The Tax Institute

QLD Tax Forum

What do the current issues in Legal Professional Privilege mean for advisors?

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Greg Antipas,
Ground Floor Wentworth Chambers

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1. Introduction

The Commissioner of Taxation's powers to obtain information are extensive and necessary in the public interest to administer Australia's taxation laws effectively and fairly.

One such power, which has featured in recent cases, is s 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (**TAA**), which allows the Commissioner to request, among other things, a person provide information, give information in person and/or produce documents. It is useful to set out this provision in full at the outset:

> **353-10 Commissioner's power**
>
> (1) The Commissioner may by notice in writing require you to do all or any of the following:
>
> (a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a *taxation law;
>
> (b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;
>
> (c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.
>
> Note: Failing to comply with a requirement can be an offence under section 8C or 8D.

However, this power is limited, relevantly, by the common law doctrine of legal professional privilege (**LPP**). In very general terms, LPP protects from disclosure communications between a legal adviser and their client where the dominant purpose of the communications is legal advice or providing legal services.

LPP has been described as a fundamental right or immunity at common law. The High Court of Australia said of LPP in *Daniels Corporation*[1]:

> (L)egal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceeding. ….
>
> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity.

And in *Grant v Downs*, the High Court explained:[2]

[1] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552, 553 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[2] *Grant v Downs* (1976) 135 CLR 674 at 685, per Stephen, Mason and Murphy JJ.

> The existence of the privilege "assists and enhances the administration of justice by facilitating the representation of clients by legal advisers … by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure ... to the solicitor."

As Deane J expressed it in *Baker v Campbell*[3], a person should be entitled to seek and obtain legal advice in the conduct of his or her affairs without the apprehension of being prejudiced by subsequent disclosure of the communication.

The common law doctrine of LPP has to a large extent been codified in sections 117 to 126 of the *Evidence Act 1995* (Cth). Section 118 creates a privilege for confidential communications made and confidential documents prepared for the dominant purpose of a lawyer providing *legal advice*. Section 119 creates a privilege for confidential communications made and confidential documents prepared for the dominant purpose of a lawyer providing *legal services in relation to litigation*.

The focus of this paper, however, is LPP in the context of the Commissioner's review or audit of a taxpayer's affairs, before the commencement of any Part IVC proceedings. The exercise of the Commissioner's information gathering powers by way of issue of a s 353-10 notice is not in respect of a proceeding to which the *Evidence Act* applies and therefore is outside the scope of operation of the *Evidence Act*.[4] Accordingly, the common law doctrine of LPP applies here.[5]

How the Commissioner's powers to request disclosure in the exercise of its statutory function of administering taxation laws interacts on the one hand, with a taxpayer's fundamental right of immunity from disclosure on the other hand, is a complex and evolving area which is the subject of recent decisions of the Federal Court Australia and the Commissioner's Draft LPP Protocol.

Arguably, the most significant development in this space is the delivery of judgment on 25 March 2022 by Moshinsky J in *Commissioner of Taxation v PricewaterhouseCoopers*.[6] The reasons for decision are substantial (at 934 paragraphs over 228 pages) and provide a detailed consideration of the operation of the common law doctrine of LPP in the context of the audit of a large multinational taxpayer advised by a major international multi-disciplinary partnership.

The judgment provides a detailed insight into how a Court may approach the resolution of disputed LPP claims in the context of an ATO review or audit where both lawyers and non-lawyers, such as accountants, are involved in advising the taxpayer. For this reason, the focus of the Paper will be a consideration of the decision of Moshinsky J in *PricewaterhouseCoopers*.

At around the time *PricewaterhouseCoopers* was heard before Moshinsky J in September 2021, the Commissioner issued his Draft LPP Protocol and the decision of the Full Federal Court (Middleton, McKerracher and Griffiths JJ) was delivered in *CUB Australia Holding Pty Ltd v Commissioner of Taxation*[7], upholding the decision of Moshinsky J at first instance.[8]

Before embarking on a consideration of *PricewaterhouseCoopers*, the applicable common law principles of LPP, *CUB Australia Holding* and the Draft LPP Protocol will first be considered.

[3] *Baker v Cam*pbell (1983) 153 CLR 52 at 114.
[4] Section 4, *Evidence Act 1995* (Cth).
[5] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [135].
[6] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278.
[7] *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171.
[8] *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCA 43.

2. Legal Professional Privilege

2.1 Key Principles

The often cited decision of Young J in *AWB Ltd v Cole (No. 5)*[9] provides a comprehensive and convenient outline of the key principles of LPP. A condensed summary of these follows[10].

- For a communication between a lawyer and his or her client to qualify for advice privilege the communication must be confidential, the legal adviser must be acting in his or her professional capacity and the communication made, or the document brought into existence, for the dominant purpose of giving or obtaining legal advice;
- The party claiming privilege carries the onus of proving that the dominant purpose that led to the making of the confidential communications was to enable the legal adviser to give, or the client to receive, legal advice;
- The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence as to purpose from the maker of the document or the person who authorised or sought it may be received but is not conclusive;
- The existence of legal professional privilege is not established merely by the assertion that privilege applies or that communications were undertaken for the purpose of obtaining or giving legal advice;
- In the ordinary case, where the communications take place between a client and his or her independent legal advisers or between a client's inhouse lawyers and those legal advisers, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given;
- The concept of legal advice is of broad compass and includes all communications relating to, and arising from, the normal lawyer client relationship involving the provision of legal advice or legal services, but does not extend to advice that is purely commercial or of a public relations character;
- Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client;
- In the absence of a formal or express retainer, the existence of a lawyer client relationship can be implied or inferred; and
- The Court has power to examine documents over which legal professional privilege is claimed and, where there is a disputed claim, the Court should not be hesitant to exercise such a power.

2.2 Continuum of communications

The scope of LPP extends not only to the formal advice given by the lawyer and the formal instructions given to the lawyer, but also to a *continuum of communications* that, while not advice or instructions in the formal sense, are prepared for the dominant purpose of keeping the lawyer, or the

[9] *AWB Ltd v Cole (No. 5)* (2006) 155 FCR 30 at [44].
[10] References omitted.

client, informed so that they are in a better position to give fully informed advice (or instructions). This principle derives from the UK Court of Appeal decision in *Balabel v Air India*:[11]

> There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. …. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

In *DSE (Holdings) Pty Limited v Intertan Inc,* Allsop J observed:[12]

> (I)t would be rare that one could, with any degree of confidence, say that a communication between client (or agent) and lawyer, in the circumstances of a retainer requiring legal advice and the directing of the client by a legal adviser, was not connected with the provision or requesting of legal advice.

More recently, Thawley J in *Kenquist Nominees Pty Ltd v Campbell (No 5)* stated:[13]

> Where a lawyer has been retained for the purposes of providing legal advice in relation to a particular transaction, communications between the lawyer and client relating to the transaction will prima facie be privileged, notwithstanding they do not contain advice on matters of law; it is usually enough that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser to the client: *AWB No 5* at [47]; *DSE* at [51]-[52].

2.3 Third Parties

A confidential communication prepared by a third party, or prepared by the client and provided to a third party, will attract LPP provided that the communication was prepared and made with the dominant purpose of the client seeking and obtaining legal advice from the client's lawyer.[14]

LPP extends to internal communications that record legal work carried out by the lawyer (or agent or third party) for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client.[15]

[11] *Balabel v Air India* [1988] Ch 317 at 330, per Taylor LJ.
[12] *DSE (Holdings) Pty Limited v Intertan Inc* (2003) 135 FCR 151 at [45].
[13] *Kenquist Nominees Pty Ltd v Campbell (No 5)* [2018] FCA 853 at [15].
[14] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.
[15] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 569, per Gummow J.

3. *CUB Australia Holding Pty Ltd v Commissioner of Taxation*

CUB Australia Holding Pty Ltd is a recent decision in the context of the exercise of the Commissioner's information gathering powers by way of issue of a s 353-10 notice and claims for LPP in response.

The Commissioner issued a s 353-10 requiring CUB Australia Holdings Pty Ltd (**CUB**) to produce certain documents which he considered relevant to determining CUB's income tax liability. In response to the notice, CUB claimed LPP over some 20,000 documents. Sometime later, the Commissioner issued a second s 353-10 notice requiring CUB to provide the following information in respect of each document the subject of an LPP claim, in the following terms[16]:

> "For every document responsive to the notice issued under section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) on 30 May 2018 that was not wholly produced due to claims for legal professional privilege, provide:
>
> a. the title of the document. Where the document is an email, the title of the document means the subject line of the email;
>
> b. the name of the person who authored the document;
>
> c. the name of each person to whom the document was communicated; and
>
> d. where the document is an email, for each person who received the email, whether the email was sent directly to the person or copied to the person."

CUB Australia sought judicial review of the Commissioner's decision to issue the second s 353-10 notice, on 4 grounds. The first 3 grounds challenged the validity of the second notice contending in essence that it was issued for an improper purpose, namely, for the Commissioner to determine the validity of CUB's LPP claims, which is something that is within the power of the Courts and not the Commissioner to determine. The Commissioner contended that the second notice was issued for a valid purpose, namely, to obtain sufficient information to enable him to decide whether to accept or challenge the LPP claims.

By the fourth ground, CUB sought a declaration that the titles of documents or subject lines of email were themselves privileged and therefore CUB was not required to produce that information to the Commissioner. In contrast with the first 3 grounds, the fourth ground required a determination to be made, on a case by case basis, of whether the titles of the relevant documents were covered by LPP.

It was agreed amongst the parties that the first 3 grounds be determined separately first before the fourth ground.[17] This decision therefore only concerns the validity of the second s 353-10 notice and not whether the titles of documents or subject lines of emails are themselves privileged.

Moshinsky J held the Commissioner's purpose, or substantial purpose, was to obtain information that he considered necessary to determine whether to accept or challenge CUB's LPP claims and that the second notice was validly issued for the purpose of the administration of a taxation law.[18]

[16] *CUB Australia Holding Pty Ltd v Commissioner of Taxation [2021] FCA 43* at [4].
[17] *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCA 43 at [8]-[9].
[18] *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCA 43 at [10].

