

## Article Information

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## Crack down on the use of legal professional privilege protections by Federal Court of Australia. What you need to know as a multidisciplinary practice or are engaged with one.

The much anticipated decision of *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 was handed down on 25 March 2022. It is one of two long running privilege disputes the Commissioner of Taxation (the Commissioner) is conducting against PricewaterhouseCoopers (PwC) and its clients. The other being *CUB Australia Holding Pty Ltd v Commissioner of Taxation* [2021] FCA 43. The action is based on the ATO's long running desire to stop baseless and blanket claims of legal professional privilege (LPP) used by multidisciplinary practices (MDP) to shield documents from being produced under ATO audits of multinational clients.

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The Federal Court ruled that a legitimate relationship between lawyer and client did exist, but PwC had incorrectly applied privilege to more than half the documents requested by the ATO.

### LPP Principles

In discussing this Case, it is important to review the longstanding principles that govern the reliance on LPP. They require covering the following:

1. Was the communication in question **confidential**? Was it **made in confidence**? Are the **contents of what was said, not widely known**?
2. Was the **communication made within the confines of a lawyer-client relationship**? In an in-house context, was the counsel (lawyer) **advising their client in a legal capacity**;
3. Was the **communication made for the dominant purpose of giving and receiving legal advice to the client**?; or the client being provided with legal services relating to current and/or anticipated litigation to which they are/may be party to?

The Court was called to determine whether MDPs, like PwC, were extending LPP to situations outside the legal context scope. Ultimately, the Court determined the privilege of documents by considering their dominant purpose, that being, looking to whether the dominant purpose was the giving, obtaining or in the provision of legal services.

### Facts and arguments made by the Commissioner

This decision followed an ATO statutory notice to produce documents made to JBS Parties and their advisors, PwC, as part of an audit. PwC claimed privilege over more than 44,000 documents to which the Commissioner applied to the Court for a declaration to the effect that approximately 15,500 documents held by PwC Australia and their clients were not in fact covered by LPP.

The Commissioner based their argument on the fact MDPs, like PwC, cannot give rise to a lawyer-client relationship as the nature of their services are predominantly commercial and not legal in nature. Thus the documents are not created for the purpose of giving legal advice and relied on the following three grounds:

1. PwC's engagements with clients, specifically in their 'Statements of Work' where PwC purports to provide legal services to its clients did not establish a lawyer-client relationship necessary to support LPP;
2. More broadly, the services of PwC were not provided, as a matter of substance, pursuant to a lawyer-client relationship necessary to support LPP; and
3. The documents are not, or do not record, communications made for the dominant purpose of giving or obtaining legal advice from lawyers of PwC Australia.

## Findings

### General Findings

The Court was satisfied a lawyer-client relationship existed between some of the PwC and JBS parties, through:[\[1\]](#)

- PwC Australia's umbrella engagement agreement with clients and nine "statements of work" which identified the work to be carried out for their client and was described as "legal services";
- PwC Australia's "statement of work" which identified the team that would carry out the work to the client, and whether they were legal practitioners or non-legal practitioners; and

The clients having appointed the non-legal practitioners as their agents for the purpose of communications to and from the legal services team, including the giving of instructions and receiving legal advice in order to assist in the provision of legal services **Sample Document Findings**

As it was not feasible for the Court to review all 15,500 documents in issue, the Court and parties agreed to select 116 documents to form the "sample documents" to be reviewed by the Court. The Court found, from this sample, that while many of the documents were in fact privileged, many were not as the communication was not made for (and further did not have record of) the dominant purpose of giving or receiving legal advice.

The findings were:

- 49 were privileged;
- 6 were partly privileged; and
- 61 were not privileged.

### PwC as a multidisciplinary practice (MDP) and LPP

As touched on above, the critical issue for the Court to determine was what is the scope of LPP within MDPs who provide both legal and non-legal services to its clients and what practical effects this will have on the use of LPP going forward.

This case has highlighted the principles of LPP and the dominant purpose analysis. In this case, for a privilege to arise, it was not sufficient that giving or obtaining legal advice or providing legal services was in part the purpose; it had to be the **dominant purpose** of the relevant communication. Emphasising the principles of *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* (2005),[\[2\]](#) where the Full Court said 'the dominant purpose is not the same as the "primary" or the "substantial" purpose. Where two purposes are of equal weight, neither is dominant in the relevant sense'. Applying this principle to MDPs:[\[3\]](#)

- **a document is not privileged** where one purpose is to discuss legal advice, but another service such as accounting, consulting or auditing is raised for an equally important purpose; and
- if a decision is made to **bring a document into existence for a professional service such as accounting, consulting, or auditing, and in the process, a tax issue arises that a lawyer advises on. In that case, that document may not have access to privilege.**

### Key Takeaways

This decision should not cause concern to MDPs or their clientele. The Court does not deny that that a lawyer-client relationship cannot exist in MDPs, although it does put MDPs on notice that LPP can be easily lost when the dominant purpose test is employed. LPP within MDPs is factually complex. This decision shows that it does not matter how confidential the information included within the communication(s) is, if another equally important purpose is raised, i.e. outside the scope of legal advice (tax advice), it will not be privileged. The risk of losing LPP within MDPs is exacerbated given the fact team members at various levels and across various service areas are constantly working on matters together and are in constant communication that can easily jeopardise the 'dominance' of communications with the multi-disciplinary firms for a legal purpose.

This judgement emphasises the important of clear and well-structured engagement documentation within MDPs, especially

in circumstances where non-lawyers and/or where foreign admitted lawyers will be involved in aspects of the matter, and the importance of considering how best to structure and run matters involving teams from different countries and (or) where non-lawyers are involved in the provision of legal advice or litigation, such as through clearly defined information barriers.

[\[1\]](#) *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278, [190], [204].

[\[2\]](#) (2005) 225 ALR 266; 2005 ATC 4903; (2005) 60 ATR 466; [2005] FCA 1247

[\[3\]](#) *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278, [146], [222].