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ATO Legal Professional Privilege Protocol

The Law Council of Australia welcomes the release of the Australian Taxation Office's (ATO) legal professional privilege (LPP) protocol (**Protocol**) today, but believes more work is needed to ensure confidentiality of privileged material continues to be protected.

"We appreciate the purpose and objectives of the Protocol and the ATO's attempts to assist advisers and taxpayers work through LPP matters," Law Council of Australia President, Mr Tass Liveris said.

LPP is an important aspect of Australia's system of administration of justice and facilitates the rule of law in the public interest. The Law Council commends the ATO on its willingness to consult on the development of the Protocol and we are grateful for the opportunities we have been provided to contribute to this work over many years."

At all times, the Law Council's position has been that it is in both the ATO's and the community's interests to achieve the dual goals of providing the Commissioner with the documents to which he is entitled and preserving confidentiality that LPP claimants are entitled to preserve.

"Whilst the Protocol correctly acknowledges that LPP is a fundamental common law right and the court is the ultimate decision maker in respect of LPP claims, we must ensure LPP is always respected and not put at risk."

In the Law Council's [submission](#) dated 19 November 2021, concerns were raised, among other things, about instances where the ATO appears to be requesting information about the subject matter of advice, including information such as subject lines.

In the Protocol, the ATO recommends the provision of particulars including 'a title or subject line of the communication, except to the extent that disclosure of the title or subject line would also disclose the content of legal advice'.

"As we highlighted in our submission, LPP belongs to the client and lawyers are obliged to maintain confidentiality over privileged material. The topic or subject matter upon which advice is given, or in respect of which advice is sought, is as much a part of the confidential communication as is the other parts of the content of that communication. For that reason, it is immune from compulsory disclosure. We are concerned that a government agency asking for this type of information can unwittingly lead a member of the public who is not regularly involved in the law of LPP to think that it is appropriate that this information be provided. If it were to be provided by a practising lawyer, it may put the lawyer in breach of his or her ethical duties to their clients," Mr Liveris said.

The Law Council looks forward to continuing to work collaboratively with the ATO and other stakeholders to ensure the Protocol is applied in a manner which strikes an appropriate balance between both the Commissioner obtaining information and also preserving LPP confidentiality.

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