

LEGAL PROFESSIONAL PRIVILEGE: INTERNAL & EXTERNAL COMMUNICATIONS

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Legal Briefings - By **Hugh Paynter, Leah Serafim and Hannah Stanley**

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This article is part of our [Legal Professional Privilege in Australia](#) series where our regulatory and disputes specialists have developed a suite of resources to provide practical guidance on common questions and scenarios when dealing with LPP in Australia.

PURPOSE

This guide provides guidance on the treatment of internal and external communications, including formal or informal documents such as emails, text messages and WhatsApp messages.

You can [request a copy](#) of our LPP communications protocol containing practical steps that should be taken to protect present and future communications and documents which are subject to legal professional privilege (**LPP**) or the accountant's concession but may still risk review.

This guide is intended to be used as a guide only. Independent legal advice specific to your issue should be obtained.

OVERVIEW OF LPP

LPP applies to communications, whether oral, in writing or recorded which are confidential in nature between:

- a lawyer (including an in-house lawyer) and their client;
- the agents of a lawyer and their client; or
- the lawyer or client and a third party.

That communication must have been created or brought into existence for:

- the dominant purpose of the lawyer giving legal advice to the client; or
- use in litigation that is either underway or reasonably contemplated.

If you can show that LPP applies to a document, or part of that document, then you generally will not be required to disclose that document or part. LPP can be regulated by either the common law or the applicable Evidence Act in the relevant jurisdiction.

ACCOUNTANTS' CONCESSION

Communications between a client and their professional accounting or tax adviser are not ordinarily protected by LPP.

The Australian Taxation Office (**ATO**) is able to give administrative concessions to the clients of external accounting or tax advisers. This is known as the 'accountants' concession' and is a recognition of a class of documents which should remain confidential to professional accounting advisors and their clients. Under this concession the ATO will in certain circumstances not seek access to certain advice documents which are considered to be 'restricted source' and 'non-source' documents. Note the concession does not apply to documents prepared by the taxpayer, its employees or in-house advisers.

'**Restricted source**' documents include advice documents on how to structure or record a transaction or arrangement and advice papers that are used solely for the purpose of advising a client on tax-related matters.

'**Non-source documents**' are advice papers which:

- are provided after the relevant transaction has been complete;
- are papers relating to transactions;
- relate to arrangements which have not and are not intended to be put into effect; or
- do not materially contribute to a tax strategy.

Non-source documents also include audit and assurance files (including statutory audit, prudential tax audit and due diligence reviews).

The Accountants' Concession therefore applies to a more limited range of documents and communications than LPP since it only applies to advice documents (and not to requests for advice).

The ATO can, in exceptional circumstances, lift the Accountants' Concession to access documents the subject of the concession. These include (among other categories):

- there are reasonable grounds to believe that a tax offence is being committed, or that fraud, evasion or any other illegal activities has taken place;
- the taxpayer or taxpayer's accountant refuses to provide source documents, or the taxpayer's source documents have been lost or destroyed, or appear on reasonable grounds to contain omissions or other material deficiencies;
- some or all of the taxpayer's records are maintained overseas and the taxpayer denies the ATO access to those records, or claims an inability to obtain them;
- the ATO is unable to ascertain from the documents that have been provided to it the facts necessary to determine the tax consequences or the transaction or arrangement in question; or
- the ATO takes the view that anti-avoidance provisions apply to the transaction or arrangement.

Ultimately, the Accountants' Concession does not afford the same level of protection to taxpayers as LPP and is applied at the discretion of the Commissioner of Taxation.

Further details about the Accountants' Concession are published in the ATO's *Guidelines to Accessing Professional Accounting Advisors' Papers as part of its Access and Information Gathering Manual*.

ACCESS TO BOARD PAPERS

An administrative concession may be applied by the Commissioner of Taxation to only access corporate board papers on tax compliance risk in certain circumstances.

However, circumstances where the concession will generally not apply include where the taxpayer has a history of non-compliance or taking aggressive tax positions, has not co-operated with the ATO or where the Commissioner believes anti-avoidance provisions may apply.

SECTION 353 NOTICES

Under s 353-10 of the *Taxation Administration Act 1953* (Cth) the Commissioner has the power to issue a written notice requiring you to:

- give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a taxation law;
- 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; and
- produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a tax law.

Additionally, under s 353-15 the Commissioner is permitted to inspect, examine, make copies of, or take extracts from any documents for the purposes of a taxation law.

PROTOCOL AVAILABLE

You can [request a copy](#) of our LPP communications protocol containing practical steps that should be taken to protect present and future communications and documents which are subject to legal professional privilege (**LPP**) or the accountant's concession but may still risk review.

Please reach out to your usual Herbert Smith Freehills contacts with any queries you might have on Legal Professional Privilege.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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