



Australian Government
Attorney-General's Department



Australian Government
The Treasury

Review of the Use of Legal Professional Privilege in Commonwealth Investigations

DISCUSSION PAPER | 2024

ISBN: 978-1 (on-line)

ISBN: 978-1- (print)

© Commonwealth of Australia 2024

With the exception of the Coat of Arms and where otherwise stated, all material presented in this publication is provided under a Creative Commons Attribution 4.0 International licence

(www.creativecommons.org/licenses).

For the avoidance of doubt, this means this licence only applies to material as set out in this document.



The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 4.0 licence (www.creativecommons.org/licenses).

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are detailed on the Department of the Prime Minister and Cabinet website (www.pmc.gov.au/government/commonwealth-coat-arms).

Contents

Introduction	2
Purpose of this discussion paper	2
Request for feedback and comments	2
Confidentiality	2
Submission content	3
Key Issues	4
1. LPP is fundamental to our legal system	4
2. Commonwealth investigations underpin trust in our systems	5
3. LPP claims can be made in Commonwealth investigations	5
4. There are concerns about some LPP claims in Commonwealth investigations	6
Discussion questions and next steps	12
Attachment A: Stakeholders consulted	13

Introduction

Purpose of this discussion paper

On 6 August 2023, the Australian Government announced a joint Attorney-General's Department (AGD) and Treasury review of the use of legal professional privilege (LPP) in Commonwealth investigations to present options for government to respond to concerns that some claims of privilege are being used to obstruct or frustrate investigations undertaken by Commonwealth agencies. This review is part of a larger package of responses to strengthen regulatory arrangements to ensure they are fit for purpose in light of the systemic issues raised by the PwC matter.¹ The review is only considering LPP in the context of Commonwealth investigations.

Since the government's announcement, AGD and Treasury have engaged with approximately 100 stakeholders on the review, including in relation to current settings for claiming LPP in Commonwealth investigations and key issues from the Commonwealth agency, client and representative perspective. An overview of stakeholders engaged to date is outlined at **Attachment A**. AGD and Treasury particularly acknowledge the extensive engagement of Commonwealth regulatory and enforcement agencies, representatives of the legal profession, and experts and academics with the review team in this initial stage of the review.

The purpose of this discussion paper is to present and test the key issues identified by AGD and Treasury through the initial consultation and research undertaken to inform the review, and to seek further feedback. Feedback received in response to this discussion paper will inform further consultation and the development of possible reform options. A second and final paper setting out possible reform options will be released for public consultation in 2025.

Request for feedback and comments

You are invited to make a submission in response to the questions in this discussion paper. To provide a submission, visit AGD's Consultation Hub and click on 'Make a submission': <https://consultations.ag.gov.au/legal-system/lpp-review/>. You may also upload a document containing your submission via AGD's Consultation Hub. If you are having difficulty using the Consultation Hub, you can contact AGD via evidence@ag.gov.au.

Confidentiality

As this is a joint review, AGD will share all submissions received with Treasury (including any submissions provided on a confidential basis and any submissions containing personal information). Your submission may be published unless you request that your submission be kept confidential or if we consider (for any reason) that the submission should not be made public. We may also redact parts of published submissions if appropriate.

Any submission provided on a confidential basis remains subject to the *Freedom of Information Act 1982* (Cth). AGD and Treasury are bound by the Australian Privacy Principles (APPs) in the *Privacy Act 1988* (Cth). The APPs regulate how we collect, use, store and disclose personal information and how you may seek access to, or correction of, the personal information that we hold about you. Refer to AGD and Treasury's privacy policies for more information.

¹ The Hon Dr Jim Chalmers MP, the Hon Mark Dreyfus KC MP, Senator the Hon Katy Gallagher and the Hon Stephen Jones MP, 'Government taking decisive action in response to PwC tax leaks scandal' (Media Release, 6 August 2023), <https://ministers.ag.gov.au/media-centre/government-taking-decisive-action-response-pwc-tax-leaks-scandal-06-08-2023>.

Submission content

AGD and Treasury are seeking feedback on key issues related to the use of LPP claims in Commonwealth investigations. Specific alleged breaches of Commonwealth, state or territory laws are not within the scope of this review. Complaints about particular legal practitioners also are not within scope. Information about these matters should **not** be included in submissions to this consultation process. Case studies should only be included where identifying information has been removed, or the information referred to is already publicly available.