The decision, upheld by the Full Federal Court, confirms the Commissioner has the power to request the following information from a taxpayer to assist it in determining whether to accept or challenge a taxpayer's LPP claim:

- Names of author and recipient of documents and the names of the sender of, recipients of and those copied in on emails.
- Title of documents and the subject lines of emails

The issue of whether the title of documents and the subject line of emails are themselves privileged remains unresolved.

The Full Federal Court also confirmed that it is for the Court, not the Commissioner, to determine whether a taxpayer's LPP claims are made out.[19]

Further, the Full Federal Court said:[20]

> …CUB also argued (correctly) that in exercising a coercive power, the Commissioner should not impinge upon rights which are not clearly abrogated by the grant of the power: *LHRC v Federal Commissioner of Taxation* [2015] FCAFC 184; (2015) 239 FCR 240 (at [10]).

In *LHRC v Federal Commissioner of Taxation,* Siopis and Pagone JJ considered the extent of former s 264 of the *Income Tax Assessment Act* 1936 (Cth), the predecessor to s 353-10, and the decision of Lockhart J in *Citibank Ltd v Federal Commissioner of Taxation*[21], relevantly stating at [10]:

> The decision in *Citibank* was … that the Commissioner was required to exercise the power under s 263 without transgressing rights which s 263 did not override. In *Citibank* Lockhart J said at 1491:
>
> > In my opinion, the person — whether the Commissioner or his delegate, who presumably will be a senior and trusted officer of the Taxation Office — who is called upon to authorise the exercise of s 263 powers must apply his own mind to the question of the exercise of such powers, must consider the relevant circumstances and must decide whether it is appropriate in all the circumstances to authorise the exercise of the power to enter a person's premises, search for and copy documents. The power conferred by s 263 is a compulsory power. There is a fine line, even in our society, between responsible exercise of large powers and authoritarian cynicism. The Commissioner and his delegates must consider the circumstances of the particular exercise of the s 263 power to ensure that that line is not transgressed.
>
> In that case the relevant right at risk of being transgressed by the exercise of the power under s 263 was a right of legal professional privilege over communications that a person was entitled to maintain as against the Commissioner in the face of the statutory power: **s 263 did not abrogate legal professional privilege and, therefore, the power should not be exercised in disregard of the continuing existence of the right. The exercise of the power under s 263, therefore, and by parity of reasoning under s 264, should not impinge upon rights which are not abrogated by the grant of the power.**
>
> **[Emphasis added]**

[19] *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171 at [3].
[20] *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCAFC 171 at [19].
[21] *Citibank Ltd v Federal Commissioner of Taxation* (1988) 19 ATR 1479.

4. Draft ATO LPP Protocol

In September 2021, the ATO issued a draft "Legal Professional Privilege Protocol" (**Protocol)** which it says is designed to assist taxpayers and their advisors with LPP claims in response to formal information requests by the ATO.

The Protocol is not law and has no binding legal effect: nor could it have such effect. It is ultimately for the taxpayer, as recipient of a formal information request, to decide whether to disclose its documents and to form its own view as to whether they are immune from disclosure by reason of LPP. As already noted in the previous discussion regarding *CUB Holding Australia*, it is for the Court, not the Commissioner, to determine whether a taxpayer's LPP claims are validly made out.

Nor is the Protocol intended to be an analysis of the law of LPP. The Protocol is intended to provide guidance to taxpayers and their advisors on how the Commissioner will exercise his administrative powers in response to LPP claims.

The Protocol outlines:

- the approach that the ATO recommends taxpayers and their advisors follow when making a claim for LPP and
- what taxpayers and their advisors can expect from the ATO in response to an LPP claim, depending on the approach taken by taxpayers and their advisors.

Where the Protocol is followed, the ATO says it will usually, but not always, have all the information it needs to either:

- decide whether to accept an LPP claim or
- more readily identify and particularise any concerns and further information required before deciding whether to accept an LPP claim.

The ATO says if the Protocol is followed it is likely in many cases that a claim for LPP will be accepted. And if the Protocol is not followed, it says that although it won't presume the LPP is invalid, it warns that it will ask for further information to determine whether to accept claims.

The Protocol then sets out in detail its 3 step process that taxpayers and their advisors should follow when deciding whether to make a LPP claim. The 3 steps are:

- Assess your engagement and each communication for LPP,
- Explain your claim by providing certain particulars, and
- Advise what approach was taken to making the LPP claims.

Each step is outlined below.

Step 1: Assess your engagement and each communication

The ATO splits this first step into 3 sub-steps.

Step 1.1 - Identify the service or engagement giving rise to the communication

The ATO lists 4 categories of service or engagement (ie retainer). Taxpayers are asked to assign each communication (or document) to one (or more of the following) types of engagement:

1. Service or engagement involving only legal practitioners acting in their capacity as legal practitioners.
2. In-house counsel.
3. Service or engagement that had involvement by non-legal persons or by legal practitioners not acting in the capacity of legal practitioners.
4. Service or engagement where third party advice was obtained other than from a legal practitioner.

Step 1.2 - Assess each communication for LPP

Once the type of service or engagement has been identified, each individual document pursuant to that type of service or engagement must be assessed separately to see if LPP applies. That is, is it, or does it reveal, a confidential communication between a client and lawyer (or their agents) made for the dominant purpose of giving or obtaining legal advice or the provision of legal services?

This includes assessing each email and any attachment in an email chain. Each document must be assessed separately. This includes originals and copies of the same document[22].

This also includes assessing whether any LPP that may apply has been waived by conduct inconsistent with the maintenance of the privilege (eg disclosure to third parties).

The Protocol warns that 'blanket claims' across bundles of unreviewed documents or relying solely on computer-assisted processes are not recommended by the ATO and will attract their attention.

Engagements that had involvement by non-legal persons

In the case of communications or documents in the context of services or engagements that had involvement by non-legal persons or by legal practitioners not acting in the capacity of legal practitioners or where third party advice was obtained other than from a legal practitioner, the Protocol recommends:

1. evaluating whether the overarching service/engagement or relationship is capable of establishing the requisite lawyer/client relationship and may involve the following arrangement which are of concern to the ATO:
    a. Contrived arrangements or relationships which purport to attract LPP where there is a purpose of concealing communications from us such as circumstances where LPP is actively promoted as a feature of tax advice, rather than merely pointing out that LPP is an ordinary feature of communications that are for the dominant purpose of giving or receiving legal advice.
    b. Routing advice through a lawyer merely for the purpose of obtaining privilege..
    c. Legal engagements entered into after the substance of advice was provided by non-legal persons.
    d. Concepts and ideas proactively promoted or marketed, or presented by a person or firm, whether lawyer/law firm or otherwise, prior to a legal engagement and unsolicited by the taxpayer.
    e. Communications exclusively between non-legal persons in circumstances where the involvement of a lawyer is not apparent.
    f. non-legal persons purporting to be an agent of the client in dealing with legal staff, an agent of the lawyer in dealing with the client, as well as potentially being an independent expert on tax law matters.

[22] See *Esso Australia Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [81]-[82], per McHugh J.

2. identifying and reviewing the role or function being performed by each non-legal person involved in the communication
3. assessing the purpose of any communication which was initiated or developed by non-legal persons and how it relates to the purpose of providing legal advice or use in anticipated legal proceedings and
4. determining the capacity in which the communication was made.

Step 1.3 - Check for communications which are usually not privileged

The final step is to carefully check the communication against a long list of types of communications that the ATO considers are not usually privileged, before deciding on whether to proceed with a claim for LPP in respect of that communication.

For example documents such as the following are not usually privileged unless they are copies provided to a lawyer for the dominant purpose of receiving legal advice or legal services: Internal reports and memoranda, minutes of meetings, file notes, that do not convey or record privileged communications and advices, transaction documents, financial or accounting records.

Documents or communications such as those made for or involving the participation in a fraud or an illegal purpose are excluded from privilege.

The ATO says that documents that are brought into existence for multiple purposes will requires specific scrutiny as to whether the dominant purpose was for giving or obtaining legal advice or the provision of legal services.

Step 2: Explain your claim

Once the service or engagement giving rise to the communication has been identified and the communication or document has been assessed and the decision to claim LPP has been made, then the LPP claim in respect of each communication or document must be separately particularised by the provision of the following “standard particulars”:

- a Document ID, file name or reference number;
- the name of privilege holder(s);
- the date the document was prepared/communication was made; the number of pages in the document;
- title or subject line of the communication;
- the form of the communication i.e., email, letter, file note;
- the type of document i.e., advice, contract, invoice;
- the identity and role of each person between whom the document/communication is made:
- whether the document is a copy;
- the dominant purpose for which the communication was made (see the example below) but not to the extent this discloses the content of the advice;
- the legal issue being advised upon or for which the advice is being sought except to the extent that disclosure of the legal issue would also disclose the content of the advice;
- whether the communication was forwarded. If so, provide an explanation of:
    - the purpose of forwarding it;
    - how confidentiality in the communication was maintained; how you assured yourself that privilege was not lost.
- whether LPP is claimed in full or in part; and
- if there are attachments to the document whether LPP is being claimed over the attachment/s. If yes:

- Identify the relevant Document ID/number of the attachment/s e.g., Attachment to doc X;
- Provide the standard particulars for the attachment/s.

The Protocol recommends completing a Legal professional privilege form 1 (LPP 1)[23] to assist them in the provision of these standard particulars.

To support LPP claims in relation to communications by or to an in-house advisor acting as a legal advisor, the Protocol recommends providing the following additional particulars (in addition to the standard particulars):

- identify the in-house legal advisor (name);
- Identify whether the in-house legal advisor has been admitted to practice and if so jurisdiction of admission;
- Describe all of the functions, positions, roles and responsibilities at the time of the communication of the person who is acting as the in-house legal advisor who prepared the communication; and
- Describe the capacity in which that person was acting in making the communication.

The Protocol recommends completing an Additional questionnaire: In-house legal adviser – Legal professional privilege form 2 (LPP 2) [24] to assist them in the provision of these additional particulars.

