine that they are not privileged.

Provided the ATO is made aware that the claim is provisional, and that the subsequent assessment is completed in an appropriate timeframe (ideally, an agreed one), this is an appropriate and reasonable approach. The benefits to both the ATO and the privilege holder, wanting to properly assert a fundamental legal right, are obvious.

The Consultation Paper states that the ATO expects practitioners to make an assessment of privilege before claiming LPP. This expectation needs to be coupled with a requirement for sufficient time to be provided. The Consultation Paper should state that the ATO is required to provide sufficient time to assess documents for LPP. It should also be noted that what is "sufficient" will depend on the circumstances (eg the volume of documents requested, the type of documents requested and the timeframe that the relevant documents relate to).

It is suggested that senior officers from the ATO Review and Dispute Resolution business line be available where there is a dispute as to whether sufficient time has been provided, and that these officers be given authority to extend timeframes where they consider it appropriate.

Independent review

The Consultation Paper refers to a “Full LPP Review”. According to the Consultation Paper, this requires a legal practitioner “being independent of the privilege holder and the adviser” to review the documents and form an opinion about privilege in respect of each relevant document. This requirement for independent review for privilege to be claimed is an inefficient, time consuming and very costly approach.

We acknowledge that the Consultation Paper does not specifically state that an independent review is required to maintain a valid LPP claim. However, given the tone of the Consultation Paper, we consider that a positive statement to this effect should be included in the Consultation Paper (ie a statement acknowledging that independent review is not a prerequisite for claiming LPP).

It is also not required in any other context (for example, in litigation in various Courts and tribunals). It is often necessary to understand the context of the document to assess privilege claims. The likely consequence is that the review process will take much longer to complete given that an independent reviewer will need to be briefed and gain an understanding of relevant the events and parties to make decisions in relation to LPP. Further, assessing privilege is not a widely practiced area of speciality and it requires a particular level of skill and experience to engage in it confidently. It may not be possible to find an appropriate reviewer to independently review large volumes of documents at short notice and prepare the necessary documents to claim privilege.

The Tax Institute does not understand the need for this approach. As the Consultation Paper correctly notes, legal practitioners are subject to professional conduct rules and owe a paramount duty to the court. In this regard, there is no requirement for an independent legal practitioner to review claims for legal professional privilege in examinations conducted by other federal government regulators (such as the Australian Securities and Investments Commission) or for the purposes of court ordered discovery. As previously stated, the ATO should explain why concerns regarding the independence of legal practitioners arise in the context of ATO examinations and why existing professional conduct rules are not sufficient to deal with these concerns.

Further, the ATO’s proposed requirement for the taxpayer to engage an independent legal practitioner to review all documents to assess the extent to which they are subject to LPP would, in many cases, lead to unnecessary delays and costs. These costs may be incurred before it is readily apparent that the ATO and the taxpayer have a difference in opinion in respect of the ability to claim LPP over specific documents and communications.

The Tax Institute’s view is that the ATO should consider whether the suggestion of an independent review of LPP claims would be more appropriate as part of guidelines developed for the resolution of differences in opinion after an initial LPP claim has been made by or on behalf of a taxpayer.

It is important to note that the privilege belongs to the recipient of the relevant advice, and taxpayers have no obligation to obtain legal advice (independent of their advisors or otherwise) prior to an LPP claim being made. The absence of an obligation to seek legal advice must be recognised in any public statement the ATO may wish to make as to the process that it seeks taxpayers follow to identify and claim privilege.

If a person wishes to assert a fundamental right, they should be able to do so according to law. Administrative processes are important but they should be designed to facilitate and not limit the claiming of a legal right. The approach suggested in the Consultation Paper should not be mandated. There is a place for independent review. However, this should be limited to those circumstances where the parties are in dispute about a claim and they agree to appoint an independent reviewer to make binding or non-binding determinations on LPP.

LPP Schedule/forms

The Consultation Paper notes that the LPP schedule which the ATO currently requires to be provided needs improvement or re-design. The Tax Institute agrees with this. We suggest that it should be sufficient for a schedule to be completed for appropriate categories of documents rather than separately for every document the subject of a claim for privilege.

The determination of claims for LPP is not a statutory function of the Commissioner of Taxation. Claims for LPP in response to the exercise of the ATO's access and information gathering powers are common law LPP claims, and the Commissioner is entitled to seek appropriate declarations from a court where he considers that a claim has not been properly made. Although the Commissioner has been expressing his concerns regarding LPP publicly for some time, it is not clear that he has taken any particular action to test the validity of his concerns and there is little publicly available evidence to support his concerns.

Forms proposed by the ATO should not become a *de facto* discovery process for an action to test a privilege claim. Any updated forms that the ATO seeks a taxpayer to complete to explain a claim must recognise that the completion of the forms is a voluntary process, which a taxpayer may wish to cooperate with in order to give the ATO greater assurance as to the claims it has made. ATO officers should clearly understand that an unwillingness to complete the forms in whole or in part may not be an indication that claims for LPP are being made inappropriately.

An updated form must also recognise that the advice which a taxpayer seeks as to whether communications are subject to LPP will itself be subject to LPP. If the ATO is seeking to encourage legal advice to be sought in relation to claims for LPP, the forms should not include questions which may result in the waiver of LPP over that advice.

Form of the Consultation Paper

It is unclear what the nature of the Consultation Paper will be in terms of its status or form in terms of ATO guidelines. The Paper is drafted as a statement of ATO practice. The ATO needs to make it clear what the purpose and status of the Consultation Paper is intended to be.

Rather, we suggest the Consultation Paper should state the best practice and outline a very clear protocol (just as a practice note would in the court system). Usually, privilege claims are detailed by reference to categories of documents together with a description of the documents. If the ATO has issues with any of the claims, there could be a process for independent review of the contested privilege claims.

It is our view the protocol should outline best practice. The Consultation Paper should state that the majority of professional advisers are making valid privilege claims. The ATO could then set out the areas of concerns and make it clear that blanket claims for privilege will not be acceptable without further justification.

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If you would like to discuss, please contact either me or Tax Counsel, Angie Ananda, on 02 8223 0050.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Neilson', written in a cursive style.

Tim Neilson
President