Information on how to report a crime

The Australian Federal Police (AFP) is responsible for investigating alleged Commonwealth offences. If you suspect a Commonwealth offence has been committed, you can make a report to the AFP at www.afp.gov.au/report-crime.

If you suspect that an offence has been committed against a state or territory law, you can make a report to the responsible agency:

- **Victoria:** www.police.vic.gov.au/report
- **New South Wales:** www.police.nsw.gov.au/safety_and_prevention/victims_of_crime/report_crime_and_missing_persons
- **Queensland:** www.police.qld.gov.au/policelink-reporting
- **Western Australia:** www.police.wa.gov.au/Crime/Report-a-crime
- **South Australia:** <https://www.police.sa.gov.au/services-and-events/make-a-report-to-police>
- **Tasmania:** www.police.tas.gov.au/contact-us/
- **Australian Capital Territory:** www.police.act.gov.au/report-and-register
- **Northern Territory:** <https://pfes.nt.gov.au/form/report-online>

Complaints about legal practitioners

The regulation of the legal profession is primarily a matter for state and territory governments, legal profession regulators and professional bodies. If you are concerned about the behaviour of a legal practitioner, more information about lodging a complaint is published by the following bodies:

- **Victoria:** www.lsc.vic.gov.au
- **New South Wales:** www.olsc.nsw.gov.au
- **Queensland:** www.lsc.qld.gov.au
- **Western Australia:** www.lpbwa.org.au
- **South Australia:** www.lpcc.sa.gov.au
- **Tasmania:** www.lpbt.com.au
- **Australian Capital Territory:** www.actlawsociety.asn.au; www.actbar.com.au
- **Northern Territory:** www.lawsocietynt.asn.au

Key Issues

1. LPP is fundamental to our legal system

LPP is a long-standing principle of the Australian legal system which supports access to justice and the rule of law. LPP protects the confidentiality of certain communications that are made for the dominant purpose of giving or receiving legal advice (**advice privilege**) or for use in or in relation to existing or reasonably anticipated litigation (**litigation privilege**) – this is referred to as the ‘dominant purpose test’ for LPP. LPP belongs to the client, not their lawyer. A communication can be oral, written or recorded. A client can be an individual, company or other entity such as a government agency (**the client**). Lawyers owe professional duties to their client, which include an obligation to protect the confidentiality of the client’s information.²

LPP is recognised by common law and statute, including in the *Evidence Act 1995* (Cth) (Commonwealth Evidence Act) where it is called ‘client legal privilege’.³ The Commonwealth Evidence Act applies to all proceedings in the federal courts.⁴ It provides that evidence will not be adduced if, on the client’s objection, the court finds that doing so would result in the disclosure of certain types of confidential communications or documents made or prepared for the dominant purpose of legal advice or litigation.⁵

The common law of LPP (also sometimes referred to as ‘client legal privilege’) applies more broadly, including in non-court processes such as Commonwealth investigations. The common law also applies to the pre-trial stages of a proceeding to which the Commonwealth Evidence Act applies (for example, producing documents under a subpoena). Under the common law, LPP is ‘an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications’.⁶ This means that where the common law of LPP applies, a person generally cannot be compelled to disclose communications that are covered by LPP in a Commonwealth investigation. Disputes about whether a communication is privileged are determined by a court.

LPP does not apply in all circumstances. For example, legislation can modify the common law, including as to when and how a person can claim LPP. It can also provide that LPP does not apply during a particular type of investigative process, even where the dominant purpose test is met (noting however this is a rare occurrence).⁷ LPP can also be waived by the client, and does not apply to communications made in furtherance of an illegal or improper purpose.

LPP promotes the public interest by encouraging clients to make full and frank disclosures to their lawyers, ensuring there is a relationship of confidence between the parties to support the effective provision of legal representation and advice. Without LPP clients may be reluctant to discuss matters frankly and may therefore not receive proper legal advice and representation.

² There are exceptions to lawyers’ confidentiality obligations, including where the client has authorised the disclosure or it is compelled by law. For example, see Australian Solicitors Conduct Rules, r 9.

³ *Evidence Act 1995* (Cth), Part 3.10, Division 1.

⁴ *Evidence Act 1995* (Cth), s 4. The LPP law of the state or territory will generally apply to proceedings in a state or territory court.