In the case of communications or documents in the context of services or engagements that had involvement by non-legal persons or by legal practitioners not acting in the capacity of legal practitioners or where third party advice was obtained other than from a legal practitioner, the Protocol recommends

- Explain the steps taken to ascertain that the service/engagement/relationship was a legal one, given the involvement of non-legal persons.
- State all purposes of the communication.
- Explain why the legal advice from the legal practitioner is the dominant purpose of the communication.
- Where communications were originally initiated or developed by non-legal persons provide a copy of the terms of engagement (also referred to as a statement of work) that they are engaged under for the communication and explain the reason for their involvement in the communication.
- For each person involved in the preparation of the communication provide
  - their name (if not already provided in Standard Particulars);
  - their position, role and responsibility held in the organisation at the time of preparing the communication;
  - the specific capacity the person was acting in when preparing the communication; and
  - whether the person held a current practising certificate at the time of preparing the communication.

Step 3: Advise the ATO of the approach taken to making LPP claims

Finally, the last step asks taxpayers or their advisors to advise the ATO of the process used for making the LPP claims by answering the following questions:

[23] At URL https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/ATOC_37612_LPP1form.pdf accessed 13 April 2022.
[24] At URL https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/ATOC_37613_LPP2form.pdf accessed 13 April 2022.

Was step 1 of the Protocol followed?

If not, describe the process used to identify the communications over which an LPP claim is made?

Were any computer-assisted processes used to assess if LPP applies? If so, which platform was used and explain the process undertaken?

Was the assessment of LPP based on any assumptions or pre-determined judgements around the context of the communications which guided the assessment of LPP? If so, what were they?

There are 2 Addendums which outline additional information regarding the ATO's approach to LPP claims and related matters. Some of these have already been touch on above.

Of particular note, is that the ATO say they will not contend that the information or particulars provided about LPP claims in accordance with the recommended approach amounts, by itself, to a waiver of LPP and the ATO does not seek to create waiver of LPP by following the Protocol.

Feedback

The ATO invited feedback on its Draft Protocol by 31 October 2021.

The issues of waiver has been one of a number of concerns raised in feedback received from the profession.

The Tax Institute of Australia made a submission in response on 15 November 2021. Some of the matters raised in submission are highlighted below and include the following.

The Draft Protocol ought not place an undue burden on taxpayers who choose not to comply with it, provided they comply with the law in claiming LPP.

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

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

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

Law Council of Australia also made a submission in response on 19 November 2021. Some of the matters raised in submission are highlighted below and include the following:

Concerns both in terms of consistency with established principles of LPP, and professional and ethical obligations held by the legal profession.

Instances where the ATO appears to be requesting information concerning the subject matter in respect of which advice is given (including matters such as subject lines, topics and client names);

The practicality of performing all of the required steps, and assembling all the required particulars, for each individual document in large-scale information requests;

The possibility that the Commissioner will claim that LPP has been waived due to the level of detail expected by way of particulars;

It is likely that the ATO may revisit its Protocol in light of Moshinsky J's decision in *PricewaterhouseCoopers*, which is now considered below.

5. *Commissioner of Taxation v PricewaterhouseCoopers*

5.1 The Client

Flora Green Pty Ltd (**Flora Green**), JBS Holdco Australia Pty Ltd (**JBS Holdco Australia**) and JBS Australia Pty Ltd (**JBS Australia**) are Australian companies (together, **JBS Parties**) wholly owned, directly or indirectly, by JBS SA. Flora Green is the head company of a multiple entry consolidated group, and JBS Holdco Australia and JBS Australia are subsidiary members of the group[25].

JBS SA is a Brazilian multinational company listed on the Brazil Stock Exchange. JBS SA, together with its subsidiaries, (**JBS Global Group**) is a global leader in the processing of animal protein and operates through five business units in more than 15 countries, including the United States of America and Australia.[26] It is the leading beef producer in the world, with operations in the United States, Australia and Canada. It is also the second largest pork producer in the world and also is the majority shareholder of Pilgrim's, the leading poultry producer in the world. It owns Primo which is Australia's largest provider of ham, bacon, salami and deli meats.[27]

5.2 The Lawyer

PwC Australia is a multi-disciplinary partnership, as distinct from a traditional law firm, which describes itself as a partnership between legal and non-legal practitioners where the business of the partnership includes the provision of legal and non-legal services. PwC Australia is part of a global network of firms operating in 158 countries under the PricewaterhouseCoopers, or PwC, brand.

Three PwC offices were particularly relevant in this case: PwC Brazil, PwC USA and PwC Australia. Some of its partners and employees are Australian legal practitioners: others are not. Partners and employees of PwC Australia who held an Australian practising certificate entitling them to practise as an Australian legal practitioner were referred to as "ALPs". Whereas, partners and employees of PwC Australia who were not ALPs, together with partners and employees of other PwC offices, namely PwC USA and PwC Brazil, were referred to as NLPs.[28]

5.3 Procedural history

In February 2019, the Commissioner of Taxation commenced an audit of Flora Green. In the course of the audit, the Commissioner issued s 353-10 notices[29] to Glenn Russell, a partner of PwC Australia, which provided services to the JBS Australia Group; and Flora Green.

In response to the notices, LPP was claimed by PwC Australia (on behalf of Flora Green) and by Flora Green over approximately 44,000 documents. The Commissioner disputed the claims of

[25] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [3].
[26] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [38].
[27] At URL https://jbsfoodsgroup.com/our-business accessed 9 April 2022.
[28] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [44].
[29] Notices to produce documents under s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth).

privilege over approximately 15,500 documents (**Documents in Dispute**) comprising emails and attachments brought into existence between September 2013 and May 2016.

By way of the subject proceeding, the Commissioner sought the following declaratory relief against the respondents, PwC Australia, Flora Green, JBS Holdco Australia and JBS Australia:

1. A declaration that the Documents in Dispute are not, and do not record, communications fairly referable to a relationship of lawyer and client.
2. Further and alternatively, a declaration that the Documents in Dispute are not, and do not record, communications which are protected by legal professional privilege.

The Commissioner relied on 3 grounds. The first 2, had the Commissioner been successful, would have applied to all the Documents in Dispute. The third, framed in the alternative and in which the Commissioner was in part successful, relied on a document by document determination of LPP claimed.

The 3 grounds relied on by the Commissioner, as summarised by Moshinsky J, were[30]:

A. The form of the engagements, reflected in the relevant 'Statements of Work' by which PwC Australia purported to provide legal services to the JBS Parties, did not establish a relationship of lawyer and client sufficient to ground a claim for legal professional privilege.
B. Further or alternatively, as a matter of substance, the services provided by PwC Australia to the JBS Parties pursuant to the engagements, were not provided pursuant to a relationship of lawyer and client sufficient to ground a claim for legal professional privilege.
C. Alternatively, the Documents in Dispute are not, or do not record, communications made for the dominant purpose of giving or obtaining of legal advice from one or more lawyers (of PwC Australia).

The Commissioner made no allegation of waiver of LPP or that the communications lacked confidentiality.

Given the volume of Documents in Dispute, it was agreed that as an initial step in the proceeding, the Court set down for hearing a Separate Question in the following terms:

> In respect of the 50 sample documents identified by the applicant and the 50 sample documents identified by the respondents, is the applicant entitled to the relief sought in the amended application?

In selecting his 50 documents the Commissioner did not have access to any of the Documents in Dispute and so relied on schedules of documents setting out the LPP claims provided by the respondents in response to the s353-10 notices. The Court appointed 3 barristers as Amici Curiae, or friends of the court, to assist the Court in reviewing the sample documents and provided its own independent submissions to the Court in respect of the separate question. Where a Sample Document comprised an email and an attachment or attachments, they were treated as two or more documents, resulting in the number of documents actually reviewed totalling 116, rather than 100.

The hearing of the Separate Question took place over five hearing days. In addition to affidavit evidence relied on by the parties, a number of witnesses were called to give evidence, including Mr Russell, ALP of PwC, Ms Mario Manzano, Legal Manager (Taxation) of JBS SA and Edison Alvares, CFO of JBS Australia Group. Parts of the hearing were conducted on a confidential basis and were

[30] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [8].

closed to the Commissioner, his lawyers and the public, where reference was required by the respondents or the Amici Curiae to the contents of the Sample Documents the subject of LPP claims.

5.4 Aspects of evidence at the hearing

Some notable aspects of evidence that was adduced and admitted in the course of the 5 day hearing are set out below.

PwC Australia provided services to JBS Australia Group pursuant to an "Umbrella Engagement Agreement", governing their overall engagement relationship, and nine separate "Statements of Work" specifying particular work described as legal services to be undertaken and the ALPs and NLPs carrying out such work.

The Umbrella Agreement contained a paragraph entitled, "Legal services or non-legal services" which stated that services would not be provided as legal services "unless specifically disclosed as such under a SoW [statement of work] or engagement letter". It also stated that services which are not provided as legal services may still be provided by partners or professional staff of PwC Australia who are ALPs, who are acting in a capacity other than as an ALP (for example, as a registered tax agent).[31]

Each of the Statements of Work[32]:

- was expressly stated to be for the provision of legal services;
- provided that the services the subject of the Statement of Work would be provided by identified ALPs including, but not limited to, Mr Russell (other than in the case of 2 Statements of Work, where Mr Russell was the only ALP referred to);
- distinguished between the PwC personnel who would provide the services as either ALPs or NLPs;
- stated that "[n]on legal practitioners may assist in the provision of legal services under the direction of the Australian legal practitioners";
- included a "Communications Protocol" in the following terms:

> To facilitate delivery of the services you appoint the non-legal practitioners who assist in the provision of the legal services as your agents for the purpose of communications to and from the legal services team. This includes giving instructions to and receiving legal advice and services from the Australian legal practitioners.
>
> We will communicate with you regarding our legal services and provide our legal advice separately from communications and advice regarding any non-legal matters.

The evidence included a PwC Australia document headed "MDP Protocols for legal services". This outlined in some detail how services could either be provided as legal or non-legal services and how LPP would apply. Mr Russell gave evidence that PwC Australia had a this was part of a suite of policies that PwC partners and staff were aware of and needed to be followed.[33] Some extracts from this protocol include[34]:

[31] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [63].
[32] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [89].
[33] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [49].
[34] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [50]-[52].

