

## Making sure it ain't too late to claim legal professional privilege

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**The Tax Office has, arguably understandably, had ongoing attempts to narrow the range of information that taxpayers can keep as private and confidential between themselves and their advisers – including in relation to strategies involving SMSFs.**

Generally there are stamp duty exemptions in each state for transfers between individual family members of farming properties (with some iterations for transfers involving related entities, for example in New South Wales a transfer from a company to a person can be exempt from duty).

In September 2021 the Tax Office confirmed in the publication 'legal professional privilege (LPP) protocol' (Protocol) the framework for determining (in its view) whether a communication can be considered confidential on the basis of privilege.

The Protocol confirms that the Tax Office (when a claim of LPP is made) needs 'to decide whether to accept or challenge that claim'.

A key situation where LPP may be waived is where 'there is a team of people with different roles involved in the communication and it is not clear (as to) why a particular communication is privileged'. Relevantly the ubiquitous approach in the SMSF space of accountants, financial advisers and lawyers working collaboratively to achieve results for clients is at high risk of LPP being waived.

For example, waiver of LPP can occur by disclosure of legal advice to any third party (ie other than from the lawyer to the client), including accidental disclosure or a reference to the existence of a communication in any non-confidential document.

### Situations where waiver of LPP likely

In the Protocol the Tax Office lists a number of areas of focus for where it flags it may challenge the ability to claim LPP, including:

1. Routing advice through a lawyer merely for the purpose of obtaining LPP (that is, the communications are not actually for the sole or dominant purpose of giving or receiving legal advice or for litigation).
2. Legal engagements entered into after the substance of the advice was provided by non-legal persons.
3. Communications exclusively between non-legal persons in circumstances where the involvement of a lawyer is not apparent.

### pwc decision

While not (on the face of the decision) necessarily involving an SMSF, the case of *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 provides a high profile example of the types of disputes that can arise in relation to taxpayer claims of LPP.

Relevantly, the Tax Office was disputing the claim of LPP over approximately 15,500 documents, being emails and attachments to emails brought into existence between September 2013 and May 2016.

In a judgment that runs to almost 1,000 paragraphs, around 900 are redacted because much of the hearing was conducted on a confidential basis, as it was necessary to refer to the contents of the documents in respect of which LPP was claimed.

The court considered a sample of 116 documents and determined that:

- a) 49 were privileged;
- b) 6 were partly privileged; and
- c) 61 were not privileged.

## Key lessons from pwc decision

Relevantly the court made the following observations:

- A pwc, as a multi-disciplined practice included a statement in its costs agreement to the effect that, “[t]o facilitate delivery of the services you [that is, the client] 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”.
- B pwc also specifically confirmed that “Non legal practitioners may assist in the provision of the legal services under the direction of the Australian legal practitioners”.
- C In this type of factual matrix it was necessary to consider, on a document-by-document basis, whether any particular document is in fact subject to LPP.
- D That is, there needs to be a consideration of whether a document is, or records, a communication made for the dominant purpose of giving or receiving legal advice.
- E This question is determined by reference to the content of the document, its context, and the relevant evidence relating to the document.

A critical part of the context here was that the services were provided by a multi-disciplinary partnership and that the team advising the client was comprised both of lawyers and non-lawyers, with some overseas arms of the firm unable to provide legal advice (and made it clear that they were not doing so).

## Hourly rates and size mattering

Interestingly, the court also stated it was 'notable' that the charge-out rate for at least one of the non-legal practitioners was higher than the charge-out rate for the Australian legal practitioner.

Presumably this observation by the court was inspired by the heuristic that the hourly rates of lawyers generally trump those of their colleagues in the accounting and other financial services professions.

## Conclusion

Ultimately, it appears clear that LPP does not exist between:

- i. a lawyer and a non-lawyer adviser who is not an agent of their client, or does not have authority to engage the lawyer directly.

- ii. an adviser who is the client of the lawyer, and any third party the adviser provides the legal advice to (such as their own client).

In this second situation the adviser is likely to have impliedly waived the LPP that exists between the lawyer and the client (being the adviser). Any lawyer acting for an adviser should explicitly explain that if the adviser gives the legal advice to third parties, they may be waiving LPP.

If an adviser who is the client of a lawyer intends providing the legal advice to their client, at a minimum it should be explained (if there is a desire to maintain LPP) that:

- i. the advice being shared is highly confidential;
- ii. the advice is subject to LPP; and
- iii. provision of a copy of the advice by the adviser to their client is not an express or implied waiver of LPP and its sharing is withdrawn if it waives LPP.