⁵ *Evidence Act 1995* (Cth), ss 118–119.

⁶ *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646, 656.

⁷ For example, see *Crimes Act 1914* (Cth) s 3ZQR; *Proceeds of Crime Act 2002* (Cth) s 206; *Ombudsman Act 1976* (Cth) s 9. See also *Royal Commissions Act 1902* (Cth) s 6AA, which allows a Commissioner to inspect documents to determine whether the documents are privileged.

2. Commonwealth investigations underpin trust in our systems

Commonwealth regulatory and enforcement agencies have an important role in ensuring safety and maintaining the economic and social wellbeing of the Australian community. Parliament has passed legislation which gives Commonwealth agencies particular functions and powers, including powers to ensure compliance with legislative requirements and to respond to instances of non-compliance. There is a public interest in Commonwealth regulatory and enforcement agencies carrying out their functions, and exercising relevant powers, effectively. For example, it is in the public interest to promote public confidence in regulated firms, sectors and professions, safeguard critical systems, markets and government revenue, protect the rights and safety of Australians and ensure the delivery of public goods and services.

To support their functions, Commonwealth regulatory and enforcement agencies often have enabling legislation which provides for compulsory information-gathering powers in their civil, administrative and criminal investigations. The kinds of compulsory information-gathering powers available to Commonwealth agencies depend on the agency's functions, applicable legislation and the seriousness of the conduct being investigated. For example, a search warrant may be issued under the *Crimes Act 1914* (Cth) and executed by a police officer in relation to all Commonwealth offences.⁸ Some Commonwealth agencies have regulatory functions which trigger the monitoring and investigation powers in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which include entry, search and seizure powers that can be exercised where consent is given by the occupier of the premises or where a warrant has been issued.⁹ Commonwealth regulators can often issue a notice to produce documents or answer questions related to their investigations.¹⁰ Other Commonwealth agencies also have bespoke information-gathering powers, including the power to inspect documents or books.¹¹ Commonwealth agencies may also undertake voluntary information-gathering processes, such as issuing requests for information.

The compulsory information-gathering powers of Commonwealth regulatory and enforcement agencies are not absolute. There are safeguards and limitations on the use of these powers in Commonwealth legislation and under the common law. One example of a statutory safeguard is a legislative requirement to apply for a warrant to ensure judicial oversight of the exercise of particular powers. Common law safeguards include privileges such as the privilege against self-incrimination and LPP.

3. LPP claims can be made in Commonwealth investigations

A person can claim LPP under the common law in almost all civil, administrative and criminal Commonwealth investigations. In rare instances Commonwealth legislation abrogates LPP, and this legislation has been subject to Parliamentary debate and scrutiny by relevant Parliamentary committees.

The process for claiming common law LPP in a Commonwealth investigation will differ based on the information-gathering power exercised. For example, the recipient of a compulsory production notice must be given a reasonable opportunity to claim privilege on their behalf or, in the case of lawyers, on behalf of their clients. If there is a dispute about LPP that cannot be resolved between the agency and the person and/or their legal representative, either party may apply to the court to determine the dispute.

⁸ Section 3E of the *Crimes Act 1914* (Cth) is the principal Commonwealth search warrant provision: for further information, see 'Search Warrants', *Australian Federal Police* (Web Page) <https://www.afp.gov.au/our-services/national-policing-services/search-warrants>. There are also specific search warrant provisions in other pieces of Commonwealth legislation.

⁹ For further information, see 'Monitoring and Investigation Powers', Attorney-General's Department (Web Page) <https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers/monitoring-and-investigation-powers>.

¹⁰ See, for example, *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 30, 30A, 30B, 31, 32A, 33; *Competition and Consumer Act 2010* (Cth) s 155; *Taxation Administration Act 1953* (Cth) sch 1 s 353-10; *Renewable Energy (Electricity) Act 2000* (Cth) s 125A; *Therapeutic Goods Act 1989* (Cth) ss 31A, 31AA, 31B, 31BA; *Migration Act 1958* (Cth) s 140XF.

¹¹ See, for example, *Australian Securities and Investments Commission Act 2001* (Cth) s 29; *Taxation Administration Act 1953* (Cth) sch 1 s 353-15.