> Tax advisory services such as tax structuring advice and other advice about compliance with taxation legislation can be provided as either legal or non-legal services depending on the capacity in which the service is provided and the disclosure to the client about the nature of that service.
>
> …..
>
> Privilege will generally be available where a lawyer requests a third party expert to assist with a matter that is beyond the lawyer's own expertise but upon which the lawyer needs expert advice in order to provide legal advice to his or her client. The client is able to claim LPP over the expert's report/advice because it came into existence so that the lawyer could advise his or her client.
>
> This is what happens in the conduct of our MDP when an ALP who has been engaged by a client to provide legal advice, informs the client and obtains instructions that in order to provide that legal advice he or she will be calling on the assistance of expert tax practitioners who are not themselves lawyers but who will assist the ALP in providing legal advice or whose tax advice will be incorporated into and become an integral part of the legal advice.
>
> In so far as the non−legal team relay information to and from the client to the ALP providing legal services, they must do so as an agent of the client under the terms of the legal engagement letter or SoW in order for the client to be able to claim LPP in respect of those communications.

Mr Russell was PwC Australia's overall engagement partner for the JBS Australia Group since late 2013. On 14 July 2014, Mr Russell was admitted as a solicitor of the Supreme Court of Queensland. On 15 September 2014, Mr Russell received an unrestricted principal practising certificate authorising him to engage in legal practice, subject to conditions including that he only practise on taxation law (which was subsequently lifted on 15 May 2020).

Mr Russell gave the following evidence in his affidavit regarding the proposed engagements of PwC Australia:[35]

> 129. In about late May 2014 or early June 2014, I attended a meeting at JBS' premises in Dinmore, Queensland, with Mr Alvares and Mr Lannan. During the meeting, I said to Mr Alvares words to the effect that: "I will soon be admitted as a solicitor. **It is possible for tax advice provided by PwC Australia to be provided as a legal service, which would include the benefit of communications attracting legal professional privilege**". He said to me words to the effect that he would think about it.
>
> 130. I subsequently had a telephone conversation with Mr Alvares, which to the best of my recollection occurred in early June 2014, in which I said words to the effect:
>
> Me: "Do you remember how we recently had a conversation about potentially providing tax advice as legal advice and the benefits of that? Whilst I have not yet been admitted, if you are interested in our Australian work being provided as legal advice, would you like me to bring in a colleague who is a lawyer ?"
>
> Mr Alvares: "Yes, let's do that."

[35] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [57].

(emphasis added)

Mr Alvares gave evidence that from about June or July 2014, he expected that Mr Russell would be giving him legal advice under future engagements and that it would be subject to legal professional privilege.[36]

Mr Russell sent the following email[37]:

> Gustavo,
>
> The other advantage of setting the engagement up as a legal engagement is that provided certain protocols are followed, **legal advice is privileged and therefore the Australian Taxation Office should not be able to obtain copies of it** in the event of any ATO review activity. Mark will be able to explain in more detail, otherwise let me know if you would like to discuss further.
>
> Regards
> Glenn
>
> **(Emphasis added.)**

During cross-examination of Mr Russell, the following exchange took place regarding tax advice services provided by Mr Russell to JBS Australia before and after he was admitted as a lawyer in July 2014[38]:

> [SENIOR COUNSEL FOR THE COMMISSIONER]: And until you became a lawyer in mid-2014, you were providing that advice in your role at PwC as a tax adviser, weren't you?---Yes, I was.
>
> And would you say you were providing it in your role as an accountant tax adviser?---To the extent that I have an accounting designation, that – that would be correct, but – yes.
>
> Right. And once you became a lawyer, you continued to give the same type of advice, didn't you?---To some extent, yes.
>
> So the only difference was that now you were a lawyer, you say you were able to provide the same advice as legal advice and not as non-legal advice; is that right?---It is, yes.

5.5 Relevant LPP principles

Moshinsky J sets out a comprehensive outline of the relevant principles drawn from the key authorities which provides a very useful reference point for practitioners. For this reason, his Honour's outline is summarised below with some supplementary references.

Some aspects relating to LPP did not arise in the proceeding and therefore were not considered by his Honour, including the principles of LPP in the context of in-house lawyers employed in business or government entities and the principles regarding waiver of LPP.

[36] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [58].
[37] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [60].
[38] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [64].

5.5.1 Rationale underlying LPP

The rationale underlying LPP is explained by Dawson J in *Baker v Campbell*:[39]

> [I]ts justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. This is why the privilege does not extend to communications arising out of other confidential relationships such as those of doctor and patient, priest and penitent or accountant and client. …. The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships. It has been found necessary that professional guidance in the complex processes of the law should be uninhibited by the possibility that what is said to enable advice to be sought or given might later be used against the person seeking the advice.

Also, Deane J in *Baker v Campbell* relevantly stated:[40]

> The importance of the principle that **a person should be able to seek relevant legal advice and assistance without apprehension of prejudice** has been recognized in many cases. Thus in *Pearse v Pearse*, Knight Bruce V.-C. pointed out, in a judgment which Lord Selborne L.C. was subsequently to describe as "one of the ablest judgments of one of the ablest Judges who ever sat in this Court", that **it could not even be sacrificed to promote the main purpose of the existence of courts of justice, namely, the discovery, vindication and establishment of truth**. The Vice-Chancellor added:
>
> > "And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."

Moshinsky J summed up the rationale as follows[41]:

> The doctrine of legal professional privilege seeks to strike an appropriate balance between the competing public interests of encouraging full and frank disclosure by clients to their lawyers, which supports the administration of justice by encouraging the candid obtaining of legal advice and assistance, and seeking the fullest possible access by courts to information relevant to the issues in a case.

[39] *Baker v Campbell* (1983) 153 CLR 52 at 128.
[40] *Baker v Campbell* (1983) 153 CLR 52 at 114-115.
[41] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [138].

5.5.2 LPP General Principles

LPP applies to confidential communications between a client and lawyer (or their agents) made for the dominant purpose of giving or obtaining legal advice or the provision of legal services[42]

"Dominant" purpose may be described as the ruling, prevailing, paramount or most influential Where two purposes are of equal weight, neither is dominant. If the decision to bring the document into existence would have been made irrespective of any intention to obtain legal advice, the purpose of obtaining legal advice cannot be the dominant purpose for the making of the document.[43]

For LPP to apply, the lawyer's advice must satisfy the description of professional advice given by a lawyer in his or her capacity as a lawyer.[44]

LPP belongs to the client and not the lawyer.[45]

LPP attaches to a copy of a document that is provided to a lawyer if the copy was made for the dominant purpose of obtaining legal advice, even if the original document itself is not privileged.[46]

LPP extends to any document prepared by a lawyer or client from which the nature of the advice sought or given may be inferred; for example, communications between the various legal advisers of the client, draft correspondence with the client, and legal research memoranda.[47]

Whether a confidential communication is for the dominant purpose of the provision of legal advice will depend on the particular facts. In some instance, the character of documents may be sufficient to establish the purpose for which they were created. In other instances, particularly in a case where the documents themselves do not disclose the purpose for which they were created, it may be necessary to identify the circumstances in which the communication took place and the subject matter to which the instructions or advice were directed.[48]

The fact that a document is labelled as privileged or as being prepared for legal advice will not establish a privileged dominant purpose.[49]

LPP applies to confidential communications even if there is no retainer between the lawyer and client.[50] What is critical to the existence of the privilege is the client's bona fide belief that they are seeking legal advice from a lawyer. *In Global Funds Management (NSW) Ltd v Roo*ney [1994] 36 NSWLR 122, Young J said:

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[42] *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at [35]; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245.
[43] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [143]-[144] citing *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at [30].
[44] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [139] citing *AWB Ltd v Cole* (2006) 152 FCR 382 at [101,] per Young J.
[45] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [140] citing *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at [1], per Gleeson CJ, Gaudron and Gummow JJ.
[46] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [141] citing *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Esso*; *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at [44(11)], per Young J.
[47] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [142] citing *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501;at 569 per Gummow J; *AWB Ltd v Cole* (2006) 152 FCR 382 at [127]-[139], per Young J.
[48] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [146] citing for example *Kennedy v Wallace* (2004) 142 FCR 185 at [12]-[17], [41].
[49] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [146] citing *Seven Network Ltd v News Ltd* [2005] FCA 142 at [6], per Tamberlin J.
[50] *Minter v Priest* [1930] AC 558 at 573; *Perazzoli v Bank SA* [2017] FCAFC 204 at [172].

> In my view the authorities go further to support the proposition that if the client bona fide believes on reasonable grounds that the other is his or her solicitor, then the privilege exists up to the time when that belief is exploded.

5.5.3 Continuum of communications

The scope of LPP extends not only to the formal advice given by the lawyer and the instructions given to the lawyer, but also a continuum of communications that keep the lawyer, or the client, informed so that they are in a better position to give fully informed advice (or instructions).[51] In *Balabel v Air India* [1988] 1 Ch 317, Taylor LJ said at 330:

> [L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

Allsop CJ in *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 135 FCR 151, after referring to *Balabel v Air Indi*a, at [45] states:

> What legal advice is, however, goes beyond formal advice as to the law. This recognition does not see the privilege extend to pure commercial advice. In any given circumstance, however, it may be impossible to disentangle the lawyer's views of the legal framework from other reasons that all go to make up the "advice as to what should prudently and sensibly be done in the relevant legal framework" (Taylor LJ in *Balabe*l at 330)

The position was recently summarised by Thawley J in *Kenquist Nominees Pty Ltd v Campbell (No 5)* [2018] FCA 853 at [15]-[16] (references omitted):

> Where a lawyer has been retained for the purposes of providing legal advice in relation to a particular transaction, communications between the lawyer and client relating to the transaction will prima facie be privileged, notwithstanding they do not contain advice on matters of law; it is usually enough that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser to the client.
>
> Particularly in the context of protracted or complex transactions, where information is passed between lawyer and client as part of a continuum aimed at keeping both informed so that advice may be sought and given as required, privilege may attach.