4. There are concerns about some LPP claims in Commonwealth investigations

LPP has a fundamental role in the Australian legal system and Commonwealth regulatory and enforcement agencies consulted in the initial phase of this review have emphasised that they recognise the importance of LPP. AGD and Treasury acknowledge that many individuals and entities who make LPP claims during Commonwealth investigations do so appropriately and in accordance with the law. However, there is concern that some LPP claims are being used improperly in Commonwealth investigations.

Stakeholders, including regulatory and enforcement agencies, have observed instances of behaviours related to LPP which have the effect of obstructing and frustrating Commonwealth investigations. For example, this may include claiming LPP over communications where the party does not have a reasonable basis for asserting that the communication is privileged, failing to engage with agency requests for additional information in a timely way, or making broad claims over communications requested or seized by an agency.

These behaviours can have various impacts on Commonwealth investigations. It is important to note that while these behaviours may impact Commonwealth investigations, this does not mean that they are intended to obstruct or frustrate an investigation. There can be many reasons why a particular LPP process is time consuming or complex – this does not necessarily mean that the LPP claim is improper. However, as outlined further below, there is concern that bad actors may seek to take advantage of current LPP processes that can be complex, lengthy and costly to intentionally obstruct or frustrate Commonwealth investigations. There is also concern that current processes may not always support people who are trying to claim LPP appropriately and in good faith, but are considering a large volume of communications that may be relevant to a compulsory information-gathering process.

The purpose of this section is to explore the environmental, behavioural and procedural issues that stakeholders have identified with the use of LPP claims in Commonwealth investigations. This analysis is supported by stakeholders' qualitative feedback. While quantitative data about the scope of these issues is limited (including because issues often only become apparent if a dispute is resolved by the courts or the disputed communication becomes available through other means), some relevant illustrative data does exist. For example, the large market segment of the Australian Taxation Office, as at the preparation of this paper, has around 27 active cases with unresolved LPP claims totalling around 133,000 claims. Approximately 75% of these active cases involve claims made over a year ago. Issues related to the use of LPP claims in Commonwealth investigations have also been directly raised by stakeholders,¹² and in reviews and inquiries over decades.¹³

¹² For example, in 2008 the Australian Law Reform Commission published its final report about client legal privilege in federal investigations. In that report, the Australian Law Reform Commission noted feedback from stakeholders including the Australian Taxation Office and the Commonwealth Director of Public Prosecutions about the impact of LPP claims in federal investigations: *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, February 2008). In 2024, the Australian Taxation Office indicated, '[w]e've spoken in the Senate committee since about 2015-16 — I think the commissioner did a speech called 'Enough is enough' — about the difficulties we had around reckless LPP': Evidence to Senate Finance and Public Administration References Committee, Parliament of Australia, Canberra, 9 February 2024, 12 (Jeremy Hirschhorn). Also in 2024, the Australian Securities and Investments Commission told the Economics Legislation Committee that '[...] the issue about claiming legal professional privilege remains a continuing challenge for all regulators': Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 15 February 2024, 29 (Sarah Court).

¹³ For example, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, February 2008), which was announced as part of the Australian Government's response to the Royal Commission that investigated the conduct of the Australian Wheat Board in relation to the United Nations 'Oil for Food' programme: see Terrence R H Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (November 2006). See also *Independent Review of the Tax Practitioners Board* (Final Report, October 2019) 56-8; Senate Finance and Public Administration References Committee, *PwC: The Cover-Up Worsens the Crime* (Report, March 2024) 16-17; Senate Finance and Public Administration References Committee, *PwC: A Calculated Breach of Trust* (Report, June 2023) 3-4, 14-15.

4.1 The changing operating environment

AGD and Treasury heard from all stakeholder groups consulted that the landscape in which Commonwealth investigations are undertaken and legal services are provided is changing, and this is creating challenges for Commonwealth agencies, clients and lawyers in relation to LPP and Commonwealth investigations.

Advances in technology mean that large volumes of electronic material can be within the scope of compulsory information-gathering processes exercised during Commonwealth investigations. Stakeholders noted that the number of communications subject to some information-gathering processes can be in the hundreds of thousands, and that terabytes of data may be received by Commonwealth agencies exercising their investigatory functions. This can make it more time consuming and expensive for clients and lawyers to review material requested or seized by a Commonwealth agency, in order to identify privileged communications. It may result in delays and broad claims of LPP over large categories of communications, which can impose compliance costs and slow down Commonwealth agencies' investigations. It can also increase reliance on digital and AI tools to support document review. While relying on AI and digital tools can make identifying privileged communications more efficient, without adequate oversight and appropriate review, it may result in improper LPP claims.

The way legal services are sought and provided has also changed. In recent decades there has been a growth in multi-disciplinary firms that concurrently provide legal and non-legal services to clients. Services may include consulting, assurance, transaction support, and/or taxation consulting. Clients also continue to seek legal services from traditional law firms and also from lawyers who work in-house. However, clients may choose to seek advice from several professional advisers on a single issue (for example, lawyers, accountants, consultants). These ways of seeking and providing services often require lawyers to work closely with professionals from other disciplines. This can result in the creation of communications that have a range of purposes, which can make it more difficult to assess whether the dominant purpose test for LPP is met. The mere fact that a lawyer has drafted or possessed a communication will not in itself meet the dominant purpose test or substantiate a claim for LPP. Documents prepared by that lawyer may still need to be assessed for LPP in order to respond to a compulsory information-gathering process.

The following case study demonstrates some difficulties that Commonwealth regulatory and enforcement agencies may encounter when dealing with numerous LPP claims, including the time and resource intensive nature of disputing LPP claims and the delays in progressing the underlying investigations in relation to which the LPP claims are being made.

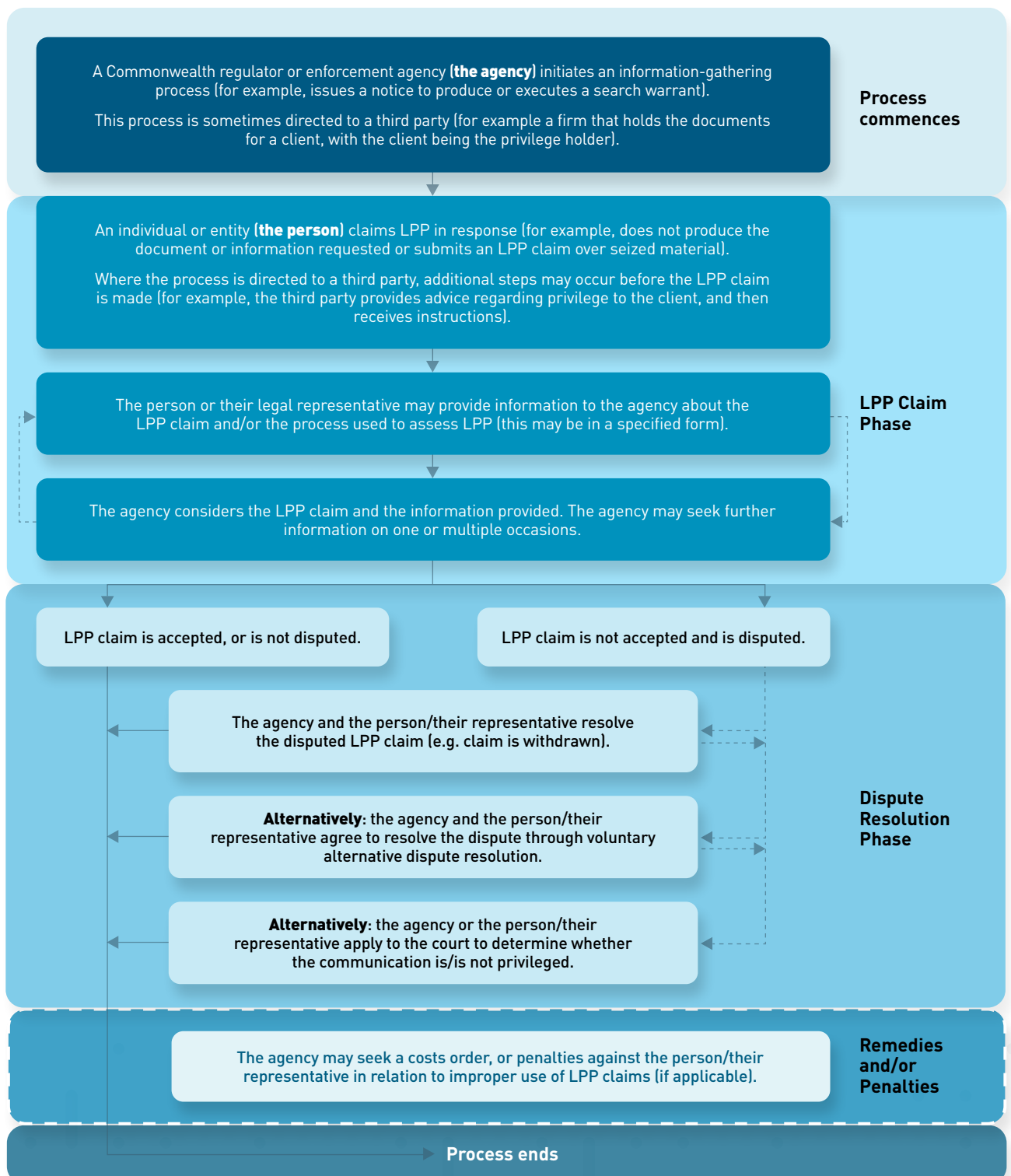
Commissioner of Taxation v PricewaterhouseCoopers [2022] FCA 278: In February 2019, the Commissioner of Taxation commenced an audit of a PwC client (Flora Green, the second respondent). In the course of the audit, the Commissioner of Taxation issued notices to produce to a PwC Australia partner and the second respondent. In response, LPP was claimed by PwC Australia (on behalf of its clients), Flora Green or other members of the same multi-national enterprise over approximately 44,000 documents.