Once it is established there is a retainer between a client and lawyer for the provision of legal advice, "it would be rare that one could, with any degree of confidence, say that a communication between client (or agent) and lawyer … was not connected with the provision or requesting of legal advice."[52].

5.5.4 Third Parties

LPP extends to confidential communications prepared by a client's agent and the lawyer's deputy. Likewise, privilege extends to confidential communications prepared by a third party, or prepared by the client or the lawyer and provided to a third party (regardless of that party's relationship with the client), provided that the communication was prepared and made with the dominant purpose of the

[51] *Balabel v Air India* [1988] Ch 317 at 330, 332.
[52] *DSE (Holdings) Pty Limited v Intertan Inc* (2003) 135 FCR 151 at [45], per Allsop J.

client seeking and obtaining legal advice from the client's lawyer.[53] Agency was not necessary for LPP to apply in respect of third-party communications in the advice context[54].

In *Pratt Holdings Pty Ltd v Commissioner of Taxation*, Stone J (with whom Merkel J agreed) stated as follows::[55]

> The history of legal professional privilege shows that the courts have been willing and able to adapt the doctrine to ensure that the policy supporting the doctrine is not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege. The complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts, including financial experts such as accountants, in formulating a request for legal advice and in providing legal advisers with sufficient understanding of the facts to enable that advice to be given. This much was recognised by Taylor LJ in Balabel.
>
> The complexity of commercial arrangements is matched by increasing volume, complexity and technicality in the law: taxation legislation now runs to many volumes, encompassing nearly 2,000 provisions; corporations and securities legislation is similarly mammoth. A company that wishes to obtain legal advice as to its obligations under such legislation may well need to rely on experts to assist it in instructing its legal advisers."
>
> The coherent rationale for legal professional privilege developed by the High Court does not lend itself to artificial distinction between situations where that expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. Nor, in my view, should the availability of privilege depend on whether the expert opinion is delivered to the lawyer directly by the expert or by the client. Provided that the dominant purpose requirement is met I see no reason why privilege should not extend to the communication by the expert to the client.

Moshinsky J summarised at the principles or propositions concerning communications between a (non-agent) third party and a lawyer or client, and the question of legal professional privilege at [170]:

a) The important consideration is the nature of the function the third party performed for the client. If that function was to enable the client to make a communication necessary to obtain legal advice, privilege may attach to a documentary communication authored by the third party. The third party has been "so implicated" in the communication made by the client to its legal adviser as to bring the third party's work-product within the rationale of legal advice privilege: *Pratt Holdings* at [41] per Finn J (Merkel J agreeing).
b) The question of the client's purpose or purposes is one of fact. Particular care needs to be taken in evaluating evidence of purpose in a setting in which the third party performs a professional function for a client in a non-litigation setting, but in a matter in which legal advice is to be or is being sought by that client: *Pratt Holdings* at [45] per Finn J (Merkel J agreeing); see also at [106] per Stone J (Merkel J agreeing).
c) For example, in determining the preferred structure of a business transaction, a person (the client) might consult not only a lawyer, but also one or more of an accountant, a financial planner and a merchant banker for advice. The advices given by such other advisers will rarely be capable of attracting privilege for the reason that they will almost invariably have the character of discrete advices to the client, with each advice, along with the lawyer's advice,

[53] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at [1], [22], [41]-[42], [49].
[54] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 per Finn J (with whom Merkel J agreed) at [41].
[55] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at [103]-[105].

having a distinctive function and purpose in the client's decision-making – albeit all of the advices may be interrelated in the sense of providing collectively a basis for informed decision by the principal: *Pratt Holdings* at [46] per Finn J (Merkel J agreeing); *Asahi* at [40] per Beach J; see also *Pratt Holdings* at [106] per Stone J (Merkel J agreeing).

d) Privilege does not extend to protect "things lodged with a legal adviser for the purpose of obtaining immunity from production": *Baker v Campbell* at 112 per Deane J; *Pratt Holdings* at [46] per Finn J (Merkel J agreeing). Nor does it extend to third party advices to the client simply because they are then "routed" to the legal adviser: *Pratt Holdings* at [46].

5.5.5 Multi-disciplinary partnerships and the analogy with work done by law graduates

Moshinsky J noted that PwC Australia's model for the provision of legal services relies in part on an analogy with work done by law graduates in a traditional law firm or legal practice within an accounting (or professional services) firm and concluded that where: "

> although most or even all of the drafting has been carried out by the law graduate, the letter or memorandum may be treated as the legal work of the partner or solicitor (and hence capable of attracting legal professional privilege) in circumstances where the law graduate's work was carried out under the supervision and direction of the lawyer, the lawyer substantively reviewed the draft, and the lawyer adopted the work as his or her own by sending it out under his or her name.
>
> In considering whether these elements are present, it is relevant to consider the expertise of the lawyer in relation to the relevant legal work; the lawyer must have sufficient knowledge and experience to be able to substantively review the law graduate's work.
>
> Importantly, in the scenario described above, the role of the lawyer in the preparation and finalisation of the advice is substantive; the lawyer is not merely a conduit through which advice is provided by the law graduate to the client.[56]

5.5.6 Email chains

Lengthy email chains are a feature of modern day practice and Moshinsky J summarised the applicable principles as follows[57]:

a) If the communication being the latest email was made for the dominant purpose of the giving or receiving of legal advice, then it may be that the email chain will be privileged because the earlier emails in the chain are to be regarded as copies of documents provided for the dominant purpose of the giving or receiving of legal advice.
b) For example, if the dominant purpose of the communication being the latest email was the giving of legal advice by a lawyer, then it may be that the email chain will be privileged because the earlier emails in the chain are to be regarded as copies of documents furnished by the lawyer with the advice being the latest email: see *Kenquist Nominees* at [19(2)].
c) By way of further example, if the dominant purpose of the communication being the latest email was the obtaining of legal advice from a lawyer, then the email chain may be privileged

[56] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [171]-[173].
[57] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [175].

because the earlier emails are to be regarded as copies of communications provided to the lawyer for the dominant purpose of obtaining legal advice: see *Kenquist Nominees* at [19(3)].

d) The same principles can apply to earlier emails in the chain. For example, it may be that the latest email in the chain is not privileged, but the penultimate email (in time) may be a communication made for the dominant purpose of the giving or receiving of legal advice, and the earlier emails are to be regarded as copy documents which have been provided for the same dominant purpose.

5.6 Ground A

The form of the engagements, reflected in the relevant 'Statements of Work' by which PwC Australia purported to provide legal services to the JBS Parties, did not establish a relationship of lawyer and client sufficient to ground a claim for legal professional privilege

In rejecting this ground, Moshinsky J concluded that[58]:

> as a matter of form, the Statements of Work do establish a relationship of lawyer and client sufficient to be able to ground a claim for legal professional privilege. . Each Statement of Work identifies the client, the ALPs who are to provide the services, the NLPs who will assist the ALPs in the provision of those services, and describes the services to be provided as legal services. The identified ALPs are lawyers qualified such as to be capable of being in a lawyer and client relationship which gives rise to privileged communications.
>
> In these circumstances, and noting that there is no prescribed form for a retainer that must be met in order for privilege to arise, as a matter of form the Statements of Work are capable of establishing the requisite lawyer and client relationship within which communications may be protected by legal professional privilege.
>
> While the structure of the relevant engagements, in particular the appointment or nomination of the NLPs as agents of the client (for the purpose of communications to and from the legal services team) and as persons who may assist in the provision of legal services (under the direction of the ALPs), is perhaps confusing, I am not satisfied that, as a matter of principle, the same person cannot be appointed to both roles or that there is necessarily a conflict between the roles. Both in acting as agent (in the limited way described in the Statement of Work) and in providing assistance, the NLP is acting in the best interests of the client – there is no necessary conflict of interest. I therefore do not consider that this aspect of the structure precludes the establishment of a lawyer-client relationship sufficient to ground a claim for legal professional privilege.

5.7 Ground B

Further or alternatively, as a matter of substance, the services provided by PwC Australia to the JBS Parties pursuant to the engagements, were not provided pursuant to a relationship of lawyer and client sufficient to ground a claim for legal professional privilege

In rejecting this ground, Moshinsky J concluded[59]:

[58] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [190]-[192].
[59] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [204]-[205].

> In circumstances where I have concluded that the form of the Statements of Work establishes a relationship of lawyer and client sufficient to be able to ground a claim for legal professional privilege (see ground (a), above), it is not possible, by reference to the expertise, experience, seniority and quantitative contribution of the ALPs and NLPs involved in the provision of services under the Statements of Work, to conclude as a global matter that the services performed pursuant to them were not fairly referable to a lawyer and client relationship, so as not to be protected by legal professional privilege
>
> Whether or not the Documents in Dispute are privileged is to be determined by reference to whether, as to each particular document, it constitutes or records a communication made for the dominant purpose of giving or obtaining legal advice. That question is to be determined by reference to the content of the document, its context, and the relevant evidence relating to it. The question cannot be determined on a global basis.

5.8 Ground C

Alternatively, the Documents in Dispute are not, or do not record, communications made for the dominant purpose of giving or obtaining of legal advice from one or more lawyers (of PwC Australia)

As outlined above, Moshinsky J, rejected the first 2 grounds, not being satisfied that as a general proposition, no relationship of lawyer and client came into existence sufficient to ground a claim for LPP. His Honour was satisfied that in at least some circumstances, a lawyer-client relationship did exist between Mr Russell and other ALPs and the JBS Parties.[60] To determine whether this ground was made out, a document by document analysis of LPP in respect of each of the Sample Documents was required.

Moshinsky J explained the approach to be undertaken in a document by document analysis of each of the Sample Documents: [61]

> The question whether the Sample Documents are, or record, communications made for the dominant purpose of giving or receiving legal advice is to be determined by reference to the content of the document, its context, and the relevant evidence relating to the document.
>
> Here, the context includes, importantly, the Umbrella Engagement Agreement and the Statements of Work, which have been described in detail above. However, the mere fact that a communication was made pursuant to one or more of the Statements of Work (which describe the services to be provided as legal services) does not mean that the communication is necessarily subject to legal professional privilege. In each case, it is necessary to determine whether the communication was made for the dominant purpose of giving or receiving legal advice.
>
> A critical part of the context in the present case is that the services were provided by a multi-disciplinary partnership and that the team carrying out the work comprised both lawyers and non-lawyers. Another contextual matter is the involvement of overseas PwC firms in many of the same projects (under separate engagements). At least in the case of PwC Brazil and PwC USA, the overseas firms were not able to provide legal advice and made clear that they were not doing so. These contextual matters suggest that caution is required in evaluating

[60] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [20].
[61] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [218]-[220].

whether or not a particular communication was made for the dominant purpose of giving or receiving legal advice.