In 2022, a decision of the Federal Court of Australia considered LPP claims made over approximately 15,500 disputed documents. In its decision, the court noted that whether the disputed documents were privileged was to be determined by reference to the content, context and relevant evidence relating to each document. The court considered a sample of 116 documents and more than half of those were found not to be protected by LPP. The court noted that the fact services were provided by a multi-disciplinary partnership was a critical part of the context in the case. The court also identified some documents that appeared to be "routed" through a lawyer to obtain the protection of LPP.

4.2 Procedural and behavioural concerns in the LPP claim process

Stakeholders consulted in the initial phase of this review have noted that issues related to LPP claims can arise at various stages of a Commonwealth investigation. The purpose of this section is to explore these issues. To support this analysis, **Figure 1** outlines a high-level summary of the key phases for LPP claims in Commonwealth investigations. This figure is indicative only, noting that processes differ across investigations and the steps involved in a particular LPP process will depend on the circumstances and applicable legislation. For example, the process may differ if LPP is claimed during an oral interview.

Figure 1: Indicative LPP Claim Process in Commonwealth Investigations



LPP Claim Phase

In the LPP claim phase clients and lawyers assess the information captured by a particular compulsory information-gathering process, and provide relevant documents and information or assert LPP claims. Where LPP is claimed, Commonwealth regulators and enforcement agencies may ask the person claiming LPP to provide information to support their claim. Commonwealth agencies seek information about LPP claims in order to determine whether the claim has been made on reasonable grounds or ought to be disputed (for example, a claim may be disputed because the agency is concerned that LPP has been claimed over material that is not privileged). Agencies consulted have emphasised they do not seek to compel the production of privileged communications (such as legal advices) where LPP applies.¹⁴

Under some legislation, parties are required to provide information to the agency about their LPP claim. For example, under the *Australian Securities and Investments Commission Act 2001* (Cth) a lawyer must provide particulars about certain LPP claims.¹⁵ If a lawyer fails to provide this information, the Australian Securities and Investments Commission can apply to the court to make an order for the person to comply with this requirement. However, this type of legislation is rare. More often, Commonwealth regulatory and enforcement agencies publish or provide voluntary guidance about the information a person should provide when making an LPP claim.¹⁶ As this guidance is voluntary, it may not always be followed. This can delay Commonwealth investigations, particularly if the Commonwealth agency has to make several requests to the person for further information about their LPP claim. In some cases where information about the LPP claim is not provided voluntarily, a Commonwealth agency may apply to the court to seek that information, so that it can determine whether to dispute the LPP claim. This can delay the Commonwealth investigation. In many cases, legal action may not be pursued having regard to time and costs involved.

Feedback indicates that there can be many reasons why there are delays in assessing and claiming LPP, and why information requested by an agency to support an LPP claim may not be provided. In some cases, it may appear that a party is attempting to obstruct or frustrate investigations; for example, in order to conceal evidence, delay the Commonwealth agency from identifying individuals/entities involved in wrongdoing or the breadth of wrongdoing, or avoid penalties or reputational damage. However, we have also heard that there are other reasons why delays may occur. This may include growing complexity in organisational arrangements, or information-gathering processes that capture a large volume of communications (as explored above). Different types of information (or information in different formats) may be required or requested in relation to LPP claims, depending on the type of Commonwealth investigation – we have heard this can impact time and cost for those responding to an information-gathering process. Some parties may also be concerned that voluntarily providing certain information about a communication to a Commonwealth agency might waive LPP.

AGD and Treasury have heard that there may be changes to existing LPP claim processes that could improve these matters. For example, it has been suggested that greater consistency between LPP processes across Commonwealth investigations could reduce the time taken to claim LPP or provide information about an LPP claim in Commonwealth investigations. In some cases, there may be opportunities for Commonwealth agencies to work more collaboratively with a person or their lawyers to clarify what information they are seeking or identify categories of communications (noting that this already occurs in some cases and will not be appropriate in all instances). Statutory clarification may support lawyers and their clients to confidently provide particulars to a requesting agency, without fear of waiver. If LPP claims are made without a proper basis or with an improper intent, legislative change may also be needed to deter this behaviour (see **Remedies and/or Penalties** below).

¹⁴ Noting that in rare circumstances, Commonwealth legislation modifies or abrogates LPP.

¹⁵ *Australian Securities and Investments Commission Act 2001* (Cth) ss 69–70.

¹⁶ For example, Australian Taxation Office, *Legal Professional Privilege (LPP) Protocol* (June 2022) <<https://www.ato.gov.au/law/view/document?DocID=SGM/LPP-FINAL>>; Australian Competition and Consumer Commission, 'Claims of Legal Professional Privilege' [Web Page] <<https://www.accc.gov.au/business/compliance-and-enforcement/claims-of-legal-professional-privilege>>; Australian Securities and Investments Commission, 'Claims of Legal Professional Privilege' [Web Page] <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/claims-of-legal-professional-privilege/>>.

Dispute Resolution Phase

Stakeholders have expressed a common concern that existing processes for resolving disputes about LPP can be lengthy and costly for all parties involved. There are no standard rules for resolving disputes about LPP claims during Commonwealth investigations. Regulators and enforcement agencies consulted have reported that it can take years to resolve LPP claims once a compulsory information-gathering process is initiated.

Currently, where a Commonwealth agency disputes an LPP claim, this may be resolved in several ways. The agency and the person claiming LPP may agree to resolve the matter through alternative dispute resolution (ADR). One example is arbitration of the dispute by an independent third party such as a barrister. ADR may offer a quicker form of resolution compared to seeking a decision in court. ADR may also be employed if a court has only determined privilege claims in respect of a sample of the disputed documents. However, there may be a limit to the number of communications an independent third party can feasibly review which, given the large volumes of information potentially involved, may limit the effectiveness of this voluntary process. ADR can also involve substantial costs to parties and may not be appropriate in all circumstances. For example, if a decision about privilege could have significant or precedent-setting implications for one of the parties, they may prefer to have their dispute determined by the court.

If one of the parties applies to the court to resolve the dispute, these processes can be lengthy and costly. This may be due to the time needed to prepare a case to be brought before the court, or the reality of large document cases, where it may not be feasible for the court to review and rule on thousands of LPP claims. In these instances, the court may consider a sample of the communications in dispute. While the sampling of communications can help mitigate some of these volume related pressures, we have heard that there are limitations in the practice of selecting sample communications for the court to consider. One reason for this is that one party (the person claiming privilege) has access to all of the communications in dispute and the other (the Commonwealth agency) does not and may be required to select a sample without seeing the communications.¹⁷

These lengthy processes can undermine enforcement action, particularly where there are statutory time limits for bringing action. For example, the promoter penalty laws in the *Taxation Administration Act 1953* (Cth) require the Commissioner of Taxation to bring an application to the Federal Court of Australia within a specified period. Some stakeholders have suggested that issues about delay could be addressed by implementing new mechanisms to support the court process, for example through the adoption of court-appointed LPP examiners who would consider the underlying communications and adjudicate claims, or through the appointment of special registrars to consider LPP disputes.

¹⁷ See *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278, [13].