His Honour concluded that of the 116 documents, 49 were privileged; 6 were partly privileged; and 61 were not privileged.[62]. An Annexure to his Honours reasons lists each document and the conclusion reached in respect of each.

At [931] his Honour summarises the 116 documents into 8 broad categories and the conclusions reached in respect of each. The first 6 are categories where the documents were not privileged. The remaining 2 are categories where the documents were privileged.

5.8.1 Categories of Sample Documents which were *not* privileged

1. ***A document constituting advice given by an NLP at PwC Australia to the client (JBS) on matters of stamp duty, whether in an email or a memorandum, including ones where Mr Russell is copied on or party to the email.***

His Honour cites Document 26 as an example and considers it at [389]-[394]. Document 26 was an email chain between Mr DeBellis (PwC Australia – NLP) and Mr Sinokula (JBS Australia), copied to Mr Russell (ALP), Mr Stewart (NLP) and Ms Fantin (ALP) (all of PwC Australia), regarding the [redacted] Primo acquisition. The latest email in the chain, from Mr DeBellis to Mr Sinokula (copied to Mr Stewart, Mr Russell and Ms Fantin) attached a fixed assets register, which was Document 27. The subject line of the emails was "Primo – [Redacted]"

Privilege was claimed over the whole of Documents 26 and 27 on the basis that the email chain forms part of a "confidential continuum of communications between the client and PwC (including PwC lawyers and non-legal advisors working under the direction of a PwC lawyer or on a legal services engagement) for the dominant purpose of obtaining legal advice", and the fixed asset register is an attachment to an email "which communicated confidential legal advice, or a request for confidential legal advice, between a lawyer and a client, and the attachment was relevant to the seeking or the provision of that legal advice". The JBS Parties submitted that the documents were communications that reveal instructions or information provided by JBS.

His Honour concluded that documents 26 and 27 were not privileged, stating that "[A]lthough ALPs were copied on the emails, in substance the emails (including the attachment to the latest email) represent advice provided by Mr DeBellis (an NLP) regarding the [redacted] Primo acquisition. Given that Mr DeBellis was not a lawyer, I would characterise his advice as non-legal advice (albeit concerning stamp duty). In these circumstances, I consider that the documents do not record communications made for the dominant purpose of giving or receiving legal advice."

It appears that the decisive factor was the fact the person who gave the advice, Mr DeBellis, was not a lawyer.

2. ***A document constituting advice given by an NLP at PwC Australia to the client (JBS) on matters of valuation, whether in an email or a memorandum, including ones where Mr Russell is copied on or party to the email.***

His Honour cites Document 56 as an example and considers it at [549]-[557]. Document 56 was an email chain between Mr Sinokula (JBS Australia), Mr Stewart (PwC Australia – NLP), Mr Russell (PwC Australia – ALP), Andrew Wellington (PwC Australia – appears to be NLP) and Masha Lewis

[62] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [22].

(PwC Australia), copied to other personnel at PwC Australia, with the subject line of the emails being "JBS Group – [redacted] (confidential and subject to LPP)".

Mr Russell gave evidence that the first email in the chain from Mr Stewart summarised discussions Mr Russell had had with Mr Stewart and that Mr Russell approved a draft of the email before it was sent by Mr Stewart. The fifth email in the chain, from Mr Wellington (a partner at PwC Australia specialising in valuations), made reference to valuations being undertaken. Mr Russell also gave evidence that this work was being prepared under a Statement of Work, and was necessary for the purposes of considering the Australian income tax implications in relation to the formation of the proposed tax consolidated group. Mr Alvares of JBS Australia Group gave evidence that he had meetings with the PwC Australia team on the subject of the need for valuations to determine the consequences of proposed reconsolidation steps and that the email chain in this document reveals aspects of what was discussed in those meetings and the advice he received from PwC Australia about this issue. Further, Mr Alvares stated that he believed Mr Stewart's advice was considered and approved by Mr Russell.

His Honour found that Document 56 was not privileged, stating:

> [A]lthough Mr Russell was a party to most of the emails in the email chain, in substance the emails represent advice provided by Mr Stewart (an NLP) and Mr Wellington (who appears to be an NLP) [redacted]. Given that Mr Stewart and Mr Wellington were not lawyers, and that the subject matter of the email chain concerned valuation, I would characterise their advice as non-legal advice. While Mr Russell gives evidence that he discussed the valuations with Mr Stewart, and approved the email before Mr Stewart sent it, I would nevertheless characterise the advice as non-legal advice, for the reasons given above.
>
> As noted above, PwC Australia submits that the dominant purpose of this communication was to obtain valuations in order for Mr Russell to be able to provide his legal advice. This submission seems to rely on the authorities concerning third parties discussed above. The contention seems to be that Mr Stewart and Mr Wellington were third party experts providing an input to enable Mr Russell to provide legal advice to his client (JBS). I do not accept these submissions. While I accept that Mr Russell needed to understand [redacted] in order to provide advice on certain taxation issues, it does not follow that the dominant purpose of the preparation of the [redacted] was to enable Mr Russell to prepare his legal advice. Based on my review of the document, and having regard to Mr Russell's evidence, I consider there to have been multiple purposes for the communications in this document, including the giving of [redacted] by Mr Stewart and Mr Wellington for the purposes of implementation of the proposed transaction by the client. This purpose was of at least equal weight to a purpose of giving or receiving legal advice.

The decisive factors were the fact the person who gave the advice, Mr Wellington, was not a lawyer and that the advice was valuation advice and therefore non-legal advice. Further, the valuation advice, though non-legal in nature, was not provided by Mr Wellington, as a third party expert, for the dominant purpose of Mr Russell providing legal advice. It seems his Honour characterised the valuation advice as one of a number of discrete advices to the client, with each advice, along with the lawyer's advice, having a distinctive function and purpose in the client's decision-making.[63]

3. document constituting an email exchange between NLPs at PwC Australia in relation to matters of accounting.

[63] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [175]; *Pratt Holdings* at [46] per Finn J (Merkel J agreeing).

His Honour cites Documents 60 and 61 as examples and considers them at [568]-[579]. Document 60 was an email from Mr Moss (PwC Australia – NLP) to Wee Liam Foo, John Ratna, and Michael Scheibli (all PwC Australia – NLPs) regarding a draft accounting discussion paper. Attached to the email was the draft accounting discussion paper, which was Document 61. There were no ALPs copied to the email.

Mr Russell gave evidence, relevantly, that he considered that, in order for him to provide and finalise his advice on Australian taxation issues in relation to the GRAP, he needed to understand accounting implications of the GRAP steps. Mr Alvares gave evidence that he believed he needed to understand the accounting situation before he could give instructions to Mr Russell on whether certain steps should proceed and while he understood that Mr Russell was being assisted by accounting experts at PwC, Mr Alvares believed that the advice Mr Moss gave him had been considered and approved by Mr Russell.

PwC Australia submitted that the documents were for the dominant purpose of providing the accounting advice in relation to transaction steps and that this was for the dominant purpose of Mr Russell providing legal advice in relation to transaction steps.

His Honour found that Documents 60 and 61 were not privileged, stating:

> Document 60 is an email between non-lawyers. No ALP was party to the email. In substance, the email and its attachment represent advice in relation to accounting issues in relation to the GRAP. Given that the advice was provided by non-lawyers, and concerned matters of accounting, I would characterise the advice as non-legal advice.
>
> [PwC Australia's] submission appears to rely on the authorities concerning third party experts discussed above. The contention seems to be that Mr Moss and other accounting experts at PwC Australia were third party experts providing an input to enable Mr Russell to provide legal advice to his client (JBS). I am not persuaded by these submissions. While I accept the evidence of Mr Russell and Mr Alvares discussed above, it does not follow that the dominant purpose of the communication was to enable Mr Russell to provide legal advice to his client. Based on my review of the email and its attachment, and having regard to the evidence of Mr Russell and Mr Alvares, I consider there to have been multiple purposes for the making of the communication, including the giving of accounting advice to assist the client in the development of the GRAP. This purpose was of at least equal weight to a purpose of giving or receiving legal advice.

The decisive factors were the fact the person who gave the advice, Mr Moss, was not a lawyer and that the document was in respect of accounting advice and therefore non-legal advice. Further, the accounting advice, though non-legal in nature, was not provided by Mr Moss, as a third party expert, for the dominant purpose of Mr Russell providing legal advice. It seems his Honour characterised the accounting advice as one of a number of discrete advices to the client, with each advice, along with the lawyer's advice, having a distinctive function and purpose in the client's decision-making.

4. A document constituting accounting advice prepared by an NLP at PwC Australia which is provided by Mr Russell (an ALP) to the client (JBS) as "legal advice". An example is the communication comprising Documents 82 and 83.

His Honour cites Documents 82 and 83 as examples and considers them at [716]-[728]. Document 82 was an email from Mr Russell (PwC Australia – ALP) to Mr Alvares, Mr Marinho, Mr Veiga, Ms Dale and Mr Sinokula (JBS Australia) (copied to various NLPs at PwC Australia). The subject line of the email was "Legal advice – Confidential and subject to legal professional privilege". Attached to

the email was a document comprising a cover letter from Mr Russell to Mr Alvares and an advice headed "Accounting Topic Discussion Paper" relating to the GRAP on the topic "[Redacted]" (Document 83). The cover letter part of that document included a bold notation "Confidential and subject to legal professional privilege". The letter had the heading "PwC Legal Advice – Global Regional Alignment Project" and includes: "[Redacted]." The letter also states that "[t]his legal advice has been provided in accordance with our Statement of Work dated 11 September 2015".

Privilege was claimed on the basis that Document 82 forms part of a "confidential continuum of communications between the client and PwC (including PwC lawyers and non-legal advisors working under the direction of a PwC lawyer or on a legal services engagement) for the dominant purpose of obtaining legal advice", and Document 83 was an attachment to an email "which communicated confidential legal advice, or a request for confidential legal advice, between a lawyer and a client, and the attachment was relevant to the seeking or the provision of that legal advice".

The evidence of Mr Russell and Mr Alvares given in respect of Documents 60 and 61 (referred to above) was also, broadly, repeated in respect of Documents 82 and 83. Mr Russell stated that this version of the discussion paper (Document 83) also included journal entries, although they were not the major part of the advice. He stated that the journal entries were useful to help him understand the accounting implications of certain steps and with future conversations with Mr Alvares in respect of his advice. PwC Australia repeated the submissions it made in relation to Documents 60 and 61.

His Honour found that Documents 82 and 83 were not privileged, stating

> The communication comprises the email and the attachment. In substance, the email and the attachment constitute accounting advice relating to the GRAP steps prepared by NLPs at PwC Australia. Despite the references to legal professional privilege, and the description of the content of the accounting topic discussion paper as "legal advice" in the email and covering letter, I would characterise the advice as non-legal advice. This characterisation is supported by the heading of the discussion paper ("Accounting Topic Discussion Paper") and by the contents of the discussion paper. The paper involves a detailed analysis of the accounting considerations relevant to the GRAP steps. It does not involve, for example, the application of taxation law or corporate law.
>
> The contention appears to rely on the authorities concerning third parties discussed above. The contention seems to be that the NLPs who prepared the accounting discussion paper were third party experts providing an input to enable Mr Russell to provide legal advice to his client (JBS) (or to enable Mr Alvares to instruct Mr Russell). I do not accept these submissions. It is difficult to reconcile the submissions with the communication being one from Mr Russell to the client. Further, while I accept that Mr Russell needed to understand the accounting treatment in order to provide his Australian tax advice, it does not follow that the dominant purpose of the communication was to enable Mr Russell to provide legal advice to his client (or for Mr Alvares to instruct Mr Russell). Based on my review of the documents, I consider there to have been multiple purposes for the communication, including the giving of advice by PwC Australia to the client (JBS) as to the accounting treatment of the GRAP steps. This purpose was of at least equal weight to a purpose of giving or receiving legal advice.
>
> … I make the following additional observation for completeness. **Given the nature of the accounting discussion paper (as described above), Documents 82 and 83 appear to be an instance of non-legal advice being "routed" through Mr Russell in order to obtain the protection of legal professional privilege.**
>
> **[emphasis added]**

The decisive factors were the fact that, notwithstanding the labelling of the advice as "Legal advice – Confidential and subject to legal professional privilege", the advice was accounting advice and therefore non-legal advice. The accounting advice, though non-legal in nature, was not provided by NLPs, as third party experts, for the dominant purpose of Mr Russell providing legal advice. His Honour further stated, as highlighted above, that the third party advices to the client did not become legal advice simply because they were then "routed" to the legal adviser.[64]

5. ***An email exchange between an NLP at PwC Australia and an overseas PwC firm containing substantive advice given by the NLP or the overseas PwC firm, and no substantive advice given by an ALP, and PwC Australia's contention is that the NLP was effectively acting as Mr Russell's agent to obtain information from the person at the overseas PwC firm to enable Mr Russell to provide his legal advice to his client (JBS), whether or not Mr Russell is a party to the email.***

His Honour cites Document 7 as an example and considers it at [251]-[259]. This document was an email exchange between Mr Fuller (PwC Australia – NLP) and Mr Kulich (PwC USA). There were no ALPs copied to the emails.

PwC Australia submitted that Mr Fuller was assisting Mr Russell to obtain information from PwC USA which was necessary for Mr Russell to provide his legal advice to JBS. The contention was that Mr Kulich of PwC USA was a third party expert providing an input to enable Mr Russell to provide legal advice to his client (JBS). His Honour was not persuaded by these submissions. On the assumption that Mr Fuller was acting as Mr Russell's agent and accepting that Mr Russell discussed concepts in the emails with Mr Fuller beforehand, that the subject-matter of the emails was being considered under a Statement of Work, and that Mr Russell was considering providing further advice, it did not follow that the dominant purpose of the communications in these emails was to enable Mr Russell to provide legal advice to his client. His Honour considered there to have been multiple purposes for the making of the communications, including the giving of advice by Mr Fuller and Mr Kulich to assist the client (the subject of the advice having been redacted in the published reasons) This purpose was found by his Honour to be of at least equal weight to a purpose of giving or receiving legal advice.

Furthermore, his Honour did not accept the submission from the JBS parties that the email chain is privileged on the basis that it forms part of a "continuum of communications" that are directly related to the performance by Mr Russell of his professional obligations under the Statements of Work.

The decisive factors appear to be that no lawyers were copied into the emails, that the persons involved in the communications were not lawyers, and that the document was in respect of non-legal advice, which was not provided by NLPs, as Mr Russell's agent, for the dominant purpose of Mr Russell providing legal advice.

6. ***An email exchange between an NLP at PwC Australia and the client (JBS) involving the NLP requesting JBS to provide information about a matter relating to a proposed transaction, and where no substantive emails are authored by an ALP, and PwC Australia's and the JBS Parties' contention is that the email exchange forms part of a "continuum of communications" between the client and PwC Australia for the dominant purpose of obtaining legal advice.***

His Honour cites Document 44 as an example and considers it at [481]-[489].

[64] *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [175]; *Pratt Holdings* at [46] per Finn J (Merkel J agreeing).

This document was a chain of emails. The first was an email from Ms Manzano (JBS SA) to personnel at JBS SA, JBS USA, JBS Australia, PwC USA and Mr Fuller (PwC Australia – NLP) regarding a call to discuss next steps. The second was an email from Mr Fuller to Ms Manzano and Ms Garland (JBS USA) (copied to Mr Kulich (PwC USA) requesting confirmation in relation to several points, including regarding advice that had been provided from Ernst & Young. The third was an email from Mr Fuller to Ms Garland (JBS USA). There were no ALPs copied to the emails.

His Honour concluded that the document was not privileged The second email in the chain, which was the only substantive email, constituted a request (from Mr Fuller to Ms Manzano and Ms Garland) for confirmation of various matters and there was no suggestion in the email that the information was sought to enable Mr Russell, as distinct from Mr Fuller, to provide advice.

PwC Australia submitted that Mr Fuller was effectively acting as Mr Russell's agent in sending the second email in the chain and that the document was for the dominant purpose of Mr Russell providing his legal advice. The submission was that Mr Fuller was obtaining information from JBS on which Mr Russell was to provide his legal advice. His Honour was not persuaded by these submissions. Although, his Honour accepted evidence that Mr Russell was subsequently forwarded the email chain by Mr Fuller and that Mr Russell discussed the matters raised by Mr Fuller with him and asked him to follow them up, his Honour found that it did not follow that the dominant purpose of the communication was to enable Mr Russell to provide legal advice to his client. His Honour considered there to have been multiple purposes for the email, including to enable Mr Fuller to give (non-legal) advice to JBS. According to his Honour, this purpose was of at least equal weight to a purpose of giving or receiving legal advice.

The decisive factors appear to be that no lawyers were involved in the emails, and that the emails (in particular the second email) were in respect of non-legal advice, which was not provided for the dominant purpose of Mr Russell providing legal advice, even where Mr Russell was subsequently forward these emails and discussed them with a NLP, Mr Fuller.

5.8.2 Categories of Sample Documents which *were* privileged

7. A document constituting advice given by Mr Russell (an ALP) to the client (JBS) on matters of Australian taxation law, whether in an email or a memorandum, including where the advice was drafted by an NLP at Mr Russell's request, was substantively reviewed by Mr Russell, and adopted by Mr Russell as his own advice.

His Honour cites Document 3 as an example and considers it at [224]-[229].

Document 3 comprises a memorandum from Mr Russell to Mr Alvares. Mr Russell gave evidence in relation to Document 3 that he received an email from Marcus Phillips (PwC Australia) in relation to reviewing the draft SPA (share purchase agreement) for the Primo acquisition to provide any Australian tax comments and he asked Mr Stewart (PwC Australia) for assistance in reviewing it. Mr Russell gave evidence that Mr Stewart prepared the first draft of the memorandum and that he (Mr Russell) finalised it. Mr Russell gave evidence that the opinions in the memorandum were his. His Honour found that while Mr Russell was assisted in preparing the memorandum of advice by Mr Stewart (an NLP), Mr Russell substantively reviewed the advice, finalised the memorandum, and provided it to the client under his own name. The memorandum constituted substantive advice by a lawyer on matters of Australian income tax, stamp duty and GST issues. His Honour concluded that the document constituted legal advice.

8. A document constituting draft advice prepared by an ALP at PwC Australia for review by Mr Russell (an ALP) on matters of Australian taxation law (whether in an email or a memorandum), with a view to the advice being provided by Mr Russell to the client.

His Honour cites Document 32 as an example and considers it at [419]-[432].

Document 32 was a draft memorandum or discussion paper relating to issues arising from the acquisition of Primo to be sent by Mr Russell and Mr Stewart (an NLP) to Mr Sinokula of JBS Australia.

Privilege was claimed over Document 32 on the basis that it was for the dominant purpose of JBS requesting or being provided with legal advice from PwC (including Mr Russell) in relation to the 'Global Restructure Project – Australian Income Tax and Stamp Duty Legal Advice' SoW in respect of which Glenn Russell is the relevant ALP partner.

Mr Russell gave evidence that the document was prepared by Mr Ali (an ALP) and Mr Stewart (an NLP) at Mr Russell's request following a discussion with him. Mr Russell stated that he continued to provide comments on the draft as it was developed, and that the document was an updated draft incorporating comments.

His Honour concluded that the document was created for the dominant purpose of providing legal advice in the form of a memorandum that would be provided by Mr Russell (an ALP) and Mr Stewart (an NLP) to Mr Sinokula of JBS Australia.