Remedies and/or Penalties

If a person breaches a Commonwealth law, they may be subject to a criminal, civil or administrative penalty. Criminal and civil penalties are imposed by the courts, where a breach is proven beyond reasonable doubt (for criminal penalties) or on the balance of probabilities (for civil penalties). Administrative penalties can be imposed by an agency or regulator.

There are existing Commonwealth penalties that may apply in relation to LPP claims. For example, under the *Criminal Code* (Cth) it is a criminal offence to knowingly give false or misleading information to a Commonwealth entity (for example, when information is provided to comply with a notice to produce).¹⁸ Under the *Australian Securities and Investments Commission Act 2001* (Cth), if a lawyer fails to provide required particulars about an LPP claim, there is a penalty of 3 months imprisonment.¹⁹ Some other Commonwealth legislation, including the *Taxation Administration Act 1953* (Cth), makes a person liable to pay an administrative penalty for making false or misleading statements.²⁰ The *Tax Agent Services Act 2009* (Cth) also provides a range of sanctions for registered tax practitioners that breach code of conduct obligations relating to honesty and integrity, and making false or misleading statements.

In addition to existing penalties in Commonwealth legislation, lawyers also have professional obligations, including duties as officers of the court and under state and territory legislation. If a lawyer breaches these professional obligations, they may be subject to disciplinary action. Based on consultation to date, AGD and Treasury are not aware of any disciplinary matters involving misuse of LPP by a lawyer.

AGD and Treasury have heard from some Commonwealth agencies that current settings may not adequately deter improper LPP claims. We have heard that possible options to address this may include expanding existing penalties or creating new targeted penalties in Commonwealth legislation to deter improper LPP claims (these could include criminal, civil or administrative penalties). However, it has also been noted that improper behaviour related to LPP may never become known unless, for example, a client makes a complaint that they were not properly advised about LPP or communications that have been subject to an LPP claim later become available through another means.

¹⁸ *Criminal Code* (Cth) s 137.1.

¹⁹ *Australian Securities and Investments Commission Act 2001* (Cth) s 69.

²⁰ *Taxation Administration Act 1953* (Cth) sch 1 div 284.

Discussion questions and next steps

LPP has a fundamental role in the Australian legal system and any identified reforms in relation to the use of LPP claims in Commonwealth investigations require careful consideration.

This discussion paper has outlined the context and purpose of the review and the key issues identified by stakeholders in the initial phase of this work. AGD and Treasury welcome comments on the matters outlined in this discussion paper, including in relation to LPP processes and procedures, training and guidance, dispute resolution, penalties and other frameworks.

Feedback to this paper will inform further consultation and the development of possible reform options. A second and final paper setting out possible reform options will be released for public consultation in 2025.

Discussion questions

1. Do you agree with the key issues identified in this paper? Are there other key issues you think should be considered in relation to the use of LPP claims in Commonwealth investigations?
2. Are there options for reform that you think should be considered in relation to the use of LPP claims in Commonwealth investigations? For example, options for reform related to guidance and training, LPP claim processes, dispute resolution, or remedies and/or penalties.
3. Are there approaches in other jurisdictions that you think AGD and Treasury should consider?
4. What risks should the government consider when evaluating options for reforms to the operation of LPP processes in Commonwealth investigations?
5. Do you have any other views you wish to share at this time (noting that there will be a further opportunity to provide comment on possible options for reform in 2025)?

Attachment A: Stakeholders consulted

During this first phase of the review AGD and Treasury have engaged in initial consultations and research to inform the development of this discussion paper.

Stakeholders consulted	<p>AGD and Treasury have contacted approximately 100 stakeholders with the opportunity to provide initial input to the review.</p> <p>Stakeholders who provided initial input include:</p> <ul style="list-style-type: none">• Commonwealth regulatory and enforcement agencies, including the Australian Taxation Office, the Australian Federal Police, the Australian Securities and Investments Commission, the Tax Practitioners Board and AUSTRAC• Legal profession representative bodies, including the Law Council of Australia and the Association of Corporate Counsel• Industry, including accounting, auditing and consulting firms (e.g. KPMG, PwC, Deloitte, EY)• Legal experts and academics with relevant experience and expertise, including expertise in legal education
Methodology	<p>AGD and Treasury have utilised the following consultation methods:</p> <ul style="list-style-type: none">• Meeting directly with stakeholders• Inviting feedback through correspondence• Conducting a roundtable of experts and academics