6. The way forward and what it means for advisors

6.1 What do the recent decisions in CUB Australia and PricewaterhouseCoopers and the Commissioner's Draft Protocol mean for advisors?

6.1.1 Importance of the retainer

Having an appropriate written retainer in place for the provision of legal services, as early as possible, is preferred: and indeed required by legislation and regulations governing the conduct of the legal profession. A retainer should have sufficient detail to establish a relationship of lawyer and client so as to provide the basis for a LPP claim over communications made or documents created within that retainer. At a minimum, the retainer should identify the client, the lawyers to provide the legal services and the legal services to be provided.

If the retainer involves non-lawyers, or lawyers not acting in their capacity as lawyers, then the nature and scope of this arrangement needs to be set out in detail in the retainer. This is a common feature in multi-disciplinary partnerships that provide taxation advisory services, amongst other services. The involvement of non-lawyers in these arrangements needs to be clearly articulated in these retainers. These kinds of retainers are more likely to attract the ATO's attention in LPP claims, as has been made clear in the Protocol.

A particular arrangement of concern to the ATO is where non-lawyers as part of the retainer are either assisting lawyers or acting as the agent of the client in the provision of the legal services. The ATO's concern with such arrangements is reflected in its Protocol and its (unsuccessful) argument of Grounds A and B in *PricewaterhouseCoopers*.

In *PricewaterhouseCoopers*, the fact that non-lawyers not acted *as assistants of lawyers* in the giving of advice to the client but also acted *as agents of the client* for the purpose of communications with the lawyers, including the giving of instructions and the receiving of legal advice and services from lawyers, did not preclude the establishment of a lawyer-client relationship sufficient to ground a claim for LPP. Nor did the fact of a non-lawyer having a higher hourly rate than that of a lawyer, of itself preclude the establishment of the lawyer-client relationship.

However, even if no formal retainer exists then LPP can still apply to confidential communications. What is critical is a client's bona fide belief that they are seeking legal advice from a practicing Australian lawyer.

If a communication is from a client to a lawyer, given in confidence and provided to the lawyer in their professional capacity as a lawyer, then it will be privileged.

If a communication is from a lawyer to a client and comprises legal advice given in pursuance of a request (express or implied), made of the lawyer in their professional capacity, then it will be privileged.

If a communication is from a lawyer to a client and comprises legal advice given, not in pursuance of a request (express or implied) made of the lawyer in their professional capacity, but given in circumstances such that the client would reasonably expect to be given such advice, then it will be privileged.

So for example if a client asks their tax lawyer for legal advice regarding the application of the income tax legislation to a gain from a proposed sale of a recently constructed investment property, the tax lawyer, having provided this advice, also gives legal advice regarding the potential GST liability under the GST legislation arising from this proposed sale, then that GST advice would also be privileged, along with the income tax advice.

6.1.2 Document by document approach to LPP claims

The decision of Moshinsky J in *PricewaterhouseCoopers* gives practitioners the latest insight into how the Courts may approach LPP claims.

It seems clear from the Protocol that "global" or "blanket" approaches to LPP claims made by taxpayers over unreviewed documents are less likely to be accepted by the Commissioner. It seems also clear that global or blanket approaches to LPP claims, at least in the context of a multi-disciplinary partnerships, will likely be rejected by the Courts. The Commissioner's global approach in challenging the LPP claims in *PricewaterhouseCoopers*, as set out in Grounds A and B, was unsuccessful.

Instead, a document by document examination, supported by admissible evidence, is required, as reflected in how Moshinsky J addressed Ground C.

The Commissioner's approach in considering whether to accept or challenge a taxpayer's LPP claim is also premised on a document by document approach. The Protocol, which is reflective of the Commissioner's approach, recommends taxpayers who are considering a claim for LPP over documents that fall within the scope of a s 353-10 notice, examine each individual document separately for LPP and provide certain particulars explaining to the Commissioner each LPP claim over each document.

The 8 different categories of documents identified by Moshinsky J in *PricewaterhouseCoopers* provide some examples of the kinds of documents to which LPP may or may not attach in the context of a multi-disciplinary partnership with retainers that are capable of grounding a claim for LPP.

These examples from *PricewaterhouseCoopers* are summarised below in an attempt to provide advisors with a roadmap of the kinds of documents or communications that may or may not attract privilege in this context.

6.1.3 Examples of kinds of documents or communications to which LPP is unlikely to apply

1. Emails, including annexed document(s);

- from a non-lawyer (eg. accountant or person admitted as lawyer but does not hold a practicing certificate),
- to the client,
- in which the non-lawyer provides advice on taxation law, and

- where either no lawyer is a recipient or a lawyer is merely copied in.

2. Emails, including annexed document(s);

- from a non-lawyer (eg. valuer),
- to the client,
- in which the non-lawyer provides advice (eg. valuation advice as inputs into calculations under the tax consolidation provisions),
- the lawyer is merely copied in, and
- where it is asserted that the valuation advice was necessary in order for the lawyer to provide legal advice on the tax consolidation provisions.

3. Emails including annexed document(s);

- between non-lawyers (accountants),
- regarding the accounting treatment of steps in a proposed transaction, and
- annexing a copy of a draft accounting advice.

4. Email annexing a document;

- from a lawyer,
- to the client,
- copied in to non-lawyers,
- in which the lawyer provides accounting advice, and
- the accounting advice is marked “Privileged” and “Confidential – subject to Legal Professional Privilege”

This was described by Moshinsky J as an example of routing non-legal advice through a lawyer to obtain LPP.

5. An email exchange:

- between non-lawyers,
- in which no lawyer is copied in,
- which does not involve legal advice, and
- where it is asserted that the non-lawyers are obtaining information on behalf of the lawyer for the dominant purpose of the lawyer to giving legal advice to the client.

6. An email exchange:

- between non-lawyers and the client,
- in which no lawyer is copied in,
- in which the non-lawyers are requesting information from the client, and
- where it is asserted that the email exchange forms part of continuum of communications between the lawyer and the client for the dominant purpose of obtaining legal advice.

6.1.4 Examples of kinds of documents or communications to which LPP is likely to apply

1. A document;

- from a lawyer,
- to the client,
- comprising a memorandum of advice,
- regarding Australian taxation law, and
- where the advice was prepared by the lawyer.

Where there is an email chain in which the non-lawyer prepares advice and emails it to the lawyer, the lawyer then forwards this email to the client, copying in the non-lawyer, and:

- the advice is not simply routed to the client via the lawyer,
- the role of the lawyer in providing the advice to the client is substantive,
- the lawyer supervised or directed the non-lawyer to prepare the advice,
- the lawyer has sufficient knowledge and experience to be able to review the non-lawyer's work, and
- the lawyer substantively reviewed the draft and adopts the advice as their own.

2 A document;

- from a junior lawyer and/or non-lawyer,
- to a senior lawyer,
- comprising a draft memorandum of advice,
- regarding Australian taxation law,
- prepared at the request of the senior lawyer,
- with a view to the senior lawyer substantively reviewing the draft and ultimately adopting the final advice as their own before providing it to the client, and
- the senior lawyer has sufficient knowledge and experience to be able to review the junior lawyer's and/or non-lawyer's work.

6.1.5 Risk of waiver of LPP in following Protocol

The Protocol provides valuable and detailed guidance as to how the Commissioner will approach LPP claims in response to formal information requests.

However, the Protocol is not the law; nor is it intended to be. As already stated, LPP is a fundamental common law immunity of the taxpayer.

It is therefore critical that advisors, in the discharge of their professional obligations to their clients, ensure that responses to information requests are consistent with the legal principles governing LPP and does not result in a waiver of LPP. This is even more acute in the context of the preparation of detailed responses in line with the Protocol to information requests involving large quantities of documents.

As illustrated in *PricewaterhouseCoopers* and *CUB Australia Holdings*, the task of identifying and examining documents to which LPP applies and preparing LPP claims in response in these circumstances, will necessarily require significant time and resources from taxpayers. The profession has already raised a number of concerns regarding the Protocol; some of which include the potentially significant burden placed on taxpayers in following the ATO's recommended approach to making LPP claims. The greater administrative burden in collating and preparing responses and pressures in complying with deadlines for response in this context potentially gives rise to a greater risk of waiver of LPP; a risk that advisors need to maintain awareness of and address.

6.1.6 Disclosure of titles of documents and subject lines of emails

CUB Australia Holding confirms that the Commissioner has the power to request the titles of documents and subject lines of emails over which a taxpayer claims LPP in response to an information request.

A particular concern expressed by the profession in response to the Protocol was the risk of waiver of LPP by the provision of the title of a document or the subject line of an email, as recommended by the Protocol. The issue of whether the title of a document or the subject line of an email is subject to LPP remains a live issue which is the subject of the yet to be heard fourth ground in the *CUB Australia Holding* proceeding.

An appropriate approach may be to provide the title of a document or the subject line of an email to the Commissioner as recommended in the Protocol. However, before doing so, it is essential to review the content of the title or subject line to determine whether disclosing to the Commissioner all or any part of it may tend to disclosure the content or substance of the document or communication over which privilege is claimed. If it does, then those portions of the title or subject line should be redacted and marked subject to LPP before being provided to the Commissioner.

6.2 The way forward

The decision of Moshinsky J in *PricewaterhouseCoopers* in provides a comprehensive and contemporary statement of the current principles relevant to LPP, particularly in the context where lawyers and non-lawyers (for example tax agents, accountants, valuers) may be involved in the provision of taxation law advice and where those lawyers and non-lawyers practice are part of the same multi-disciplinary partnership. Some aspects relating to LPP claims did not arise in the proceeding and therefore were not considered. These include the principles of LPP in the context of in-house lawyers employed in business or government entities and the principles regarding waiver of LPP.

It remains to be seen to what extent, if at all, the Commissioner may amend the Protocol in light of *PricewaterhouseCoopers* and *CUB Australia Holdings*.

What seems certain is that the interaction of the Commissioner's powers to request disclosure in the exercise of its statutory function of administering taxation laws with a taxpayer's fundamental right of immunity from disclosure under the doctrine of LPP remains a complex and evolving area in the ongoing search for striking the right balance.